

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 2 April 2007

Public Authority: Forest Heath District Council
Address: District Offices
College Heath Road
Mildenhall
Suffolk
IP28 7EY

Summary

The complainant requested a copy of legal advice held by the public authority regarding the quorum necessary for a properly constituted meeting of the local Licensing Sub-Committee. The public authority initially declined relying solely upon an exemption under section 42 ("section 42") of the Freedom of Information Act 2000 (the "Act") claiming legal professional privilege and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. Following the Commissioner's involvement, the public authority also referred to an exemption under section 41 ("section 41") of the Act stating that the information had been provided in confidence. The Commissioner considers that as the public authority did not itself commission the legal advice and instead obtained it from another public authority, it was wrong to rely upon the section 42 exemption. However, he is satisfied that the public authority was entitled to rely upon the section 41 exemption to withhold the information as the legal advice was shared with it as part of a confidential agreement.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. Subsequent to earlier correspondence between the complainant and the public authority in which the public authority had confirmed the existence of Counsel's Opinion on the matter of the number of persons necessary to represent an effective quorum for a properly constituted meeting of the public authority's Licensing Sub-Committee the complainant on 14 October 2005 by e-mail

requested to be provided with "*the release of the legal advice under the Freedom of Information Act.*"

3. On 7 November 2005 the public authority refused, relying upon the section 42 exemption.
4. On 8 November 2005 the complainant requested a review of the refusal.
5. On 28 November 2005 the public authority confirmed that the review had taken place and that the refusal under section 42 had been upheld.

The Investigation

Scope of the case

6. On 8 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled in that he maintained that the public authority had been wrong to refuse to disclose the legal advice.

Chronology

7. On 13 November 2006 the Commissioner raised a number of questions with the public authority relating to its application of the section 42 exemption and invited both parties to make appropriate representations.
8. The complainant responded the following day indicating that he was content to rely upon the representations made at the time of his original complaint.
9. He confirmed that the complaint had been made as a direct result of the holding on 22 September 2005 of a hearing of the public authority's Licensing Sub-Committee to deal with an application to vary the permitted licensed opening hours of a local night club.
10. The Sub-Committee sat with a quorum of two presiding councillors and he had initially questioned the legality of the public authority's decision to allow the Sub-Committee to sit with a quorum of two as opposed to three as referred to in both the Licensing Act 2003 and the public authority's own regulations for the conduct of hearings made under that legislation.
11. The public authority responded to the Commissioner's questions on 21 December 2006 confirming that the legal advice had not been obtained directly from Counsel. Rather it had been obtained from another public authority (the "second authority") as part of an agreed scheme for the sharing of legal advice and assistance.
12. The public authority referred the Commissioner to an e-mail dated 27 September 2006 (the "supporting e-mail") which had been sent to the public authority by the second authority when it supplied the legal advice.

13. The public authority pointed out that the supporting e-mail had been marked *private and confidential*, something it had not previously appreciated. As a result of this, in addition to the section 42 exemption, it also now felt it appropriate to rely upon the section 41 exemption.
14. On 8 January 2007 the Commissioner advised the complainant of the raising of the section 41 exemption and invited him to make any further representations he felt appropriate. None were made.
15. The Commissioner at the same time raised a number of further questions with the public authority. The public authority responded on 25 January 2007 clarifying that the information sharing arrangement related to a Licensing Special Interest Group of likeminded authorities within the area. It indicated that this was a common practice throughout local government and a practice encouraged by central government.
16. The public authority also made it clear that the second authority did not consent to the disclosure of the legal advice as the supporting e-mail clearly stated *for your use only our private and confidential advice*.

Analysis

17. The Commissioner has investigated this case with a view to ascertaining whether the public authority has complied with the Act. He has taken into account all relevant information and in particular has considered a copy of the legal advice together with a copy of the supporting e-mail. He will firstly consider the issue of procedural matters and thereafter the public authority's use of the exemptions. A full text of the relevant statutes referred to is contained in the legal annex.

Procedural matters

18. Where a public authority refuses a request for information it is required under section 17 of the Act to provide to the applicant, within the time limit set out in section 10, a notice ("the refusal notice") detailing the refusal and specifying (and explaining if necessary) the exemption or exemptions relied upon.
19. In addition where the application of an exemption relied upon is subject to the public interest test unless it is dealt with in a separate notice (served within such time as is reasonable) the reasoning involved in that test must be detailed in the refusal notice.
20. In this case the public authority refused the complainant's initial request on 7 November 2005 indicating by e-mail that it was relying upon the section 42 exemption. This communication constituted the refusal notice.
21. The section 42 exemption is subject to the public interest test. The application of that test was not set out in either the refusal notice or a separate notice.

22. The section 41 exemption was first raised by the public authority on 21 December 2006. This was well outside the time limits for compliance with section 17 as set out in section 10 of the Act.

Exemption

Section 42

23. The section 42 exemption originally applied by the public authority relates to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
24. There are two separate categories within this privilege those being legal advice privilege and litigation privilege.
25. Advice privilege relates to communications between a person and his lawyer provided that they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations.
26. In this case it is clear that whilst the information in question relates to such advice, the advice privilege itself rested with the second authority as it had obtained the advice from Counsel. It was therefore the client in that lawyer/client relationship. The public authority was not the client and was accordingly wrong to seek to rely upon the exemption.

Section 41

27. The Commissioner notes that the section 41 exemption was first raised by the public authority on 21 December 2006. The fact that it was not referred to in the refusal notice does not disentitle the public authority from thereafter seeking to rely upon it, although clearly this amounts to a failure to comply properly with its obligations under the Act.
28. The section 41 exemption relates to information obtained by the public authority from another person (including another public authority) where disclosure of the information would give rise to an actionable breach of confidence.
29. In this case the information was clearly provided to the public authority by another person, namely the second authority. So, the Commissioner must now consider whether the second authority could in the event of unauthorised disclosure take legal action against the public authority for breach of confidence.
30. Three questions need to be considered here. Is there a duty of confidence? If there is, then is the information itself confidential in nature? If it is, would a defence exist to an action brought in respect of the disclosure of the information?
31. A duty of confidence arises where information is provided to a person in the expectation that it will only be used or disclosed in accordance with the wishes of the person providing the information. This can be implied from the circumstances of the particular case or explicitly set out.

32. In this case, the second authority explicitly set out in the supporting e-mail the limitations on the use of the information. The e-mail attached the legal advice with the proviso (set out in full by the Commissioner) "*I attach for your use only our "private and confidential" advice obtained on quorums.*" It is accordingly clear that the information was provided in confidence.
33. The Secretary of State for Constitutional Affairs has under section 45 of the Act issued a Code of Practice (the "Code") in relation to the discharge of public authorities' functions under Part I of the Act. Whilst the Code makes it clear that public authorities should demonstrate caution when accepting duties of confidentiality, it also makes it clear that, in certain circumstances, such duties are entirely appropriate.
34. The Commissioner finds that the acceptance of the duty in this case was appropriate. If the public authority had not accepted the obligation of confidentiality, the second authority would have been able to refuse to share the legal advice and could simply have relied upon the section 42 exemption if it itself received a request for disclosure under the Act (see paragraph 26). The use of the duty of confidentiality facilitates the sharing of legal advice between public authorities with its associated cost savings.
35. As it is also clear that the information is confidential (see paragraphs 25 and 26) the Commissioner must now consider whether there would be a defence to any action brought in respect of the disclosure of the information.
36. At common law, there are a number of possible defences against an action brought in respect of the disclosure of confidential information. These include defences available in circumstances where disclosure is required by law or where the confider (in this case the second authority) consents to the disclosure. Neither applies in this case.
37. The Courts have also been prepared to accept that the public interest may override a duty of confidence, if the greater public interest lies in the disclosure of the information. However a duty of confidence cannot be overridden lightly.
38. In this case the Commissioner has already found that the acceptance of the duty of confidence was appropriate in furtherance of the principles underlying the concept of legal professional privilege (see paragraph 34.) He does not consider there to be a sound basis for arguing in all the circumstances of this case that there is a greater public interest in disclosure. He is therefore satisfied that disclosure would constitute an actionable breach of the duty.
39. The section 41 exemption therefore applies and being an absolute one, not requiring the further application of a public interest test, the Commissioner finds that the public authority was justified in withholding the information.

The Decision

40. The Commissioner's decision is that the public authority had grounds for withholding the requested information under section 41 exemption of the Act.

However, the Commissioner has decided that it did not have grounds for applying the exemption under section 42 of the Act.

The Commissioner finds that the public authority breached section 17 of the Act in two respects:

Firstly it failed in the refusal notice to set out its application of the public interest test in relation to the section 42 exemption.

Secondly it failed to specify the appropriate exemption (section 41) in the refusal notice.

Steps Required

41. The Commissioner requires no steps to be taken.

Right of Appeal

42. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 2nd day of April 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled -

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 10 provides that -

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(3) If, and to the extent that -

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(6) In this section -

“the date of receipt” means -

- (a) the day on which the public authority receives the request for information, or
- (b) if later the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17(1) provides that -

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 41 provides that -

(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Section 42 provides that -

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.