

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 6 August 2007

Public Authority: Foreign and Commonwealth Office (FCO)

Address: Old Admiralty Building
London
SW1

Summary

The complainant requested a copy of legal advice obtained by the FCO. The legal advice concerned the issue of whether the UK Government had discharged any duty of care it owed as trustee of the Southern Rhodesia Widows' Pension Fund when it handed over the colony of Southern Rhodesia to the Government of Zimbabwe. The FCO claimed that it was exempt from disclosure as section 42 of the Act, which relates to legal professional privilege, was engaged. The FCO further argued that the public interest favoured maintaining the exemption. The Commissioner investigated the FCO's application of section 42 and found that the information requested is legal advice, but that privilege was waived when the FCO disclosed large parts of the advice to the complainant and others. The Commissioner's decision is that the exemption is not engaged, and requires the FCO to disclose the requested information in full to the complainant.

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 Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

The Request

2. The complainant has advised that on 18 October 2005 he requested the following information from the FCO:

“Please may I have sight of the full opinion given by the FCO legal adviser referred to in the FCO letter of 21 May 2004 to the Overseas Service Pensioners’ Association.”

3. The complainant was a member of the Overseas Service Pensioners’ Association (OSPA), which was involved in a dispute with the FCO. The dispute related to responsibility for public service pensions owed to individuals who had served as public officers in Southern Rhodesia before it gained independence from Britain and became Zimbabwe. The information requested by the complainant comprised a legal opinion obtained by the FCO in relation to a paper submitted by the complainant to the FCO on 25 February 2004. The legal opinion concerned the issue of whether the UK Government had discharged any duty of care it owed as trustee of the Southern Rhodesia Widows’ Pension Fund when it handed over the colony of Southern Rhodesia to the Government of Zimbabwe. The complainant had been made aware of the existence of the legal advice by way of a letter from the FCO to OSPA dated 21 May 2004.
4. The FCO responded to the complainant’s request on 14 November 2005, and advised that it was considering the exemptions under sections 35 (formulation of government policy) and 36 (prejudice to the effective conduct of public affairs) in relation to the requested information. The FCO advised that it needed additional time to consider the application of the public interest test in relation to these exemptions.
5. The FCO wrote to the complainant again on 5 December 2005. In this letter the FCO indicated that it believed the requested information was exempt under section 42 of the Act (legal professional privilege). Although the FCO had considered the exemptions under sections 35 and 36, it felt that section 42 was the most appropriate. As section 42 is a qualified exemption the FCO also considered the public interest arguments in favour of disclosure, and in favour of maintaining the exemption. The FCO advised the complainant that it had concluded that the public interest in maintaining the exemption did outweigh the public interest in disclosure of the information. Accordingly, the FCO refused to release the information to the complainant.
6. The complainant was dissatisfied with the FCO’s decision, and following further correspondence he requested an internal review of the FCO’s refusal on 27 March 2006.
7. The FCO wrote to the complainant on 28 April 2006, advising that it had conducted an internal review as requested. The FCO referred the complainant to a recent Information Tribunal decision which upheld a public authority’s reliance on the exemption under section 42. The FCO noted that the Tribunal had found that there is a strong public interest in maintaining legal professional privilege,

and the FCO did not feel that there was a strong enough public interest argument to overturn the exemption in the complainant's case. Therefore the FCO upheld its refusal to disclose the requested information.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 8 May 2006 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate the refusal by the FCO to disclose the information he had requested.

Chronology

9. The Commissioner contacted the FCO on 3 May 2007 to obtain a copy of the withheld information (ie the legal opinion). This was provided in confidence to the Commissioner on 4 May 2007.
10. The Commissioner considered the withheld information, and noted that large portions of the legal advice appeared to have been reproduced, word for word, in the letter sent by the FCO to OSPA dated 21 May 2004. It appeared to the Commissioner that privilege might have been waived, and he asked the FCO for its comments. The FCO indicated that it was not aware of the letter of 21 May 2004, so the Commissioner provided the FCO with a copy for its reference.
11. The Commissioner also referred the FCO to the Information Tribunal's decision in the case of Kirkaldie & ICO v Thanet District Council (Appeal number EA/2006/001). In this case the public authority was found to have waived privilege by providing a summary of legal advice at a public meeting.
12. The FCO advised the Commissioner of its view that privilege had not in fact been waived in this case. The FCO acknowledged that parts of the legal advice had been quoted in the letter dated 21 May 2004, but did not feel that this meant privilege had been waived in relation to the remainder of the advice. The FCO maintained that the parts of the advice which were quoted may have lost their confidentiality in relation to the complainant, but that they remained confidential in relation to the public at large.
13. The FCO referred to the Tribunal's explanation of the "cherry-picking rule" in the Kirkaldie decision (paragraph 24). The Tribunal in this decision recognised that unfairness arises when parties to litigation choose to disclose some privileged information, while refusing to disclose other parts. In this sense "cherry-picking" of disclosure of privileged information is considered unfair, and therefore if a party waives privilege in relation to some information, it must effectively waive privilege in relation to the remainder, to ensure fairness.

14. The FCO explained that legal professional privilege is a rule of evidence, and that waiver of privilege only applied to information which was being used, or which was about to be used, in litigation. As there was no litigation ongoing or pending in relation to the complainant, the FCO argued that no unfairness would result from the advice being partially disclosed, and therefore privilege could still attach to the remainder of the advice.
15. For the reasons set out above, the FCO remained of the view that the legal advice was in fact exempt under section 42 of the Act, and that the public interest favoured maintaining the exemption.

Analysis

16. The Commissioner asked the FCO to consider whether the full advice could be disclosed to the complainant by way of informal resolution, but the FCO did not wish to pursue this option. Therefore the Commissioner is required to make a formal decision in this case.

Procedural matters

Section 17 – refusal Notice

17. The Commissioner considered whether the refusal notice issued by the FCO complied with section 17 of the Act. Section 17(1) states that a public authority which is relying on an exemption in order to withhold information must give the applicant a notice which:
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if it would not otherwise be apparent) why the exemption applies.
18. The Act states that a refusal notice must be provided to the applicant within the statutory time limit, ie, no later than twenty working days following the date of receipt of the request. If an authority considers that a qualified exemption is engaged in relation to the requested information, it must consider whether the public interest favours disclosure of that information or maintenance of the exemption. Section 17(3) of the Act allows a public authority to extend the time limit in order to consider the public interest arguments in relation to the exemptions applied in accordance with section 17(1).
19. In this case, the FCO advised the applicant on 14 November 2006 that it was considering the application of the exemptions under sections 35 (formulation of government policy) and 36 (prejudice to the effective conduct of public affairs). This letter did not explain how the FCO considered the exemptions to be engaged, it merely stated that the FCO would require an additional fifteen working days in order to consider the public interest arguments.

20. The FCO's letter of 5 December 2006 explained that the FCO was no longer seeking to rely on the exemptions stated in its letter of 14 November 2006, and that it was now seeking to rely on the exemption under section 42 of the Act (legal professional privilege). The letter did explain why this exemption was considered applicable to the requested information, and provided details of the public interest arguments considered.
21. In light of the above, the Commissioner finds that the FCO's letter of 14 November 2006 did not constitute an adequate refusal notice, and that the FCO's letter of 5 December 2006 can more appropriately be considered as the refusal notice in this case. If the FCO had intended to rely on the exemption under section 42 of the Act then it ought to have communicated this to the complainant in its letter of 14 November 2006. In any event, the letter of 14 November 2006 did not contain sufficient detail as to why the exemptions cited were applied, and therefore would have been inadequate as a refusal notice.
22. The Commissioner notes that the complainant's request was made during the first year of the Act, and expects that the FCO has since improved its procedures in relation to the issuing of refusal notices.

Exemption claimed

Section 42 – legal professional privilege

23. Section 42(1) of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.
24. The Commissioner is satisfied that the information in question constitutes legal advice, and was obtained by the FCO from its legal advisor. The Commissioner has therefore considered whether a claim to legal professional privilege could be maintained in legal proceedings, in relation to the legal advice.

Waiver of privilege

25. The Commissioner is satisfied that much of the legal advice was disclosed to OSPA, and therefore to the complainant, in a letter sent by the FCO to OSPA dated 21 May 2004. The question for the Commissioner to consider, then, is whether the FCO has waived privilege in the information through this disclosure.
26. The FCO argues that privilege has not been waived, for the reasons set out in paragraphs 12-14 above. The FCO's arguments appear to be based on two premises. The first is that the information contained within the letter of 21 May 2004 has not been disclosed into the public domain, and therefore confidentiality has been maintained. The second is that partial disclosure of the advice would not amount to "cherry-picking" as set out at paragraph 13 above, as there is no litigation and therefore no risk of unfair advantage to one party.

27. With regard to the first premise, the Commissioner does not accept the FCO's argument that the information has not been disclosed to the public at large. The letter of 21 May 2004 is not protectively marked, nor are there expressed any restrictions as to its use. The Commissioner is also mindful of the fact that the full text of the letter of 21 May 2004 is available on the Internet. It formed part of a submission to the Select Committee on Foreign Affairs, made on 15 July 2004¹. Therefore the Commissioner finds that the information disclosed within the letter has in fact effectively been disclosed to the public at large.
28. With regard to the second premise, the Commissioner is mindful of the Information Tribunal's decision in the case of Kircaldie (reference as set out in paragraph 11 above). The Commissioner considers that the present case is similar in that there may not have been any intention to waive privilege, but that privileged information was nonetheless disclosed. The Tribunal was not deterred from this conclusion by the lack of litigation in Kircaldie, and the Commissioner has no reason to assume that the Tribunal would take a different approach in this case.
29. The Commissioner is greatly assisted by the Tribunal's clarification of the test for waiver (Kircaldie, paragraph 26):
- “The test for waiver is whether the *contents* of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver (Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd [2003] EWCA Civ 901).”
30. Applying this test, the Commissioner is satisfied that the FCO did in fact quote the contents of the legal advice in its letter to OSPA of 21 May 2004.
31. The Commissioner acknowledges that the FCO does not appear to have intended to waive privilege in this case, but he is of the view that this has nevertheless occurred. Again, he is assisted by the Tribunal's view (Kirkaldie, paragraph 32):
- “Waiver is an objective not a subjective principle. Whether a party intended to waive privilege in a particular document is not the question. What matters is an objective analysis of what the party has done.”
32. The Commissioner has also had regard to a number of recent Decision Notices he has issued in relation to waiver of privilege (Dover District Council, reference FER0082136, and City of Bradford Metropolitan District Council reference FER0081580). Again, the Commissioner sees no reason in this particular case for him to diverge from the approach followed in these cases.

¹ <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmfaaff/111/111we03.htm>

The Decision

33. The Commissioner's decision is that the FCO did not deal with the request for information in accordance with the Act. The Commissioner is satisfied that the legal advice which is the subject of the complainant's request is not exempt under section 42(1) of the Act. This is because the Commissioner finds that privilege has been waived in relation to the legal advice, and the exemption under section 42(1) of the Act is therefore not engaged.
34. The Commissioner finds that the FCO did not comply with sections 1(1) and 17(1) of the Act.

Steps Required

35. The Commissioner requires the FCO to disclose the legal advice in full to the complainant.
36. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

37. 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 6th day of August 2007

Signed

Marie Anderson
Assistant Information Commissioner

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

- (1) 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.

2. **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 ... is to any extent relying:

- on a claim 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 public authority holds the information, or
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim 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 public 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.”

3. Section 42(1) provides that:

“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.”