

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 March 2007

Public Authority: Crown Prosecution Service
Address: 50 Ludgate Hill
London
EC4M 7EX

Summary

The complainants made a request for information relating to alleged offences committed by members of the public on a footpath which bisects the complainants' land. The CPS responded by providing some material, but not the instructions given to Counsel nor Counsel's advice, citing the legal professional privilege exemption contained in section 42 as the reason for refusing this aspect of the request. The complainants submitted that release of the advice and instructions was in the public interest. The Commissioner's decision is that the use of the section 42 exemption is upheld in this matter, and that the public interest favours maintaining the exemption in this instance.

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. On 29 June 2006 the complainants sought access to all documents on a file related to a footpath which bisects their property, as well as instructions given to Counsel by the Crown Prosecution Service (CPS) and the resulting advice from Counsel. The advice related to whether there was sufficient evidence for a prosecution by the CPS under the Road Traffic Act for alleged misuses of the footpath by members of the public.
3. The CPS responded on 7 July 2006. It provided the complainants with copies of the documents sent to Counsel, which were documents the complainants had provided to the CPS. The CPS denied access to the remaining information which

constituted the instructions to Counsel and the resulting advice, citing the legal professional privilege exemption contained in Section 42 of the Freedom of Information Act.

4. The complainants requested a review of this decision on 14 July 2006.
5. This request for review was answered on 3 August 2006. The review upheld the use of the exemption and no access was granted to the instructions and advice sought.
6. The Information Commissioner (the Commissioner) received a complaint from the complainants on 16 August 2006. In that complaint they referred to their previous requests for “a copy of Counsel’s advice under the Freedom of Information Act including copies of documents sent to Counsel with instructions”, from the CPS.

The Investigation

Scope of the case

7. On 16 August 2006 the complainants contacted the Commissioner to complain about the way their request for information had been handled. The complainants specifically asked the Commissioner to consider whether all documents, including instructions to and advice from Counsel to the CPS, in the matter relating to the footpath which bisects the complainants’ property, could be disclosed to them.
8. In the course of the investigation the Commissioner has considered the following issues:
 - Whether the matter is more suitably covered by the Environmental Information Regulations.
 - Whether the matter would be more suitably dealt with as a Subject Access Request under the Data Protection Act 1998 (‘the DPA’).
 - Whether the Section 42 exemption has been appropriately cited and maintained by the public authority.

As the complainants have been provided with copies of the documents supplied to Counsel, which they originally submitted to the CPS, the Commissioner has not given further consideration to that material. He has focussed his investigation on the instructions to Counsel and the advice provided.

Chronology

9. The footpath in question has been the subject of litigation and disputes of one sort or another since the complainants purchased their property in 1985. The usage of fifty metres of the footpath has been the ongoing issue in the dispute. The footpath has a public right of way attached to it, as well as being privately

- owned. Issues related to access to the footpath were decided by the Supreme Court of Judicature, in the Court of Appeal (Civil Division) in 2000. Those proceedings were brought by Hampshire County Council against the complainants to enforce a public right of way on the disputed footpath and supported earlier findings of Southampton County Court that the land on which the footpath runs, and which bisects the complainants' land, did not belong to the complainants, but rather to a neighbour of theirs. The Complainants continue to dispute the ownership; width and usage of the footpath notwithstanding this.
10. Documents provided to the Information Commissioner indicate that in 2001, after the civil proceedings were at an end, the complainants contacted Hampshire Constabulary about alleged criminal offences taking place on the disputed footpath. In particular it was alleged that section 34 (1) of the Road Traffic Act was being breached.
 11. **Section 34 (1)** states that:

“Subject to the provisions of this section, if without lawful authority a person drives a mechanically propelled vehicle-

b) On any road being a footpath, bridleway or restricted byway, he is guilty of an offence”.
 12. These complaints resulted in advice being sought of the Crown Prosecution Service about whether members of the public driving on the footpath could be prosecuted by the CPS under Section 34.
 13. The CPS has decided there is no realistic prospect of conviction under the criminal standard contained in their Code for Crown Prosecutors (the Code). This decision was communicated to the complainants. They did not agree with the decision and sought that the decision be reviewed internally. The CPS responded to this complaint by seeking advice from external counsel as to whether there was a realistic prospect of conviction, applying the evidential test in the Code. Upon receipt of this advice, the CPS confirmed with the complainants that they would not be pursuing the matter as it did not satisfy their evidential test.
 14. The complainants' state in their complaint to the Information Commissioner's Office, that they believe that there is a public interest in providing this information as it relates to a public footpath. The complainants' position is that criminal acts are being committed on this public footpath and that the footpath is not wide enough for vehicular access and that public nuisances are taking place. The only issue considered by the CPS was the alleged offences under Section 34 of the Road Traffic Act. The complainants also state in their complaint that “the only information we were provided with from the CPS file was our own documents which we already had”.
 15. A caseworker wrote to the complainants on 17 November 2006. In that letter the complainants were invited to make additional submissions about the public interest considerations, over and above those already outlined in their letter of complaint to the Commissioner.

16. On 21 November 2006, the complainant called the Information Commissioner's Office. In that phone call she reiterated that it was in the public interest for the advice and instructions to be provided as people were having to jump out of the way of moving cars on the footpath. She stated that there is an old people's home nearby and they used to walk on the footpath, but that now you could not push a wheelchair there as there were ruts in road. The complainant reiterated that she wanted to make sure that Counsel had been given all the available information to come to this decision to not prosecute, and that they wanted to see the advice if possible, so they could either contest the basis of the decision or understand why prosecution was not possible.
17. A caseworker wrote to the CPS on 17 November 2006. The CPS was asked to provide a copy of all documents, instructions and advice to and from counsel in this matter.
18. The CPS responded on 27 November, providing the instructions and advice together with a copy of all documents sent to Counsel. Their position is that the only documents provided to Counsel (apart from instructions) were copies of documents given to them by the complainants, and that these documents were provided to the complainants on 25 July 2006.

Findings of fact

19. During the investigation, the Commissioner found that:
 - The instructions and advice in question consisted of communications between a professional legal adviser (Counsel) and his client (the CPS).
 - The advice sought related solely to contemplated proceedings.
 - That there was no evidence that the CPS shared the legal advice or instructions with any third parties.
 - The information sought related to legal advice about Section 34 of the Roads and Traffic Act, and whether a prosecution could be contemplated under the CPS Code for Crown Prosecutors.
 - Litigation related to this footpath is still a live issue and there have been ongoing disputes about its usage since the complainants purchased the land in 1985.

Analysis

Is the requested information environmental information and would it be more suitably dealt with under the Environmental Information Regulations 2004?

20. Consideration was given to whether the matter was better dealt with under the Environmental Information Regulations (EIR).

21. Regulation 2 defines environmental information as any information on,
- “ (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marines areas, biological diversity and its components, including genetically modified organisms, and the interaction of these elements;
- a. factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases in to the environment, affecting or likely to affect the elements of the environment referred to in (a);
- b. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements”.
22. Whilst driving cars on the path may constitute information on an activity affecting land, the Commissioner decided that should not be dealt with under the EIR, as the information sought related only to contemplated legal proceedings about enforcement action under the Road and Traffic Act and as such was not directly connected to activities affecting the land or the other elements of the environment.
23. The CPS's views on whether the EIR were applicable to this matter were sought. In a letter dated 27 November 2006 it stated that ‘there has been no such consideration as it is not thought to be relevant to the circumstances of this request’ and that ‘I have reviewed the EIR and guidance on your website and do not think it is applicable. If it were otherwise, then all Road Traffic Act offences would be subject to EIR’.

Does the requested information constitute the complainants' personal data and should the application be more suitably dealt with under the Data Protection Act 1998?

24. In the Commissioner's view the requested information does not constitute personal data and therefore it would have been inappropriate to deal with it as a Subject Access Request under section 7 of the DPA. The advice sought related to usage of a public footpath and whether prosecutions under Section 34 of the Road and Traffic Act could be justified under the CPS evidential test. Therefore, the advice was not specific to the complainants, but rather was related to the usage of the public footpath.

Exemption

25. The Commissioner considered the following questions when assessing the application of legal professional privilege to the information in this matter:

Does the exemption in section 42 (1) of the Act apply to the requested information?

26. **Section 42(1) of the Freedom of Information Act 2000** 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.”
27. The advice sought related to contemplated proceedings and was obtained for this sole purpose. Therefore the privilege falls into the category of litigation privilege, rather than advice privilege.
28. The documents in question were communications between Counsel and his client, for the purposes of contemplated proceedings. Therefore, legal professional privilege was correctly claimed over the material by the CPS. Litigation privilege will therefore attach to all documents, reports, information, and evidence obtained for the dominant purpose of the contemplated litigation. The exemption has been correctly claimed.

Is there any argument that legal professional privilege has been waived by the CPS?

29. When deciding whether or not the section 42 exemption had been correctly applied in this case, the Commissioner considered whether or not there was any argument that the CPS had waived privilege. The test for disclosure under the Act is whether the material can be released to any member of the public and not just an interested or involved party. The Commissioner considered whether there was any evidence that the CPS had released the withheld material to the public, thus potentially waiving their privilege over the disputed information. There was no evidence which indicated that the instructions or the advice had been shared with any member of the public, therefore the CPS could not be seen to have waived their privilege regarding this material.

The Public Interest Test

30. The exemption is a qualified one and must be balanced by a consideration of whether it is in the public interest to maintain the exemption. In reaching a view on the public interest, the Commissioner has taken into account a number of other cases that have already been heard by the Information Tribunal ('the IT') in which the issue of legal professional privilege and the public interest have been considered.
31. In the case EA/2005/2003 *Bellamy v the Information Commissioner and the DTI* ('the Bellamy decision'), the IT decided that, 'with regard to legal professional privilege, there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned' (paragraph 8).
32. Paragraph 10 of the Bellamy decision cites the case of *In Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 at page 32E, where Lord Nicholls of

Birkenhead stated that, 'the public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases'.

33. The Tribunal found at Paragraph 35 that 'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest'.
34. The Commissioner also considered the Information Tribunal's decision EA/2006/0044 of *Kitchener v the Information Commissioner and Derby City Council* ('the Kitchener decision') and in particular their findings regarding public interest and legal professional privilege.
35. Paragraph 16 of the Kitchener decision states, regarding legal professional privilege, 'if either the lawyer or the client could be forced to disclose what either said to the other (whether orally or in writing) as part of that process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there was a possibility that disclosure might later be ordered'.
36. Paragraph 12 of the Kitchener decision states, 'It is clear that, in law, each request for disclosure of information must be considered by the Commissioner on its merits, against the framework. '
37. Whilst those cases are not binding upon the Commissioner's decision, they provide the Commissioner with guidance in determining what weight should be given to the public interest arguments in this matter.
38. A public authority such as the CPS must be able to seek legal guidance when making decisions. This advice should be free from the threat of interference except in exceptional circumstances, where the arguments in favour of disclosure override the arguments in favour of non-disclosure.
39. Taking into account the above points, the Commissioner has approached his analysis to the public interest in this case by considering a number of questions. These are addressed in turn below.

What is the status of the legal proceedings and the age of the information?

40. In EA/2005/2003 *Bellamy v the Information Commissioner and the DTI* (the Bellamy Case) the Information Tribunal states at Paragraph 35 that, 'where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight'. It is therefore arguable that the public interest in maintaining the exemption in section 42 is likely to be weaker where advice can be deemed to be stale or the older the information becomes. Arguably the sensitivity of information reduces over time and therefore the older the information, the weaker the public interest arguments in favour of maintaining the exemption. This view is supported by the fact that by virtue of section 63 of the Act, information cannot be exempt under section 42 where it is older than 30 years old.

41. The Commissioner has considered the status of the proceedings and whether the advice in this matter could be considered stale and related to issues of some historicity. Although there are currently no specific proceedings pending, the Commissioner is aware that the complainants intend to pursue their case further and therefore the issues remain live. He also notes that the advice was provided relatively recently, in May 2006.
42. Where a matter remains live and there is real possibility of further litigation, the public interest in maintaining legal professional privilege is strong. If the information were released in such circumstances, it would undermine the public authority from defending its position in future proceedings. There is considerable public interest in ensuring that public authorities can present and defend their position in proceedings on a level playing field with the opposition. If other parties were able to access the legal advice provided on a particular matter in advance, this would disadvantage the public authority and prejudice the administration of justice. More generally, it may also hinder the ability of public authorities to access full and frank legal advice.

Is there a suggestion or any evidence that the public authority has not assessed whether or not to prosecute in accordance with its own procedures?

43. The Commissioner recognises that there is a public interest in ensuring that the CPS is accountable for its decisions. He accepts that if the legal advice were released it would increase transparency and it would, to some extent, enable the public to determine whether the decision taken in the case was made in accordance with CPS procedures. Arguably, greater transparency about decisions taken by public bodies is likely to contribute to increased quality of those decisions and public confidence in them.
44. It can be argued that where information reflects that a public authority has not followed its own practices or procedures the public interest in disclosure is likely to be stronger. Further, where there is a widespread concern that a public authority may or may not have sought advice where appropriate or that it may not have provided the legal advisor with all relevant facts; arguably the public interest in disclosing the instructions and legal advice on a particular matter may also be considerable. This cannot be seen to be the case in this matter, as the CPS sought advice about their position from external counsel; and provided the complainants with the documents provided to counsel.
45. The Commissioner considered the complainant's argument that she wanted to make sure that Counsel had been given all the available information to come to the decision not to prosecute. As previously mentioned, the complainants have been provided with copies of the material that was sent to Counsel, which they originally supplied to the CPS. Therefore they are aware, to some extent, of the evidence that Counsel had to consider when providing advice. The Commissioner makes no further comment in this regard.
46. Further the Commissioner is not aware of any suggestion or evidence to show that the way in which this matter was processed by the CPS was not in

accordance with its standard processes. The CPS investigated and assessed the complainants' allegations of misuse of the path and assessed whether members of the public driving on the footpath could be prosecuted by the CPS under Section 34; they then reviewed their decision internally. Upon receipt of a further complaint they sought advice from external counsel as to whether there was a realistic prospect of conviction, applying the evidential test in their Code. Upon receipt of this advice, the CPS confirmed with the complainants that they would not be pursuing the matter as it did not satisfy their evidential test. The Commissioner is therefore satisfied that the CPS assessed the complainant's request in accordance with its own procedures and therefore he has not given particular weight to this argument in this particular case.

Would the information help the public to understand the decisions made by the public authority?

47. The complainant informed the caseworker that she wanted to see the advice so that she could either contest the basis of the decision or understand why prosecution was not possible. The Commissioner agrees that the complainants would better understand the reasons why prosecution was not possible by having access to the advice. He recognises that there is a strong public interest in people understanding, from an informed standpoint, decisions that are made which affect them.
48. The Commissioner accepts that there is a strong public interest in ensuring that public authorities are accountable and transparent. If members of the public are provided with information that shows the basis on which decisions have been taken this will enable them to understand the reasons behind those decisions and to have greater confidence in them. The Commissioner notes the comments made in Paragraph 14 of the Information Tribunal's decision EA/2006/0044 of *Kitchener v the Information Commissioner and Derby City Council* (the Kitchener Case) on this topic which stated, 'there is a public interest in ensuring that the activities of public authorities are known and can be called to account if appropriate.'
49. The Commissioner notes that the private ownership of the footpath is disputed and he makes no comment about the ownership of the path as this is outside his remit. However, information about the footpath which has been provided to the Commissioner in the materials submitted by the complainants indicate that:
 - i. There is an historic public right of way by foot over the footpath
 - ii. There is evidence of motorists using the footpath
 - iii. Civil courts have determined in previous proceedings that the footpath is owned by a neighbour of the complainants¹
 - iv. That neighbour has granted rights of way for motor vehicles over the footpath to tenants of his, and that visitors and tradespeople calling upon those tenants would have a lawful defence if using the footpath for that purpose²

¹ Contained in the Judgment of Lord Justices Brooke and Sedley of the Supreme Court of Judicature (Civil Division) on appeal from Southampton County Court, 5 April 2000

² Contained in a letter from Hampshire Constabulary to the complainants dated 25 October 2001

50. In this case, the Commissioner has been mindful of the fact that the footpath has a public right of way attached to it, as well as being privately owned. Therefore, arguably the advice impacts upon a larger number of people than if the land were restricted to private use. This is one factor which the Commissioner considers is relevant when assessing the public interest. It is arguable that the public interest in disclosing information that helps people to understand decisions may be greater the more people that decision impacts upon. In this case the decision not to prosecute motorists has the capacity to affect not only the complainants but also other members of the public who use the footpath. He recognises that making the disputed information available would help members of the public concerned about the usage of this footpath to understand the CPS's decision not to prosecute.
51. However, the Commissioner does not consider that the arguments set out above are sufficiently strong to outweigh the argument that the CPS are entitled to properly consider whether to prosecute or not and that they should be able to get full and frank advice about this from Counsel.
52. In this matter, the Commissioner finds that the public interest considerations in maintaining the exemption are stronger than those cited by the complainants to support disclosure.

Conclusion

53. The Commissioner has given careful consideration to each of the points above. He acknowledges that releasing the legal advice would assist the complainants and the wider public to understand the CPS's decision not to prosecute motorists driving on the footpath. He also recognises that access to the material would ensure that the CPS is accountable for its decision and it may increase confidence in the overall decision making process. However, in this case, he does not believe that these factors outweigh the strong public interest in the CPS accessing full and frank legal advice. This ensures that decisions are made which are in accordance with the law. In addition, where there is still reasonable prospect of further legal proceedings, as in this case, it is important that public authorities such as the CPS are able to defend their position on the same footing as opposing parties. Therefore, he has concluded that the public interest in this case favours maintaining the exemption in section 42.

The Decision

54. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and appropriately maintained the exemption in section 42 of the Act.

Steps Required

55. The Commissioner requires no steps to be taken.

Right of Appeal

56. 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

57. 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 13th day of March 2007

Signed

**Richard Thomas
Information Commissioner**

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