

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 May 2007

Public Authority: Merseytravel
Address: 24 Hatton Garden
Liverpool
L3 2AN

Summary

The complainant requested information about a specific loan. The public authority declined relying upon the sections 36 and 42 exemptions and in maintaining that in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information. The Commissioner is satisfied that the public authority has applied the section 42 exemption and the public interest test correctly.

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 15 January 2005 the complainant made the following request for information concerning a loan that was supposed to have arisen from Mersey Tunnels losses between October 1988 and March 1992: *'We therefore ask to see all the reports, agendas and minutes relating to the loan.'*
3. On 24 February 2005 the public authority declined to disclose the requested information relying upon the sections 36 and 42 exemptions.
4. On 7 March 2005 the complainant requested an internal review.
5. On 11 May 2005 the public authority confirmed that an internal review had taken place. It decided to disclose reports and minutes relating to the legal opinion it

had sought concerning the loan arising from the operation of the Mersey Tunnels. However the public authority did not disclose the legal advice itself.

The Investigation

Scope of the case

6. On 6 September 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - he had already complained to the auditor about Merseytravel's accounts and had received a copy of the legal advice from the auditor. However he was informed that he could be imprisoned if he discloses it under the Audit Commission Act 1988 section 49 and
 - the legal advice should be available to him under the Act and
 - public authorities should freely disclose such information.
7. Although the public authority applied the sections 36 and 42 exemptions to the requested information, it is not necessary for the Commissioner to consider the application of the section 36 exemption if the section 42 exemption has been correctly applied..

Chronology

8. On 15 October 2006 the complainant contacted the Commissioner. The complainant's concern was that although he had received a copy of the legal advice from another source, if he disclosed it he could be imprisoned for up to two years under section 49 of the Audit Commission Act 1998.
9. On 27 February 2007 the Commissioner contacted the complainant to clarify his complaint. The complainant felt that if he obtained the legal advice under the Act he could disclose it and he also asserted that as the legal advice was old, it would not be exempt under the section 42 exemption.
10. On 1 March 2007 the Commissioner contacted the public authority and asked for copies of the exempt information, an explanation about its use of the section 42 exemption and factors it had taken into account when looking at the public interest.
11. On 3 April 2007 the public authority responded providing a copy of the legal advice it had sought and an explanation of its application of the section 42 exemption including its application of the public interest.

Analysis

12. The Commissioner considered firstly, procedural breaches and secondly, the public authority's use of the section 42 exemption including its application of the public interest test with regard to the exemption. A full text of the relevant statute referred to is contained in the legal annex.

Procedural matters

13. Section 17 (1) of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain what exemption or exemptions have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. Although the public authority did state which exemption it sought to rely upon the Commissioner is of the view that it did not state with sufficient clarity why the withheld information fell under the terms of the exemption under section 42.
14. The public authority was required by virtue of sections 17(3)(b) of the Act to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The public authority did not demonstrate in its refusal notice any consideration of the public interest arguments in favour of disclosure or non-disclosure, although it did subsequently provide these arguments to the Commissioner on request.
15. Further the public authority was required by virtue of sections 17(7)(a) to provide particulars of any procedure it provided for dealing with complaints about the handling of requests for information and sections 17(7)(b) to contain particulars of the right to appeal under section 50 of the Act. The public authority did not provide these details.
16. Accordingly the Commissioner finds that public authority has failed to meet the obligations imposed upon it by section 17 of the Act

Exemption

17. Section 42 exempts information that attracts legal professional privilege. The principle of legal professional privilege can be described as a set of rules or principles designed to protect the confidentiality of legal or legally related communications and exchanges, between the client and his/her or its lawyers, and exchanges which contain or refer to legal advice which might be imparted to the client. It also includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
18. There are two separate categories within this privilege known as advice privilege and litigation privilege.

19. Advice privilege covers communications between a person and his lawyer provided they are confidential and written for the sole or dominant purpose of obtaining legal advice or assistance in relation to rights or obligations.
20. Litigation privilege arises where litigation is contemplated or is in fact underway. Where this is the case privilege attaches to all documents, reports, information, evidence and the like obtained for the sole or dominant purpose of proposed or on-going litigation. This includes communications between a professional legal adviser and her/his client, communications with third parties made for the purpose of assisting the client's case for example expert opinion and may cover a variety of documents.
21. The Commissioner has considered the exempt information and the arguments put forward by both parties.
22. The Commissioner notes that the exempt information is in the form of legal advice. He accepts that this was obtained by the public authority from Counsel, was prepared for the dominant purpose of providing legal advice and therefore attracts legal advice privilege.
23. The Commissioner went on to consider the public interest arguments for maintaining the exemption and disclosing the information.
24. The public authority acknowledged that there were factors in favour of disclosure including that disclosure could lead to a greater understanding of why decisions had been taken. This would also lead to greater transparency about the decision making process and enhanced accountability regarding the quality of its decision-making.
25. However the public authority argued that it is in the greater public interest to withhold the requested information. Factors it took into account included protecting the principle of confidentiality of communications between lawyers and their clients. The public authority must be able to communicate fully and frankly with its legal advisers and vice versa so that it can obtain comprehensive legal advice. This will help it comply with its legal obligations.
26. It also argued that legal advice must be fair, frank and reasoned and be able to highlight both strengths and weaknesses of an authority's position and possible courses of action. If legal advice was routinely disclosed public authorities would be reluctant to seek advice as it could damage its position; this in turn would lead to a poorer quality of decision-making by public authorities rendering them less capable of complying with their legal obligations.
27. The public authority also acknowledged that, as the legal advice was old (thirteen years) it could be considered "stale". The issue of legal advice being "stale" was considered by the Information Tribunal in *Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023)*. Paragraph 35 stated: *'there is a strong public interest inbuilt into the privilege itself ... It may well be that, in certain cases ... for example, where the legal*

advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.”

28. However the public authority argued that as it was still relying upon the advice with regard to the management of the Mersey Tunnels finances the advice could not be considered as “stale”. It referred to a decision notice issued by the Commissioner which dealt with this issue (*Spring Common Campaign v Huntingdon Town Council (FS50072299)*). In this case the legal advice in question was six years old. The Commissioner found that the advice was not “stale” because the issue to which it was related was likely to be revisited at some point.
29. The Commissioner recognises that the public interest in disclosing the requested information lies in creating accountability and transparency in actions and decisions being taken by the public authority. The Commissioner also considers that disclosure of the legal advice may further the public’s understanding of the basis on which the public authority made its decision about the Mersey Tunnels.
30. However the Commissioner also recognises that the concept of legal professional privilege is based on the need to ensure that clients receive confidential and candid advice from their legal advisers after having full and frank disclosures. This is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
31. The Information Tribunal has endorsed this principle. In its decision in *Bellamy v Information Commissioner (Appeal No: EA/2005/0023, FS006313)* the Information Tribunal stated in 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 ... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case*”.
32. The Commissioner also accepts that, although the legal advice is old, the issue it deals with is not “stale” as the legal advice is still being relied upon with regards to the financial management of the Mersey Tunnels. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exemption under section 42 of the Act because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure.

The Decision

33. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - the application of the section 42 exemption.

34. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- section 17 of the Act as discussed in paragraphs 13 – 16.

Steps Required

35. The Commissioner requires no steps to be taken.

Right of Appeal

36. 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 22nd day of May 2007

Signed

**Richard Thomas
Information Commissioner**

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

Section 17

Section 17(1) provides that -

A public authority which, in relation to any request for information, 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(7) provides that –

A notice under subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of the requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 42

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.

Section 42(2) provides that –

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.