

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 January 2008

Public Authority: The Charity Commission
Address: PO Box 1227
Liverpool
L69 3UG

Summary

The complainant requested copies of legal advice and other information relating to an application made by it to the public authority for registration as a charitable institution. The public authority refused to release the requested information claiming that it was subject to legal professional privilege and was exempt under Section 42 of the Act. The public authority also claimed that the information contained personal data relating to a third party and was therefore exempt from disclosure under Section 40 of the Act.

The Commissioner has decided that the public authority has correctly applied section 42 of the Act in this case and that the public interest in maintaining the exemption is not outweighed by the public interest in disclosing the requested information. The Commissioner has therefore not considered whether the public authority was correct to withhold the information under section 40 of the Act.

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 Background

The complainant is a company limited by guarantee which was established with the aim of providing and carrying out research in relation to the pharmaceutical trade in the United Kingdom. It lodged an application with the public authority for registration as a company with charitable status. The application was considered by the public authority which has responsibility for the regulation of charities in

England and Wales. The public authority refused the application on the grounds that the aims of the complainant were not charitable and it was not satisfied with the number of trustees which the complainant had appointed.

The Request

2. By e-mail dated the 18 May 2005 the complainant contacted the public authority and requested the following information,

“The Name of the Person in the Legal Division from whom you (the public authority) allegedly sought advice regarding our claim for financial redress. Furnish us with copies of all paper-based and electronic based files and notes relating to (The complainant’s) application and complaint, including copies of all e-mails and all legal and other opinion used by (the public authority) from any other government department that has had any input regarding the application or complaint.

Provide us with a full breakdown of manpower activity, time and costs that have been expended by (The public authority) on this application to date”. (“The Request”).

3. The request relates to three separate categories of information as follows: (i) the name of the person who gave the legal advice, (ii) all files and notes relating to the application and complaint including the legal opinion, (iii) a breakdown of manpower activity spent on the application to date.
4. The public authority responded on the 13 June 2005 by letter to the complainant and supplied to the complainant the information concerning the name of the person who gave advice in relation to the claims for financial redress. In relation to the category (iii) request for details on manpower activity, the public authority advised that it did not hold such information. In relation to the documents requested in category (ii) the public authority advised that any documentation it held related to the application and was information it had obtained from Companies House and was therefore already in the public domain.
5. In relation to the category (ii) information the public authority refused to disclose the documents relating to the legal advice it had obtained as it considered the information was subject to legal professional privilege and was exempt under Section 42 of the Act. Also the public authority advised that the information contained personal data relating to a third party and as such was exempt under Section 40 (2) of the Act.
6. Following an exchange of correspondence between the public authority and the complainant, the public authority emailed the complainant on the 13 July 2006 and advised it that:
 - (i) it noted that the complainant had already made a request for assistance to the Commissioner but that it was aware that this step could not be taken

until such times as the complainant had exhausted all its other possible remedies including requesting an internal review by the public authority.

- (ii) in order to speed up matters the public authority would carry out an internal review unless the complainant objected.
7. The complainant did not make any objection and an internal review of the decision was undertaken by the public authority. The public authority then wrote to the complainant on the 9 September 2006 and advised it that it had completed a review and considered the initial decision to withhold the category (ii) information namely the files and the legal advice (the withheld information) to be correct.

The Investigation

Scope of the case

8. On 16 May 2006 the complainant contacted the Commissioner to complain about the way its request for information had been handled by the public authority.

Chronology

9. On the 4 June 2007 the Commissioner wrote to the public authority and requested copies of the withheld information which the public authority claimed attracted legal privilege. The Commissioner also sought details of how the withheld information was created, who created them and in what circumstances.
10. The Commissioner expressed his concern at the way the public authority had applied the public interest test in relation to section 42 and asked it to consider the public interest test as it applied to each item of information it considered to be exempt.
11. On the 24 July 2007 the public authority replied to the Commissioner and advised him that due to sickness and absences there would be a delay in responding. The public authority also provided the Commissioner with copies of some of the documentation which had been requested. The documentation provided related to correspondence between the public authority and the complainant.
12. By letter dated the 9 August 2007 the public authority provided the Commissioner with a detailed response and copies of the withheld information. In particular the public authority identified the legal advisor and confirmed that the person was a qualified in house solicitor engaged in the legal secretariat of the public authority.
13. The public authority also confirmed that it had waived privilege in relation to one item of the withheld information on the grounds that it reflected information which was already provided to the complainant in the course of correspondence. The Commissioner has had sight of this document and notes that it has been redacted to conceal the identities of the employees of the public authority.

Findings of fact

14. The Commissioner has had sight of the withheld information and finds as follows:

- (i) the requested information comprises a number of communications in the form of memos and notes sent by members of staff to the legal secretariat seeking legal advice and clarification in relation to concerns which they had regarding the complainant's application for charitable status; and
- (ii) it also comprises the replies to those communications from the legal secretariat to the employee making the request for the advice.
- (iii) all save one item of the withheld information is marked "privileged legal advice" or "request for privileged legal advice". The document which has not been marked does however contain requests for legal advices in relation to charitable status.
- (iv) all of the communications are confidential and relate to legal advice concerning the proposed registration of the complainant.
- (v) the person in the legal secretariat giving the advice is a qualified lawyer.

Analysis

Procedural matters

Exemptions: Section 42 of the Act .

15. Section 42 of the Act provides that:

"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"

The application of section 42 of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)*² where legal professional privilege was described as:-

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client,"³

16. Legal professional privilege can be classified into two types:

- (i) Legal Advice Privilege

² EA/2005/0023

³ See paragraph 9 in the *Bellamy Case*.

(ii) Litigation Privilege

17. Legal advice privilege relates to confidential communications and other documents such as draft statements, reports and opinions passing between a lawyer and client for the purposes of receiving advice and direction in either a litigation or a non-litigation context.
18. In "The Law of Privilege"; Bankim Thanki Q.C., notes at page 8:

"So far as legal advice privilege is concerned, the rationale is the same, whether litigation is contemplated or not. There are two aspects to this:

 - (i) the public interest in enabling persons to obtain appropriate legal advice and assistance; and
 - (ii) the recognition of the courts that effective legal advice requires absolute candour between the client and his lawyer. The requisite candour is much less likely to exist if their exchanges are liable to be disclosed."
19. Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect of pending. The sole purpose of the communication must be to give or obtain legal advice in relation to litigation or collect evidence for use in litigation.
20. Confidentiality is an essential prerequisite to a claim for legal professional privilege. Communications will be confidential if they have taken place in circumstances where a relationship of confidence is express or implied. It is also noted that the confidentiality can be waived where the party which owns the information decides to waive the privilege. The Commissioner has not been presented with any evidence of the privilege being waived in this case. Waiver of legal professional privilege occurs when the owner of the information gives consent for the information to be published to a third party or where the information is treated in such a way that it can be implied from that action that the privilege has been waived.
21. The Commissioner notes that in this case the legal advices which have been withheld have not been given in circumstances where litigation was being considered rather the legal advice has been requested and given as legal guidance in relation to queries raised about an application for charitable status. The Commissioner also notes that the information was provided by a legally qualified member of the legal secretariat to employees of the public authority.
22. The Commissioner is therefore satisfied that in this case all of the withheld information falls within the category of legal advice privilege and is also satisfied that a claim to legal professional privilege could be maintained in legal proceedings. Therefore he is satisfied that the section 42 exemption is engaged in relation to the withheld information.

The Public Interest

23. Section 42 of the Act is a qualified exemption which means a public authority having established that information is exempt must then consider whether in all the circumstances of the case the public interest in maintaining an exemption is outweighed by the public interest in disclosure.
24. In the case of *Guardian & Brooke v The Information Commissioner* [The BBC][EA/2006/0011 & 0013] the Tribunal noted that there is under section 2(2)(b) an assumption in favour of disclosure and which underpins the Act.

When the public interest factors are equally balanced in any case this presumption operates to require that the information must be disclosed.

The Public Interest Test:

25. In considering the public interest test in this case the Commissioner recognises that there is a strong public interest in enabling persons to obtain appropriate legal advice and assistance. It is also recognised that it is important for the administration of justice that a client should have free and frank discussions with their lawyers with a high degree of certainty that the instructions given or the discussions that take place or the advices given will not be disclosed without their consent.
26. In *Shipton v The Commissioner the Information Tribunal* (the National Assembly of Wales) referred to the judgement of Lord Scott of Foscote in the House of Lords decision in *Three Rivers District Council v The Governor and Company of the Bank of England* (2004) HL [No.6], where his Lordship considered the public policy reasons for the application of the doctrine of legal professional privilege. His Lordship emphasised that legal professional privilege provides a means by which a client and his lawyer can engage in candid discussion about legal advices without fear that the content of those discussions will not be revealed and will remain confidential. If that were not the case then those discussions may not be as free and as frank as is necessary and the quality and objectivity of the advice given could be affected. This would result in incorrect advice being given with the consequences which would flow from that.
27. In its responses to the Commissioner the public authority argued that while there was a public interest in it being transparent and accountable for the decisions it may take, there was a greater public interest in withholding the legal advice.

The public authority argued that the accuracy and quality of the decisions it makes would be affected if legal advice upon which they are based were impaired by a lack of candour between the public authority and its lawyers. The public authority further argues that the possibility that those advices may be disclosed into the public domain would result in inaccurate or impaired advices which could lead to wrong decisions being made and to expensive litigation which may result in a cost to the public purse. By contrast in correspondence with the public authority the complainant in this case considered that the entire matter was not a matter of national importance and therefore it could understand as to why the information could not be released.

28. The Commissioner accepts that transparency and accountability are strong public interest arguments favouring the release of the legal advice. The Commissioner also notes the point made by the complainant that the issues under consideration are not of national importance or grave public concern.

29. In the Tribunal decision of Pugh v The Information Commissioner (The Ministry of Defence)(EA/2007/0055) the Tribunal noted that the public interest test is that set out in section 2 (2)(b) of the Act which requires that:

"...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information..."

The Tribunal also noted in the Pugh decision that there was almost an inbuilt public interest in maintaining the exemption because of the recognised need for candour between the lawyer and his or her client. The Tribunal also pointed out that in considering the public interest test the Commissioner should consider the public interest in the circumstances of the case under consideration.

30. In this particular complaint the Commissioner notes that the public authority has relied on the need and importance for candour between the public authority and its legal advisors. The Commissioner notes the point made by the public authority as to the possible consequences should that relationship which is based on candour and confidence be impaired because of the possible disclosure of legal advice given.

31. The Commissioner also takes into consideration the point made by the complainant that the issues which gave rise to the public authority seeking legal advice are not important in that they do not concern matters of grave public concern. However the Commissioner considers that whilst the disclosure of the information is of importance to the complainant in this case in considering the public interest the Commissioner must take into account that publication of the information under the act is to the whole world. Therefore the Commissioner must take into account whether or not there are issues arising within the circumstances of this complaint which would be of importance to the public at large.

32. The information which has been withheld is in the form of legal advices sought concerning an application for charitable status. The Commissioner having read the advices is satisfied that there are no issues which are of public concern or interest which would should placed in the public domain for public scrutiny or would advance democracy or inform public debate.

34. Therefore taking all these matters into consideration the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure and that the public authority has correctly applied the exemption contained in section 42 of the Act.

Section 40 of the Act:

35. As the Commissioner has decided that section 42 of the act applies in this case and has been correctly applied by the public authority the Commissioner does not need to address the issues raised in relation to section 40 of the Act.

The Decision

36. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act and has correctly applied both section 42 of the Act. He therefore does not uphold the complaint in this case.

Steps Required

37. The Commissioner requires no steps to be taken.

Other matters

38. There are no other matters to be dealt with in this case

Failure to comply

39. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 28th day of January 2007

Signed

**Marie Anderson
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF**

Legal Annex:

2 Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) 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,

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21,

(b) section 23,

(c) section 32,

(d) section 34,

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords,

(f) in section 40—

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g) section 41, and

(h) section 44.

Section 40 Personal information

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny—
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either—
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

- (ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.
- (7) In this section—
- "the data protection principles" means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
 - "data subject" has the same meaning as in section 1(1) of that Act;
 - "personal data" has the same meaning as in section 1(1) of that Act.

Section 42 Legal professional privilege

- (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