

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

22 June 2009

**Public Authority:** National Offender Management Service  
(Ministry of Justice)  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Summary

---

The complainant requested the legal advice sought by the Prison Service (The National Offender Management Service) concerning the calculation of daily rates of pay. The public authority withheld the requested information by virtue of section 42 of the Act, on the basis that it attracts legal professional privilege. The Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information and has therefore not ordered the requested information to be disclosed.

The Commissioner finds that the public authority breached section 17(1) of the Act by failing to issue a refusal notice within the statutory time limit for complying with the request.

#### 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.

#### Background to the request

---

2. The complainant was unhappy with the way his pay in lieu of leave was calculated on his retirement from the prison service in October 2003. He therefore contacted his MP to look into the matter on his behalf.
3. The complainant's MP and the Prisons Minister agreed to keep the complainant informed of the progress of this matter during a review being conducted by the

Cabinet Office in the autumn of 2003. The prison service would then resolve the matter through the introduction of a new pay and grading system, taking into account the Cabinet Office review. The Prisons Minister agreed that the complainant would also be informed of the outcome of the review.

## The Request

---

4. On 23 May 2005 the complainant wrote to the Prisons Minister, Paul Goggins MP, making the following request:

*'Under the terms of the Freedom of Information Act I would like to take this opportunity to request a summary of the legal advice given to HM Prison Service regarding my complaint.'*

5. After its receipt by the Prisons Minister, and on an undetermined date, the request was transferred to the Open Government Unit of the National Offender Management Service (NOMS). The Open Government Unit acknowledged its receipt of the request in a letter dated 17 January 2006 and stated that the complainant would now receive a full reply.
6. On 30 January 2006 NOMS wrote to the complainant. It informed him that the legal advice concerning the issue of payment for annual leave was exempt from disclosure under the Freedom of Information Act 2000 and the Data Protection Act 1998. NOMS cited section 42(1) of the Freedom of Information Act. It informed him that this section is a qualified exemption and is subject to a public interest test. It concluded that the public interest was best served by not releasing the material due to the need to keep communications between lawyers and their clients confidential.
7. The complainant wrote to NOMS on 21 February 2006 to request an internal review of its decision to withhold the requested information.
8. NOMS wrote to the complainant on 20 February 2007 following the completion of its internal review. NOMS determined that the application of section 42 should be revised on the basis that it did not hold legal advice in relation to the complainant's request. NOMS confirmed that it held legal advice on the general issue of pay for annual leave; however this related to cases raised by other individuals and therefore fell outside the scope of the complainant's request. The internal review then went on to consider the general advice it held and confirmed the application of section 42 to it.

## The Investigation

---

### Scope of the case

9. On 14 February 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner accepts NOMS explanation that it does not hold any legal advice relating to the complainant by name. He therefore considers that it was correct in stating this position at the internal review stage.
11. However the Commissioner has determined that the scope of the request did in fact cover the general legal advice held by NOMS in relation to pay for annual leave for the following reasons:
  - The complainant understood that NOMS did not hold legal advice solely in relation to his case. He had been told that the Prisons Service was seeking legal advice regarding this matter because of its implications for the whole Civil Service and therefore, by implication, the general legal advice concerned his complaint.
  - He had been informed by his MP that the Prisons Minister had agreed to keep him informed on this matter as it progressed through the Cabinet Office review in 2003. The Prisons Minister agreed that the complainant would be informed of the outcome of the review and that the prison service would resolve the question of pay for annual leave through the introduction of a new pay and grading system.
  - The complainant had retired and considered that any new pay and grading system would not address his complaint to NOMS.
  - NOMS made no attempt to clarify what the complainant meant by the term 'regarding my complaint'; indeed, NOMS initial refusal of the request concerned the general legal advice it held and the application of section 42 to it.
  - When the Commissioner informed NOMS of his decision to investigate the application of section 42 to the general legal advice, NOMS did not object to this.
12. During the course of this investigation the Commissioner has considered the following issues:
  - Whether legal professional privilege can be claimed for the general legal advice?
  - Whether legal advice privilege or litigation privilege can be claimed for the requested information?

- The public interest arguments cited by the complainant and by NOMS and whether NOMS has appropriately refused to supply the requested information under section 42 of the Act.
13. The Commissioner understands that NOMS, at no stage, considered releasing a summary of the general legal advice it holds: neither NOMS nor the complainant clarified this matter and the complainant understood that NOMS had considered his request in terms of the legal advice in its entirety, as this legal advice by implication related to his complaint. Having contacted both parties in relation to this point the Commissioner is satisfied that as of the outcome of the internal review when the nature of the information held was clarified, the request was understood by both parties to be a request for the general legal advice in full.

### **Chronology**

14. On 13 February 2008 the Commissioner wrote to NOMS asking to be supplied with copies of the withheld information. Additionally, he asked a number of questions concerning: the context whereby the advice had been sought and given; the type of legal professional privilege being claimed; whether the privilege had been waived in this matter; the public interest arguments which NOMS had considered prior to its decision to withhold the requested information; and whether it would consider disclosure of the legal advice on the basis that it was now five years old.
15. NOMS responded to the Commissioner's request on 2 April 2008, providing copies of the withheld information, together with its responses to the Commissioner's questions. NOMS stressed that there had been no waiver of privilege; the withheld information had not been shared with any third party; and that the issue is still live. The legal advice was provided in the context of developing the policy on the daily rate of pay, which would influence the issue of pay in lieu of annual leave. NOMS also submitted its assessment of the public interest test in disclosing the withheld information and those which favoured maintaining the exemption.
16. The Commissioner telephoned NOMS on 19 June 2008 to make further enquiries about the withheld information.
17. NOMS responded to the Commissioner's enquiries on 22 July 2008. It provided the context in which each piece of withheld information was created, specifically, the purpose(s) of the request(s) for legal advice and the status of the persons providing that advice.

## Analysis

---

### Procedural matters

#### Section 17 – Refusal of a request

18. Section 17(1) of the Act 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.”*

19. Section 10 of the Act requires public authorities to comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of the receipt of the request.

20. The Commissioner notes that NOMS took more than eight months to issue a refusal notice under section 17(1) and consequently he finds NOMS in breach of this section.

21. The Commissioner acknowledges that NOMS apologised to the complainant for this delay and that an undertaking was given to address this excessive delay.

### Exemption

#### Section 42 – Legal Professional Privilege

22. Section 42(1) provides that –

*“Information in respect to which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”*

23. The withheld information in this matter relates to the calculation of daily rates of pay. The withheld documents can be characterised as follows:

- a Treasury Solicitors' minute
- Counsel's Conference note
- Treasury Solicitors' advice
- one email and three chains of related emails

24. The Commissioner has examined the emails withheld by NOMS by virtue of section 42. There is a single 'stand alone' email and three chains of emails. The Commissioner is satisfied that the emails do not fall within the scope of the complainant's request. The emails are related, to some extent, to the legal advice obtained by the Prison Service / NOMS. However, they do not constitute the legal advice itself and it is this which is the focus of the complainant's request. The Commissioner has not gone on to consider whether or not the emails themselves would attract section 42 of the Act.
25. Legal professional privilege is a common law concept designed to protect the confidential relationship between the legal advisor and client. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* [EA/2005/0023], the Information Tribunal described legal professional privilege 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, or her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.”*
26. Information will attract privilege where it constitutes legal advice between a legal advisor and a client, where it is provided in a professional capacity, and where it is held for the dominant purpose of providing legal advice. There are two types of legal professional privilege: legal advice privilege, where no litigation is contemplated or pending, and litigation privilege, where litigation is contemplated or pending.
27. The Commissioner has reviewed the contents of the withheld information. He is satisfied that the Treasury Solicitors' minute and the Counsel's conference note attract the section 42 exemption. The information can properly be construed as attracting legal advice privilege. The Commissioner is satisfied that both pieces of information were provided by legal advisors to their clients in a professional capacity, for the purpose of developing the policy on the daily rate of pay.
28. The Commissioner is also satisfied that the Treasury Solicitors' advice attracts section 42. This information was created in circumstances where there was a reasonable prospect of litigation. It is legal advice given by Treasury Solicitors to the Prison Service following a dispute between itself and a former employee. The Commissioner is satisfied that the withheld information attracts litigation privilege.
29. The Commissioner notes that confidentiality can be waived. The party which owns the information may of its own volition decide to waive the privilege. Also, legal professional privilege can be waived in circumstances where the owner of the information gives permission for the information to be shared with a third party, without restriction, or where the information is treated in such a way that it can be implied from that treatment that privilege has been waived.

30. NOMS has assured the Commissioner that the contents of the legal advice were not shared with any third party. The Commissioner accepts that the legal professional privilege has not been waived.

### Public Interest Test

31. Section 42 of the Act is a qualified exemption and therefore the Commissioner has made an assessment of the public interest test. This test is set out in section 2(2)(b) of the Act, which states that the obligation to disclose information does not arise if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
32. NOMS accepts there is a public interest in its legal advisors being held accountable for the quality of the advice they give. This is particularly the case where the advice relates to NOMS staff and where that advice is used by Home Office staff in making their decisions.
33. The complainant asserts accountability would be served by disclosure of the legal advice. He believes that disclosure would hold management accountable for their actions, especially where they act contrary to the legal advice they receive and moreover, where they continue with these actions.
34. The Commissioner agrees with both the complainant's and NOMS' positions. He agrees that the disclosure would augment the accountability of decision makers in public office and that disclosure would potentially raise the quality of their decisions.
35. This argument in relation to accountability and transparency was considered in the *Foreign Office and Commonwealth Office v The Information Commissioner* [EA/2007/0092]. The Information Tribunal said at paragraph 29:
- "...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."*
36. In considering the facts at the time of the request the Commissioner has found none of these factors present in this case.
37. NOMS asserts that the public interest would not be served by the disclosure of the legal advice. It offered the following arguments:
- It is in the overall public interest that NOMS continues to receive high quality legal advice to ensure the effective conduct of its business and that any legal advice it receives should be protected by legal professional privilege.

- Disclosure of the legal advice in this case could prejudice NOMS in defending its legal interests.
  - The decisions NOMS makes in this case need to be made in a 'fully formed legal context', where the legal advice it receives presents a full picture, and where it is given without the fear of disclosure.
  - Disclosure of the advice could dissuade NOMS and its lawyers from making permanent record of the advice it requests or receives.
38. The Commissioner notes NOMS' arguments and has considered these next to the statement made by the Information Tribunal in *Bellamy v the Information Commissioner* [EA/2005/2003]. In that case the Information Tribunal held:
- "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt 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..."*
39. The Commissioner recognises that there is a public interest in disclosing the requested information as this would foster greater accountability and transparency in NOMS decision making. Nevertheless he also recognises that the concept of legal professional privilege is based on the need to ensure that clients receive full confidential and candid advice from their legal advisors. He considers that this is a fundamental principle in the legal system and there is a strong public interest in maintaining this principle.
40. In *Bellamy v the Information Commissioner* the Tribunal stated:
- "The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*
41. The Commissioner has considered the public interest in the legal advice in terms of the number of people affected by it and its potential impact on public expenditure. He is in no doubt that the advice potentially relates to significant numbers of people working within the prison service and in the civil service generally. He accepts that the legal advice has implications for large numbers of public employees and consequently may involve the expenditure of large amounts of public money.
42. Nevertheless the Commissioner accepts that the issue of the calculation of daily rates of pay relates was very much a live issue at the time of the request and was likely to have been considered during the on-going negotiations between government departments and employee representatives. He also accepts that

there was a perceived and potentially real threat of legal action at the time of the request and is aware that part of the withheld information concerns this action.

43. The Commissioner considers that in this case at the time of the request the weight of the public interest in disclosure of the legal advice, in light of its potential impact on the a large number of public employees and on public expenditure, was not as great as the public interest in allowing the public authority to seek legal advice during negotiations and where government departments may be involved in legal disputes.
44. These considerations, together with the public interest inbuilt in legal professional privilege, lead the Commissioner to find that at the time of the request the public interest in maintaining the exemption outweighed the public interest in disclosing the information to which section 42(1) applies. However, in reaching this view the Commissioner should point out that his conclusion is on the basis of the circumstances at the time of the request and therefore he may reach a different conclusion in relation to the balance of the public interest were the request made today.

## The Decision

---

45. The Commissioner's decision is that the National Offender Management Service dealt with the following elements of the request in accordance with the requirements of the Act:
- the application of the section 42(1) exemption.
46. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- in failing to respond to the complainant's request within the time for complying with section 1(1) of the Act, NOMS breached section 17(1); NOMS failed to issue a refusal notice to the complainant within the time for compliance set out in section 10 of the Act.

## Steps Required

---

47. The Commissioner requires no steps to be taken.

## Other matters

---

48. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

49. The Commissioner notes that it took NOMS one year to conduct its internal review. He considers this to be a wholly unacceptable delay.
  
50. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. Whilst he recognises that in this case the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took a full 12 months for an internal review to be completed.

## Right of Appeal

---

51. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 22nd day of June 2009**

**Signed .....**

**Nicole Duncan  
Head of FOI Complaints  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### General Right of Access

**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.”

### Time for Compliance

**Section 10(1)** provides that –

“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.”

### Refusal of Request

**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.”

### Legal Professional Privilege

**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.”