

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 February 2011

Public Authority: Her Majesty's Revenue and Customs
Address: 100 Parliament Street
London SW1A 2BQ

Summary

The complainant requested copies of instructions and the background given to the legislative draftsmen who produced some proposed legislation related to tax agents. The public authority declined to disclose this information, relying upon the sections 42 and 35(1)(a) exemptions. The Commissioner finds that all of the information is exempt under section 42 therefore he did not consider the application of section 35(1)(a).

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

2. The public authority produced proposed legislation called "Working with Tax Agents: The Next Stage". The complainant felt that this proposed legislation in its current form was unworkable and therefore requested information about it as set out below.

The Request

3. On 23 April 2010 the complainant submitted the following request:

'Please provide a copy of the instructions and background brief given to the legislative draftsmen who produced the proposed legislation published in your release of 8 February 2010: Working with Tax Agents: The Next Stage'.

4. On 18 May 2010 the public authority issued a refusal notice. It declined to disclose the requested information, citing the sections 35(1)(a) and 42 exemptions.
5. On 27 May 2010 the complainant requested an internal review.
6. On 23 June 2010 the public authority confirmed it had carried out an internal review. It confirmed that it was withholding the information on the same grounds.

The Investigation

Scope of the case

7. On 5 July 2010 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:
- Advice privilege could not apply because it enables parties to obtain confidential legal advice on matters which may ultimately come to court. As there are no relevant laws to give advice on because they have not yet been passed, advice privilege could not apply.
 - There is a great public interest in creating a just balance between State Powers and the active efforts of a profession to help individuals and businesses comply with complex laws.
 - It is an intrinsic element of the rule of law that citizens comply with just laws.
 - It must be recognised that history recognised frequent occasions when a UK government sought to impose taxation without consent, resulting in material disaster for the government itself, for example: Charles 1 and Ship Money, the Boston Tea Party and more recently, Poll Tax Riots in Trafalgar Square.

8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
9. It is the Commissioner's view that all of the withheld information is exempt under section 42, therefore he has not considered the public authority's application of the section 35(1)(a) exemption.

Chronology

10. On 6 October the Commissioner contacted the public authority asking for clarification regarding its application of section 42. The public authority provided this.
11. On 7 October 2010 the Commissioner contacted the complainant to inform him that his case had been allocated to a caseworker.
12. On 8 October the complainant contacted the Commissioner. He explained that he considered that legal professional privilege could not apply. He also explained that he had spoken to various lawyers, (although he had not sought actual legal advice) and they had all agreed with his interpretation of legal advice.

Analysis

Exemptions

Section 42

13. Section 42 provides an exemption from disclosure of information if the information attracts legal professional privilege.
14. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (the Tribunal) in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023; 4 April 2006)* 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, and even exchanges between the

clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."

15. There are two types of privilege – litigation privilege and legal advice privilege. In this particular case the public authority has claimed legal advice privilege.
16. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be:
 - confidential,
 - made between a client and professional legal adviser acting in their professional capacity and;
 - made for the sole or dominant purpose of obtaining legal advice.
17. Communications made between adviser and client in a relevant legal context will attract privilege.
18. The public authority sent instructions to the Office of Parliamentary Counsel (the Parliamentary Counsel) seeking legal advice. In an earlier decision (FS50100137) the Commissioner considered whether the Parliamentary Counsel could act as a legal adviser in a professional capacity and accepted that it could. In the present case, the Commissioner considers that the Parliamentary Counsel was acting as a legal adviser in a professional capacity.
19. The instructions to the Parliamentary Counsel are contained in a document dated 30 September 2009. It is clear that the public authority (the client) provided these instructions to the Parliamentary Counsel (the professional legal adviser) in order to obtain legal advice in connection with its proposed legislation.
20. The Commissioner is therefore satisfied that the information within the document constitutes confidential instructions to Counsel for legal advice on a specific matter. He is also satisfied that the dominant purpose of the communication was to obtain legal advice.
21. The Commissioner also notes that there is a background section within the instructions provided to the Parliamentary Counsel, rather than a separate document as referred to in the request for information.
22. The public authority confirmed that the requested information has not been shared with any third party outside the public authority and its professional advisers.

23. As section 42 is a qualified exemption it is subject to the public interest test under section (2)(2)(b) of the Act. This states that the duty to provide information in section 1(1)(b) does not apply, if or to the extent that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”. The Commissioner has therefore considered the public interest arguments in favour of maintaining the exemption and in favour of disclosing the information below.

Public interest arguments in favour of disclosing the requested information

24. The Commissioner considers that there is a public interest in the public authority being accountable and transparent about the way in which it proposes to deal with deliberate wrongdoing by tax agents. In this case, disclosure would show the public authority's considerations in making its decision within the context of the legal framework. There is also a public interest in understanding how public money has been spent by public authority in this context.
25. The complainant argued that as it stood, the proposed legislation was unworkable. He also argued that the definition of deliberate wrongdoing contained in the proposed legislation appeared to encompass any advice which could reduce revenue from tax; the complainant provided the public authority with a quiz to illustrate his point.
26. The complainant also pointed out that it was a statement of the obvious that the successful functioning of national taxation system is a pre-requisite for continuing civilised government. He also explained that there was a great public interest in creating a just balance between State Powers and the active efforts of a profession to help individuals and businesses comply with complex laws.
27. Further the complainant argued that, according to published statements (including the consultation documents connected to the proposed legislation), from the public authority, it recognised the tax profession as being crucial to the operation of the tax system. This put the importance of the document “Dealing with Tax Agents: The Next Steps” into context. He went onto explain that if the public authority gets its relationship with the tax profession wrong it will, on its own analysis, cost the country an enormous amount of money.
28. The complainant also pointed out that UK compliance with tax law is significantly higher than in many countries including other EU Member States; the complainant stated that this should not be taken for granted. He pointed to the alleged problems experienced by the public

authority during the Northern Ireland troubles but did not explain what these were. He also argued that this demonstrated that compliance levels, even in the UK, could fall away at a huge cost to the Exchequer if there was a general drop in confidence in the system.

29. The complainant went on to point out that it had to be recognised that history had recognised frequent occasions when a UK government sought to impose taxation without consent. He explained that this had resulted in material disaster for the government for example: Charles 1 and Ship Money, the Boston Tea Party and more recently, Poll Tax Riots in Trafalgar Square.
30. The complainant also pondered whether it was accepted that "Chartered Accountant" is often used as a stereotypical phrase, suggesting a boring, law abiding citizen. He explained that if it this was the case, would it really make sense for the draft legislation to suggest that they would be accused of deliberate wrongdoing for taking perfectly ordinary actions in the course of their profession. He further explained that this was the nub of his request for information.

Public interest arguments in favour of maintaining the exemption

31. The public authority argued that there is a strong public interest in a person seeking access to legal advice being able to communicate freely with his legal advisers in confidence. Further, the public authority pointed out that the importance of this public interest was reaffirmed by the House of Lords in *Three Rivers DC v Bank of England (No.6) [2005] 1 AC 610*, i.e. the underlying rationale for having a strong rule against disclosure is that it encourages full and frank exchanges between clients and their legal advisers, which is judicially recognised as being something strongly in the public interest.
32. The above argument is also supported by the comments made by the Tribunal in the *Bellamy* case in which it stated that disclosure was unlikely to be justified in most cases as:

'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 cut case...'

33. The public authority also argued that this applied with particular force in relation to obtaining legal advice concerning governmental policies. It explained that this was because it was strongly in the public interest for government action to respect the rule of law which makes it imperative that clear, fully informed and fully reasoned legal advice

should be available to decision-makers with responsibility for such decisions.

34. The public authority argued that if such advice was put into the public domain the pressures of political debate and criticism would be such that the advice and possibly the instructions underpinning such advice, might end up being tailored to take into account the impact they would have in the public debate in which they would feature, which would directly undermine the point above.
35. Further the public authority argued that it was in the public interest to allow government to have a clear space immune from exposure to public view, in which it can debate matters internally with candour and also free from the pressures of public political debate. It pointed out that this had been judicially recognised in such cases as *Conway v Rimmer [1968] AC 910* and *Burmah Oil Co Ltd v Bank of England [1980] AC 1090*.
36. The Commissioner is aware that the matter concerns tax issues. The instructions for legal advice therefore concerns serious issues and also relates to significant personal interests of individuals.

Balance of the public interest arguments

37. The Commissioner has considered whether the arguments in favour of disclosure are outweighed by those in favour of maintaining the exemption. In carrying out the balancing exercise he has borne in mind that there is an assumption in favour of disclosure in the Act.
38. The Commissioner notes the complainant's argument that the public authority has already publicly acknowledged (including within consultation documents connected with the proposed legislation) that the accountancy and taxation professions are vital to the functioning of the UK tax system, as it currently operates.
39. Although the Commissioner has attributed some significance to the arguments in favour of releasing the withheld information he has also taken into account the comments of the Tribunal in the *Bellamy* case in which it stated that:

'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 public interest'.

40. The Commissioner agrees with the Tribunal's comments and in this case has attributed considerable weight to the argument that there is a public interest in preserving the concept of legal professional privilege. This preserves the ability of people and organisations to obtain full and frank legal advice, including the provision of instructions to legal advisers for legal advice.
41. However, there have been a few cases where legal professional privilege has been claimed and the Commissioner or Tribunal have considered that in all the circumstances, the public interest in disclosure was strong enough to outweigh the public interest in maintaining the exemption.
42. One such case was the Tribunal decision in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052). In this particular case, the Tribunal outlined some of the factors which weighed in favour of disclosing the information. It judged that the number of people affected in this particular case was significant as the advice in question affected 80,000 drivers every weekday and could also affect around 1.5 million residents. There was also a large amount of money at stake: approximately £70 million.
43. The Tribunal judged that the countervailing considerations in favour of disclosure were strong enough to override the strong public interest arguments in favour of maintaining the exemption. Further, in giving less weight to the arguments inherent in the exemption the Tribunal noted that the advice received was not recent, being over 10 years old.
44. The Commissioner notes that in the present case a large amount of public money could be at stake and a large number of people could be affected. However the instructions in question are about proposed legislation in connection with the prevention of deliberate wrongdoing by tax agents. The Commissioner notes that at the time of the request the instructions were recent i.e. 7 months old.
45. It is the Commissioner's view that the fact that the instructions were recent means that if the information was released, it is more likely that in future both lawyer and client would feel inhibited about providing the full circumstances of a case and from giving frank legal advice. He also considers that the fact that the instructions were recent adds public interest in preserving the concept of legal professional privilege. This preserves the ability of people and organisations to obtain full and frank legal advice weight to the arguments in favour of maintaining the exemption in this case.
46. The Commissioner acknowledges that in the *Merseytravel* case the

Tribunal also afforded less weight to protecting legal professional privilege because the advice was concerned with matters of public administration rather than “significant private interests”. However in his view the starting point is that there is an equal public interest in preserving the ability of public authorities to obtain legal advice in connection with their duties and responsibilities. He believes that support for this approach can be taken from the Tribunal’s findings in the case of *Fuller v the Ministry of Justice (EA/2008/005)* which stated that the principles behind legal professional privilege “are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law...”

47. There is a particular public interest in ensuring that the public authority can obtain full and informed legal advice so that it can make decisions that are compliant with its legal obligations. Therefore it is important that the public authority should be allowed to submit full and frank instructions to Counsel in confidence, in order to obtain full and frank legal advice to ensure that it makes informed and lawful decisions.

Conclusion

48. In view of all the above the Commissioner is satisfied that in this case the arguments in favour of maintaining the exemption outweigh those in favour of disclosure. He notes in particular that the instructions are recent and are concerned with the prevention of deliberate wrongdoing by tax agents. The Commissioner also notes that the complainant has written to the public authority, providing his views and feedback on the draft legislation, as explained in his request for information.
49. The Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

50. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

51. The Commissioner requires no steps to be taken.

Right of Appeal

52. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 16th day of February 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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.