

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 June 2011

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Summary

The complainant made a request to the Department for Education (formerly the Department for Children, Schools and Families) for legal advice referred to in a letter from Ed Balls MP to Michael Gove MP regarding provisions with the Children Schools and Families Bill. The Department for Education refused the request under section 35(1)(a) (Formulation and development of government policy) and section 42(1) (Legal professional privilege) of the Act. The Commissioner has investigated the complaint and has found that the information was exempt under section 42(1) and the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner found that the public authority dealt with the request in accordance with the Act and requires no steps to be taken.

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 9 April 2010 the complainant made a freedom of information request to the public authority for copies of legal advice referred to in a letter from the former Secretary of State Ed Balls MP to Michael Gove MP on 7 April 2009. The letter concerned the government's proposals surrounding Sex and Relationship Education (SRE) which the

government intended to introduce in the Children, Schools and Families Bill that was at that time making its way through Parliament. Mr Balls' letter had indicated that the government had been advised by its lawyers that because of Mr Gove and his party's insistence that the age limit at which parents may remove their children from SRE be increased to 16 made the entire bill non-compliant with the European Convention on Human Rights and that therefore he had had to remove all Personal, Social and Health Education (PSHE) provisions from the bill.

3. The complainant said that he wanted the public authority to confirm whether the legal advice referred to in the letter was given and that he wanted copies of all such legal advice. The complainant offered the following clarification of the information he was seeking:

"To be clear, I am asking for disclosure of all legal advice provided in 2009 and 2010 by DCSF or other government lawyers, including Parliamentary Counsel, or by outside counsel instructed by government lawyers, on the questions (a) whether any amendment to the Children, Schools and Families Bill to give parents the right to withdraw their children from "PSHE" until the age of 16 would or would not be incompatible with Convention rights and (b) on the question whether ministers had any choice but to remove those provisions from the Bill. I am also asking you to disclose whether or not such legal advice was or was not given, by whom it was given, and when. If you believe naming individuals would prejudice individual privacy I would be happy for you only to disclose the fact that advice was given e.g. by a DCSF lawyer, from a lawyer from another named department, from Parliamentary Counsel or from outside counsel.

"I would be happy to receive copies of any written advice by e-mail. If any such advice was given orally, I would happy to receive either a scanned copy of any attendance not recording the advice, or a copy of any minutes of a meeting recording the advice. I would also be happy if no written record exists for the information now to be recorded from memory by the relevant lawyer and sent to me."

4. The public authority acknowledged receipt of the request on 13 April 2010, indicating that it intended to respond within the next 20 working days.
5. The complainant contacted the public authority again on the same day and asked if it could respond to his request by 6 May 2010 as the response may help to inform his voting intentions in the General Election due to take place on 6 May 2010. The complainant also stressed that the information he was seeking was "any legal advice given in the days and weeks before Mr Ball's letter and which is most

relevant to the Human Rights compatibility...and whether the Minister had any option but to withdraw the PHSE provisions from the Bill.”

6. On 28 April 2010 the complainant contacted the public authority again to ask that it consider his request that it respond by 6 May 2010.
7. On 29 April 2010 the public authority contacted the complainant to say that it aimed to respond to his request within the departmental deadline. It explained that it was having to deal with a number of freedom of information requests as well as other correspondence, all of which were subject to deadlines. In the circumstances it said that it did not think that it would be fair to prioritise one request over another.
8. The public authority issued its substantive response on 10 May 2010. It now informed the complainant that it held legal advice from a departmental lawyer as well as external counsel which fell within the scope of the request. However it said that this information was being withheld as it was exempt from disclosure under section 35(1)(a) (Formulation and development of government policy) and section 42(1) (Legal professional privilege). In addition the public authority said that the names of the lawyers who had given the advice were exempt under section 40(2) (Personal information). The public authority explained why each exemption was believed to apply and in the case of sections 35(1)(a) and 42(1) why the public interest in maintaining the exemption outweighed the public interest in disclosure.
9. On 12 May 2010 the complainant asked the public authority to carry out an internal review of its handling of his request. In particular the complainant said that he was happy for the names of the lawyers to be removed if they had refused consent to disclosure.
10. The public authority presented the findings of its internal review on 10 June 2010 at which point it upheld the decision to refuse to disclose the information it held.

The Investigation

Scope of the case

11. On 10 June 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 public authority's decision to refuse to disclose the information he requested. The complainant also asked the Commissioner to consider, what he considered to be, the public authority's lack of promptness in responding to his request.

Chronology

12. On 24 March 2011 the Commissioner contacted the public authority with details of the complaint. The Commissioner asked to be provided with copies of the information falling within the scope of the complainant's request, clearly marked to show where any exemption(s) was being applied. The Commissioner also asked for further details on the public authority's application of the exemptions. For section 35(1)(a) the Commissioner asked the public authority to confirm which government policy the withheld information related to and what stage the policy process had reached by the time the complainant had submitted his request. The Commissioner also asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure. As regards section 42(1) the Commissioner asked the public authority to comment on the complainant's argument that the legal advice was no longer covered by legal professional privilege because the substance of the advice had been made public in the letter from Ed Balls to Michael Gove. The Commissioner also asked the public authority to confirm whether or not the legal advice had otherwise been made public.
13. Finally the Commissioner asked the public authority to explain why it was not able to accommodate the complainant's request that it respond to his freedom of information request by 6 May 2010.
14. The public authority responded to the Commissioner on 15 April 2011 and provided copies of the withheld information. It provided the Commissioner with submissions on the application of section 35(1)(a) and section 42(1). The public authority also provided its response to the complainant's suggestion that it failed to respond to the request 'promptly'.

Findings of fact

15. On 7 April 2010 the then Secretary of State for Children, Schools and Families Ed Balls MP wrote to Michael Gove MP regarding the Children, Schools and Families Bill. The letter included the following passage regarding the government's proposal on reducing the parental opt-out from SRE to 15:

"As I explained yesterday, your insistence that parents should have a right to withdraw their children until they reach the age of 16 – the age at which they are in many respects considered adults – makes it impossible for us to proceed. Both British and European case law do

not support an opt-out up to the age of 16. As I explained when we discussed yesterday, that amendment would have meant that the bill would not have been compliant with the ECHR. Your insistence that the age limit must be increased to 16 would have made the entire bill non-compliant with UK and European law and, therefore, our lawyers advised me that, as Secretary of State, I had no choice but to remove all the PSHE provisions.”¹

Analysis

16. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 42 – Legal professional privilege

17. Section 42(1) provides that information in respect of which a claim for legal professional privilege could be maintained in legal proceedings is exempt. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal 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.”²

18. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the withheld information constitutes detailed legal advice provided by external counsel on the compatibility of elements of the proposed Children, Schools and Families bill with the European Convention on Human Rights. Also withheld is an email from

¹ <http://www.edballs.co.uk/index.jsp?i=4812>

² Bellamy v The Information Commissioner and the Secretary of State for Trade & Industry [EA/2005/0023], para. 9.

a lawyer within the public authority summarising the legal position. So long as the advice remains confidential this information will be subject to legal advice privilege.

19. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost.
20. In this case the complainant has suggested that the exemption has been wrongly claimed because the substance of the legal advice was disclosed in Ed Balls' letter and therefore any privilege has been lost. The Commissioner rejects this argument. The withheld information constitutes legal advice provided by both a departmental legal adviser as well as external counsel. The advice provides a full and detailed analysis of the legal position regarding the government's proposals surrounding Sex and Relationship Education (SRE) including details of possible legal challenges. Whilst Ed Balls' letter referred to the legal advice the Commissioner's view is that a mere reference to or a brief summary of the legal advice will not mean that it has lost its necessary quality of confidence. If the disclosure does not reveal the reasoning behind the conclusion or a considered examination of the relevant case-law, precedent and the way they apply to the case, it is more likely that the full advice will remain confidential and protected by privilege. Only if substantial contents of the advice have been disclosed will privilege have been lost. In this case the legal advice is significantly more detailed than the brief references included within Ed Balls' letter. Indeed the advice from counsel runs to 21 pages and includes many points which have not been made public. Therefore the Commissioner is of the view that privilege has not been lost as a result of Ed Balls' letter.
21. As part of his investigation the Commissioner had also asked the public authority whether the withheld information had otherwise been disclosed, in addition to the reference to the legal advice in Ed Balls' letter. In response the public authority explained that an email had been sent by Ed Balls' Private Secretary to Michael Gove (then Shadow Secretary of State for Education) which replicated the summary of the legal advice provided by the internal legal adviser. The Commissioner has considered whether this disclosure would lead to a loss of privilege.
22. The public authority has explained that this email differed significantly from Ed Balls' open letter. The open letter made a reference to the compatibility with human rights legislation but did not discuss the detailed legal advice. In contrast, the email sent to Michael Gove was,

the public authority explained, a private email between two members of Parliament sent during the 'wash-up' process when the various provisions of the Children Schools and Families Bill were negotiated in order for agreed measures to pass in the last days of the Parliamentary session. The public authority explained that the email followed a discussion about the case for inclusion of the PHSE provisions.

23. The Commissioner has reviewed this email and has not found any explicit restriction placed on its distribution. For instance, the email does not say that it is provided in confidence or that it should not be shared more widely. However, the public authority has argued that the email is a continuation of a private conversation, and as such destined for one person only. Furthermore, the difference in content between this email and the open letter which Ed Balls' chose to make public, indicates that the email was intended to be treated as private.
24. Having considered the public authority's arguments the Commissioner is satisfied that the email amounted to only a restricted disclosure and was not intended to be shared more widely. The recipient would have implicitly understood that the information was being shared on a confidential basis. Indeed the Commissioner has not seen any evidence to suggest that this email is publicly available. The Commissioner's view is that a restricted disclosure of legal advice will not result in a loss of privilege and therefore the Commissioner has decided that the requested is covered by legal professional privilege and is therefore exempt under section 42(1) of the Act.

Public interest test

25. Section 42 is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that where a qualified exemption applies, information shall only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

26. The complainant has suggested that if Ed Balls' reference to the legal advice in his letter was partial, selective or misleading then the public interest would favour disclosure.
27. The public authority said that when carrying out the public interest test it took into account the fact that the disclosure would increase transparency in the decision making process. This could include demonstrating that government decisions were taken on the basis of

high quality legal advice. Disclosure would also enable the public to better understand decisions made by public authorities and to challenge those decisions where appropriate. The public authority also recognised that there is a public interest in increasing public debate about matters of public policy including the parental right of withdrawal from SRE. The Commissioner would also highlight the fact that this particular issue was very sensitive with strong opinions held on both sides of the argument.

Public interest arguments in favour of maintaining the exemption

28. In favour of maintaining the exemption the public authority argued that there was a very strong public interest in maintaining lawyer client confidentiality. It explained that government officials need to be able to consult lawyers in confidence in order to obtain effective legal advice “in a safe forum, conducive to a candid exchange of views and consideration and assessment of potential risks without fear of disclosure”. This is in the public interest because government needs to have access to high quality legal advice in order to be able to take decisions in a fully informed legal context. It went on to say that lawyers need to be able to set out their arguments without fear that their advice might be disclosed and any potential weaknesses in the government’s position revealed.
29. As well as affecting the quality of the advice it suggested that this would expose the government to unnecessary legal challenge and the expense of defending such challenge would not be in the public interest. The public authority argued that disclosure would also prejudice its ability to defend its legal interests by unfairly exposing its legal advice to challenge.
30. The public authority also explained that the public interest favoured maintaining the exemption on the particular circumstances of this case because the issue of parental opt-out from SRE was still ‘live’ and therefore the legal advice would be likely to be relied on in future.

Balance of the public interest arguments

31. When considering the public interest in maintaining the exemption under section 42 of the Act the Commissioner will take into account the general public interest in protecting legal professional privilege. The Commissioner’s view is that there will always be a strong public interest inbuilt into the section 42 exemption. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case of *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* in which it states:

"...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 cut case..."³

32. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right". Therefore the Commissioner finds that the public authority's arguments regarding the importance of it being able to obtain quality legal advice in confidence are strong.
33. When considering the particular weight to be given to the arguments in favour of disclosure or maintaining the exemption the Commissioner will also have regard to the particular circumstances of the case. At the time the request was received in this case the legal advice was both very recent and also 'live' insofar as it related to issues that were under active consideration because the government had indicated that it would seek to reintroduce the measures in the first session of the new Parliament had the Labour Government been returned in the 2010 General Election. The public authority has also indicated that the issue of parental opt out for SRE is likely to be returned to in the near future. It explained that current government ministers will need to consider their position on this issue when amendments to the current Education Bill are laid before Parliament which it said were likely to call for statutory SRE or for changes to parental right of withdrawal. It also suggested that the National Curriculum review and a private members bill by Chris Bryant MP might also require Ministers to consider this issue further. The Commissioner is aware of the convention whereby Ministers are not allowed access to advice given to a previous administration of a different political complexion. However, the public authority has explained that the legal advice and the legal opinions contained in it would be drawn upon by those providing advice on future decision making in this area and so would continue to be relevant.
34. The Commissioner considers that the public interest in maintaining privilege will be stronger for legal advice which is live and/or recent. This is based on the principle that where legal advice is recent it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure. Where legal advice is 'live' and

³ *Bellamy*, para. 35.

therefore potentially subject to legal challenge the public interest will favour maintaining legal professional privilege because disclosure would risk upsetting the delicate balance of fairness between legal adversaries. In this case the legal advice is both live and recent and therefore the Commissioner also considers that the arguments in favour of maintaining the exemption are compelling in the particular circumstances of this case.

35. The Commissioner accepts that there is a public interest in disclosure. The issue of parental opt out for SRE is a controversial one. As well as the general public interest in transparency and accountability, disclosure would help the public to better understand the reasons why the proposal to lower the age of parental opt out from SRE to 15 had to be dropped from the Children, Schools and Families Bill. However, the Commissioner's view is that these arguments are not sufficient to weigh the public interest in favour of disclosure. Given the strong public interest in protecting legal professional privilege both in general and in the particular circumstances of this case the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other exemptions

36. The public authority had also withheld the information under section 35(1)(a) of the Act, however, the Commissioner has not considered whether this exemption would apply as he is satisfied that all of the withheld information is exempt on the basis of section 42(1).

Procedural Requirements

37. The complainant has also asked the Commissioner to consider the length of time the public authority took to respond to his request and in particular he has complained that the public authority breached the Act by failing to respond to his request promptly.
38. Section 10(1) of the Act provides that a public authority must respond to a request promptly and in any event within 20 working days. The Commissioner's view is that the primary obligation on a public authority is to respond to requests promptly and that the 20 working day limit acts as a "long stop". It will be possible for a public authority to be in breach of section 10(1) even if it responds within 20 working days if it can be shown that it acted unreasonably in failing to respond sooner.
39. The Commissioner asked the public authority to explain why it was not possible to respond to the complainant's request by 6 May 2010,

slightly before the 20 working day deadline. In response the public authority said that a number of factors prevented it from responding to the request by the complainant's preferred deadline of 6 May. The request was submitted in the run up to a general election during which, the public authority said, special priority had to be given to correspondence from prospective parliamentary candidates. The public authority also explained that freedom of information requests are dealt with by the policy teams dealing with the subject areas which are the topic of the request and that rather than being a 'relatively light period for the department in policy making terms' as the complainant had suggested, this was in fact a very busy period. Policy units would have been working on policy options and briefings for incoming ministers depending on the various possible outcomes of the election.

40. The Commissioner is also mindful of the fact that the public authority applied two qualified exemptions to the request and therefore in the circumstances it was not unreasonable for the public authority to take the full 20 working days to respond to the request. The Commissioner finds no grounds on which to conclude that the public authority breached section 10(1) in its handling of the request.

The Decision

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

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. 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: 0300 1234504

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 sent.

Dated the 14th day of June 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

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.”

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.”