

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 September 2011

Public Authority: The Department of Health
Address: Room 317
Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant made a request to the Department of Health (DoH) for a copy of any legal advice on EU competition law given to the Secretary of State or other Ministers in relation to a specific aspect of the Health and Social Care Bill. The DoH withheld this information under section 42 of the Freedom of Information Act 2000 (the "Act"). The Commissioner finds that the public interest balance under section 42 falls in favour of disclosure and the information should be disclosed.

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. The complainant made a request to the DoH on 26 April 2011 for a copy of the following information:

1. *What legal advice was given to the Secretary of State or other Ministers in the Department about the implications of "any willing provider" in the Health and Social Care Bill on EU Competition law or EU procurement law either for the Explanatory Notes or at any time? and;*
2. *I would also like to seek information on the legal implications for the replacement wording "any qualified provider"?*
3. The DoH provided a response to the complainant on 23 May 2011. In relation to point 1 of the request it explained that legal advice was integral to the DoH's advice to Ministers on the Introduction of the Health and Social Care Bill. However it said that no separate legal advice was commissioned by officials on the impact of the Bill upon the application of EU competition law to the NHS. It also explained that advice was sought (in 2007) on the application of EU competition law during the process of establishing the Cooperation and Competition Panel.
4. It explained that the 2007 advice would be exempt from disclosure due to Legal Professional Privilege and the public interest test favoured maintaining the exemption.
5. In relation to the advice to Minister's it said that this was exempt from disclosure under section 35(1)(a) as it related to the formulation of Government policy.
6. In relation to point 2 of the request it explained that this information was not held.
7. The complainant requested an internal review of the DoH's decision on 1 June 2011. On 28 June 2011 the DoH wrote to the complainant with the details of the result of the internal review it had carried out. In relation to point 1 of the request the DoH explained that legal advice relating to the implications of "any willing provider" on EU competition or procurement law had not been the subject of submissions to Ministers. It explained that it therefore no longer wished to rely upon the section 35(1)(a) exemption. It went on to clarify that specific legal advice on the application of EU competition law to the NHS was commissioned by officials at the time of the establishment of the Cooperation and Competition Panel. It said that the legal advice obtained at

the time of the establishment of the Cooperation and Competition Panel was exempt from disclosure under section 42 of the Act (Legal Professional Privilege).

8. In relation to point 2 of the request the DoH confirmed that this information was not held.

The Investigation

Scope of the case

9. On 30 June 2011 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 whether the DoH had been correct to withhold the legal advice he had requested at point 1 of his request.

Chronology

10. On 8 July 2011 the Commissioner wrote to the DoH to establish what information was held relevant to point 1 of the request and if this was being withheld which exemptions were applicable.
11. On 28 July 2011 the DoH responded to the Commissioner. It explained that the only information held relevant to point 1 of the request was the advice sought in 2007 on the application of EU competition law during the process of establishing the Cooperation and Competition Panel. It explained that this information was being withheld under section 42 of the Act. It provided the Commissioner with a copy of the withheld information and further arguments in support of the application of the exemption.

Analysis

Exemptions

Section 42

12. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal

- professional privilege and this claim to privilege could be maintained in legal proceedings.
13. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
 14. The DoH has confirmed that in this case the category of privilege it is relying upon is advice privilege. This privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity.
 15. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
 16. The DoH explained that the withheld information is a piece of legal advice provided to it by its legal advisers. It confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
 - confidential;
 - made between a client and professional legal adviser acting in their professional capacity; and
 - made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
 17. The DoH also confirmed that it was satisfied that the privilege attached to the withheld information had not been waived.
 18. Upon considering the withheld information and the submissions provided by the DoH, the Commissioner considers that the section 42 exemption was correctly engaged.
 19. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

20. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

"...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..."

"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."

21. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest must be *"clear, compelling and specific"*.
22. The Tribunal decision in *Mersey Tunnel Users Association v the Information Commissioner and Merseytravel (EA/2007/052)* was an example of a decision where the Information Tribunal found that the public interest factors in maintaining the exemption did not outweigh those in favour of disclosure. The Tribunal highlighted the significance of factors such as the large amount of money involved, the large number of people affected and lack of transparency in the public authority's actions.
23. Whilst not a direct parallel to this case the Commissioner has also drawn upon the judgment of the European Court of Justice in *Sweden and Turco v Council and Others (C-39/05 and C-52/05)*¹. The case is not binding as it relates to 'Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents', but the principles considered are of relevance to this case. The case concerned a request made for legal advice held by the Council on a proposed

¹ Also summarised in this press release <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/cp080043en.pdf>

Directive. The Court set aside the judgment of the Court of First Instance and annulled the decision of the Council refusing Mr Turco access to the legal opinion. The Court made the following points in the judgment:

45. In that respect, it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 of the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

46. "Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights."

Public interest arguments in favour of disclosing the requested information

24. The DoH recognises that there is a general public interest in making legal advice on matters of EU law available to promote greater transparency and accountability in the DoH's decision making processes.
25. The DoH also acknowledged that disclosure of the requested legal advice could result in the public being better informed about advice received by the Government on the application of EU law to the NHS and therefore better placed to engage in debate on the issues associated with competition within the health service.

26. Additionally the Commissioner considers that EU competition law in relation to the NHS could have a significant effect on a large number of people; a significant percentage of the population who access NHS services and a significant effect on individuals working in the NHS.
27. The Commissioner is also aware that the withheld legal advice is the most recent advice sought by the Government on EU competition law and the NHS and therefore whilst the DoH has explained that legal advice was not contained in the submissions to Ministers, this is the most up to date advice on this issue when the Health and Social Care Bill was drafted. As this Bill is soon to be considered by Parliament the Commissioner again considers that this strengthens the public interest in favour of disclosure.
28. The DoH argued that there is already a lot of information in the public domain about EU competition law and the NHS. It suggested therefore that this goes some way to meeting the public interest in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

29. The DoH considers that there is a very strong public interest in upholding the established principle of confidentiality in communications between lawyers and their clients and therefore upholding the principle of legal professional privilege.
30. The DoH has also argued that *"the need for high quality, comprehensive legal advice which is given without fear of disclosure and which assesses both the strengths and weaknesses of a proposed decision or policy, or defence of a legal claim, is essential for the effective conduct of the DoH's business."* It has explained that advice needs to be given with all the relevant facts and on a confidential basis. It explained that it is in the public interest that the DoH is able to make decisions based upon full and thorough legal advice. It explained that disclosure of the withheld legal advice could impede the decision making process in the future in that legal advice may not be sought or provided in such a full and frank way and therefore decisions made may not be as robust as when based upon full and thorough legal advice.

31. The DoH has suggested that disclosure may also discourage clients and lawyers from making a permanent record of advice that is sought or given, or may only make a partial record. It has explained that it would not be in the public interest to diminish the quality of record keeping.
32. The Commissioner considers that whilst the legal advice dates back to 2007, it is still the most up to date legal advice on EU competition law and the NHS and for this reason the Commissioner regards it as recent advice, which has some relevance to a live issue. This adds significant weight to the public interest arguments in favour of maintaining the exemption.

Balance of the public interest arguments

33. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in the DoH's decision making processes, particularly in relation to changes to the NHS as it impacts such a large number of people. There is a high level of public interest in how the NHS is organised and who delivers the services. He also considers that there is a very strong public interest in allowing the public to be fully informed when legislation such as the Health and Social Care Bill is being debated, enabling them to fully engage in the debate. The Commissioner has taken into account the public debate taking place about the competition aspects of the Bill at the time the request was made and the extent of information available to the public that would enable them to understand the government's position on the implications of the Bill in terms of EU competition law.
34. The Commissioner has considered the argument that there is already information in the public domain about EU competition law and the NHS from different sources but this does not negate the public interest in the public seeing the legal advice the government holds on matter. The complainant has also argued that once the private sector expands and the state's provision reduces in the NHS, EU competition law may become more prevalent. He has explained that the point that this is likely to happen is of major importance in any public discussion of the Health and Social Care Bill.

35. The Commissioner does however also consider that there is a very strong public interest in the DoH being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent that legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the DoH which would not be in the public interest. But the Commissioner does not accept that disclosure would lead to the DoH or its legal advisers failing to record legal advice thoroughly in the future.
36. The Commissioner has considered the withheld information and the wider context that informs the public interest against the principles detailed in paragraphs 20 to 23 above. Whilst this is a finely balanced case, the Commissioner considers that public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Procedural Requirements

Section 1(1)

37. Section 1(1) of the Act provides that: -

"Any person making a request for information to a public authority is entitled –

1. to be informed in writing by the public authority whether it holds information of the description specified in the request, and
2. if that is the case, to have that information communicated to him."

38. As the DoH incorrectly applied section 42 in this case it breached section 1(1)(b) as it did not provide the complainant with the requested information within the statutory time for compliance.

Section 10

39. Section 10(1) of the Act 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.”

40. The Commissioner has considered whether or not the DoH complied with section 10(1) of the Act.

41. The DoH failed to comply with section 1(1)(b) the statutory time for compliance, therefore it breached section 10(1) of the Act in its handling of the request.

The Decision

42. The Commissioner’s decision is that the public authority did not deal with the complainant’s request in accordance with section 42, section 1(1)(b) or section 10(1) of the Act.

Steps Required

43. The Commissioner requires the DoH to disclose the requested information to the complainant.

44. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

45. 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

46. 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,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

47. 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.

48. 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 20th day of September 2011

Signed

Steve Wood

Head of Policy Delivery

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."

Section 2(3) provides that –

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

- (c) section 21
- (d) section 23
- (e) section 32
- (f) section 34
- (g) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (h) 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,
 - (iii) section 41, and
 - (iv) section 44"

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (i) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (j) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (k) prescribe different days in relation to different cases, and
- (l) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (m) the day on which the public authority receives the request for information, or
- (n) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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.”