

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2012

Public Authority: Department of Regional Development
Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant has requested the following information:-
 - "1. All legal advice sought or received by the Department of Regional Development, Northern Ireland Water, or the Panel charged with assessing, short listing, or interviewing applicants for the position of Non Executive Directors at Northern Ireland Water.
 2. All legal advice, notes and correspondence (internal and external) relating to the advice specifically sought in relation to my application for the position of Non Executive Director at Northern Ireland Water. In addition copies of all guidance given in relation to responding and justifying the refusal to interview, myself and the subsequent rejection of my appeal by the Panel."
2. The Department of Regional Development ("DRD") disclosed some of the information requested in part 2 of the complainant's request, however it refused to disclose the information in part 1 of the request and the remainder of the information in part 2 of the request ("the withheld information"), citing the exemptions under sections 40(2)(b) (personal data) and 42(1) (legal professional privilege) as a basis for non-disclosure.
3. The Commissioner's decision is that the DRD has correctly applied the sections 40(2)(b) and 42(1) exemptions to the withheld information.
4. The Commissioner requires no steps to be taken.

Request and response

5. The complainant has requested the following information from the DRD: -
 - "All legal advice sought or received by the Department of Regional Development, Northern Ireland Water, or the Panel charged with assessing, short listing, or interviewing applicants for the position of Non Executive Directors at Northern Ireland Water.
 - All legal advice, notes and correspondence (internal and external) relating to the advice specifically sought in relation to my application for the position of Non Executive Director at Northern Ireland Water. In addition copies of all guidance given in relation to responding and justifying the refusal to interview, myself and the subsequent rejection of my appeal by the Panel."
6. The DRD responded stating that it was withholding some of the requested information under sections 40 (personal information) and 42 (legal professional privilege) of FOIA. The specific information being withheld under each section is set out in a Schedule of Documents which is annexed to this Notice.
7. Following an internal review the DRD wrote to the complainant on 5 August 2011. It stated that it was upholding its initial application of sections 40 and 42 of FOIA to the withheld information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled, specifically the DRD's application of the specified exemptions to the withheld information.
9. The Commissioner considered that some of the information was the complainant's personal data and has dealt separately with that element of the request. Therefore, this notice relates only to the remaining withheld information.
10. The Commissioner has considered the DRD's use of the above exemptions in relation to the remaining withheld information.

Reasons for decision

The exemption under section 40(2) of FOIA

11. Section 40 (2) of FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
12. One of the conditions, listed in section 40(3)(a)(i), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA.)
13. The DRD stated that some of the withheld information in part 2 of the complainant's request was exempt from disclosure under section 40(2)(b) of FOIA as it was personal data from which individuals (other than the complainant) could be identified and that its disclosure would breach the first data protection principle.
14. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
15. In order to reach a view on whether this exemption could be applied, the Commissioner initially considered whether or not the information in question was in fact personal data.

Is some of the withheld information personal data?

16. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
 - from those data,
 - or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
17. The Commissioner considers that some of the withheld information is personal data as it is the names of staff members in the DRD and therefore specific living individuals could be identified from it.

Would disclosure of this personal data be unfair and in breach of the first data protection principle?

18. The personal data in this case would relate to the named individuals in a professional capacity. This is significant in that the Commissioner has made a clear distinction in previous decisions between requests for information relating solely to professional matters and information relating to individuals outside their professional capacity. The Commissioner's position is that he considers it far less likely that disclosure of personal data relating to professional matters would be unfair than would disclosure of information relating to individuals in a non-professional capacity.

Expectations of the data subjects

19. The DRD advised the Commissioner that the data subjects were junior members of staff in the DRD and would not have expected information held about them to be disclosed.
20. The Commissioner considers that a data subject's expectations regarding what will or might happen to their personal information will be shaped by several factors. In this case, as the information relates to the individuals in their professional capacity, the Commissioner has considered the following specific factors: -
- the seniority of the roles,
 - whether the roles are public facing and
 - whether the positions involve responsibility for making decisions on how public money is spent etc.
21. The DRD has advised the Commissioner that the individuals named in the information being withheld under section 40(2) are junior members of staff. The information specifically relates to the application and recruitment process for Non-executive directors of NI Water. The complainant argued that the DRD needed to take due account of the seniority of the individuals involved in the process. However, the DRD has informed the Commissioner that it has already disclosed the names of senior members of staff involved and that the junior members of staff whose names remain redacted had no direct influence on the substance of the information or on any decisions taken regarding the process. Therefore, the DRD argues that it would be unfair to disclose the names of the individual junior staff members.
22. As mentioned in paragraph 16 above, the Commissioner has taken a clear line that disclosure of personal information relating solely to individuals in a professional capacity would be less likely to be considered unfair than disclosing information about the private lives of

those individuals. It can also be argued that employees of public authorities should have an expectation that they will be accountable.

23. However, the Commissioner accepts the DRD's assertion that disclosure of the names of junior members of staff would be unfair, as those members of staff would have a reasonable expectation that such information would not be disclosed as they were not directly involved in the recruitment and application process in this case. Disclosure of such information would therefore constitute an unwarranted interference with the privacy of the individual staff members which could not be justified by any legitimate interest considerations.
24. The Commissioner is of the view that the exemption under section 40(2)(b) by virtue of section 40(3)(a)(i) of FOIA is engaged. In making this decision the Commissioner has first concluded that disclosure of the withheld information would constitute a disclosure of personal data. The Commissioner considers that it is clear that specific individuals could be identified from the information.
25. Secondly, the Commissioner concludes that disclosure of this personal data would be unfair and thus would be in breach of the first data protection principle. In making this decision, the Commissioner has taken into account the lack of expectation on the part of the individuals named in the request that this information would be disclosed, the potential for detriment as a result of disclosure and that the DRD has disclosed the names of senior staff involved in the recruitment and application process.

Section 42(1) – legal professional privilege

26. Section 42(1) of FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt from disclosure.
27. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI*¹ 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

¹ EA/2005/0023 - 4 April 2006

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.” (para. 9)

28. There are two types of privilege – litigation privilege and legal advice privilege.
- Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
 - 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 principal or dominant purpose of obtaining legal advice
29. The category of privilege upon which the DRD is relying as a basis for non-disclosure of the information in part 1 of the request and some of the information in part 2 is advice privilege. It argues that the withheld information attracts advice privilege as it consists of documents containing, seeking and discussing legal advice regarding the application and recruitment process for the positions of Non-executive Directors at NI Water.
30. The Commissioner’s view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is capable of attracting legal professional privilege. This is only to the extent that disclosure of the comment or discussion would itself amount to the disclosure of legally privileged information.
31. The information withheld under section 42(1) clearly consists of legal advice as it is made up of communications between the DRD’s legal advisers (the Departmental Solicitor’s Office) and staff members created for the purpose of obtaining legal advice and also communications between DRD staff members themselves discussing the advice sought and received, in some cases attaching draft letters for consideration by the legal advisers. The Commissioner finds that the withheld information attracts legal advice privilege and that therefore the exemption under section 42(1) is engaged.

32. As section 42(1) is a qualified exemption it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest test

33. Section 2 of the Act sets out the circumstances under which a public authority may refuse a request for information. According to this section, where a public authority has applied a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*".

Public interest arguments in favour of disclosing the withheld information

34. The DRD recognised the general public interest in accountability and transparency in public authorities and their decision-making processes. The Commissioner agrees with this and considers that this is a strong argument in favour of disclosure of the withheld information.

Public interest arguments in favour of maintaining the exemption

35. The Commissioner is of the view that there is a strong element of public interest inbuilt in maintaining legal professional privilege. This position was endorsed by Justice Williams in the High Court case of *DBERR v Dermod O'Brien*² who said:

".....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight" (para 53).

36. The Commissioner accepts this and considers that, as stated by the Tribunal in the case of *Bellamy*, cited in paragraph 10 above, at least equally strong countervailing considerations need to be adduced to override that inbuilt public interest. The above does not mean that the counter arguments favouring public disclosure need to be

² EWHC 164 (QB) – 10 February 2009

exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above. The DRD argued that government departments and other public authorities need to be able to obtain legal advice without prejudice. It further argued that disclosure of the withheld information would have a high potential to prejudice its ability to defend its legal interests. That prejudice could occur directly to those legal interests, as it would leave the DRD's legal position open to challenge, and indirectly as it could diminish reliance upon the advice as having been given freely and frankly without fear of it being disclosed to the public.

37. The Commissioner agrees that it would not be in the public interest for the quality of legal advice provided to government to be potentially diminished by the prospect of disclosure. He also agrees that it would not be in the public interest to leave the government's legal position open to challenge. He notes that, even without the withheld information being disclosed to him, the complainant is still free to challenge the DRD's decision in this case. In the event of any litigation, even through the discovery process, the complainant would be highly unlikely to receive copies of DRD documents seeking, providing or discussing legal advice. In any case, that process is completely separate from FOIA.

Balance of the public interest arguments

38. The Commissioner considers that it is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

39. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept.
40. The Commissioner would observe that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate

transparency. From his perusal of the withheld information, the Commissioner could see no obvious sign of unlawful activity, evidence that the DRD had misrepresented any legal advice it had received or evidence of a significant lack of transparency where more transparency would have been appropriate.

41. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions. However, having regard to the circumstances of this case, it is the Commissioner's view that, on balance in this case, the public interest in disclosure does not equal or outweigh the strong public interest in maintaining the DRD's right to consult with its lawyers in confidence. Therefore the withheld information should not be disclosed.

Right of appeal

42. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
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