

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2012

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested legal advice provided in connection with a Flexible Working Policy.
2. The Commissioner's decision is that the public authority was correct to withhold the information within the scope of the request on the basis of the exemption at section 42(1) of the Freedom of Information Act (the Act).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 24 June 2011 the complainant wrote to the public authority and requested information in connection with the public authority's Flexible Working Policy (FWP). The request was partly worded as follows:

'I would like;

- *All legal advice received in the preparation of the Home office/UKBA's FWP,*
- *All legal advice received regarding the Home Office/UKBA's FWP since its first publication,*
- *All legal questions asked, and replies received, regarding the introduction/wording/implementation/amendments to section 39 FWP and/or specifically an employer's ability to change an employee's terms and conditions of service without prior agreement.'*

5. The public authority responded on 20 July 2011. It stated that the information held (the disputed information) was exempt from disclosure on the basis of section 42(1) of the Act.
6. Following an internal review the public authority wrote to the complainant on 16 August 2011. It upheld the original decision to withhold the disputed information on the basis of section 42(1).

Scope of the case

7. On 20 August 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to rule on the public authority's refusal to provide him with the disputed information.
8. A schedule of the documents identified by the public authority as constituting the disputed information can be found in the confidential annex to be disclosed to the public authority only. To include the schedule in the main body of this notice would defeat the purpose of the exemption.
9. The Commissioner identified the following salient points made by the complainant in support of disclosure:
10. Section 39 of the FWP, specifically the phrase '[the Department] reserves a contractual discretion to revert to your previous terms and conditions' is in conflict with section 80 of the Employment Rights Act 1996 (the ERA). The complainant submitted that section 39 of the FWP had been 'misused' by the management at Luton Airport.
11. There is a public interest in ensuring that the public authority is fulfilling its legal obligations to staff.
12. If legal action was taken against the public authority in connection with the FWP, the legal advice requested would form part of any defence and would consequently therefore become a matter of public record.
13. Finally, *'The public interest in disclosure must weigh heavier than the principle of legal privilege in this case, given that no other factors come into play'*.

Reasons for decision

Section 42(1)

14. Information is exempt from disclosure by virtue of the exemption at section 42(1) if it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.
15. The public authority explained that the disputed information consists of email exchanges between officials and the legal advisors branch in connection with the FWP. It pointed out that some of the emails relate to specific queries concerning a member of staff. It also stated that the emails were not widely copied and the advice provided was not publicly disclosed. According to the public authority the disputed information is exempt from disclosure because a claim to legal advice privilege could be maintained in respect of it.
16. It submitted that legal advice privilege applies to information which relates to communications between a person and his lawyer provided they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations.
17. The Commissioner is satisfied that the disputed information covers all three items of the request above. It consists of queries by officials to the legal advisors branch in relation to the application of the FWP (including section 39 of the FWP) and the responses provided by the legal advisors. He also agrees with the public authority that a claim to legal advice privilege could be maintained in respect of the disputed information.
18. The Commissioner therefore finds that the disputed information was correctly withheld by the public authority on the basis of the exemption at section 42(1).

Public Interest Test

19. Section 42(1) is however subject to a public interest test. The Commissioner must therefore also decide whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.
20. In favour of disclosure, the public authority recognised the general public interest in accountability for its decision making. It further recognised the public interest in the transparency of its decision making process. Specifically in relation to the public interest in disclosing the disputed information, the public authority acknowledged that it would allow insight to the consideration that was afforded to the

FWP and also show that it is mindful of its legal obligations towards staff.

21. Against disclosure, the public authority submitted that case law¹ had established that there is a strong element of public interest inbuilt in maintaining legal professional privilege and at least equally strong countervailing considerations need to be adduced to override that inbuilt public interest. According to the public authority this inbuilt public interest in maintaining legal professional privilege is borne out of the long standing recognition of the need to maintain the confidential relationship between lawyers and clients. It argued that disclosing the disputed information could prejudice the government's ability to defend its legal interests – both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice provided.
22. The public authority also pointed out that legal advice given in one context is likely to be helpful or relevant to subsequent similar issues. It argued that because the advice provided relates to human resources, an area that can generate many enquiries, it is reasonable to assume that the disputed information could be relevant to future enquiries. As policy develops or litigation decisions are made it will be important to be able to refer back to advice previously provided. It therefore argued that there is also a public interest in not disclosing the disputed information in order not to prejudice future legal interests in the matter.
23. The public authority further submitted that there is also a risk its lawyers would avoid making a permanent record and instead keep partial records relating to advice they have provided. It argued that without comprehensive advice, the quality of its decisions would be greatly reduced and that would not be in the public interest.

Balance of Public Interest

24. The Commissioner agrees with the general public interest in disclosure acknowledged by the public authority. He specifically agrees with both the complainant and the public authority that there is a strong public interest in establishing that the public authority is mindful of its legal obligations.

¹ It specifically referred to the information Tribunal's findings in *Calland v The Information Commissioner & FSA* (EA/2001/0136), *Bellamy v The Information Commissioner & DTI* (EA/2006/0023), and *Kitchener v The Information Commissioner & Derby County Council* (EA/2006/0044)

25. The Commissioner also agrees with the public authority that there is a strong inbuilt public interest in maintaining legal professional privilege. He further agrees that to override this strong inbuilt public interest, there must be equally strong countervailing public interest considerations favouring disclosure.
26. Section 80F of the ERA provides a statutory right for an employee to request a contract variation relating to hours of work, times of work, place/location of work, or any other aspects of his/her terms of conditions of employment as the Secretary of State may specify by regulations, and where his/her purpose for applying for any such change(s) is to enable him/her to act as carer for a child or a person aged 18 or over.
27. Section 39 of the FWP in broad terms states that there may be rare occasions where the public authority may have to review flexible working arrangements to meet business needs. It also states, as mentioned by the complainant, that the public authority reserves a 'contractual discretion' to revert to previous terms and conditions to meet business requirements.
28. The Commissioner does not consider the legal advice the public authority received regarding the application of section 39 of the FWP to be wholly unreasonable or irrational such that it raises serious questions in relation to the weight given to the public authority's statutory obligations under section 80F of the ERA. The Commissioner must stress that he is in no way suggesting that the complainant does not have legitimate concerns regarding the potential conflict between the FWP and the ERA. However, to determine if there is an equally strong public interest in disclosing the legal advice obtained in relation to section 39 of the FWP, he considers that he firstly has to be satisfied in the circumstances of this case that the public authority gave little or no weight to its statutory obligations under the ERA. The Commissioner does not consider that such a claim could be sustained as he is satisfied that the legal advice does not raise serious questions in terms of how mindful the public authority is of its legal obligations under the ERA.
29. The Commissioner has also not seen any evidence to suggest that there was a widespread or systemic 'misuse' of section 39 of the FWP to warrant disclosure of the disputed information. In any event, evidence of misuse alone would not be sufficient to overturn the strong inbuilt public interest in maintaining legal professional privilege. There must be a demonstrable link between the disputed information and the alleged misuse. In other words, there is unlikely to be a significant public interest in disclosing legal advice if section 39 of the FWP had been wrongly applied or 'misused' by senior officials.

30. The Commissioner agrees with the public authority that legal professional privilege can be maintained at a Court or Tribunal. A Court or Tribunal will make its own decision as to whether or not the FWP is legally compliant and it does not require the legal advice obtained by the public authority to reach its decision. Furthermore, the Commissioner is not persuaded that the public authority having to present its defence in the event of any legal action is a significant public interest in favour of disclosure in response to this request. The presentation of its defence in the event of any legal action does not amount to waiving legal professional privilege as it would be restricted to interested parties and does not therefore amount to disclosure to the world at large (as under FOIA).
31. The Commissioner also disagrees with the complainant that the public interest in disclosure is significantly weightier because '*no other factors come into play*'. As mentioned, there is already a strong inbuilt public interest in maintaining the principle of legal professional privilege and there must be equally strong countervailing public interest factors before the disputed information can be disclosed. The Commissioner has not seen any evidence to suggest there was a lack of transparency by the public authority regarding the application of FWP in general and/or section 39 in particular.
32. The Commissioner agrees with the public authority that the disputed information could also be relevant to future enquiries or disagreement regarding the application of the FWP. He agrees therefore that there is a strong public interest in withholding the disputed information in order to prejudice the public authority's future legal interests in relation to future enquiries.
33. However, the Commissioner is not persuaded by the argument that the public authority's lawyers would be less inclined to keep full and permanent records of future advice if the disputed information is disclosed. In view of the lack of any compelling evidence, the Commissioner has consistently rejected the argument that the disclosure under the Act would have a chilling effect on record keeping. He does not accept that officials responsible for providing advice and recording information would cease to perform their duties on the ground that the information may be disclosed. Officials providing legal advice are able to rely on the strong protection afforded to such advice by the principle of legal professional privilege and in the Commissioner's view, that is sufficient to discourage them from not maintaining adequate records.
34. Nevertheless, in all the circumstances of this case, the Commissioner finds that on balance, the significant public interest in maintaining the exemption at section 42(1) (by virtue of the strong inbuilt public

Reference: FS50411701



interest in maintaining legal professional privilege) outweighed the public interest in disclosure.

Right of appeal

35. 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

36. 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.
37. 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

**Alexander Ganotis
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