

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 13 February 2012**

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

#### **Decision (including any steps ordered)**

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1. The complainant made a request to the Department of Health (DoH) for a copy of the legal advice given to the previous government in 2006 on the application of EU competition law during the process of establishing the Cooperation and Competition Panel. The DoH withheld this information under section 42 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DoH has correctly applied section 42 FOIA to withhold the requested information.
3. The Commissioner requires no steps to be taken.

#### **Background**

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4. The Commissioner previously considered the same information in decision notice FS50402010. In this case he found that public interest under section 42 favoured disclosure. The Department of Health appealed the decision to the First-tier Tribunal (Information Rights). In the grounds of appeal, for the first time in the case, the department argued the information was not within the scope of the request. The Commissioner considered the arguments and accepted the information was not within scope. The appeal was disposed of using a consent order, which substituted the Commissioner's decision. The complainant subsequently made a new request for the information.

## Request and response

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5. On 22 November 2011, the complainant wrote to the DoH and requested information in the following terms:  
  
"I repeat my request this time specifying the exact document that has already been described incorrectly by your Department as relating to 2007. I request under the Freedom of Information (FOI Act) the legal advice given to the previous government in 2006 on the application of EU competition law during the process of establishing the Cooperation and Competition Panel."
6. The DoH responded on 20 December 2011. It refused to disclose the requested information under section 42 of FOIA.
7. The Parliamentary Under Secretary of State for Quality (Lords), Earle Howe, also responded to the complainant on 11 January 2012, in which he confirmed the DoH's application of section 42 to the withheld information. The DoH explained that this should be treated as its internal review.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether section 42 had been correctly applied by the DoH in this case to withhold the requested information.

## Reasons for decision

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10. The Commissioner has considered this new case, noting that the Department has provided different arguments and different circumstances existed at the time this new request was made.
11. Section 42(1) of FOIA 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.
12. 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.
  13. 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.
  14. 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.
  15. 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.
  16. The DoH also confirmed that it was satisfied that the privilege attached to the withheld information had not been waived.
  17. Upon considering the withheld information and the submissions provided by the DoH, the Commissioner considers that the section 42 exemption was correctly engaged.
  18. 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.

19. 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."*

20. 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"*.

### **Public interest arguments in favour of disclosing the requested information**

21. 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.
22. 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.
23. Additionally the Commissioner considers that EU competition law in relation to the NHS could have a significant effect on a large

- number of people; in particular it could effect a significant percentage of the population who access NHS services and have a significant effect on individuals working in the NHS.
24. The withheld legal advice is the most recent advice held by the Government on EU competition law and the NHS. It is also the most up to date advice on this issue when the Health and Social Care Bill was drafted. There was significant public debate about the competition issues, while the Bill was under consideration by Parliament. The Commissioner considers that this strengthens the public interest in favour of disclosure. Furthermore the complainant has 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 argued that this is of major importance in any public discussion of the Health and Social Care Bill.
25. The DoH argued that there was significant information in the public domain about EU competition law and the NHS. It directed the Commissioner to information which is available on the DoH's website<sup>1</sup>. It explained that the response to the complainant from Earle Howe contained letters between the DoH and the Office of Fair Trading (OFT) which provided further information on the issue of where competition law would apply to providers of NHS services. The DoH also confirmed that these letters are in the public domain. It said that this goes some way to meeting the public interest in favour of disclosure. The Commissioner notes that the OFT information was not in the public domain at the time of the request.

### **Public interest arguments in favour of maintaining the exemption**

26. 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.
27. 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*

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[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_129883.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129883.pdf)

*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. This is because legal advice may not be sought or be 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.

28. 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.
29. The Commissioner considers that whilst the legal advice dates back to 2007, it can still be regarded 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.
30. The DoH also said that it took into account whether disclosure might prompt litigation. It said that in *Mersey Tunnel Users Association v the Information Commissioner's Office & Mersey Travel (EA/2007/052)*, the Tribunal placed considerable reliance on the fact that the advice could not be relied on to mount a legal challenge. It has said that there is a particularly strong public interest in maintaining the exemption in this case where disclosure might prompt or assist litigation because such litigation is a drain on the public purse. It also introduces unwelcome uncertainty in public administration and disclosure in such circumstances is likely to have a very powerful chilling effect on the willingness of public authorities to obtain advice on potential litigation risks.

### **Balance of the public interest arguments**

31. 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 around the time the request was made. There is a strong public interest in the public understanding any legal advice the government holds about how competition law could apply to the NHS, if changes are made to the structure and roles of the different actors. He has also considered the extent of information available to the public (at the time of the request) that would enable them to understand the government's position on the implications of the Bill in terms of EU competition law. The Commissioner notes that more information has been made available on the competition implications of the Bill as it has progressed. He is also aware that a number of amendments have been made to the Bill since it was originally drafted, following public debate, related to choice and competition.
32. 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. However 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.
  33. The Commissioner also considers that there is a strong public interest in not disclosing legal advice which might prompt or assist litigation.
  34. As noted above, the Commissioner has considered the case afresh and considered the arguments provided and the circumstances that existed at the time of the request.

35. The Commissioner has considered the withheld information and whilst this is a finely balanced case, the Commissioner considers that public interest in maintaining the exemption outweighs the public interest in disclosure.



## Right of appeal

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36. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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** .....

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**