

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 December 2012

Public Authority: Intellectual Property Office
Address: Concept House
Cardiff Road
Newport
NP10 8QQ

Decision (including any steps ordered)

1. The complainant requested correspondence and legal advice relating to the Artist's Resale Rights. The Intellectual Property Office ('the IPO') provided copies of correspondence but withheld the legal advice under section 42 of the FOIA. The Commissioner's decision is that the IPO correctly applied section 42 to some of the information, but other information is not exempt under section 42 of the FOIA.
2. The Commissioner requires the IPO to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the requested information which it has so far withheld, subject to the redactions as highlighted in the confidential annex.
3. The IPO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 13 March 2012, the complainant wrote to the IPO and requested information in the following terms:
 - "All correspondence between Baroness Judith Wilcox and Sir Malcolm Rifkind regarding the Artist's Resale Right.

- Legal advice provided by BIS lawyers to the Intellectual Property Office relating to the Artist's Resale Right.

This request extends to any written correspondence but also minutes of any meeting between the named parties and/or reports, papers or internal correspondence resulting from this, between the dates 01 June 2011 and 31 January 2012, held by yourselves or originated by yourselves”.

5. The IPO disclosed information relating to the first part of the request, but withheld information relating to the second part of the request under section 42 of the FOIA.
6. On 17 May 2012, the complainant contacted the IPO and requested an internal review of its decision to withhold the legal advice referred to in the second part of the request.
7. The IPO provided the outcome of its internal review and upheld its decision that the legal advice requested was exempt under section 42 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 27 June 2012 to complain about the way her request for information had been handled. She asked the Commissioner to consider whether the legal advice she had requested should be disclosed, particularly as the legal advice was openly referred to in the correspondence which was disclosed in relation to the first part of her request.
9. The IPO advised the Commissioner that it did not hold any relevant documents within the date range requested by the complainant. However, it did hold documents outside the specified date range. It disclosed some of this information, and withheld the legal advice under section 42 of the FOIA. As the withheld information does not fall within the date range specified in the original request, the Commissioner contacted the complainant who confirmed that she was interested in receiving the withheld information even though it did not fall within the date range she originally specified. The complainant clarified that she was aware that legal advice had been sought by the IPO, but was unsure of the actual date.
10. The Commissioner has considered whether the legal advice held by the IPO should be disclosed, or whether it was correct in withholding the information under section 42 of the FOIA.

Reasons for decision

Background

11. Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art was adopted on 27 September 2001. The Artist's Resale Right was implemented in the UK from 14 February 2006 by Statutory Instrument 2006 No. 346 – The Artists Resale Right Regulations 2006. According to the information on the IPO website¹:

“Artist's resale right (ARR) is an EU right introduced into the UK in 2006. This intellectual property right entitles certain artists and their successors in title to a royalty, for a limited period of time, each time their art work is resold through an art market professional such as a gallery, art dealer or auction house”.

“Resale right in the UK is managed by collecting societies who then distribute the royalty to the artists. Individual artists cannot request payments directly from the art market professionals involved in the sale”.

Section 42 – Legal professional privilege

12. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege (“LPP”) could be maintained in legal proceedings. This exemption is subject to a public interest test.
13. 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 both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
14. The information which the IPO has withheld under section 42 in this case consists of legal advice requests and responses between the IPO and its legal advisers. Having considered the withheld information the

¹ <http://www.ipo.gov.uk/businessguidance.pdf>

Commissioner is satisfied that it represents communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice.

15. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
16. The complainant referred to information contained within a letter from Baroness Judith Wilcox to the Rt Hon Sir Malcolm Rifkind MP ('the Rifkind letter'), which the IPO disclosed in relation to the first part of her request. This letter refers to the author having sought a legal opinion regarding the issue of collective management of ARR in the UK. The complainant has argued that, as the legal advice has been openly referred to by the author, the information withheld by the IPO under this exemption no longer attracts LPP, and as such this exemption cannot apply.
17. During the course of his investigation, the Commissioner raised the issue of loss of privilege in respect of the legal advice with the IPO. It accepted that some of the legal advice was referred to in the Rifkind letter it disclosed to the complainant, but maintained that there were substantive aspects of the withheld information which had not been referred to in the communication.
18. The Commissioner considers that where legal advice is disclosed outside litigation without any restrictions, it is no longer confidential and therefore is no longer protected by LPP. If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its legal professional privilege protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.
19. In order to reach a view on this the Commissioner has carefully considered the information withheld under this exemption. Having done so he has noted that some of the information withheld relates very closely to parts of the Rifkind letter. The Rifkind letter was disclosed under the FOIA in response to this request. The Commissioner considers that, information released under the provisions of the FOIA can essentially said to be in the public domain. Further, he has seen no

evidence to suggest that any restrictions were placed on the use of the Rifkind letter when it was disclosed.

20. Bearing in mind the contents of some of the withheld information, and the information contained within the Rifkind letter, the Commissioner considers that the right to claim LPP has been lost in relation to some of the withheld information. As such, the Commissioner considers that some of the withheld information can no longer be said to be confidential.
21. However, in relation to some of the information withheld under section 42, the Commissioner is satisfied that the information can still be said to be confidential and therefore is subject to LPP. As such he considers that advice privilege applies and therefore section 42 is engaged in relation to this information. This information is identified in the confidential annex attached to the end of this notice which will be sent to the IPO but not, for obvious reasons, to the complainant.
22. As section 42 is a qualified exemption and therefore subject to a public interest test the Commissioner has gone on to consider whether, in relation to the information which he considers is still subject to LPP, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

23. The IPO has submitted limited public interest arguments specifically in relation to section 42 of the FOIA. However, it acknowledges that there is a public interest in the public knowing that the Government has followed legal advice it has obtained.
24. The complainant advised that the Artists Resale Rights Regulations stipulate that the compulsory collective right shall be collected by a deemed mandated collecting society in cases where an artist/beneficiary has not expressly mandated a collecting society. She added that, when ARR was introduced into UK Law in 2006, IPO's official statement in interpreting the provisions was that one particular collecting society should operate under the deemed mandate for in the UK. However, the IPO has since revised its policy and no longer supports the understanding that a deemed mandate is operative in the UK and has referred to the legal advice in question as the basis for this revision. The complainant is of the opinion that the operation of a deemed mandate ensures that intended beneficiaries receive the monies they are entitled to. The complainant believes, therefore, that there is a strong public interest in disclosure of the legal advice considering the implications the

policy change has on the ability of artists and their beneficiaries to collect resale royalties due to them.

25. The complainant also argues that disclosure of the legal advice would enable artists collecting societies to provide opinions to art market professionals about the interpretation of the ARR Regulations and the need to collect royalties on sales. She considers that withholding the legal advice is prejudicial to the smooth operation of ARR in the UK, which is not in the public interest.
26. The Commissioner considers that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of decision making. In this case, disclosure of the withheld information would assist the public in ascertaining whether there was any incompatibility between the advice provided and the decisions taken and whether any advice provided had been followed.

Public interest arguments in favour of maintaining the exemption

27. The IPO maintains there is a strong public interest in maintaining the confidentiality of legally privileged material, which has long been recognised by the courts. The IPO often refers questions on particular points of law to its lawyers before responding to stakeholders or taking policy decisions. The IPO believe that it is of vital importance that it is able to obtain full and frank legal advice in confidence. The purpose of legal advice is to set out the strengths and weaknesses of a case so that the client can be fully informed of what options are available before a decision can be taken. The IPO considers that it is important to record such discussions in writing so that they can be referred to for future reference. It maintains that disclosure of such legal advice would severely compromise these frank, open exchanges.

Balance of the public interest arguments

28. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts, and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.

29. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. The Commissioner notes that the policy change in relation to ARR has the potential to affect a significant number of artists and their beneficiaries, however he does not consider this factor alone would be sufficient to overturn the strong inbuilt public interest in maintaining legal professional privilege.
30. The Commissioner has also taken into account the fact that some of the main points arising from the legal advice can be considered to be in the public domain, as the information was contained in the document disclosed by the IPO in relation to the first part of the request in this case. As outlined in paragraph 20 of this notice, the Commissioner considers that privilege has been lost in relation to this information and he has ordered disclosure of these parts of the withheld information. The Commissioner has also taken into account the fact that there is no evidence the legal advice sought has been misrepresented.
31. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the IPO and its legal advisors and that this would lead to advice that is not informed by all the relevant facts. The Commissioner believes that there must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
32. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the timing of the request and the status of the advice, which is live inasmuch as it is still being relied on by the IPO. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege.
33. Whilst the Commissioner considers that the arguments in favour of disclosure have weight, he has determined that in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exemption under section 42. He therefore determines that the exemption at section 42 has been applied correctly by the IPO to the information identified in the confidential annex.

Right of appeal

34. 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

35. 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.
36. 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

Anne Jones
Assistant Commissioner
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