

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2012

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested the draft Communications Data Bill 2008. The Cabinet Office refused to disclose this information under the exemption provided by section 42(1) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the draft Bill is covered by legal professional privilege and so the exemption provided by section 42(1) is engaged. He has also found that the public interest in maintaining this exemption outweighs the public interest in disclosure and so the Cabinet Office is not required to disclose this information.

Request and response

3. On 10 May 2012, the complainant wrote to the Cabinet Office and requested information in the following terms:
"A copy of the draft Communications Data Bill 2008, or any document pertaining to outline that legislation in pre-draft form."
4. The Cabinet Office responded on 23 May 2012. It stated that the request was refused, and cited the exemptions provided by section 35(1)(a) (formulation or development of government policy) and 42(1) (legal professional privilege) of the FOIA.
5. The complainant responded on 28 May 2012 and asked the Cabinet Office to carry out an internal review. The Cabinet Office responded with the outcome of the internal review on 27 June 2012. It stated that the

refusal of the request under the exemptions cited previously was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 27 June 2012 to complain about the refusal to disclose the information he had requested. The complainant referred to the legislation specified in his request having been abandoned, and that he did not agree with the arguments advanced as to why this information should not be disclosed.

Reasons for decision

Section 42

7. Section 42(1) of the FOIA provides an exemption for information that is subject to legal professional privilege. Consideration of this exemption is a two-stage process; first, it must be considered if the information is subject to legal professional privilege. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
8. The Cabinet Office is relying here on a claim of advice privilege. This is available where the information consists of confidential communications between a client and legal adviser made for the sole or dominant purpose of obtaining legal advice. The Cabinet Office noted that a judgement by the House of Lords had explicitly confirmed that legal professional privilege applies to advice given by Parliamentary Counsel to government departments in relation to the drafting and preparation of Bills.¹
9. The Commissioner accepts that the content of the information here does consist of advice that was provided by a legal adviser to a client in the expectation of confidence. Although the information in question here is a draft Bill in its entirety, rather than, for example, comments on specific clauses from a Bill, the view of the Commissioner is that this information can still be fairly characterised as advice provided by specialist Counsel to a client. Legal professional privilege therefore does extend to this

¹ Three Rivers DC v Bank of England (No. 6) [2004] UKHL 48, paragraph 41

information and the conclusion of the Commissioner in relation to this information is that the exemption provided by section 42(1) of the FOIA is engaged.

10. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost. In this case the Commissioner notes that the information in question is an unpublished draft Bill, so this information has not been placed into the public domain at any stage and privilege continues to apply.
11. Having found that the exemption is engaged, it is necessary to go on to consider the balance of the public interest. The Commissioner has taken into account here the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...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..." (paragraph 35).
12. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
13. The Commissioner has also considered the recent Tribunal decision *Keith Gordon v Information Commissioner and the Cabinet Office* EA/2012/0015. Whilst the information in *Gordon* was instructions to Parliamentary Counsel for drafting a Bill rather than a draft Bill itself, the evidence submitted by the Cabinet Office and the Tribunal's analysis on public interest are still relevant to this case, for example the impact of

disclosing communications with Parliamentary Counsel. In particular the Commissioner has accepted the relevance of paragraphs 94, 95, 96, 98 and 103.

14. The complainant has argued that as the Bill in question is no longer live this is a relevant factor when considering the maintenance of the exemption; it was a policy of the previous Government that has not been continued by the current Government. The complainant has cited this when arguing in favour of disclosure on the grounds that as this Bill is no longer live, the legal advice is also no longer current. The Commissioner agrees that the public interest in favour of preserving legal professional privilege is, to a limited extent in this case, reduced as this advice is no longer current, when compared with the weight of the public interest in preserving legal professional privilege in relation to legal advice that is current. Whilst not current the Commissioner would regard the draft Bill as recent, which does add weight to maintaining the exemption.
15. Whilst the Bill in question here is no longer live, there is a current Bill with the same title that covers a similar policy area. The view of the Commissioner is that the existence of this current Bill can be cited in support of both maintenance of the exemption and disclosure of this information.
16. There is a strong public interest in favour of disclosure in order to compare the previous iteration of this Bill with the current related Bill. Disclosure would serve to inform the public how the current Bill differs from the previous Bill and how policy in this area has evolved. The Commissioner regards this as a factor in favour of disclosure of significant weight. The Commissioner recognises the significant step both pieces of draft legislation represent in terms of personal information retention by Communications Service Providers and access to this information by various security bodies and public agencies. The potential impact on privacy therefore creates a strong general case for disclosure.
17. However, that a related Bill is currently live in the system means that arguments concerning the importance of preserving legal professional privilege in relation to the older Bill continue to carry some weight, in addition to the general weight, on the basis that the legal advice provided in the form of the previous draft Bill may be relevant to the current Bill. This is a valid factor in favour of maintenance of the exemption that is also of significant weight.
18. In line with the relevant case law, the Information Commissioner accords significant weight to the maintenance of legal professional privilege. Whilst the Commissioner remains mindful that this should not

mean that this exemption becomes effectively absolute, it is the case that there will need to be very clear and specific public interest grounds for the public interest in the maintenance of legal professional privilege to be overridden. Having reviewed the withheld information and taking all the circumstances into account, the view of the Commissioner is that there are not sufficiently clear and specific grounds in favour of disclosure in this case and so he considers that the public interest in maintaining legal professional privilege outweighs the limited public interest he has recognised in favour of disclosure of this information. The Cabinet Office is not, therefore, required to disclose this information.

Right of appeal

19. 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

20. 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.
21. 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
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