

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 March 2013

Public Authority: The University of Oxford
Address: University Offices
Wellington Square
Oxford
OX1 2JD

Decision (including any steps ordered)

1. The complainant has requested information relating to correspondence between her solicitors, Morgan Cole LLP, to the University of Oxford's (the University) solicitors, Nabarro LLP, regarding the alteration of a reference from a named professor. The University's position is that the information which is not the complainant's personal data is exempt from disclosure under section 42 of the FOIA as it is subject to a claim of legal professional privilege.
2. The Commissioner's decision is that the University was correct to rely on section 42 to withhold the requested information. However, in responding outside the prescribed 20 working days, the Commissioner finds that the university has breached section 10. Therefore, he does not require the University to take any steps.

Request and response

3. On 27 July 2010, the complainant wrote to the University and requested information in the following terms:

"All data relating to the request sent by Morgan Cole LLP to Nabarro LLP on 4 December 2008 for the agreed reference from [named individual] to be altered to make it appropriate for an Oxford application and all documents relating to the eventual supply of a reference to Merton College, including the reference itself."

4. The University responded on 25 October 2010. It stated that the complainant had received copies of the correspondence between Morgan Cole LLP and Nabarro LLP which confirmed that the reference provided was as agreed in the COT 3 agreement. However the University also stated that any correspondence on the matter between Nabarro LLP and the University was exempt from disclosure under section 42 of the FOIA. It also advised that it considered that the public interest favoured withholding the information in order to protect the confidentiality of legally privileged information. It also noted that in the event that any of the information was personal data, it was also exempt from disclosure under the Data Protection Act 1998 (the DPA) as it was subject to a claim of legal professional privilege.
5. Following an internal review the University wrote to the complainant on 18 November 2010. It stated that it maintained that information withheld under section 42 was genuinely privileged and was covered by either legal advice or litigation privilege. It noted that the requests were set against a backdrop of tribunal litigation which the complainant commenced against the University in 2007. The University also maintained its position that the public interest in protecting the confidentiality of legal advice outweighed the public interest in disclosing the information.

Scope of the case

6. The complainant initially contacted the Commissioner on 20 December 2010 to complain about the personal data aspects of her request. Following an assessment under section 42 of the DPA, the complainant clarified on 21 November 2011 that she also wished to pursue a complaint about the way the University dealt with the request in terms of the FOIA.
7. The Commissioner therefore considers the scope of this case to be to determine whether the University was correct to withhold any information which is not the complainant's personal data under section 42 of the FOIA.

Reasons for decision

8. Section 42(1) FOIA says that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

9. In other words, section 42 sets out an exemption from the right to know for information protected by legal professional privilege (LPP).
10. LPP is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and to safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.
11. The Commissioner recognises that there are two types of privilege within LPP, litigation privilege and advice privilege.
12. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation (legal action before a court). For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing the case. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
13. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice.
14. In its response to the Commissioner, the University stated that the correspondence was covered by both legal advice privilege and litigation privilege. The information arises from claims made by the complainant against the University in the Employment Tribunal. It refers to these claims as the 2007-2008 claims.
15. The University has identified the information falling within the scope of the request which is not the complainant's personal data. It consists of communications between the University's solicitors Nabarro LLP and a specific individual at the University and concerns the interpretation of legal rights and obligations arising from settlements in the 2007-2008 claims.
16. The University has also advised that at the time of the request the complainant continued to pursue a number of related claims against the University, known as the 2009-2011 claims, in which the complainant sought to make arguments about the 2007-2008 claims and the 2008 correspondence. The Commissioner therefore notes that at the time of the request in July 2010, the University was engaged in ongoing

litigation with the complainant relating, at least in some part, to the information requested.

17. The Commissioner notes that the complainant has raised concerns that the University has used solicitors to limit her access to information. For example, she alleges that the University's lawyers have conducted investigations on the University's behalf in order to withhold the information from her on the basis of legal privilege. In relation to the withheld information in this case, the Commissioner has seen no evidence that the University has relied upon section 42 in respect of any such information.
18. The Commissioner has viewed the information and has considered it in the context of both the creation of the information and of the ongoing litigation at the time of the request. He considers that the information relates to interpretation of settlements in previous litigation in the setting of continuing claims, and he is therefore satisfied that the exemption is engaged.

Public interest test

19. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the requested information

20. The complainant considers that where data has been obtained by solicitors in relation to an investigation into allegations of the University's wrongdoing, then the public interest will favour disclosure. It is her view that if the University has nothing to hide, then the disclosure of the information will aid the resolution of her dispute, which would therefore save public money. However, if the University has acted unlawfully and has something to hide, then it cannot be in the public interest to allow a public authority to hide its wrong doing.
21. The Commissioner accepts that in some cases, reasoning such as this can weigh heavily in favour of disclosure of legally privileged information in the public interest. However, having viewed the withheld information in this case, he does not consider that such an argument applies here.
22. The complainant also argued that disclosure of the withheld information would be in the interests of transparency as it would aid the resolution of her claims against the University.
23. The Commissioner does not consider that such an argument is in the wider public interest, rather it is in the complainant's personal interests.

The University has also explained that it considers that the interest in disclosure in this case largely relates to the complainant's private interest in pursuing her legal claims against the University.

Public interest in favour of maintaining the exemption

24. In its initial response to the request the University argued that there is a very strong public interest in protecting the confidentiality of legally privileged information. It therefore considers that a very strong public interest in disclosure would be required for the information to be treated as disclosable under the FOIA. The University referred to the Information Tribunal's decision in *Bellamy v Information Commissioner* (EA/2005/0023) in support of its view as the Information Tribunal gave considerable weight to the public interest in withholding information which attracts legal professional privilege.
25. In its correspondence with the Commissioner, the University further explained that the public interest in withholding the information reflects the interest in protecting the ability of a public authority to communicate candidly with its legal advisers, in the same way as any other person, and in enabling a public authority to make fully informed decision on the basis of sound legal advice. The University's position is therefore that the public interest is in favour of withholding the information.

Balancing the public interest arguments

26. In balancing the opposing public interest arguments in this case, the Commissioner is also mindful of the Information Tribunal's decision in *Bellamy*. The Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
27. In line with the relevant case law, the Commissioner accords significant weight to the maintenance of LPP. 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 LPP to be overridden.
28. The Commissioner considers that in order to equal or outweigh that inherently strong public interest usually involves factors such as decisions that will affect a large number of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.

29. In considering the balance of the public interest in connection with section 42(1), the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as the particular factors in this case regarding 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.
30. The Commissioner recognises the complainant's personal interest in seeing the withheld information in this case. He also accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice. However, in his view the complainants' personal interest in the information and the general principle of transparency does not in itself overturn the public interest in protecting the confidentiality of legal advice.
31. The Commissioner considers that there are not sufficiently clear and specific grounds in favour of disclosure in this case. The complainant's arguments regarding the public interest in disclosure do not carry the same or greater weight in relation to the withheld information. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42 of the FOIA in this case outweighs the public interest in disclosure. Therefore, the University is not required to disclose the withheld information in this case.

Section 10 and 17

32. Section 10(1) of the FOIA requires a public authority to respond to a request within 20 working days. If public authority is seeking to rely on an exemption to refuse to comply with a request then in line with section 17(1) it must provide the requestor with a refusal notice, within 20 working days, stating which exemption(s) is being relied upon.
33. The request was submitted on 27 July 2010, and the complainant did not receive the University's refusal notice until 25 October 2010. The Commissioner finds that the University has breached section 10(1) and section 17(1) of the FOIA, by failing to provide a valid refusal notice within 20 working days.

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

Andrew White
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Wycliffe House
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