

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 June 2014

Public Authority: Treasury Solicitor's Office
Address: One Kemble Street
London
WC2B 4TS

Decision (including any steps ordered)

1. The complainant requested information about settlement payments made to a group of volunteers who had taken part in studies at Porton Down. The Treasury Solicitor's Office ("TSol") provided some information but claimed that it did not hold the remainder within the meaning of section 3(2)(a) of the FOIA. The Commissioner's decision is that TSol does hold some of the requested information within the meaning of section 3(2)(a). However, he considers that this information is exempt from disclosure under section 42. He requires no steps to be taken.

Background

2. Porton Down is a UK government military science research centre. Some research volunteers claim to have suffered long term illness or injury as a result of experiments they took part in there. The complainant requested information about a group action for compensation brought against the Ministry of Defence ("MoD") by some of the volunteers. TSol was instructed by the MoD to act on its behalf in relation to this compensation claim. The claim was settled out of court in 2008.

Request and response

3. On 18 March 2013, the complainant submitted the following request for information to TSol:

"(1) How much compensation was paid to each of the 39 families of deceased Porton Down veterans.

(2) What type of records do you hold pertaining to the 7 servicemen who were exposed to LPS?

(3) How much LPS was administered to each veteran and in what way was the bacterial endo toxin administered?

(4) What was the cause of death of the one LPS exposure victim - reported in Eastwell's letter - that would prompt a compensation payout being made to his family?

(5) Was each compensation payment that was made to 39 family members of deceased servicemen consist of the same amount? ie: 8356 pounds and 54 pence. (refer to Q 1)

(6) Who was the law firm - or law firms - who took part in the "mediation process" where it was agreed as to how much compensation would be paid out to the families of the deceased? Was the Kent law firm Thompson Snell & Passmore in any way involved?

(7) How and why was 3.72 million pounds paid to Leigh Day & Co.? (Senior Partner Martyn Day) and who sanctioned the payment

(8) Are you OR THE TREASURY aware of the inherent dangers associated with LPS exposure a copy of which is pasted below? (YES or NO)

If YES was this warning taken into consideration when deciding how much compensation was to be paid to the victims?"

4. TSol responded on 18 April 2013. It answered question 6 and referred the complainant to earlier correspondence which it said answered question 7. With regard to question 8, it stated that the first part was not a valid request for information. For the second part of question 8, and for the remaining questions, it stated that any information it held was held by it on behalf of its client, the MoD, and that the complainant should apply to the MoD for it. It also stated that information about its dealings with the MoD was legally privileged from disclosure.
5. The complainant asked for an internal review on 24 April 2013. TSol provided the results of the internal review on 1 July 2013. It cited

section 3(2) of the FOIA, which sets out, in broad terms, when information is held by a public authority for the purposes of the FOIA. It said:

"I am satisfied TSol correctly applied section 3(2) in relation to your requests for information set out in your questions 2, 3 and 4. Any information that may exist between TSol and MoD in relation to the Porton Down compensation claims would have occurred during the course of legal services provided by TSol to MoD. The information that you request is not therefore information that is 'held' by TSol.

I am also satisfied that in relation to your questions 1 and 5 TSol correctly applied section 3(2) of the Act for the same reason identified above and was also entitled to rely on the qualified exemption set out in section 42(1) of the Act. I am also satisfied that TSol was entitled to rely on this exemption in relation to your question 8 and the request for details of their dealings on behalf of MoD."

6. TSol confirmed that the public interest in maintaining the exemption at section 42 favoured non-disclosure.

Scope of the case

7. The complainant contacted the Commissioner on 30 September 2013 to complain about the way his request for information had been handled.
8. The Commissioner considers that TSol answered questions 6 and 7 of the request. In response to question 6, TSol provided the names of the law firms involved in the mediation process in the refusal notice of 18 April 2013. In response to question 7, the refusal notice referred the complainant to correspondence a month earlier, dated 21 March 2013, which explained that the MoD sanctioned the payment in response to the volunteers' claims for costs. The Commissioner has therefore excluded TSol's response to these questions from the scope of his investigation.
9. In respect of the first part of question 8, TSol argued that this was not a valid request for information under the FOIA. The Commissioner has therefore considered whether this was a valid request for information.
10. In respect of questions 1 - 5 and 8, the Commissioner has considered whether TSol holds the requested information in accordance with section 3(2) and, if it does, whether the information is exempt from disclosure under section 42 of the FOIA.

Reasons for decision

Section 8(1) – requests for information

11. In its refusal notice and during the Commissioner's investigation, TSol questioned whether the first part of question 8 constituted a valid request for information. It argued that it was more a "*...matter of comment and argument on the part of the requestor*".
12. Section 8 of FOIA outlines what constitutes a valid request for information. Section 8(1)(c) explains that a request must describe the information requested.
13. The first part of question 8 asks whether TSol or the Treasury are aware "*of the inherent dangers associated with LPS exposure*".
14. The Commissioner considers that the information required (confirmation or denial of a particular point) is adequately described for the purposes of section 8(1)(c) and that this is therefore a valid request. Whether TSol holds recorded information from which it can answer the request is a different question and should play no part in determining whether the request is valid.
15. The Commissioner has therefore gone on to include the first part of question 8 in his consideration of question 8 as a whole.

Section 3(2) – information held by a public authority

16. Section 1 of the FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
17. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of FOIA:

"For the purposes of this Act, information is held by a public authority if—

 - (a) it is held by the authority, otherwise than on behalf of another person, or*
 - (b) it is held by another person on behalf of the authority."*
18. In this case, TSol said that to the extent that it may physically hold any relevant information in relation to questions 1 – 5 and 8, such information was held on behalf of its client, the MoD. The issue for the Commissioner to determine here is therefore whether TSol holds the requested information on its own behalf or on behalf of the MoD.

19. The Commissioner's position on the interpretation of "held" for the purposes of the FOIA is that when information is solely held by a public authority on behalf of another person, it is not held for the purposes of the FOIA. However, the information will be held by that public authority if it is holding that information for someone else **and** also holding it to any extent for its own purposes.
20. In cases where legal advice has been sought from a solicitor by a public authority client, it is necessary to consider whether the file held by the solicitor is held on behalf of the public authority or whether the solicitor holds the information in its own right. In general, documents held by a solicitor in connection with the instructions it receives from the client are held on behalf of the client. They are therefore not held by the solicitor for the purposes of the FOIA, and any request for access to them would have to be made to the public authority. This is essentially TSol's position.
21. However, a solicitor's working papers belong to the solicitor. Such papers may include correspondence to and from the client, attendance notes of discussions with the client, annotations and drafts of letters and notes of other research. This statement of principle arises from *Leicestershire County Council v Faraday* [1941] 2 KB 205; and *Re Wheatcroft* [1877] 6 Ch D 97 as referenced in ***Solicitors' Negligence & Liability*** (Flenley & Leech (Tottle 2008)).
22. The First-tier Tribunal (Information Rights) considered the issue of access to legal advice from solicitors in the case of *Francis v Information Commissioner and South Essex Partnership Foundation NHS Trust* (EA/2007/0091, 21 July 2008). The Tribunal found that information held for the solicitor's own administrative purposes as well as the solicitor's own working file of papers, including annotated documents, were not held on behalf of the public authority client.
23. In that case, since the solicitor was not a public authority, the information in question was not accessible under the FOIA. In this case, TSol is a public authority. If any of the requested information constitutes its own working and/or administrative files then it follows that this will be "held" by TSol for the purposes of the FOIA.
24. In a letter dated 29 January 2014, TSol set out its reasons for considering that, for the purposes of the FOIA, it did not hold the information requested in questions 1 - 5:

"During the course of the abovementioned litigation TSol received information from MOD relevant to issues of liability and quantum of damages...It was obtained by TSol in consequence of the provision of legal services paid for by the client, MOD, as outlined above. The information was not needed for any of TSol's own functions.

It is for these reasons that TSol concluded that to the extent it still physically held the information requested it did not hold the information on its own behalf but on behalf of the MOD for the purposes of FOIA."

25. However, in the same letter to the ICO it went on to claim that section 42 nevertheless applied:

"By way of clarification I confirm that the withheld information...is subject to litigation privilege which has not been lost. For the avoidance of doubt, such confidential communications were made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation, namely the Group compensation claims mentioned above."

26. It went on to outline the public interest arguments that it had taken account of in applying section 42. This approach of simultaneously maintaining that the information was not held by it within the meaning of section 3(2)(a) and that it was exempt from disclosure under section 42 was repeated throughout the investigation, despite the Commissioner explaining several times that its application of section 42 implied an acceptance by TSol that the information was in fact held for the purposes of section 3(2)(a). TSol never addressed this point, despite being requested to.
27. The Commissioner asked TSol to clarify the extent to which, in respect of at least some of the information, there might be some crossover, with information being held both on behalf of the MOD and by TSol for the purpose of advising the MOD. TSol briefly responded, denying that it held any information in its own right:

"...what we are talking about here is not information which TSol held for its own functions but confidential communications between MOD and TSol made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation..."

28. The Commissioner asked TSol to describe the information in its possession that it considered was not held for the purposes of the FOIA, and to specify its reasons for believing the information was not held in accordance with section 3(2)(a). In response, TSol stated:

"...the information requested in questions 1-5 is held on behalf of the client for the purposes of FOIA. This is on the basis that the information belongs to the client and was created or obtained by TSol in consequence of the provision of legal services paid for by the client"

29. In a letter dated 16 May 2014, commenting on questions 2, 3 and 4 it further stated

"...I unequivocally confirm that the only way these questions could be answered would be by reference to "clean" copies of records and files passed to us by the MoD, which have not been annotated or amended in any way by us for the purposes of providing legal advice. Moreover, I confirm that we hold no separate record of the requested information amongst our own working files."

30. In the same letter and in relation to questions 1, 5 and 8 it commented that any information relevant to those requests was:

"...created or obtained by TSol in consequence of the provision of legal services paid for by the MoD. We note that you agree that the said information is exempt from disclosure by virtue of section 42(1) of the FOIA".

31. TSol did not answer specific questions asked by the ICO designed to clarify precisely what information it physically held and how it used it. Therefore, in assessing whether information is held by TSol, the Commissioner has had regard to the statements it has provided, and the nature of the information sought in each individual question.
32. Turning first to TSol's own statements, in paragraphs 27, 28 and 30, above, it clearly accepts that it physically holds the information which is described in the request for the purpose of providing legal advice to its client, the MOD. It has also acknowledged receiving information relevant to issues of *"...liability and quantum of damages ..."* in paragraph 24, to enable it to do this.
33. The Commissioner's view on information held by legal advisers is set out at paragraphs 19 - 23, above. In addition, the provision of legal advice to a client is a function which is specifically recognised by the FOIA, at section 42, as a purpose for which information may be held by a public authority. The Commissioner also considers TSol's acknowledgement that some of the requested information (which includes information about compensation awarded in relation to the claim) was "created" by it (the word "created" was used by it in at least two separate pieces of correspondence) to be particularly significant in indicating that this information was in fact held by it for its own purposes.
34. Following this, and taking account of the information that TSol has provided, the Commissioner considers that the information described in questions 1, 5 and 8 of the request is held by TSol for the purpose of providing legal advice to its client, and therefore that it holds this information in accordance with the definition at section 3(2)(a).

35. In view of the nature of the information sought by questions 2, 3 and 4 (which could only be extracted by reference to the files the MoD provided TSol with access to in order to provide legal advice) and the unequivocal assurances given by TSol in paragraph 29, above, the Commissioner accepts that this information is only held by it on behalf of the MoD and that it is not held by TSol in accordance with the definition of section 3(2)(a).
36. The Commissioner has therefore gone on to consider the claim that section 42 applies, in respect of questions 1, 5 and 8. If his conclusion at paragraph 35 is wrong and on the facts of the case the information sought by questions 2, 3 and 4 is in fact held by TSol for the purposes of FOIA, this information would also be covered by the analysis of the application of section 42, with the same outcome.

Section 42 – Legal professional privilege

37. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) the Information Tribunal described LPP as:

"... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."(paragraph 9).

38. There are two types of privilege – litigation privilege and legal advice privilege. In this case TSol has claimed that the withheld information is subject to litigation privilege.
39. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. There must be a real prospect or likelihood of litigation, rather than just a fear or possibility. In order for information to be covered by litigation privilege, it must have been created for the main purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
40. TSol explained that the only reason it was in possession of information relevant to the request was by virtue of it providing formal legal advice to its client, the MoD, in connection with a claim for compensation brought by Porton Down volunteers. This claim was subsequently settled out of court.

41. For the reasons set out in paragraph 25, TSol considers the information is subject to litigation privilege and that that privilege has not been lost or waived.
42. The Commissioner has not had sight of the information TSol holds in respect of question 1, 5 and 8. However, he considers that the specificity of those questions (which asked for information about the compensation awarded by the MoD, which was determined as a result of the legal advice provided by TSol) means that they could only be answered by TSol through provision of information which came into existence as a result of it advising its client on a matter of proposed or contemplated litigation. Therefore the Commissioner is satisfied that the requested information attracts litigation privilege and is exempt under Section 42(1).

Public interest test

43. Section 42 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 42(1) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

44. TSol explained that the public interest in protecting the confidential relationship between legal adviser and client is a long-term public interest which may be damaged by individual disclosures. In this case the disclosure of information to which LLP applies, even when the litigation it pertained to has ended, may disadvantage the government in future litigation. For example, where the information in question constitutes legal advice, it will invariably set out the possible arguments both for and against a particular view, weighing up their relative merits, including perceived weaknesses in the client's position. TSol considered that it would be contrary to the public interest to disclose such information.
45. Furthermore, the more instances in which disclosures are made of information which is subject to LLP, the greater the likelihood that a precedent will be established in respect of future, similar requests for information, which would be against the public interest. Disclosure of legally privileged information has a high potential to 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 legal advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions

themselves may not be taken on a fully informed basis. There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is sought or given or will make only a partial record. This too would be contrary to the public interest. It is in the public interest that the provision of legal advice is fully documented and that the process of decision making is described accurately and fully. As policy develops or litigation decisions are made it will be important to be able to refer back to advice given along the way.

46. TSol also argued that there is a danger that disclosing legally privileged information would, in future, discourage clients from seeking appropriate legal advice. This could lead to official decisions being made that are legally unsound and that attract successful legal challenges, which could otherwise have been avoided. Government's willingness to seek frank legal advice is essential in upholding the rule of the law.

Public interest arguments in favour of disclosing the requested information

47. TSol said that it had taken into account that public authorities should be accountable for the quality of their decisions and that the process leading to their decisions should be made as transparent as possible. In this case, disclosing legally privileged information would demonstrate that the decisions made were made on a proper basis. Transparency in public decision making and access to the information upon which decisions have been made could also enhance accountability.
48. The complainant has not offered specific public interest arguments in support of disclosure. However, the Commissioner notes his strength of feeling about the welfare of former Porton Down volunteers and his belief that it is in the public interest that as much information be placed in the public domain as possible.

Balance of the public interest

49. The Commissioner acknowledges that there is an inherent public interest in the maintenance of LPP in ensuring the rule of law. A weakening of the confidence that parties have that legally privileged information (particularly where that information pertains to legal advice) will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
50. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA

4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".

51. The Commissioner understands that the complainant has specific reasons for wanting the information. However, the public interest in the context of the FOIA refers to the broader public good. As the Commissioner has noted above, the Upper Tribunal and numerous First-tier Tribunal (Information Rights) decisions have highlighted the very strong inbuilt public interest in protecting the confidentiality of legally privileged information.
52. While the Commissioner accepts that the complainant has a legitimate interest in asking for the information, no public interest has been identified which reaches the threshold for disclosure set by authorities such as the Upper Tribunal. The Commissioner has to consider the wider public interest in public authorities being able to conduct their functions in a way which secures best value for the public purse.
53. Having had regard to these matters, the Commissioner therefore does not consider that the interests of the complainant or the public interest are sufficiently strong to warrant the disclosure of the requested information.

Section 45 - internal review

54. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
55. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
56. The complainant asked for an internal review of the outcome on 24 April 2013. TSol did not provide the results of its review until 1 July 2013, after the Commissioner had intervened. This was a period of 45 working days, and did not result in any change to TSol's previously stated position.
57. TSol has not offered an explanation for the delay. Although he acknowledges the complexities of this case, the Commissioner considers

Reference: FS50514898

that the period of 45 days to conduct the internal review was excessive and does not conform with the section 45 code.

Right of appeal

58. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF