

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2014

Public Authority: The Insolvency Service
Address: Cobourg House
Mayflower Street
Plymouth
PL1 1DJ

Decision (including any steps ordered)

1. The complainant has requested information about petitions filed by the Secretary of State for Business Innovation and Skills to wind up [named company] and 15 other companies. The Insolvency Service (IS) confirmed that some of the requested information was not held, in relation to the information that was held it provided the complainant with some information. It also withheld some information in full under section 42 of the Freedom of Information Act (FOIA).
2. The Commissioner's decision is that the IS has correctly applied section 42 FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 19 October 2013 the complainant requested information of the following description:

"1) Whether and if so what attempts have been made to confirm or otherwise deny my claim that the several petitions filed in your name naming the companies as respondents were from the outset null and void and if so confirmed

i. What if any efforts have been proposed and considered to remedy the mischief caused by the default by the Department for BIS

ii. What if any investigations have been made and what explanations have been called for from the Insolvency Service for any part they have played in causing the default by the Department for BIS

iii. What if any investigation has been made and what explanations have been called for from Wragge & Co for any part they have played in causing the default by the Department for BIS and in particular

a. Whether any claims of negligence on their part have been made

b. Whether any conflict between Wragge & Co and your Department has been recognised

c. Whether any claim for return of fees and disallowance of future fees has been claimed

2) What if any investigation has been made into the judgment handed down by Registrar Jones on 3 July 2013 and what enquiries in relation thereto have been addressed to the Office for Judicial Complaints."

5. On 6 November 2013 the IS responded. It provided the complainant with a response in relation to part 1 of the request. It said that information concerning the response to the petitions was held, but said that it fell into two categories:
- Information in communication with the solicitors employed by the petitioner – which is therefore subject to Legal Professional Privilege.
 - Communication from and information held by the Official Receiver after the making of the winding up orders – which are exempt from disclosure under the terms of the FOIA.

It said it did not hold any information in relation to the sub questions within part 1 of the request or in relation to part 2 of the request.

6. The complainant requested an internal review on 28 November 2013. The IS sent the outcome of its internal review on 6 December 2013. It clarified that section 42 FOIA was applicable and therefore the information was exempt from disclosure. It went on to also explain that the Official Receiver is not a public body as specified within schedule 1 FOIA and therefore is exempt from obligations to comply with FOIA requests.

Scope of the case

7. The complainant contacted the Commissioner on 17 December 2013 to complain about the way his request for information had been handled.

8. During the course of the Commissioner's investigation the IS provided the complainant with some information which has previously been withheld as it did not consider section 42 FOIA would be applicable.
9. The Commissioner has considered whether the information held by the Official Receiver relevant to the scope of this request is held for the purposes of FOIA and whether it has correctly applied section 42 FOIA to the withheld information.

Reasons for decision

10. The IS has explained that it has not included, within the scope of the request, information held by the Official Receiver as the information in his possession, which is relevant to this case, was obtained by him acting solely as a statutory office holder.
11. The Commissioner's Guidance¹ states that, "Official receivers are statutory officers and as such are not public authorities for the purposes of FOIA."
12. Given the scope of the request, the Commissioner is satisfied that information held by the Official Receiver would have been obtained by him acting solely as a statutory office holder. It would not therefore be held for the purposes of FOIA.

Section 42

12. Section 42(1) 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.
10. 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.

¹http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx

11. The IS has confirmed that in this case that it is relying upon both categories of privilege.
12. Advice 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. 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.
13. The IS relied on this category of privilege to the documents it labelled "JJM6" and "JJM7". This information is advice obtained from IS's legal advisers after the hearing relating to the winding up of the companies, however as the judgement handed down in this hearing had not been appealed, this advice was not sought in contemplation of litigation.
13. It confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
 - a. confidential;
 - b. made between a client and professional legal adviser acting in their professional capacity; and
 - c. made for the purposes of obtaining legal advice or assistance in relation to rights and obligations.
14. The IS also confirmed that it was satisfied that the privilege attached to the withheld information had not been waived.
16. Litigation privilege attaches to confidential communications that come into existence when litigation is in reasonable prospect or pending, for the dominant purpose of giving or getting advice in regard to the litigation or collecting evidence for use in litigation.
15. The IS has applied the category of litigation privilege to the documents it labelled "JJM4" and "JJM5". The IS explained that this information relates to the conduct of litigation and relates to prospective further action.
16. It confirmed that it is satisfied that the information meets the criteria for engaging the category of litigation privilege:
 - where litigation is underway or anticipated. Where litigation is anticipated there must be a real likelihood of litigation taking place; it is not sufficient that litigation is merely a possibility;

- the dominant purpose of the communications must be to obtain advice to assist in the litigation; and
 - the communications must be made between a professional legal adviser and client although privilege may extend to communications made with third parties provided that the dominant purpose of the communication is to assist in the preparation of the case.
15. Upon considering the withheld information and the submissions provided by the IS, the Commissioner considers that the section 42 exemption was correctly engaged in relation to both advice privilege and litigation privilege.
16. 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.
17. 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."

18. 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

19. The IS said that it recognises the inherent public interest in transparency and in the accountability of public authorities and of

furthering public understanding of the issues with which those public authorities must deal with.

20. The complainant has raised concerns with the legitimacy of the claim by the Secretary of State for BIS which led to 16 companies being wound up by the Court and with the failure of the petitioner to disclose the public record of the shareholders exercising their statutory rights to which the legal advice relates. The IS has however argued that the complainant did have recourse through the appropriate appeals process if he considered the winding up orders made were unlawful and in contravention of legal advice received. It explained that the complainant did not appeal the winding up orders.

Public interest arguments in favour of maintaining the exemption

21. The IS said that there is a strong public interest in the protection of the principle of LPP which allows public authorities to consult with their lawyers in confidence, to be able to share information fully and frankly and to seek and obtain advice, in the knowledge that this discussion is privileged.
22. The IS explained that it has applied the public interest test to the exemption as it applies to each piece of information. It said that if, there was evidence of misconduct or misfeasance, based on the facts known at the time, then it would weigh in favour of disclosure rather than application of the exemption. However, the IS has concluded there is no such indication and therefore it is entitled to seek advice from its legal advisers in confidence. Furthermore it explained that whilst the complainant may not agree with the making of the winding up orders, he did not follow through the appropriate appeals route with the court.

Balance of the public interest

23. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in the IS's decision making processes and to ensure it is operating fairly and effectively.
24. The Commissioner also considers that there is a very strong public interest in the IS 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. This in turn may have a negative impact upon the quality of decisions made by the IS which would not be in the public interest.

25. Upon viewing the withheld legal advice the Commissioner considers that at the time of the request the advice was fairly recent and furthermore he has not been presented with evidence that would suggest that the withheld advice has been misapplied. Whilst the complainant disagrees with the winding up orders and the process leading up to the making of the orders, this does not indicate that the withheld advice was misrepresented. Furthermore the IS has pointed out that the complainant did have recourse through the appeals process which it explained he did not follow through.
26. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 42 was therefore correctly applied in this case.

Right of appeal

27. 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

28. 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.
29. 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

Pamela Clements
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