

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4th July 2019

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant has requested information about the law relating to the competence and compellability of the Sovereign to give evidence in court proceedings. The Crown Prosecution Service withheld the information, citing section 42(1) (Legal professional privilege) of the FOIA.
2. The Commissioner's decision is that although section 42(1) of the FOIA is engaged, the public interest favours disclosure.
3. The Commissioner requires the Crown Prosecution Service to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The Crown Prosecution Service 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.

Background

5. Paul Burrell, a former royal butler, faced three charges of theft involving 310 items from the late Princess of Wales' estate.
6. The case against him had proceeded on the basis that he had not told anyone that he had kept items belonging to the princess.
7. However, on 2 November 2002 the trial was discontinued as the Queen confirmed that Mr Burrell had told her in a private conversation after the Princess' death, that he had kept some of her possessions for safekeeping.

Request and response

8. On 12 October 2018 the complainant wrote to the Crown Prosecution Service (the CPS) and requested information in the following terms:

"This FOIA request is for the legal grounds - redacting any personal or sensitive personal data - contained within any Treasury Counsel's Opinion on the discontinuance of the trial of Paul Burrell at the Central Criminal Court in 2002."
9. On 2 November 2018 the CPS contacted the complainant and asked him to clarify whether he was asking for Treasury Counsel's opinion or advice regarding the discontinuance. The complainant responded on the same day, providing the following clarification:

"The narrow issue of interest in this FOIA request - and this may be reflected in both Treasury Counsel's Opinion as well as the advice given on discontinuance - is the law relating to the competence and, as a separate matter, the compellability of the Sovereign (in this case The Queen) to give evidence at the trial. The leading case on this issue - which may or may not have been considered in the Opinion and/or advice on discontinuance, is R v Mylius (1911)."

This issue, which arose during the course of the case, may not have been part of Treasury Counsel's original opinion. It is likely, however to have been part of the advice given on discontinuance."
10. The CPS provided its full response on 12 November 2018. It explained that it was withholding the information, citing section 42(1) (Legal professional privilege) of the FOIA.
11. Following an internal review the CPS wrote to the complainant on 20 November 2018, upholding its original decision.

Scope of the case

12. The complainant contacted the Commissioner on 20 November 2018 to complain about the way his request for information had been handled.
13. During the Commissioner's investigation, the CPS confirmed that the legal advice, in this case a legal note, is 17 years old. The Commissioner also asked the CPS whether the advice was still current or if there had been any more recent legal advice on this topic. The CPS explained that it considered that the advice was still current.
14. The Commissioner will consider the CPS' application of section 42(1).

Reasons for decision

Section 42 – Legal professional privilege

15. Section 42(1) provides that information where a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt from disclosure. It is a class based exemption which means that any information falling within the category described, is exempt from disclosure. As section 42 is a qualified exemption it is subject to the public interest.
16. LPP is a common law concept that protects the confidentiality of communications between a lawyer and client. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the Information Tribunal described it 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."
17. There are two types of LPP: litigation privilege and advice privilege.
18. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. 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 a case for litigation. It covers communications between lawyers and third parties, as long as they are made for the purposes of the litigation. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports.

19. 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.
20. The legal adviser must have given advice in a legal context, for example legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.
21. The CPS explained that the withheld information was provided for the purposes of litigation, including communications with third parties, as the dominant purpose of the communication was to assist in the preparation of litigation.
22. The Commissioner has reviewed the withheld information which is a legal note about the competency and compellability of the Sovereign to be called as a witness in court proceedings. She is satisfied that the information is held for the dominant purpose of assisting in proposed litigation and therefore attracts legal professional privilege.
23. Taking everything into account, the Commissioner considers that section 42(1) is engaged. She will go on to consider the public interest considerations.

Public interest test

24. The Commissioner will consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of maintaining the exemption

25. The CPS argued that the public interest in maintaining section 42(1) outweighed the public interest in disclosure. It explained that the concept of LPP was developed to ensure that a client is guaranteed the greatest level of openness to allow for full and frank legal advice from their legal advisors in confidence; this is fundamental to the administration of justice. It also explained that it is important for public authorities to be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them, without the fear of intrusion.
26. In addition, the CPS explained that both client and legal adviser need to be able to discuss and debate any investigation or prosecution freely to ensure that they have considered the issues fully. It argued that disclosing the withheld information would undermine the decision-

making process. In particular, it could mean that those giving advice could be reluctant to be so frank and candid in providing their views in the future.

27. The CPS also explained that it is vital for the effective conduct of the prosecution process that confidential communications between it and third parties can take place. It argued that the prosecution process would be severely prejudiced if such communications were hindered by the fear of subsequent disclosure. The CPS pointed out that LPP is intended to provide confidentiality between professional legal advisors and their clients, in order to ensure openness between them. Additionally, it explained that confidentiality would also safeguard access to fully informed and frank legal advice.
28. The CPS argued that there is a strong public interest in maintaining that confidentiality especially for lawyers using legal advice to prepare a case for litigation. It explained that it is important for the effective conduct of the prosecution process that CPS lawyers are able to give and receive high quality comprehensive advice to/from counsel. The CPS also argued that without such advice the quality of its decision making would be severely prejudiced.
29. Furthermore, the CPS explained that disclosure of legal advice would present a significant prejudice to its ability to defend its legal interest and carry out its public function as the principal prosecuting authority for England and Wales. It argued that this could lead to poor decision making because the decisions themselves may not be taken on a fully informed basis.
30. The CPS also explained that litigation advice can apply to a wide variety of information which in this case, is an advice note from counsel. It argued that there is a strong public interest in maintaining the section 42(1) exemption in this case as the content of the advice note is still considered current.

Public interest arguments in favour of disclosure

31. The CPS acknowledged that there is public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. The CPS also acknowledged that transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.
32. Additionally, the CPS explained that there is public interest in knowing whether or not legal advice has been followed in some cases. It also

explained that legal advice is often complex and involves a fine balance of risks.

33. The CPS also pointed out that the fact that public funds had been spent on the legal advice added weight to the public interest arguments based on transparency.
34. The complainant did not offer any reasons why he considered it would be in the public interest to disclose the requested information.

Balance of the public interest arguments

35. The Commissioner considers that the public interest inherent in this 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 is turn fundamental to the administration of justice.
36. However, the Commissioner does not consider that the public interest considerations need to be exceptional in order to overturn the strong public interest in maintaining the exemption. She notes that in the information tribunal decision of *Crawford v Information Commissioner & Lincolnshire County Council* (EA/2011/0145) it was held that there must be "*clear, compelling and specific justification that at least equals the public interest in [maintaining the exemption]...*" and in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023) it was held that "*....At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.*"
37. The Commissioner has therefore attached appropriate weight to the view that there is a significant public interest in not undermining the ability of a public authority to freely seek and receive frank legal advice in future. She considers that freely seeking and obtaining frank legal advice is crucial to a public authority's ability to make informed and legally supported decisions.
38. The Commissioner also accepts that there is a need for confidentiality between lawyers and their clients so that advice can be given freely without fear of intrusion.
39. Having considered the legal advice, she notes that it relates to what the CPS can and cannot compel the Sovereign to do in terms of calling her as a witness in court proceedings. She accepts that the CPS has the right to take legal advice on this issue.
40. Additionally, the Commissioner notes that the CPS has confirmed that it considers that the legal note is still current. She considers that this is a strong argument in favour of maintaining the exemption.

41. However, the Commissioner notes that the legal note is 17 years old. In addition, she notes that it is general in nature and does not make any direct reference to the court proceedings in question.
42. The Commissioner also gives weight to the fact that the CPS is the public authority entrusted with the prosecution of criminal offences. She considers that there is a strong public interest in understanding the advice which the CPS received in relation to compelling the Sovereign to appear as a witness in criminal proceedings which is still considered current. The Commissioner is not aware that the CPS has published a policy or any guidance on this issue.
43. Furthermore, the Commissioner the notes the CPS' points about transparency. She considers that the CPS is expected to be transparent about in its approach to criminal proceedings.
44. The Commissioner also notes that the request is asking for information about the competency and compellability of the Sovereign to give evidence in court proceedings as opposed to asking for information about the Queen as an individual. The Commissioner considers that there is a strong public interest in this issue.
45. As explained in paragraph 35, the Commissioner considers that the public interest inherent in this exemption will always be strong. However, she considers that in the circumstances this particular case, there is a stronger public interest in the public knowing about the competency and compellability regarding whether the Sovereign can be called as a witness in court proceedings.

Conclusion

46. Taking all of the above into account, the Commissioner is satisfied that section 42(1) is engaged in this case. However, she considers that the public interest in maintaining the exemption is outweighed by the public interest in disclosure.

Right of appeal

47. 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: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.

49. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF