

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2020

Public Authority: The Council of the University of Cambridge
Address: University Offices
The Old Schools
Trinity Lane
Cambridge CB2 1TN

Decision (including any steps ordered)

1. Cambridge University Press ('the Press') is the publishing business of the University of Cambridge. Although it is operationally separate from the Academic University – having its own executive board, HR, IT, legal and finance departments – it is not corporately separate from the University (eg a trading subsidiary). As such, although this decision notice is served on the Council of the University of Cambridge, it concerns the Press and the Press is discussed throughout.
2. The complainant requested information about the Press' handling of previous information requests he had submitted to it. The Press released some information and is relying on sections 21 (information accessible to the complainant) section 40 (personal data) and section 42 (legal professional privilege) to withhold the remaining relevant information that it holds. The complainant is dissatisfied with the Press' reliance on section 42 to withhold some of the information he has requested.
3. The Commissioner's decision is as follows:
 - The information the Press is withholding under section 42(1) attracts legal professional privilege and is exempt information. The balance of the public interest favours maintaining the exemption.

4. The Commissioner does not require the Press to take any remedial steps

Request and response

5. Referring to requests for information that the complainant had submitted to the Press previously (the Press' handling of two of which has been considered separately under FS50828186 and FS50880167), on 7 June 2019, the complainant wrote to the Press and requested information in the following terms:

"I would like information concerning the processing of:

(i) Part (6) of CUP's response on 10 August 2018 to my request of 16 July 2018.

(ii) Part (2) of CUP's response on 27 September 2018 to my request of 30 August 2018.

(iii) Part (1)(a) of CUP's response on 3 April 2019 to my request of 6 March 2019.

1)(a) Did [named individual] compose or approve the release of any of (i), (ii) or (iii) above?

(b) Did [named individual] compose or approve the release of any of (i), (ii) or (iii) above?

(c) Did anybody else compose or approve the release of any of (i), (ii) or (iii) above?

(2) I would like all information held concerning the retrieval and processing of information for (i), (ii) and (iii) above.

This might include, but is not necessarily limited to, internal e-mail correspondence."

6. The Press responded on 5 July 2019. It answered part 1(a), 1(b) and 1(c) of the request.
7. Regarding part 2 of the request, the Press released some information. It relied on sections 40(1) and 21 of the FOIA to withhold some information as it is both the complainant's own personal data and is already accessible to him. The Press redacted other information under section 40(2) as it is the personal data of third persons. Finally, the Press withheld other information under section 42(1) of the FOIA and

confirmed it considers the public interest favours maintaining this exemption.

8. The complainant requested an internal review on 4 September 2019. This correspondence focussed on the Press' reliance on section 42 to withhold some of the information he has requested.
9. The Press provided an internal review on 26 September 2019. It maintained its position regarding the section 42 exemption.

Scope of the case

10. The complainant contacted the Commissioner on 25 December 2019 to complain about the way his request for information had been handled.
11. The Commissioner's investigation has focussed on whether the Press can withhold particular information the complainant has requested under section 42(1) of the FOIA, and the balance of the public interest.

Reasons for decision

Section 42 – legal professional privilege

12. The Press is withholding email correspondence that concerns the three requests the complainant refers to in his current request for information, as it considers the information engages the exemption under section 42(1) of the FOIA. The Press has provided the Commissioner with a copy of this material. The information dates from 20 July 2018 to 3 June 2019.
13. Section 42(1) states 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."
14. This exemption is subject to the public interest test.
15. The purpose of legal professional privilege (LPP) is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore, LPP evolved to make sure communications between a lawyer and his or her client remain confidential.

16. In his complaint to the Commissioner, the complainant has argued the following:

- i. If information was created primarily as part of processing a response to a FOI request, then it was not created with litigation as its dominant purpose. In this complaint, the requested information is precisely information created in order to process FOI requests.
- ii. Information created by a lawyer is not automatically legal advice. The Press' legal department handles its responses to FOI requests, and so information created by its lawyers as part of routine business in performing its statutory duties under the Act should be appropriately distinguished from legal advice. Routine business includes determining whether the information is held, locating the information, retrieving the information, and extracting the information. Routine business might extend to consideration of whether or not exemptions apply. Many public authorities would not routinely seek advice from lawyers in responding to FOI requests; indeed, requests handled centrally by the University are handled by an administrative department rather than a legal department. In determining whether information is routine business or legal advice, one should be mindful of what situations other public authorities would typically seek legal advice. For example, one should consider whether advice was given that an administrator who specializes in FOI requests, but who does not have legal qualifications and is not a practising lawyer, could reasonably expect to provide as routine business. Public authorities should not be encouraged to request routine advice from lawyers in order to benefit from the protection offered by legal professional privilege. In a public interest test, advice that has a substantial routine element should carry a reduced weighting in the arguments for withholding.
- iii. For information to constitute legal "advice", it is necessary, but not sufficient, that there are legal choices to make. For example, a discussion of arguments for and against applying an exemption might constitute legal advice, since applying an exemption is a choice (subject later to appeal). On the other hand, a public authority does not have the legal right to choose how to interpret a request, as that is the applicant's prerogative, and public authorities in doubt are expected to ask for clarification (advice from the applicant); in this context, no information from a lawyer can be considered legal "advice". In the case of part (6) of the Press' response to one of the complainant's requests, the Press changed the interpretation of the request from "draft" to "proposal", which it did not have the legal right to do.

- iv. If information was created for the purposes of responding to an FOI request, but that information led to a response being created that was false or misleading, then the iniquity exception to legal professional privilege may apply. In less extreme situations, the arguments for disclosure of information in a public interest test, such as accountability, should carry an increased weighting.
17. The Press' submission to the Commissioner broadly addresses these arguments. The Press has noted that for legal privilege to apply, there should be a client and a legal advisor. It says that in this case, the client(s), as it had explained in its internal review response, are the business colleagues who are the members of the Press' editorial team responsible for the book that the complainant is interested in. The legal advisors involved are Press English solicitors, an English Barrister and its Data Protection Coordinator, working in the legal department under the supervision of one of the English solicitors.
18. The Press has gone on to say that the circumstances of these communications were based on the clients' need to understand the obligations which the Press was under in responding to a request for information, and the dominant purpose of these communications was the seeking and giving of such legal advice. The Press considers that this falls within the definition of Legal Advice Privilege as set out in the Commissioner's published guidance on section 42.
19. The Press says the advice was intended to ensure it was meeting its legal obligations, and therefore the advice was provided in a legal context. The Press notes that the complainant has asserted that in-house legal advisors are not protected LPP. The Press disputes this assertion and has referred to the House of Lords decision in *Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48* . The Press is correct in this regard; in-house legal advisors are protected by LPP.
20. The Press notes that the relationship between a business client and its in-house legal advisors is in a professional capacity. Given the ongoing correspondence with the complainant, including matters which were handled outside of the remit of the Freedom of Information Act, the Press says it is clear that the clients expect to be able to have free and frank discussions when dealing with a matter of this nature. The Press has referred to the Commissioner's decision in FS50880167, noting that this particular complainant submits significant amounts of correspondence, in great detail and this generates a need to seek legal advice to ensure that all points are noted and dealt with where appropriate. In particular, the complainant has repeatedly threatened legal action against the Press in relation to a particular book published by the Press. The Press says that although the focus of its application of

section 42 is legal advice privilege, were it necessary to do so, it would also be entitled to rely on litigation privilege.

21. The Press has confirmed that, based on the Commissioner's guidance, it considers that the withheld information is covered by legal advice privilege: each item of correspondence being withheld is between a client and a lawyer acting in a professional capacity, for the dominant purpose of obtaining and providing legal advice, and imparted in circumstances that led to an expectation of confidence.
22. The Press acknowledges that the correspondence in itself is often relatively anodyne in relation to the instructions and the advice given when dealing with this complainant's requests. It goes on to say that, notwithstanding this, the principle that the clients may seek impartial and professional guidance when dealing with a difficult legal situation is unaffected. It is one which is essential to the integrity of the justice system and the very high importance given by the law to legal professional privilege.
23. As has been noted, the Commissioner has viewed the material that the University is withholding. She is satisfied that, although some of it is somewhat mundane, it is nonetheless correspondence between clients and a lawyer acting in their professional capacity for the dominant purpose of obtaining and providing legal advice about the University's response to FOIA requests the complainant had submitted. In addition, since the complainant had been in a lengthy correspondence with the Press about a particular book, the subject of the legal advice remained 'live' at the time of the request. This is because it may have been drawn on again in the future if the complainant continued to correspond with the Press about the same matter and submitted further requests for information. Furthermore, the complainant had also indicated that he intended to pursue legal action against the Press.
24. The Commissioner is satisfied that the information the Press is withholding under section 42(1) engages that exemption because it is subject to LPP. She has gone on to consider the public interest.

Public interest test

Public interest in maintaining the exemption

25. In its correspondence to the complainant, in its submission, the Press has noted the general public interest inherent in the section 42(1) exemption. This will always be strong due to the importance of the principle behind legal professional privilege: 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. The material is legally privileged and there is weight in that principle in itself, that of solicitor/client confidentiality.

Public interest in disclosing the information

26. The complainant considers that the Press (deliberately) mishandled his previous requests for information. In his request for an internal review the complainant argued that there is a public interest in the public being able to trust that its public authorities abide by the law, the FOIA in this case. The complainant said that he considers that he has a duty as a citizen to hold that authority to account, regardless of whether or not the request concerns a matter of personal interest to him. The complainant went into more detail about this matter in his complaint to the Commissioner.

Balance of the public interest

27. The Commissioner does not consider that the complainant has provided her with compelling evidence that the Press deliberately mishandled his previous requests. (They did not consider this specific concern but the Commissioner notes that, in her decisions referred to in paragraph 5, she found that the Press had complied with the FOIA.) Such evidence might sway the balance a little in favour of disclosing the disputed information. The public interest in the Press being open and transparent has been met through the Press providing some information in response to the current request, in response to previous requests from the complainant and through its general correspondence with him. In the Commissioner's view such public interest in the subject that is the focus of the complainant's request as there may be is substantially weaker than the very strong public interest in lawyers and clients being able to talk frankly and openly with each other. For this reason, the Commissioner is satisfied that the balance of the public interest falls in favour of maintaining the section 42(1) exemption in this case.

Right of appeal

28. 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

29. 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.
30. 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

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