

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 6 July 2022

**Public Authority:** Chief Constable of South Wales Police  
**Address:** [foi@south-wales.pnn.police.uk](mailto:foi@south-wales.pnn.police.uk)

**Decision (including any steps ordered)**

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1. The complainant requested a copy of legal advice concerning the supply of crack pipes. South Wales Police withheld the information requested under section 42 (legal professional privilege) of the FOIA. The Commissioner's decision is that South Wales Police correctly applied section 42 to the withheld information. The Commissioner does not require any steps to be taken.

**Request and response**

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2. On 24 July 2021, the complainant wrote to South Wales Police and requested information in the following terms:  
  
"I request a copy of legal advice to Chief Constable Vaughan regarding Chief Constables and PCC's signing a letter of comfort to drug workers which allows them to supply crack pipes to crack users as a harm reduction and protects them from prosecution under Section 9, Misuse of Drugs Act 1971".
3. South Wales Police responded on 19 August 2021 and stated that the information requested was exempt under section 42(1) of the FOIA.
4. On 19 August 2021 the complainant requested an internal review of South Wales Police's refusal to disclose the information requested.

5. South Wales Police provided the outcome of its internal review on 15 October 2021 and upheld its decision that the information was exempt under section 42(1) of the FOIA.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 1 November 2021 to complain about the way their request for information had been handled.
7. The scope of the Commissioner's investigation into this complaint is to determine whether South Wales Police correctly applied section 42(1) to the request.

## **Reasons for decision**

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### **Section 42 – Legal professional privilege**

8. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
9. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI (EA/2005/0023)* ("Bellamy") 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 their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
10. There are two categories of LPP, litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. In this case, South Wales Police considers advice privilege applies.

11. Having inspected the withheld information the Commissioner is satisfied that it comprises a communication that, at the time it was made, was confidential; made between a client and professional legal adviser acting in their professional capacity; and made for the sole or dominant purpose of obtaining legal advice.
12. The Commissioner has seen no evidence to suggest that the information was publicly known at the time of the request and there is therefore no suggestion that privilege has been lost in this case. Consequently he finds that the exemption at section 42(1) of FOIA is engaged in respect of all of the withheld information.
13. As the Commissioner is satisfied that the withheld information is subject to LPP, he has concluded that section 42 of the FOIA is engaged. He will now go on to consider the public interest test.

### **Public interest arguments in favour of disclosing this information**

14. South Wales Police accepts that there is a public interest in public authorities being accountable for the quality of their decision making and ensuring that decisions are made on the basis of good quality legal advice.
15. In their internal review request the complainant pointed out that the issuing of crack pipes to users is a proven harm reduction process in the same way as needle exchange programmes. However, the complainant advised that the issuing of crack pipes is not permitted under the Misuse of Drugs 1971. However, the complainant explained that there is a process that can be used to indemnify drug workers from prosecution under section 9 of the Misuse of Drugs Act 1971 for the supply of crack pipes whereby Chief Constables and Police and Crime Commissioners can sign a letter of comfort indemnifying drug workers against prosecution for issuing crack pipes.
16. The complainant stated that "In light of the increasing number of deaths from crack/cocaine and the desire amongst senior Police Officers to protect lives it [sic] wholly unjustifiable of an unelected legal officer to hide his/her life impacting advice behind a section of the Freedom of Information Act". The complainant considers it is in the public interest for the advice to be published, scrutinised and if necessary challenged in court.

### **Public interest in favour of maintaining the exemption**

17. South Wales Police referred to the inherent strong public interest in maintaining the principle behind LPP in safeguarding openness in communications between a client and his or her legal advisor to ensure

access to full and frank legal advice. This concept is fundamental to the administration of justice.

18. South Wales Police considers it important for the effective conduct of the police service that it is able to obtain high quality, comprehensive legal advice from its lawyers. Without such advice, the quality of its decision making would be severely prejudiced.
19. In this case the content of the legal advice deals with the management of drugs in the community in a way that may reduce the impact on the public. South Wales Police does not consider that there is any significant public interest in disclosure which could override the public interest inherent in the concept of LPP. It also considers that additional weight should be afforded to the public interest in maintaining the exemption in this case as the legal advice was provided to protect the rights of individuals and because it relates to the support and management of one of the most vulnerable groups in society.

### **Balance of the public interest test**

20. In balancing the opposing public interest factors under section 42, the Commissioner considers it necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of LPP. The general 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. A weakening of the confidence that parties have that 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.
21. 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 *Council 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”.
22. The Commissioner understands the crux of the complainant's case is that disclosure is required in order to scrutinise and, if necessary, challenge the legal advice in court. The Commissioner accepts that there is considerable legitimate public interest in disclosure of the withheld information to assist the public in understanding the background and

legality of any decisions made in relation to the supply of crack pipes to drug users by drug workers. The Commissioner recognises the importance of any measures to reduce harm for people who smoke crack cocaine. The Commissioner also accepts that in general terms weight can be attached to transparency and accountability, and there is a public interest in knowing the quality of legal advice received and whether South Wales Police chose to follow or go against it

23. The Commissioner considers that there is a very strong public interest in South Wales Police 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 and may even have an impact upon the extent that legal advice is sought. This would not be in the public interest.
24. In weighing up the public interest in this case whilst the Commissioner accepts that there are strong arguments in favour of disclosure, he does not consider that the weight of those arguments, when added together, is enough to outweigh the public interest arguments in favour of maintaining the exemption. The commissioner considers that the balance of public interest lies in withholding the information and protecting South Wales Police's ability to obtain free, frank and high quality legal advice without the fear of premature disclosure. The evidence presented is not sufficient to outweigh or override the inbuilt public interest in the information remaining protected by LPP.
25. In view of the above, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure and South Wales Police have correctly applied section 42(1).

## Right of appeal

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26. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**