

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2024

Public Authority: Judicial Appointments Commission

Address: FOIA@judicialappointments.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information from the Judicial Appointments Commission (JAC), including information relating to the Qualified Person and outreach events conducted by the JAC.
2. The JAC refused to provide some of the requested information, citing sections 42(1) (legal professional privilege) and 40(2) (personal information) of FOIA.
3. The Commissioner has considered the JAC's application of section 42(1) to the information withheld by virtue of that exemption.
4. The Commissioner's decision is that section 42(1) is engaged and that the public interest favours maintaining the exemption.
5. The Commissioner requires no steps to be taken as a result of this decision.

Background

6. The Commissioner acknowledges that the context of part 1 of the request relates to the qualified person (QP), for the purposes of section 36 of FOIA, for information held by the JAC.

Request and response

7. On 14 June 2023, the complainant wrote to the JAC and requested information in the following terms:

“1. I understand that the Ministerial authorisation under section 36 of the Freedom of Information Act (FOIA) was only issued to [name redacted] on 10 October 2022. Please provide all instructions to counsel, advice and communication leading to the issue of the said Ministerial authorisation granted to [name redacted] on 10 October 2022. If privilege is sought in respect of these documents, please state why, and provide details of how the public interest test in section 40(2) [sic] of the FOIA justifies the documents being withheld.

2. Please provide details of all outreach events conducted by the JAC (whether or not jointly with the Judicial Office or others) in the years from 2016 to 2022.

3. Please provide all the material (including situational questions, answers and marks allocated for the answers) used for each of the above outreach events.

4. Please provide details of where the above material was taken from. If the material was prepared by an outside organisation(s), please provide details of that or those organisations, specifying in each case what material they prepared”.

8. The JAC responded on 10 July 2023. In response to part 1, it confirmed it holds information within the scope of that part of the request, namely two email chains and a submission. It withheld one of the email chains in its entirety, citing section 42(1). It provided the remaining information, with redactions applied, citing sections 40(2) and 42(1). In response to parts 2 and 3, it provided information to the complainant. In response to part 4, it said that the material can mostly be found on its website.
9. The complainant responded on 26 July 2023. They sought confirmation about the amount of material supplied in relation to part 3 and a review of the handling of part 1, particularly in relation to the public interest test.
10. Following an internal review, the JAC wrote to the complainant on 22 September 2023. It confirmed its application of sections 42(1) and 40(2) to the information in scope of part 1. It also confirmed that it considered its response to parts 2-4 was satisfactory.

Scope of the case

11. The complainant disputed the JAC's application of section 42 to the information in scope of part 1 of the request. They told the Commissioner that they consider that "the public interest in favour of disclosure weighs more heavily than legal advice privilege and warrants full disclosure".
12. While they acknowledged that the JAC had disclosed information in response to part 3 of the request, the complainant expressed concern that the JAC had not provided the confirmation they requested.
13. During the course of the Commissioner's investigation, the JAC confirmed its application of section 42(1) to the withheld information in scope of part 1 of the request. It also provided the Commissioner with a copy of the disputed withheld information.
14. The analysis below considers the JAC's application of section 42(1) of FOIA to the withheld information.
15. The Commissioner has also considered the concern raised by the complainant, regarding the JAC's handling of part 3 of the request, in 'Other matters' at the end of this notice.

Reasons for decision

Section 42 legal professional privilege

16. Section 42(1) of 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. LPP protects the confidentiality of communications between a lawyer and client.
17. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
18. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the 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."

19. 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 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.
20. In this case, the JAC is relying on legal advice privilege.
21. In correspondence with the complainant, the JAC described the withheld information as "information provided by Legal Professionals as part of their role in dealing with advising the JAC".
22. Similarly, in its submission to the Commissioner, it explained that, in the withheld information, lawyers are advising in relation to the issue of the QP authorisation:

"... and advice was given by the lawyers in their capacity as legal advisers".
23. From the evidence he has seen, the Commissioner is satisfied that the withheld information falls within the definition of LPP. He is therefore satisfied that the exemption provided by section 42(1) of FOIA is engaged.

Public interest test

24. Section 42 is a qualified exemption and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exemption being maintained.

Public interest arguments in favour of disclosure

25. The JAC recognised the public interest in transparency. It accepted that greater transparency makes government more open and accountable.

26. Acknowledging that the JAC cited transparency as an argument in favour of disclosure, the complainant told the JAC that there were 'many other' public interest factors which it had not dealt with.
27. In that respect, they considered that "the intense public scrutiny that the JAC has been subject to in recent weeks" is a relevant argument in favour of disclosure. They also argued that, given that the QP authorisation is now in place, the documents in respect of which privilege is claimed "have been rendered academic".
28. They considered that, in the circumstances, the public had a right to know what advice was obtained by the JAC on that issue.

Public interest arguments in favour of maintaining the exemption

29. In favour of maintaining the exemption, the JAC argued that protecting the principle of legal professional privilege is in the public interest:

"... as it ensures that organisations can seek legal advice and that such legal advice can be given freely and frankly, to enable decisions to be made in a fully informed legal context".

30. It argued that disclosure of legal advice has a high potential to prejudice the organisation's legal interest:

"... both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented frankly and impartially".

31. It re-iterated these arguments in its submission to the Commissioner.

Balance of the public interest

32. The Commissioner's guidance¹ to public authorities on the public interest test states:

"In carrying out the public interest test, you should consider the circumstances at the time you respond to the request in accordance with statutory timeframes for compliance. That is, at the 20 working days limit.

[...]

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit8>

The [Montague] decision also means that the ICO will take a similar approach when investigating complaints under section 50 of FOIA. That is, the Information Commissioner will assess how you carried out the public interest test by reference to the time of your decision which will not include the time of the internal review, if you conducted one”.

33. The Commissioner is mindful of the arguments, put forward by the complainant, regarding the relevance of the legal advice. In accordance with his guidance, the Commissioner has assessed the public interest balance on the basis of how matters stood at the time of the JAC’s response to the request.
34. He is also mindful that the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption. He recognises, for example, that the fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing further information about it. It reflects that there has been some public interest in the subject matter, but this does not mean that further information necessarily needs to be disclosed.
35. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.
36. 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, which in turn is fundamental to the administration of justice.
37. The Commissioner recognises that the complainant believes that the public has a right to see the legal advice obtained by the JAC in relation to the matter of the QP. Clearly, they consider that the balance of the public interest favours disclosure in this case.
38. While the Commissioner accepts the undoubted public interest in the proper discharge of their public responsibilities by the JAC, the issue to be determined in this case relates to the public interest in disclosure of communications subject to LPP.
39. The Commissioner is mindful of the following from his guidance:

“What is quite plain, from a series of decisions beginning with *Bellamy v IC EA/2005/0023*, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications

between lawyer and client, which the client supposes to be confidential”.

40. In reaching his decision, the Commissioner has taken into account the significance of the actual information and what it reveals. He has also taken into account that, at the time of the request, the legal advice was still recent.
41. In order to conclude that the balance of the public interest favours disclosure, the Commissioner must be satisfied that any significant public interest in disclosure is sufficient to outweigh the normal interest in protection of LPP.
42. In this case, having weighed the factors for and against disclosure, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Other matters

43. The complainant disputed that the JAC had provided an adequate response when, at internal review, they asked for confirmation about the material supplied in response to part 3 of the request.
44. The Commissioner encourages complainants to raise all their concerns when initially asking a public authority to undertake an internal review and, later, to clarify or expand on these when submitting a complaint for him to investigate.
45. In this case, in the absence of any such arguments having previously been raised, and having viewed the information provided by the JAC in response to that part of the request, the Commissioner has not pursued this matter further.

Right of appeal

46. 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

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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF