

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 August 2019

Public Authority: Information Commissioner

Address: Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Note: This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

Decision (including any steps ordered)

1. The complainant has requested information associated with revisions made to the ICO's published guidance on section 36 of the FOIA. The ICO released some information. It withheld other information under section 42(1) (legal professional privilege) and said that the public interest favoured maintaining this exemption.
2. The Commissioner's decision is as follows:
 - The information that the ICO has withheld under section 42(1) of the FOIA is exempt information and the public interest favours maintaining the exemption.

3. The Commissioner does not require the ICO to take any remedial steps.

Request and response

4. On 3 November 2018 the complainant wrote to the ICO and requested information in the following terms:

"This is a request to the Information Commissioner's Office for information held in its role as a public authority within the meaning of the Freedom of Information Act, Schedule 1. My Request of 12 February 2017 related to the same subject matter, but with reference to the date of 9 December 2015.

On behalf of the Commissioner it was stated on 9 July 2015: The Guidance states that where another officer has been formally given that post holder's responsibilities on an acting basis, then that officer is effectively the qualified person. On 9 December 2015 it was stated: the Commissioner intends to revise this paragraph of the Guidance so that the intended meaning is clear paragraph 13 is capable of being misinterpreted to preclude delegation in the third situation. That third situation was: where a formal delegation has taken place during a period of absence (including situations where there is a temporary vacancy in the relevant role), such that the person to whom authority is delegated stands in the shoes of the QP during the period of the QP's unavailability.

Those were references to the March 2015 version of the Guide.

The recorded information the subject of the Request is:

All information brought into existence since 19 March 2015 and held in respect of the consideration and/or implementation and/or communication of possible or intended revisions to paragraph 13 of the March 2015 Guide; to include those data more specifically enumerated below.

I have used 19 March 2015 as the start date for the FOIA search and confirmation, as my Request of 12 February 2017 was refused in part because of the propinquity of its date to the stated process of revision, said then to be still live as at 10 January 2017.

The March 2015 version of the Guide advised as follows:

13. The public authority cannot choose the qualified person themselves; nor can the qualified person delegate the authority to someone else. If there is no one currently in that post, and another

officer has been formally given that post holder's responsibilities on an acting basis, then that officer is effectively the qualified person. This is not the case if the qualified person is simply unavailable for a short time, eg on leave.

The August 2018 version omits the previous wording, If there is no one currently in that post as well as the reference to another person acting as a qualified person (QP). In place of that advice there is advice in favour of formal delegation in any case of unavailability of the QP, including a blanket scheme of delegation to another person to be triggered whenever a QP is absent for any reason.

The parallel Ministry of Justice Guidance advised: Qualified person: The decision in section 36 on whether a disclosure would or would be likely to have the prejudicial or inhibiting effects specified can be taken only by a qualified person. The qualified person cannot delegate this decision making function to others.

The MoJ wording reflected the wording of section 36, which on its face does not provide for any delegation or similar authorization by a public authority. Version 3.1 of the ICO Guide cites no case law authority for the revised wording.

This present Request includes recorded information held by the ICO which does any of the following:

1 evidences the making of the decision or decisions which led to version 3.1

2 includes the wording or draft wording of any possible or intended revision

3 evidences discussion or consultation undertaken either within the ICO or with others concerning the scope or the wording of the intended revision or any possible alternative forms of any such revision

4 amounts to the name and reference of any decided case law (including any case reports pre-dating 19 March 2015) relied upon or put forward as justification for (a) delegation of the QP role; (b) the need for such delegation to be formal rather than informal; and (c) the possibility of a scheme of delegation to have automatic effect in the case of any period of absence.

I do not seek copies of legal advice or requests for such insofar as that may be privileged. But I do seek to know what case law information (in the public domain) including tribunal precedents may have been cited in requests for, or the provision of, such advice. For the avoidance of doubt I seek information as to how any revision process

was governed by the Framework document sent to me in response to my 12 January 2017 Request."

5. The ICO responded on 3 December 2018. It released some information, namely internal communications about amendments made to the ICO's section 36 guidance, and a copy of that guidance. The ICO withheld some information – communications about First Tier Tribunal (FTT) appeals brought by the complainant - under section 42(1) of the FOIA. It said the public interest favoured maintaining the exemption.
6. The ICO provided an internal review on 4 January 2019 in which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 28 January 2019 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on the ICO's application of section 42(1) to information it has withheld, and the balance of the public interest.
9. In subsequent correspondence to the Commissioner the complainant has indicated that he wants the Commissioner to take into account the particular Ministry of Justice (MoJ) guidance that discusses section 36 of the FOIA to which the complainant refers in his request. The Commissioner's investigation is, as above, on whether the ICO can rely on section 42(1). As such, she does not intend to consider this MoJ guidance as it is not relevant to this investigation.

Reasons for decision

Section 42 – legal professional privilege (LPP)

10. Section 42(1) of the FOIA 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."

11. This exemption is subject to the public interest test.
12. The purpose of 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 legal professional privilege evolved to make sure communications between a lawyer and his or her client remain confidential.

13. The ICO has provided the Commissioner with copies of the information it is withholding under section 42(1). It comprises, first, communications sent between November 2015 and May 2016 concerning FTT appeal reference EA/2015/0120 – and an annotated document associated with that appeal sent as an attachment. EA/2015/0120 concerned a related complaint the complainant had submitted to the Commissioner about a separate public authority, which she had considered under reference FS50552668.
14. The ICO has confirmed that the material from 2015/2016 had previously been withheld from disclosure in response to a previous request from the complainant in January 2017. The matter was the subject of the Commissioner's decision in FS50676914 on 20 September 2017. The Commissioner had found that the ICO could rely on section 42(1) to withhold that information and her decision was the subject of FTT appeal reference EA/2017/0232. The ICO has confirmed that the exemption under section 42(1) continues to apply to this information.
15. The withheld information also includes communications from 2017 concerning the FTT appeal reference EA/2017/0232 and a document associated with that appeal sent as an associated attachment.
16. With regard to the material from 2017, the ICO says that although the complainant specifies in his request that he was not seeking privileged information, these communications fall within the scope of his request, are privileged and are therefore being withheld under section 42(1).
17. The ICO notes that LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice and communication and/or documents created by or for lawyers for the "dominant" (main) purpose of litigation.
18. It argues that the issues involved here, ie information associated with the ICO's section 36 guidance - are still very much 'live' in that they continue to be the subject of open appeals. The Commissioner has reviewed the previews of live appeal cases published on the HM Courts and Tribunal Service's website and notes that this is the case. The ICO argues that during the course of the complainant's appeals, amongst other things, information has been exchanged between solicitors and client. Where these communications contain information that falls within the scope of the request, that information is subject to legal professional privilege. As such, the ICO considers that the information it

is withholding falls within the scope of section 42(1) of the FOIA, and is exempt.

19. The ICO has gone on to confirm that the legal advice here has not lost its privilege because, to the best of its knowledge and belief, the information has not been disclosed in any other forum. Such disclosure would have rendered LPP no longer applicable.
20. The Commissioner has noted the FTT appeal EA/2017/0232, above. At the time of the current request, the complainant's subsequent appeal to the Upper Tribunal with regard to the FTT's decision in EA/2017/0232 was ongoing. (The Upper Tribunal made its decision in January 2019.) In addition, and as has been noted at paragraph 18, at least one other related appeal case is currently live. As such, the Commissioner agrees with the ICO that, while the situation may have moved on since the complainant's earlier request of January 2017, the issues involved were still 'live' at November 2018 and remain live to date.
21. The Commissioner therefore finds that all the withheld information – the email communications and attachments to those communications – attracts litigation privilege. With regard to the attachments, in her published guidance on section 42, the Commissioner advises that any enclosures or attachments to a communication are usually only covered by LPP if they were created with the intention of seeking advice or for use in litigation. Having reviewed them, the Commissioner considers that the attachments in this case satisfy that criteria. She also finds that at the time of the request the privilege had not been waived, and consequently the Commissioner is satisfied that the ICO correctly applied section 42(1) to the withheld information.
22. Despite the information being exempt from disclosure under section 42(1) at the time of the request, it might still be disclosed if the public interest in disclosing the information is greater than the public interest in maintaining the exemption. The Commissioner has therefore gone on to consider the public interest arguments with respect to both requests.

Public interest test

Public interest in maintaining the exemption

23. The ICO has told the Commissioner that, having considered the public interest test, and the factors in favour of disclosing and withholding the information, it takes the view that this information is currently part of continuing legal cases. It says it would be particularly reluctant to disclose the information at this time because the complainant still has open appeals at the FTT.

24. The ICO argues that the general public interest inherent in the section 42(1) exemption 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.
25. 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 ICO acknowledges that there is a public interest argument that making this debate – which concerns the section 36 exemption - available to the world at large would help the understanding of the issues around delegated authority relating to section 36 of the FOIA. However, the ICO says that this interest this would currently be undermined by the ongoing and directly linked appeals proceedings and the debate may change subject to their conclusion.
27. In his internal review request, the complainant put forward arguments as to why the issue – ie the section 36 guidance debate - was no longer 'live' (namely that time had moved on and positive regulatory action had been taken). The complainant did not however put forward any public interest arguments for the information's disclosure. Nor has he put such arguments to the Commissioner.

Balance of the public interest

28. As has been discussed above, the Commissioner is satisfied that the matters covered by the complainant's current request were 'live' at the time of the request. In addition, the Commissioner is aware that the complainant has subsequently submitted another complaint to her about the ICO's handling of another request for information that he submitted to it (on the same matter). The possibility of further litigation in the future is therefore real. The Commissioner considers that any public interest that there may be in the subject that is the focus of the complainant's request 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

29. 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@hmcts.gsi.gov.uk

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

30. 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.
31. 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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