

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2014

Public Authority: Legal Ombudsman

Address: PO Box 6806
Wolverhampton
WV1 9WJ

Decision (including any steps ordered)

1. The complainant requested recordings of calls between investigators at the Legal Ombudsman and staff at a firm of solicitors. The Legal Ombudsman confirmed that it holds the information but refused to disclose it citing sections 44 (prohibitions on disclosure) and 40 (personal information) of FOIA.
2. The Commissioner has investigated the Legal Ombudsman's application of section 44. His decision is that the Legal Ombudsman was entitled to apply section 44(1)(a) to the withheld information. He requires no steps to be taken as a result of this decision notice.

Background

3. The Legal Ombudsman is an ombudsman scheme set up to resolve complaints about lawyers in England and Wales. It was set up by the Office for Legal Complaints (OLC) under the Legal Services Act 2007.

Request and response

4. Following earlier correspondence, the complainants wrote to the Legal Ombudsman on 29 January 2014 in the following terms:

"Could you please provide all telephone recordings between February 2013 – December 17 2013 as requested for both [named

investigator] and [named investigator]'s contact with Scott Fowler over both our complaints as accepted by the Legal Ombudsman".

5. The Legal Ombudsman responded on 28 February 2014. It refused to provide the information requested citing section 44(1)(a) of the FOIA (prohibitions on disclosure) by virtue of the Legal Services Act 2007 (LSA07). It explained that as it was unable to rely on section 152(3)(d) LSA07 – consent - it was lawfully unable to release the requested information.
6. The complainants requested an internal review on 24 April 2014. In respect of information relating to the telephone records of the investigators' contact with the firm of solicitors it cited an extended timeframe of February 2013 to April 2014.
7. Following an internal review, the Legal Ombudsman wrote to the complainants on 23 May 2014. It upheld its application of section 44 in relation to the call recordings. However, it additionally considered that the information engages the Data Protection Act and sections 40(3) and 40(4) of FOIA (personal information) on the basis that the recordings are the personal data of the lawyer with whom the conversations took place.

Scope of the case

8. The complainants provided the Commissioner with the relevant documentation on 29 September 2014 to complain about the way their request for information had been handled.
9. They told the Commissioner:

"The Legal Ombudsman has refused to supply telephone conversations between the firm and the Investigator regarding our case as we were not party to them".
10. The withheld information in this case comprises call recordings between staff at the Legal Ombudsman and staff at the firm of solicitors concerned. The complainants were not party to the calls.
11. The Commissioner considers that the scope of the request in this case relates to information between February 2013 and December 17 2013 – the dates specified in the original request. He considers the scope of his investigation to be the Legal Ombudsman's application of sections 40 and 44 FOIA to that information.

Reasons for decision

Section 44 prohibitions on disclosure

12. Section 44 of the FOIA provides that:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court."

13. In this case the Legal Ombudsman considers section 44(1)(a) applies.

Is disclosure prohibited by or under any enactment?

14. The Legal Ombudsman explained that the enactment in question is the Legal Services Act (LSA) 2007. It told the Commissioner that section 44 FOIA read in conjunction with section 151 LSA provides a prohibition on disclosure.

15. Section 151 LSA states:

"Section 151: Restricted information

(1) Except as provided by section 152, restricted information must not be disclosed—

(a) by a restricted person, or

(b) by any person who receives the information directly or indirectly from a restricted person.

(2) In this section and section 152—

"restricted information" means information (other than excluded information) which is obtained by a restricted person in the course of, or for the purposes of, an investigation into a complaint made under the ombudsman scheme (including information obtained for the purposes of deciding whether to begin such an investigation or in connection with the settlement of a complaint);

"restricted person" means—

(a) the OLC,

(b) an ombudsman, or

(c) a person who exercises functions delegated under paragraph 22 of Schedule 15.

(3) For the purposes of subsection (2) "excluded information" means—

(a) information which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it;

(b) information which at the time of the disclosure is or has already been made available to the public from other sources;

(c) information which was obtained more than 70 years before the date of the disclosure".

16. The Legal Ombudsman explained that the calls in question are between investigators at its office and members of staff at the firm of solicitors subject to a complaint from the complainants. It told the Commissioner:

"We consider this information to be restricted information for the purposes of LSA section 151(2)".

17. During the course of the Commissioner's investigation, the Legal Ombudsman provided the Commissioner with a sample of the disputed calls.

Is the information 'restricted' information?

18. In considering whether the information is 'restricted information', the Commissioner has first considered whether the information is 'excluded information' as defined in section 151(3) LSA.
19. The information comprises recordings of calls from which, in the Commissioner's view, information relating to individuals can be ascertained. From the evidence he has seen, he accepts that the participants and subject matter are clearly identified. In the Commissioner's view, the definition contained in section 151(3)(a) LSA cannot be met.
20. Section 151(3)(b) LSA states that information is excluded information if it is or has already been made available to the public from other sources. In this case, the Commissioner has not been provided with any evidence to show that the disputed information meets those criteria.

21. With respect to section 151(3)(c), the Commissioner notes that it is not disputed that the information was obtained more recently than the timeframe specified in that subsection.
22. As the Commissioner is satisfied that the information does not meet the conditions described in subsections 151(3) (a) (b) or (c), he considers that the information is not 'excluded information' as defined by the LSA.
23. The Commissioner has next gone on to consider whether the information was obtained by a restricted person as described in section 151(2).
24. Having considered the matter, the Commissioner is satisfied that the requested recordings contain information that was obtained for the purposes of the investigation into a complaint made by the complainants under the ombudsman scheme. He is also satisfied that the recordings containing the information - conversations between the Legal Ombudsman staff and staff at the solicitors - were created for the purposes of the investigation.
25. He is therefore satisfied that the information is 'restricted information'.

Does section 152 LSA allow disclosure?

26. The Commissioner has next considered the provisions of section 152 LSA¹ which sets out the exceptions to section 151. Section 152 states, for example, that one restricted person may disclose information to another restricted person (section 152(1)) and that restricted information may be disclosed for a variety of specific, limited, purposes listed in section 152(3).
27. During his investigation, the Legal Ombudsman told the Commissioner that it considers section 152(2) LSA is the relevant subsection in this case.
28. The Commissioner has considered the various subsections of section 152 LSA in the context of this case to see if any of the exceptions to section 151 apply.
29. Disclosure under FOIA is disclosure to the world at large. It follows that section 152(1) cannot apply. Nor, having considered the matter, has the Commissioner found that any of the specific purposes listed in 152(3)

¹ <http://www.legislation.gov.uk/ukpga/2007/29/section/152>

apply. He therefore agrees that section 152(2) is the relevant subsection in the context of this case. That section states:

"Restricted information may be disclosed for the purposes of the investigation in the course of which, or for the purposes of which, it was obtained".

30. In its submission to the Commissioner, the Legal Ombudsman said:

"When investigating a complaint it is vital that the parties to the complaint are able to engage with us via telephone in an open and confidential manner.... In our view this goes to the heart of our ability to operate an independent and credible ombudsman service able to conduct effective investigations".

31. The Legal Ombudsman told the Commissioner that, in its view, section 152(2) LSA does not apply to the withheld call recordings:

"as there were no grounds for their release during the investigation or subsequently after the case was closed".

32. In that respect it drew the Commissioner's attention to the timing of the request, advising that the request was received '*post investigation following the final decision of an ombudsman*'.

Conclusion

33. In the Commissioner's view, the operation of the statutory bar in this case is dependent on the consideration of whether the information is classified as 'restricted information' and, secondly, whether there is provision in section 152 LSA to enable disclosure.

34. For the reasons given above, the Commissioner considers that the requested information is 'restricted information' but that there are no circumstances in which the Legal Ombudsman could have lawfully disclosed it.

35. The Commissioner therefore finds that the Legal Ombudsman correctly applied section 44(1)(a) to the withheld information.

36. Section 44 is an absolute exemption, which means that if information is covered by any of the subsections in section 44 then it is exempt from disclosure. There is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.

Other exemptions

37. As the Commissioner has decided that section 44 FOIA applies, he has not gone on to consider the Legal Ombudsman's application of section 40 FOIA to the same information.

Other matters

38. The complainants made submissions in relation to their interest in this information being disclosed. While he accepts that the complainants may have personal reasons for wanting access to the requested information, it is not for the Commissioner to comment on whether there has been wrongdoing or incompetence: that is not his role and is outside his jurisdiction. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (FOIA).
39. Nor is it within the Commissioner's remit to comment on the outcome of a complaint submitted to another regulator. In that respect, he notes that there is a separate service complaint process which can be followed if a person is unhappy with the service they receive from the Legal Ombudsman.

Right of appeal

40. 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

41. 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.
42. 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
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