

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2015

Public Authority: Office of the Sussex Police and Crime Commissioner

Address: Sackville House
Brooks Close
Lewes
East Sussex
BN7 2FZ

Decision (including any steps ordered)

1. The complainant asked the Office of the Sussex Police and Crime Commissioner (OSPCC) for an electronic copy of all recorded information it held about a Twitter account which had been set up by member of the public to parody the official OSPCC account. OSPCC provided some information but withheld part of the requested information, citing the section 42(1) FOIA exemption and deciding that the balance of the public interest favoured maintaining the exemption. This decision was upheld at internal review. Following his investigation, the Information Commissioner decided that OSPCC had acted correctly in withholding this information.
2. The Commissioner does not require OSPCC to take any steps to ensure compliance with the legislation.

Request and response

3. On 23 July 2014, the complainant wrote to OSPCC to request information in the following terms:

Under the Freedom of Information Act 2000, please provide me with an electronic copy of all recorded information you hold which refers or relates to the Twitter account @Sussex_PCC (ie. not the OSPCC Twitter account but the popular parody account).

4. OSPCC responded on 7 August 2014. It refused to provide the requested information, citing the section 42(1) FOIA exemption (legal professional privilege), and deciding that the balance of the public interest favoured maintaining the exemption.
5. This decision was upheld at internal review on 18 August 2014.

Scope of the case

6. On 6 October 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that, in his view, not all of the information he had requested, such as any preparatory discussions there might have been, could be covered by the exemption. He added that there was a strong and inherent public interest in transparency surrounding steps taken by an elected public authority to silence its critics and satirists with threats of legal action. He cited a range of legal precedents which he said supported his concern about transparency.
7. The Commissioner saw that the relevant information held by OSPCC comprised: legal advice to OSPCC; a letter of instruction to its legal adviser; two letters to a member of the public; an email from the Police and Crime Commissioner to the Chief Constable about the parody Twitter Account; and, screenshots from relevant websites. Information contained within the first two items was withheld from the complainant by OSPCC relying on the section 42(1) exemption and the Information Commissioner considered its application to that information. The remaining information has now been supplied to the complainant.
8. During his investigation the Commissioner reviewed the withheld information and considered carefully the representations he had received from both parties.

Reasons for decision

9. Section 42(1) FOIA states:

"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."

10. Section 42(1) FOIA therefore provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.

11. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending; and litigation privilege where litigation is contemplated or pending.
12. In representations to the Commissioner, OSPCC relied on advice privilege to withhold the requested information. This privilege attaches to communications between a client and their legal advisers, and any part of a document which evidences the substance of such a communication, where there is currently no pending or contemplated litigation.
13. The communication in question needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which is usually to be found by inspecting the documents themselves.
14. OSPCC said that application of the exemption to the withheld information was strengthened by the fact that the information had not been made available to the public or a third party without restriction. OSPCC maintained, and the Commissioner accepted, that the privilege attached to the withheld information had not been waived or lost.
15. The section 42(1) exemption is a class-based exemption, so that there is no requirement to demonstrate any "prejudice" that may occur to the professional lawyer client relationship if the information were to be disclosed.

In this matter the Commissioner has examined the withheld information and he is satisfied that it covers confidential communications between a legal adviser and client made for the dominant purpose of seeking or giving legal advice. Its principal purpose was to seek and give advice to OSPCC and it therefore merits the protection of legal advice privilege and he decided that the section 42(1) FOIA exemption is engaged.

Public interest test

16. Section 42(1) FOIA is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

17. There is an inherent public interest in disclosure of official information to ensure that public authorities are accountable for, and transparent

about, their actions and decisions that they have taken, and to further public debate. It is also in the public interest to make available information that can enhance public understanding of public authorities' decision making. Disclosure of any legal advice received could contribute to a better informed debate of the issues of the day.

18. The complainant said that, in his view, discussions preparatory to the giving of legal advice were not covered by the exemption. He also said that there was an obvious public interest in transparency about any inappropriate attempts by public authorities to silence critics and satirists with threats of legal action. He said there was a public interest in the electors of Sussex having access to the withheld information so as to inform their voting choices at the next election for PCCs even if there was no evidence of actual wrongdoing by OSPCC. He invited the Commissioner to consider legal precedents which he presented and which he said showed that a democracy was best served by vigorous public discussion of affairs, and that politicians were expected to possess a thicker skin than ordinary members of the public and take a robust and realistic approach to living in the 21st century. He added that lampooning the Establishment was age old and that even serious imputations were not actionable if no one would take them seriously.
19. For its part, OSPCC acknowledged that there is a general public interest in promoting transparency and accountability.

Public interest arguments in favour of maintaining the exemption

20. The Commissioner recognises that there is an important public interest in maintaining a client's ability to speak freely and frankly with a legal adviser in order to obtain appropriate legal advice which is a fundamental requirement of the English legal system.
21. OSPCC provided the Commissioner with representations supporting its position that the public interest favoured maintaining the exemption. OSPCC said that disclosing any legally privileged information would threaten the principle of legal professional privilege. The advice was still 'live' in that it could still be relied on by the OSPCC in relation to either the current complaint or any similar matter that might arise in the future.
22. OSPCC said it saw no public interest in being transparent about the specific legal advice it had received. OSPCC added that there had been no suspicion of any wrongdoing by it. OSPCC said that the advice was only of interest to the complainant and that his private interest in the information did not elevate it into a matter of public interest.

Balance of the public interest

23. The Commissioner recognises the public interest in ensuring that there is appropriate transparency and accountability by public authorities. He has also had regard for the strongly expressed view of the complainant that there should be freedom of expression for critics and satirists on the actions and attitudes of public authorities and elected public officials and that they should not be inhibited from commenting with threats of legal action.
24. As regards maintaining the exemption, the Commissioner recognises that the general public interest inherent in this exemption will always be strong due to the importance of the principle of safeguarding openness in communications between a legal adviser and client to ensure that the client can have access to full and frank legal advice, which in turn is fundamental to the administration of justice. This has been recognised in a succession of Tribunal decisions, for example in the case of *Bellamy (Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023))* where the Tribunal said that:
- “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.*
25. In *Bellamy* the then Information Tribunal described legal professional privilege as, *“a fundamental condition on which the administration of justice as a whole rests”*. The courts have recognised, as has the Commissioner, that inappropriate disclosure of legal advice would undermine this important common law principle. It is therefore relatively uncommon for the public interest test for the section 42 FOIA exemption to result in disclosure.
26. In this matter the Information Commissioner has seen that the legal professional advice given was still ‘live’ at the date of the request, and could still have been relied on by OSPCC. Having reviewed its content, he has seen no public interest inherent in disclosing the withheld information and he has seen nothing in his reading of the withheld information to raise any concerns about possible wrongdoing by OSPCC.
27. In deciding this matter, while acknowledging the weight of the arguments for disclosure, the Commissioner nevertheless considers that the balance of the public interest favours maintaining the exemption.

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@hmcts.gsi.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

Jon Manners
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