

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 June 2015

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to guidance provided to the Legal Aid Agency on Exceptional Case Funding. The Ministry of Justice (MoJ) confirmed it held information within the scope of the request. It provided some of that information but refused to disclose the remainder citing section 42(1) of FOIA (legal professional privilege).
2. The Commissioner's decision is that section 42(1) is not engaged and the information was therefore withheld incorrectly.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - disclose the withheld information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Background**

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5. Under the FOIA, the Legal Aid Agency (LAA) is not a public authority itself, but is an executive agency sponsored by the MoJ. This Decision Notice refers to the MoJ as the public authority.

6. With respect to legal aid, guidance on the *gov.uk*<sup>1</sup> website states:

*"Sometimes clients can get legal aid even though their case is not in the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).*

*This is known as exceptional case funding (ECF) and these cases are dealt with by an ECF team within the Legal Aid Agency (LAA).*

*To qualify for ECF funding, a client must meet the ECF criteria as set out in LASPO and described in the [Lord Chancellor's funding guidance](#)".*

## **Request and response**

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7. On 3 December 2014 the complainant wrote to the Legal Aid Agency and requested information in the following terms:

*"I am making a request under the Freedom of Information Act for the following information:*

- 1. Guidance provided to LAA on Exceptional Case Funding*
- 2. Any training notes or additional guidance regarding Exceptional Case Funding*

*I have seen the Lord Chancellor's Guidance at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/309100/legal-aid-chancellor-non-inquests.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309100/legal-aid-chancellor-non-inquests.pdf) and am aware of this. I am seeking a release of any other guidance including training notes relating to Exceptional Cases Funding".*

8. MoJ responded on 19 January 2015. It confirmed it holds the requested information and provided some of that information to her. However, it refused to provide the remainder, citing the section 42 exemption of FOIA (legal professional privilege) as its basis for doing so.
9. The complainant requested an internal review on 19 January 2015. MoJ sent her the outcome of its internal review on 16 February 2015. It upheld its original position.

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<sup>1</sup> <https://www.gov.uk/legal-aid-apply-for-exceptional-case-funding>

## Scope of the case

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10. The complainant contacted the Commissioner on 17 February 2015 to complain about the way her request for information had been handled.
11. In correspondence with the complainant, MoJ described the withheld information as follows:

*"The information in question consists of training materials (Microsoft PowerPoint slides) prepared by external leading and junior Counsel for the purposes of advising lawyers (and individuals working for those lawyers) employed in the LAA's Exceptional Case Funding Team, as to how to determine applications for Exceptional Case Funding (ECF) pursuant to section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012."*
12. The following analysis covers MoJ's application of section 42(1) of FOIA to the withheld information.

## Reasons for decision

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### *Section 42 legal professional privilege*

13. 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. In other words, this exemption ensures that the confidential relationship between lawyer and client is protected.
14. Section 42 is a qualified exemption and is therefore subject to the public interest test; that is, information must be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

*Does the information attract legal professional privilege?*

15. There are two categories of legal professional privilege – 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.
16. In this case, MoJ considers that the withheld information is exempt under section 42(1) on the basis that the information attracts legal advice privilege. In that respect, MoJ told the complainant:

*"Some training notes or additional guidance were prepared by Counsel, for the purposes of advising the Exceptional Case Funding team as to how to determine applications for exceptional case funding pursuant to section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. I confirm that these have been prepared by Counsel to advise staff in the Exceptional Case Funding team. Although this advice has been recorded and conveyed, it does not alter their purpose, which is to provide legal advice to the Exceptional Case Funding team".*
17. The Commissioner consider that this form of LPP – legal advice privilege - covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice.
18. In the Commissioner's view, whether or not legal advice privilege applies to information is a question of fact which requires careful consideration of the relevant information in context.
19. The Commissioner has issued guidance on section 42 of FOIA<sup>2</sup>. That guidance states:

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

*"The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem".*

20. The information at issue in this case clearly relates to legal matters. However, on the basis of the above and having considered the disputed information and MoJ's submissions, the Commissioner is not satisfied that it is subject to legal advice privilege. While he accepts that the information may well represent communications between a client and their legal advisor acting in a professional capacity, in the Commissioner's view the slides do not appear to have been produced for the dominant purpose of providing legal advice.
21. In the Commissioner's view the primary motivation (and this is reflected in the nature of the information itself) was to provide generic training for caseworkers in the Exceptional Case Funding team regarding how to determine applications for exceptional case funding.
22. For these reasons, the Commissioner finds that section 42(1) of FOIA is not engaged.

*The public interest test*

23. In view of his finding that the exemption was not engaged, the Commissioner is not required to conduct the public interest test.
24. However, the Commissioner acknowledges that the issue of how the legal aid system operates, including with respect to eligibility for exceptional case funding, is a matter of some debate. He therefore considers it likely that, had the exemption been engaged, the public interest would favour disclosure.

## Right of appeal

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25. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

26. 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.
27. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**