

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 April 2016

**Public Authority:** Legal Ombudsman  
**Address:** PO Box 6806  
Wolverhampton  
WV1 9WJ

### Decision (including any steps ordered)

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1. The complainants requested information relating to telephone conversations between investigators at the Legal Ombudsman and a named barrister or staff at his chambers. 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 the 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 by virtue of the Legal Services Act (LSA) 2007. He requires no steps to be taken as a result of this decision notice.

### Request and response

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3. On 16 October 2015 the complainants wrote to the Legal Ombudsman and requested information in the following terms:

*"We are extremely keen to submit an FOI in which we would like to see:*

*1 - Transcripts of ALL conversations had between [name redacted] and any members, agents, employees or indeed any one acting on behalf of [barrister's name redacted]/Serle Court.*

*2 - We would like a dvd copy of ALL conversations had.*

*3 - We would like full unedited copies of all correspondence/communications between Serle Court, their agents, employees or indeed anyone acting on behalf of [name of barrister/Serle Court].*

*4 - We would like to know how [name redacted] got her job, what is her background/her CV?"*

4. The Legal Ombudsman responded on 13 November 2015. It refused to provide the information requested in parts 1 and 2 of the request citing section 44 (prohibitions on disclosure) and section 40(2) (personal information) of the FOIA. It refused to provide the information requested in part 3 of the request citing section 44 of the FOIA, however, the complainants were told that this information would be disclosed to them under The Legal Services Act, section 152, ie outside of the FOIA regime. It refused to provide the information requested in part 4 of the request citing section 40(2).
5. The Legal Ombudsman provided an internal review on 11 December 2015 in which it maintained its position.

## Background

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6. 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 (LSA) 2007<sup>1</sup>.
7. Sections 151<sup>2</sup> and 152<sup>3</sup> of the LSA are entitled 'Restricted information' and 'Disclosure of restricted information' respectively.
8. The explanatory notes for section 151 of the LSA state<sup>4</sup>:

*"Under this section, "restricted information" is any information that has been collected during an investigation of a complaint. This*

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2007/29/introduction>

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/151>

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/2007/29/section/152>

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2007/29/notes/division/7/6/2/39>

*section protects the complainant in that all such information is classed as confidential and, except as listed under section 152, must not be disclosed except to the extent that it is excluded information. Excluded information is information which was obtained more than 70 years before the date of disclosure, or which is already available to the public, or which is in an appropriately "anonymised" form so that information relating to a particular individual cannot be ascertained from it".*

9. The request in this case arises from a complaint to the Legal Ombudsman regarding a barrister who was instructed by the complainants.

### **Scope of the case**

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10. The complainants provided the Commissioner with the relevant documentation on 26 January 2016 to complain about the way their request for information had been handled.

11. The complainants told the Commissioner:

*"They refused to give us copies of the conversations they've had with [name of barrister redacted] and his chambers and also REFUSED to provide us with notes detailing the contents of communications....".*

12. On that basis, the Commissioner considers that the complainants are not disputing the Legal Ombudsman's response to part (4) of the request.

13. The Commissioner wrote to the complainants on 27 January 2016 advising that their case had been accepted and asking them to confirm whether they were satisfied with the Legal Ombudsman's response in relation to part (3) of the request. In particular, the complainants were asked to confirm whether the Legal Ombudsman had provided, albeit via a different access regime, the information in the scope of that part of the request.

14. No response was received from the complainants.

15. In correspondence with the Commissioner, the Legal Ombudsman confirmed, with respect to the information within the scope of part (3) of the request:

*"On 23 November 2015 this information was provided to [the complainants] by email as part of looking at their complaints about*

*[name redacted]. No information was withheld, and it was provided in the interests of resolving the differences between the two parties".*

16. In light of the above, and in the absence of any evidence of the complainants' dissatisfaction regarding part (3) of the request, the following analysis considers the Legal Ombudsman's application of exemptions to the information requested in parts (1) and (2) of the request.
17. During the course of his investigation, the Legal Ombudsman told the Commissioner, with respect to parts (1) and (2) of the request, :  
  
*"We shall deal with the above requests together as they appear to be the same request being made in different formats".*
18. The Commissioner notes that the Legal Ombudsman had taken the same approach in its correspondence with the complainants, considering those parts of the request together *"as they cover the same subject matter"*.
19. The withheld information within the scope of those parts of the request comprises telephone call recordings between staff at the Legal Ombudsman, and the barrister named in the request or his chambers.
20. The Legal Ombudsman considers that sections 40(2) and 44(1)(a) of the FOIA apply in this case.
21. The Commissioner has considered the application of section 44(1) by the Legal Ombudsman to recorded calls on a previous occasion<sup>5</sup>. In that case, the complainant requested recordings of calls between investigators at the Legal Ombudsman and staff at a firm of solicitors. While acknowledging the existence of other similar cases having been investigated, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with the FOIA.
22. The Commissioner's approach in this case has been first to consider the Legal Ombudsman's application of section 44 of the FOIA to the information requested at parts (1) and (2) of the request. If he decides

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<sup>5</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042963/fs\\_50539512.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042963/fs_50539512.pdf)

that the Legal Ombudsman incorrectly applied that exemption, he will then move on to consider its citing of section 40(2).

## Reasons for decision

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### *Section 44 prohibitions on disclosure*

23. 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.”*

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

*Is disclosure prohibited by or under any enactment?*

25. The Legal Ombudsman explained that the enactment in question is the Legal Services Act (LSA) 2007. It told the Commissioner:

*“[The requested] information was refused, in whichever format it is being requested, as we consider that section 44 (1)(a) FOIA (disclosure prohibited by or under any enactment) read in conjunction with section 151 Legal Services Act 2007 (LSA) provides a prohibition on disclosure”.*

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

27. With reference to the LSA, the Legal Ombudsman told the complainants:

*“At section 151 it provides that information that is obtained in the course or for the purposes of an investigation into a complaint made under the ombudsman scheme is to be classed as ‘restricted information’. Information classed as restricted information is prohibited from disclosure except as provided by section 152 of the Act. I do not consider any of the circumstances detailed in section 152 apply to your request, therefore you are not entitled to the information under the Legal Services Act. For this reason the information is prohibited under section 44 FOIA”.*

*Is the information restricted information?*

28. In its submission to the Commissioner in this case, the Legal Ombudsman said:

*"The calls in question are between the investigator and [name redacted] or his chambers .... The nature of the conversations is in relation to the complaint we are looking at, and have taken place for that purpose. Therefore we consider the information "restricted information" for the purposes of section 151(2) LSA.*

*Additionally we do not consider the information as falling within the terms of "excluded information" as defined by section 151(3) LSA. This is because firstly the participants of the conversation, and also the subject matter under discussion are clearly identified within the call recordings. Secondly it is not information already available from other sources, and was not obtained over 70 years ago".*

29. As noted above, the Commissioner has considered the application of section 44(1) by the Legal Ombudsman to recorded calls on a previous occasion.
30. Having previously considered the issue of restricted information for the purposes of section 151 LSA, the Commissioner does not consider it necessary to rehearse those arguments at length.
31. In the circumstances of this case, 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 the barrister or his chambers - were created for the purposes of the investigation.
32. He is therefore satisfied that the information is 'restricted information' for the purposes of section 151(2) LSA.

*Does section 152 LSA allow disclosure?*

33. In support of its withholding of the requested information, the Legal Ombudsman told the complainants that it did not consider any of the circumstances detailed in section 152 apply to the request.
34. While the Legal Ombudsman acknowledged that section 152(2) permits, amongst other things, disclosure for the purposes of an investigation, it told the complainants that it did not consider there were grounds to release the recorded information in this case.

35. It further explained:

*"The legislation we operate under places obligations on us about how and when we can or should release information. This protects both you and your lawyer.... When investigating a complaint it is important that the lawyer and complainants are able to engage with us via the telephone in an open and confidential manner. This goes to the heart of our ability to operate an independent and credible ombudsman service ...".*

36. The Legal Ombudsman also said:

*"...we have released what we consider relevant for the purposes of the investigation and that is another reason why we do not consider the exemption under Section 152(2) applies".*

37. The Commissioner has considered the provisions of section 152 LSA (disclosure of restricted information) which sets out the exceptions to section 151 (restricted information). 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).

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

*"(2) 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".*

39. In its submission to the Commissioner, the Legal Ombudsman explained the process it follows when investigating a complaint and confirmed that it had followed that process in this case. It also told him that the complainants had been provided with relevant information where that fell within its *"standard sharing of information when looking at a complaint"*.

40. However, with respect to the request for information in this case the Legal Ombudsman told the Commissioner:

*"... this request for information goes far beyond that, as they want the conversations with a third party ([name redacted]). In our view this goes to the heart of our ability to operate an independent and credible ombudsman service able to conduct effective*

*investigations. We do not consider the call recordings fall within section 152(2)".*

*Conclusion*

41. 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.
42. For the reasons given above, the Commissioner considers that the requested information is 'restricted information'. However, from the evidence he has seen, he is satisfied that there are no circumstances in which the Legal Ombudsman could have lawfully disclosed it.
43. The Commissioner therefore finds that the Legal Ombudsman correctly applied section 44(1)(a) to the withheld information.
44. 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*

45. In light of the above conclusion, the Commissioner has not considered the Legal Ombudsman's application of section 40(2) to the same information.



## Right of appeal

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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: 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)

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.

**Signed** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
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**Cheshire**  
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