

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2016

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

Decision (including any steps ordered)

1. The complainant has requested correspondence and communications within the Ministry of Justice (MOJ), or between the Legal Aid Agency (LAA) and the Foreign and Commonwealth Office, relating to the funding of a case where there had been some prospect of judicial review proceedings arising.
2. The Commissioner decided that, subject to disclosing the information listed for disclosure in the confidential annex to this decision notice for which no exemptions are engaged, MOJ has applied section 42(1) and 40(2) FOIA appropriately. He found that section 40(1) also applied to some of the withheld information. The Commissioner does not require MOJ to take any additional steps.

Request and response

3. On 26 March 2015, following correspondence with MOJ in the course of which the complainant appealed on behalf of a client over the withdrawal of the client's legal aid funding. The complainant wrote to MOJ and requested information in the following terms:

"Please provide us with copies of all correspondence and communications within the Ministry of Justice, or between the Legal Aid Agency and the Foreign Office, relating to the funding of this case. This request is to enable us to respond to the outcome of the review [of the decision to 'annul' funding of prospective judicial review proceedings] and to participate in any appeal (if applicable)."

4. Some correspondence was conducted with the LAA, an executive agency of MOJ, but MOJ is referred to throughout this notice for ease of reference.
5. MOJ responded on 27 April 2015 and refused the request relying on the exemption at section 12(2) FOIA.
6. Following an internal review MOJ wrote to the complainant on 5 June 2015 continuing to refuse the request but now relying on the section 42(1) FOIA (legal professional privilege) exemption; MOJ found that the balance of the public interest lay in withholding the relevant information. MOJ identified some information that was not caught by that exemption which it disclosed while redacting information that it considered to fall within the section 40(2) FOIA (Personal information) exemption.
7. MOJ told the complainant that it did not hold any communications with the Foreign and Commonwealth Office falling within the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 4 September 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered representations by both parties and his staff have reviewed the information being withheld. MOJ had already disclosed some information and, during the course of the Commissioner's investigation, MOJ disclosed some further information. However the complainant continued to contest application of the FOIA exemptions to the undisclosed information.
10. Having considered the representations of both parties, the Commissioner decided that much of the requested information had been correctly withheld under the section 42(1) and section 40(2) FOIA exemptions. Following his review of the information, the Commissioner prepared a schedule which forms a confidential annex to this decision notice and has been sent to MOJ only. This schedule details the information that the Commissioner decided had been correctly withheld and that which he decided should be disclosed.
11. MOJ confirmed to the Commissioner that it held no communications with the Foreign and Commonwealth Office falling within the scope of the information request.
12. The Commissioner first considered the application of the section 42(1) FOIA exemption to the information withheld by MOJ in reliance on that

exemption. MOJ had also applied section 40(2) FOIA (personal information) to that information. Where he found the section 42(1) FOIA exemption to have been correctly applied, the Commissioner did not proceed to consider the possible application of any other exemption to that same information.

13. The complainant invited the Commissioner to draw a distinction between MOJ and LAA and, having done so, to infer that MOJ might be interfering in the LAA decision making processes. As LAA is an executive agency of MOJ and therefore wholly owned and controlled by MOJ, the Commissioner did not accept the validity of this distinction.
14. The withheld information related to the funding of a specific matter and also contains the personal information of some junior MOJ officials. As set out in his confidential annex, the Commissioner considered the application by MOJ of the section 40(2) FOIA exemption (Personal information) to the information that was not covered by the section 42(1) FOIA exemption.
15. The Commissioner also noted that there was some information to which the section 40(1) FOIA exemption applied.

Reasons for decision

Section 42 FOIA – Legal professional privilege

16. Section 42 of 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".

17. 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.
18. MOJ explained to the Commissioner that it was relying upon legal advice privilege. Advice privilege attaches to communications between a client and their legal advisers and includes any information which evidences the substance of such a communication, where there is no pending or contemplated litigation.
19. The communication in question needs to have been made for the principal or dominant purpose of seeking or giving of legal advice. The determination of the dominant purpose is a question of fact which is usually to be found by inspecting the documents themselves.
20. The complainant said that a lawyer – client relationship capable of attracting legal professional privilege could not exist in this instance. He

said that MOJ's internal discussions could not properly be characterised as communications between a lawyer and client; they were instead internal and part of the MOJ administrative decision making process. He further considered that any legal advice obtained from outside of MOJ would need to be closely examined to see if the exemption had been properly claimed and whether the public interest required its disclosure.

21. MOJ told the Commissioner, and he accepted, that the lawyers' client in this matter was their Director of Legal Aid Casework.
22. The Commissioner has examined the relevant withheld information and is satisfied that it covers confidential communications between a legal adviser and client. He is further satisfied that the communications were made for the dominant purpose of seeking or giving legal advice. That legal advice was given to MOJ case officers to ensure that they were proceeding on a correct legal basis. The withheld information therefore attracts legal advice privilege.
23. Information does not attract legal professional privilege if the contents of the legal advice have been disclosed in which case the privilege would have been waived. The Commissioner's approach to waiver cases is that a reference to, or a brief summary of, legal advice, even if placed in the public domain, will not amount to waiver. Furthermore, if a very limited disclosure does not reveal the reasoning behind the conclusion or a considered examination of the relevant case law precedent and the way they apply to the case, then waiver will not have occurred. Ultimately, each case needs to be considered on its merits. In this matter MOJ confirmed that privilege had been maintained and the Commissioner has seen no evidence of waiver.
24. For the above reasons, the conclusion of the Commissioner is that the exemption provided by section 42(1) of the FOIA was engaged. This is a qualified exemption, therefore the Commissioner must go on to 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

25. There is an inherent public interest in disclosure of official information. This is to ensure that public authorities are accountable for and transparent about, decisions that they have taken. It also enables public debate and can enhance public understanding of governmental decision making. Disclosure of legal advice given to the government could also contribute to a better informed debate on the issues of the day.
26. The complainant said that the request followed a decision to withdraw funding of a specific case. He was concerned that there might have been

some 'interference' from outside of MOJ in arriving at the decision to withdraw funding which he said was unprecedented and arbitrary. He said that transparency was important in the circumstances and should weigh heavily on the scales in favour of disclosure. He saw the possibility of bias and a conflict of interest existing within MOJ such that there would be an overriding interest in openness and transparency.

27. The complainant was further concerned at the possibility of information being protected that would show evidence of malfeasance, fraud or corruption and said that there seemed to be no harm in revealing the legal reasoning behind providing, or not providing, public funding for a case.
28. For its part, MOJ accepted that there was a strong public interest in the disclosure of information relating to decisions about legal aid funding as this would be consistent with the government's wider commitment to transparency.

Public interest arguments in favour of maintaining the exemption

29. There is a strong public interest in protecting the confidentiality of communications between lawyers and their clients.
30. MOJ said that maintaining legal professional privilege supported the giving and receiving of proper legal advice and allowed a full and frank exchange of views between legal advisers and their clients. Disclosure could have a "chilling effect" and make lawyers less inclined to provide full and frank legal advice. MOJ said that in this instance there was a strong public interest in safeguarding the communications that attracted legal professional privilege to ensure access so that its case officers received full and frank advice and that this outweighed the public interest in disclosure.
31. MOJ said that there was the possibility of judicial review proceedings being initiated around the time the request was made and that disclosure of advice to its staff would unfairly prejudice MOJ's position.
32. In his decision, the Commissioner had regard for the then Information Tribunal's decision in *Bellamy and Secretary of State for Trade and Industry (EA/2005/0023)* which found 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 interest ... it is important that public authorities be allowed to conduct free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cases ..." (paragraph 35).

33. The Commissioner notes that at the time of the request the relevant legal advice had recently been given and was still 'live' since the matter in which the complainant had an interest had not been concluded.

Balance of the public interest

34. As regards maintaining the exemption, the Commissioner recognises the strong general public interest inherent in maintaining this exemption. This is because of the importance of the principle of safeguarding openness in communications between a legal adviser and client, to ensure that the client can access full and frank legal advice. This is fundamental to the administration of justice and has been recognised in a succession of Information Tribunal decisions, including *Bellamy*.
35. The Commissioner has considered the arguments put forward by both parties. In reaching his decision the Commissioner acknowledged the weight of arguments for disclosure in ensuring accountability and transparency. He has noted the complainant's concerns regarding the potential for a conflict of interest to arise and for the possibility of malfeasance arising within MOJ; however in his review of the withheld information the Commissioner saw nothing in its content to cause him concern. He also had regard for the fact that at the relevant time the advice was both recent and was still 'live'. On balance therefore he considered that the balance of the public interest favoured maintaining the exemption.

Section 40 – Personal information

36. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
37. The withheld information in this case relates to redactions applied to information within documents that MOJ disclosed to the complainant.
38. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the Data Protection Act 1998 (DPA). If it is not personal data then section 40 cannot apply.

Is the information personal data?

39. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and the individual must be identifiable from that information.
40. The DPA defines personal data as:

"...data which relate to a living individual who can be identified -

*(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

41. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
42. MOJ said that it had withheld information relating to junior officials within MOJ who did not have a public facing role and would not reasonably expect that their names would be disclosed under FOIA; it had also included information relating to the funding of a specific case. The Commissioner confirmed by inspection that the withheld information had been as described by MOJ. He decided that this information would both relate to and identify the parties concerned. The information is, therefore, personal data within the definition given in section 1(1) DPA.
43. Having concluded that the withheld information was the personal data of the parties concerned, the Commissioner proceeded to consider whether or not disclosure of the information would breach the DPA.

Would disclosure contravene the first data protection principle?

44. The first data protection principle states -

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

45. In the case of a FOIA request, the personal data is processed when it is disclosed in response to a request. This means that the information can only be disclosed if to do so would be fair, lawful and meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
46. The Commissioner first considered whether disclosure would be fair. In doing so he took into account the following factors:
 - the individuals' reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individuals concerned); and the

balance between the rights and freedoms of the data subject and the legitimate interests of the public.

47. The complainant disputed the application of the section 40 FOIA exemption on the basis that it should not have been applied to the personal information of individuals involved in the decision making processes regarding the relevant case. He said that officials and professional advisers to MOJ could reasonably expect their personal information to be disclosed where it related to their professional role. He added that MOJ's interpretation of personal information had been overly wide.
48. The complainant said that MOJ had failed adequately to take into account his own specific knowledge and involvement in the communications. However, since FOIA disclosure is made to 'the world' and not solely to an applicant, the Commissioner did not accept that the relevance of his specific circumstances within the FOIA context.
49. MOJ said that its junior officials would have no expectation that their names would be disclosed to third parties and argued that the omission of their names would not adversely impact the value of any information disclosed.
50. In relation to the reasonable expectations of the individuals concerned, the Commissioner considers that junior MOJ officials would not reasonably expect their personal information to be placed in the public domain.
51. MOJ said that disclosing information about the funding of a specific case would adversely affect the interests of its subject. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large. Given the content of the subject matter, he decided that disclosure in this case would be an intrusion into the private lives of the individuals concerned and that the consequences of any disclosure would be damaging or distressing to them.
52. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.
53. Such public interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

54. In the light of the nature of the withheld information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subjects. He considers that these arguments outweigh any legitimate interest in disclosure. He has therefore concluded that it would be unfair to disclose the withheld information as disclosure would breach the first data protection principle. As disclosure would not be fair, the Commissioner did not go on to consider whether disclosure would be lawful or whether one of the schedule 2 DPA conditions would be met.
55. The Commissioner therefore upheld MoJ's application of the section 40(2) FOIA exemption in this case.

Section 40(1)

56. The Commissioner noted that, within the body of information requested, but being withheld by MOJ, is some information that is the personal information of the complainant.
57. Section 40(1) FOIA says that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject”.
58. Under section 40(1) of FOIA information that is requested that constitutes the applicant's personal data is exempt information. This exemption is absolute; no consideration of the data protection principles is necessary when considering this subsection and it requires no public interest test to be conducted.
59. Having considered the withheld information, the Commissioner is satisfied that, in the context of the request, the relevant withheld information constitutes information that falls within the definition of personal data. Given the context and the wording of the request, it is clear that some of the information the complainant is requesting will be his own personal data. The Commissioner has reached this conclusion on the basis that the withheld information relates to an application for the funding of possible proceedings and that the complainant is acting on behalf of the person who would be their focus.
60. The Commissioner is satisfied that some of the withheld information is the personal data of the complainant. It is, therefore, exempt under section 40(1).

Right of appeal

61. 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

62. 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.
63. 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

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