

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2017

Public Authority: Attorney General
Address: Attorney General's Office
5- 8 The Sanctuary
London
SW1P 3JS

Decision (including any steps ordered)

1. The complainant requested information put before the Solicitor General by Attorney General's Office officials. The Solicitor General had decided that an application by the complainant for a fresh inquest into the death of his late mother would not have a reasonable prospect of success before the High Court. His request was refused relying on the section 42(1) FOIA exemption (legal professional privilege).
2. The Commissioner decided that the section 42(1) FOIA exemption was engaged and was not persuaded that there was a compelling public interest in disclosure sufficient to override the inherent public interest in protecting legal professional privilege. She therefore decided that the Attorney General's Office had correctly relied on the exemption to withhold the information.
3. She also decided that the section 40(1) FOIA exemption (personal information) had been correctly applied to some of the information.
4. The Commissioner does not require the public authority to take any steps to comply with the legislation.

Request and response

5. The complainant's mother died in hospital on 12 May 2012. On 15 January 2013, there was an inquest following which the Coroner delivered a narrative verdict in relation to her death which the complainant disagrees with. He is concerned about the treatment of his mother by the hospital and about what he sees as procedural failings in the inquest. He considers that there is evidence to support holding a fresh inquest which he believes might lead to a finding that the hospital was responsible for his mother's death. He sought authority to apply for a fresh inquest and, on 6 January 2017, the Attorney General's Office (AGO) told him that the Solicitor General had decided that the application did not succeed as it did not have a reasonable prospect of success before the High Court for reasons that AGO explained.
6. On 16 January 2017, the complainant requested information in the following terms:

"... I would appreciate it if you can send me a copy of the documents you sent to the solicitor [the Solicitor General] who was dealing with my mother's death, and questions you asked him, and also a copy of documents sent to you from the solicitor on his findings and the way he came to these findings..."
7. AGO responded on 17 February 2017. AGO confirmed that it held the requested information, but declined to disclose it on the basis of the section 42(1) FOIA exemption (legal professional privilege). AGO also dealt with those parts of the request that were for the complainant's personal information as a subject access request under the Data Protection Act 1998 (DPA). AGO confirmed its approach following an internal review in a letter of 30 March 2017.
8. In its evidence to the Commissioner on 17 August 2017 AGO additionally relied on the section 36 FOIA exemption (prejudice to the effective conduct of public affairs).

Scope of the case

9. The complainant contacted the Commissioner on 5 April 2017 and again on 21 April, 8 June and 24 July 2017 to complain about the way his request for information had been handled. He made representations and provided supporting papers as evidence.
10. For the avoidance of doubt the Commissioner makes clear that she has no locus in the substantive matter of whether or not there are reasons

to hold a fresh inquest. Her sole remit is to decide whether or not the AGO decision to withhold the information requested on 16 January 2017 complied with FOIA.

11. In her investigation, the Commissioner considered the representations made by both parties and the supporting evidence submitted by the complainant. She has also reviewed the contents of the requested information that AGO is withholding (the withheld information).
12. The Commissioner considered the application by AGO of the section 40(1) FOIA and the section 42(1) FOIA exemptions.
13. In the light of her decisions on those exemptions, she did not consider the application of the section 36 FOIA exemption.

Reasons for decision

Section 40(1) FOIA – personal information

14. Section 40(1) FOIA provides an exemption for information if the information would constitute the applicant's own personal data.
15. Section 1 of the Data Protection Act 1998 (DPA) defines personal data as information which relates to a living individual who can be identified:
 - from that data, or
 - from that data and other information which is, or is likely to come into, the possession of the data controller.
16. In this matter the AGO saw that some of the withheld information consisted of the personal opinions of, and other information relating to, the complainant. This included representations that he had put to AGO officials.
17. In her examination of the information which had been withheld under section 40(1), the Commissioner was satisfied that the section 40(1) FOIA exemption had been correctly relied upon by AGO as it constituted the complainant's personal data. As section 40(1) FOIA is an absolute exemption, she did not proceed to conduct a public interest balancing test.

Section 42 - (Legal professional privilege)

18. Section 42(1) provides that information where a claim to legal professional privilege could be maintained in legal proceedings is exempt from disclosure. It is a class based exemption which means that any information falling within the category described is exempt from

disclosure. As section 42 is a qualified exemption, it is subject to the public interest balancing test.

19. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the then Information Tribunal described it as:

“ ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation.”

20. There are two types of legal professional privilege – litigation privilege and legal advice privilege. Litigation privilege applies where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated.
21. In this matter litigation privilege is the relevant privilege relied upon by AGO. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between third parties so long as they are made for the purposes of the litigation.
22. The Commissioner reviewed the withheld information which comprised a submission to the Solicitor General with supporting papers. This included: the application by the complainant, representations by the Coroner, representations by the hospital, the complainant's response to the representations by the Coroner and hospital, further representations by the hospital on a medical issue (referred to as a PEG insertion) and the complainant's response to those representations.
23. The complainant did not offer representations about whether or not legal professional privilege litigation privilege applied.
24. AGO said that litigation was proposed or contemplated at the time the advice had been given. This is because the purpose of the advice was to consider whether the complainant's application for a fresh inquest had a reasonable prospect of success before the High Court and so whether the Solicitor General should authorise the beginning of litigation. Litigation had therefore been contemplated at the time the advice was produced.

25. AGO added that the withheld information had been created for the dominant (main) purpose of giving legal advice. Its purpose had been to advise the Solicitor General on the legal question of whether the complainant's application for a fresh inquest had a reasonable prospect of success before the High Court (in meeting the legal test set out in section 13 of the Coroners Act 1988). In addition, the withheld information contained advice on any legal risks to the AGO.
26. AGO said that the withheld information consisted of communications to and from a senior lawyer at the AGO whose client was the Solicitor General, a Minister of the Crown exercising the function of the Attorney General under section 13 of the Coroners Act 1988. The information had been communicated in the legal adviser's professional capacity.
27. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports. The Commissioner reviewed the withheld information and was satisfied that it consists of a submission to the Solicitor General with supporting documents. The Commissioner was satisfied that the information had been held for the dominant purpose of advising on possible litigation. It therefore attracted legal professional privilege and the section 42(1) FOIA exemption was engaged.

Public interest test

28. The Commissioner went on to consider the balance of the public interest. She considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the withheld information

29. AGO acknowledged that there is a public interest in disclosure to promote greater transparency and accountability. AGO also recognised that there is a public interest in fostering wider understanding of the legal reasons for decisions taken by Ministers. AGO said it had, however, provided detailed reasons for its decision in three letters to the complainant. AGO said it considered that a comparison between the withheld information and those letters made clear that AGO officials had not represented the basis for the decision in a misleading way.
30. The complainant said he had been "*hung on a string*" by AGO for over a year about his application for a fresh inquest. When he did finally get a reply he said it was brief, disrespectful and not right. He wanted to know whether the questions that he had put to AGO officials had been passed on to the Solicitor General; he believed that officials had not sent to the

Solicitor General all of the points he had put forward. He also felt that could be the reason for the AGO withholding the requested information.

31. The complainant added that he felt his application for a fresh inquest had not been dealt with seriously. He believed that fraud and perjury were involved as big issues in his case. He said all he wanted from AGO was a fair hearing, which he felt he had not got. He believed that the way officials had gone about his case was questionable and disrespectful to his late mother's memory. . He was suspicious of not being allowed to see what had been put before the Solicitor General and was concerned that the Solicitor General had been unaware of the true nature of his complaint when taking his decision. The complainant and his family, having looked at the transcript of the original inquest hearing, felt that it had been a staged hearing to save reputations.

Public interest arguments in favour of maintaining the exemption

32. AGO said that there was a strong in-built public interest in withholding information to which legal professional privilege applied. This has been recognised by the courts and reflected the role of legal professional privilege as a fundamental condition on which the administration of justice as a whole rests. It was important that Ministers received free and frank legal advice so that decisions were taken on a properly formed and legally sound basis. Because of this there would need to be a countervailing public interest factor of at least equal significance to justify disclosure.
33. As regards the public interest balance, AGO added that applications for fresh inquests were important and often difficult decisions. Applicants were usually close family members of the deceased. It was therefore of the utmost importance that the Law Officers received legal advice which was objective, free and frank. This included being able to advise on areas of weakness in applications. It would be exceedingly difficult to perform this function if that advice was to be made public. This was particularly so where an unsuccessful applicant for an inquest might seek to challenge the decision by way of judicial review.
34. AGO said that the complainant's application for a fresh inquest contained a serious allegation that the hospital was responsible for the death of his mother. The complainant had also made serious allegations during the inquest of wrongdoing by the hospital and by the Coroner. He had complained about AGO's handling of his case, stating that there has been "*a big cover up*" and that "*the questions asked to the Solicitor General, were not all of them*". The complainant said that he "*need[s] answers to see what has failed and what is needed for a new appeal with more New Evidence of perjury, deceit*". AGO said that the

seriousness of the allegations made it even more important for the Solicitor General to receive confidential, objective and free and frank legal advice.

35. AGO added that it was relevant that, while a report by the Parliamentary and Health Service Ombudsman (the Ombudsman) had upheld some of the complainant's concerns about his mother's care, it had also concluded that:

"...whilst there have been failings in the care provided for [name redacted], the Trust have acknowledged and apologised for these and have apologised appropriately in these circumstances. We have not found that but for these failings [name redacted] would have lived."

Thus the allegation that the hospital was responsible for the complainant's mother's death had already been formally considered and dismissed by an independent body.

36. Regarding the allegation that the Solicitor General had not been asked the right questions, AGO said that it was important to recognise that the Solicitor General had received a copy of the complainant's application for a fresh inquest and his follow-up representations. His application had therefore been presented to the Solicitor General in his own words.

Public interest balance

37. The Commissioner considers that some weight must always be given to the principles of accountability and transparency through the disclosure of information held by public authorities. Disclosure of official information can help the public understand how public authorities reach decisions, which in turn can help build trust in public authorities and may also allow greater public participation in the decision making process. Conversely, withholding information can at times fuel distrust and make it harder for members of the public to understand the reasoning behind decisions affecting their lives.
38. The Commissioner considers that there is an inbuilt public interest in withholding information which is subject to legal professional privilege. Therefore, her approach, in line with the decisions of successive tribunals, is to afford an initial weighting in favour of maintaining the exemption. Only in very clear cut cases will the public interest in disclosure outweigh the public interest in protecting the principle of legal professional privilege. There is a strong public interest in safeguarding openness in all legal communications between lawyer and client - including government Ministers - to ensure that there can be access to the full and frank legal advice, which is fundamental to the administration of justice.

39. As well as the inherent public interest in the principle of legal professional privilege, the Commissioner took into account the particular circumstances of the case. For example where, as here, the information and prospect of litigation is live or of recent origin, there will be a stronger case for withholding information.
40. The Commissioner has also noted that the Ombudsman conducted an independent review including medical aspects of this case but had not found that, but for the failings the Ombudsman identified, the complainant's late mother would have lived.
41. In weighing the balance of the public interest, the Commissioner has been mindful of the deep rooted and enduring concerns expressed by the complainant that he may not have had a fair hearing by AGO. However, in her review of the background correspondence between AGO and the complainant, the representations from both him and AGO, and her own review of the withheld information, the Commissioner saw nothing which caused her to consider that the complainant's representations had not been presented to the Solicitor General appropriately.
42. While recognising the sincerity of the complainant's doubts and the reasons for his concern, the Commissioner has seen nothing to persuade her that there was here a public interest in disclosure sufficient to override the inherent public interest in protecting legal professional privilege.
43. The Commissioner therefore decided that the public interest in maintaining the section 42 FOIA exemption outweighs the public interest in disclosure.

Right of appeal

44. 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

45. 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.
46. 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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