

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 27 July 2009

Public Authority: Department for Business, Innovation and Skills
Address: 1 Victoria Street
London
SW1H 0ET

Summary Decision

The complainant requested information from Department of Trade and Industry (DTI), now the Department for Business, Innovation and Skills (BIS), relating to its consideration of the legal position of the group Women Empowering Women.

The Commissioner finds that the DTI (now BIS) was correct to withhold the information under section 42 of the Act as the withheld information is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings and, in all the circumstances of the case, the public interest in maintaining the exemption to disclosure provided by section 42 outweighs the public interest in disclosing the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act").

This Notice sets out his decision in respect of the complainant's request.

Background

2. The Women Empowering Women scheme was a pyramid selling scheme that promised a return for an investment if each member recruits further members. The scheme reached its peak in 2001.¹

¹ BBC news Monday, 30 July, 2001, 'Women warned of 'nasty' pyramid con'
<http://news.bbc.co.uk/1/hi/business/1464997.stm>

3. The relevant or related legislation is part XI of the Fair Trading Act, as amended by the Trading Schemes Act 1996 and the Trading Schemes Regulations 1997, The Gambling Act 2005.²
4. The fact sheet on the BIS website sets out the following information:
 - The Department for Business, Innovation and Skills (BIS) has enforcement responsibility for Trading Schemes legislation and will investigate schemes which appear to be breaking the law.
 - Trading schemes can be a legitimate opportunity for people to operate business from home and are not illegal in the UK.
 - Trading schemes become illegitimate and illegal if, while purporting to offer business opportunities, the sole purpose of the scheme is to make money by recruiting other participants, rather than trading in goods or services. This form of bogus scheme is sometimes referred to as "pyramid selling".
 - There are also a wide range of bogus schemes which do not claim to trade in goods or services but which are known as "pyramid schemes". Schemes operating as chain letters or games are common examples.
 - All these bogus schemes need an infinite supply of new participants for everyone to make money. Since the supply will always be finite, the pyramid must collapse eventually and most participants will lose their money.
 - All schemes where money changes hands are subject to the general criminal law on fraud, theft, and deceit and the police are responsible for enforcement of the law in these areas.
5. The BIS fact sheet also states:

"There is precedent for schemes operating as chain letters being subject to the Lotteries and Amusement Act 1976. However, under the Gambling Act 2005 (when commenced) it will be an offence for a person to invite someone to join a chain-gift scheme or for them to knowingly participate in the promotion, administration or management of a chain-gift scheme. The Department for Culture, Media and Sport (DCMS) have policy responsibility for the Gambling Act 2005".

The Request

6. The complainant's request was made to the public authority, the Department of Trade and Industry (the DTI) on 15 April 2006.

² BIS website Trading Schemes, Pyramid Selling Fact Sheet.
<http://www.berr.gov.uk/whatwedo/consumers/fact-sheets/page38561.html>

7. In June 2007 the Department for Business, Enterprise and Regulatory Reform (BERR) was created from part of the former DTI, the Better Regulation Executive (BRE) of the Cabinet Office and the Regional Economic Performance Unit of the Department for Communities & Local Government (DCLG).
8. Accordingly, while at the time of the request the information was held by the DTI, since June 2007 responsibility for the requested information has rested with BERR. In June 2009 BERR merged with the Department for Innovation, Universities and Skills (DIUS) to form the Department for Business, Innovation and Skills (BIS). For ease of reference, the Commissioner shall hereinafter refer to the relevant public authority in this matter, whether at the time referred to known as the DTI, BERR or BIS, as "the Department".
9. On 15 April 2006 the complainant wrote to the Department requesting information as follows:

"I require reasoned explanations of the advice that the DTI put out about the Women Empowering women scam at different time, together with a reasoned comparison of the Gambling Act 2005 clause on 'Chain – gifting' with the Trading Schemes Act 1996, such that you may determine for me if the offences created in the Gambling Act 2005 were indeed already criminal offences under the Trading Schemes Act 1996, or not..."

The headings under which I require the explanations are as follows, and attached is an 'Advice Summaries and Gambling Act 2005', together with associated documents which you should take into account in your explanations:

- a) The 'chain letter advice'*
- b) Patricia Hewitt's advice on WEW*
- c) Are the offences for 'chain-gifting' created under the Gambling Act 2005 also criminal offences under the Fair Trading Act 1973 Part XI as amended by the Trading Schemes Act 1996?"*

10. The Department received the complainant's letter of 15 April 2006 on 20 April 2006.
11. The Department wrote to the complainant on 17 May 2006 acknowledging the complainant's request of 15 April 2006 and seeking clarification of the scope of the complainant's request. The Department advised that, from the complainant's letter and attachments it had identified requests for information as follows:

- 1. A request for "a reasoned argument for the advice put out by the DTI in its 'draft response' dated 6th April 2001";*
- 2. "reasons for the lengthy delay in understanding whether this pernicious scheme was legal or illegal, and under what legislation";*
- 3. "a reasoned argument for the advice put out by Patricia Hewitt on the DTI website on 16 July 2001";*
- 4. "a reasoned response to the questions raised by Mr Page on 30th November 2004;*

5. *“the draft response for Mr Caborn to the questions asked by Mr Page”;*
 6. *An explanation of why an amending SI to cover WEW under the Trading schemes Act was not considered instead of the primary legislation in the Gambling Bill.”*
12. On 18 May 2008 the complainant wrote to the Department stating
- “the only omission from the requests for information that you have identified is c) in my original letter. “Are the offences for ‘chain-gifting’ created under the Gambling Act 2005 also criminal offences under the Fair Trading Act 1973 Part XI as amended by The Trading Schemes Act 1996?””*
13. The Department wrote again to the complainant on 18 May 2006 advising the complainant that the exemption applied in relation to the request was the exemption under section 42 of the Act as the requested information was subject to legal professional privilege. The Department further explained that this was qualified exemption subject to a public interest test. The Department advised that the time limit for responding to the complainant’s request needed to be extended in order to consider the balance of the public interest. The Department advised that it hoped to respond by 14 June 2006.
14. The Department wrote to the complainant on 9 June 2006 confirming that it had considered the request under the Act. The Department advised it considered that it was *“not obliged under the Act to create “a reasoned explanation” in order to comply with requests”* but in that letter did set out explanations in response to the complainant’s request *“based upon contemporaneous information.”*
15. The Department further advised *“we are withholding the legal advice which we received on this matter under 42 of the FOI Act 2000 (Legal Professional Privilege exemption).”* The Department advised that in making the decision to withhold this information it had considered the public interest in open government and in understanding how Government makes decisions. The Department advised that it considered that it was also in the public interest that the decisions taken by Government are taken in a fully informed context.
16. The Department also advised that it considered that legal advice will often necessarily explore hypothetical arguments against the Government’s position and to disclose such information would give unfair advantage to those seeking to undermine the Governments position.
17. On 29 June 2006, the complainant requested an internal review of the decision of the Department of 9 June 2006.
18. On 11 August 2006 the Department wrote to the complainant providing further explanation in relation to the issues raised in the complainant’s request and also advising the complainant that it was upholding the decision to withhold the information in reliance on the exemption under section 42 of the Act.

The Investigation

Scope of the case

19. The complainant wrote to the Commissioner on 4 September 2006 requesting an investigation into the handling of his information request. The Commissioner accepted the complainant's request as a valid complaint under section 50 of the Act and has considered the conduct of this matter by the Department in relation to that recorded information relevant to the request.

Chronology

20. The Commissioner wrote to the Department on 16 January 2008 requesting a copy of the withheld information.
21. On 13 February 2008 the Department provided the Commissioner with details of its consideration of the application of the exemption under section 42 of the Act and of its consideration of the public interest in maintaining the exemption and the public interest in disclosing the information.
22. The Department confirmed that it had considered whether the public interest would be harmed by the release of the information. The Department confirmed that it had considered the public interest in open government and in public understanding of how Government makes decisions. The Department also confirmed that it had considered the need of Government departments for legal advice in order that decisions might be taken in a fully informed legal context.
23. On 21 July 2008 the Department provided the Commissioner with a copy of the withheld information.
24. The Commissioner considered the withheld information and the submissions of the Department and discussed the request with the complainant.

Analysis

Exemptions cited

Section 42 (legal professional privilege)

25. The Commissioner has considered whether the Department correctly applied the section 42 exemption. In order for this exemption to be engaged, the Commissioner must be satisfied that a claim to legal professional privilege could be maintained in respect of the requested information.

26. If the Commissioner is satisfied that a claim to legal professional privilege could be maintained he must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

What is legal professional privilege?

27. Legal professional privilege is an important principle of English law which provides for special protection from disclosure of communications between lawyers and their clients. In the Information Tribunal case of Mr Christopher Bellamy and The Information Commissioner and the DTI Appeal Number EA/2005/0023 27 March 2006 the Tribunal described the notion of legal professional privilege as,

“ a set of rules or principles which are designed to protect 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.”

28. Legal professional privilege is classified into two categories; legal advice privilege and litigation privilege.
29. Legal advice privilege relates to confidential communications and other documents such as draft statements and reports passing between lawyer and client for the purpose of receiving legal advice where no litigation is in progress or is being contemplated. This means that the information passing between the lawyer and the client may be privileged even though litigation may not be contemplated or in progress.
30. There are two aspects to this: (i) the public interest in enabling persons to obtain appropriate legal advice and assistance; and (ii) the recognition by the courts that effective legal advice requires absolute candour between a client and his lawyer. The requisite candour is much less likely to exist if their exchanges are liable to be disclosed.³
31. Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect or is pending. The sole purpose of the communications must be to give or get advice in relation to the litigation or collect evidence for use in the litigation.
32. Confidentiality is an essential prerequisite to a claim for legal professional privilege. Communications will be confidential if they have taken place in circumstances where a relationship of confidence is express or implied.

Is the legal professional privilege exemption engaged?

33. The Commissioner has viewed the withheld information and can confirm that it consists of confidential communications between the Department and its lawyers for the purpose of receiving legal advice and is therefore information in respect of

³ See Bankim Thanki QC, The Law of Privilege, (2006), p8

which a claim to legal advice privilege could be maintained in legal proceedings. The Commissioner was presented with no evidence that there had been a waiver by the public authority in this instance.

34. The complaint put forward an argument based on the decision *R v Cox and Railton* (1884) 14 Q.B.D. 153, namely that LPP does not attach to communications between lawyer and client if the purpose of the client in seeking legal advice is to further or facilitate crime or fraud ("the fraud exception"). The Commissioner finds that the complainant has provided no valid evidence or arguments to support this claim. The purposes for which the Government sought the information were legitimate.
35. The Commissioner is satisfied that the exemption under section 42 of the Act is engaged.

The public interest

36. Section 42 is a qualified exemption which means that once it has been determined that the exemption is engaged further consideration needs to be given to the public interest test as set out at section 2(2)(b) of the Act.
37. Section 2 (2)(b) requires the Department to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. There is a general presumption in favour of releasing information unless the public authority can show on public interest grounds that the information should not be released. If the public interest factors are equally balanced then the information must be disclosed.

Public interest factors favouring withholding the information

38. The Commissioner recognises that there is a strong public interest in enabling persons to obtain appropriate legal advice and assistance. It is important that members of the public can have frank communications with their lawyers with a high degree of certainty that the exchanges are not liable to be disclosed without consent and used against them. According to Sir Gordon Slynn in *AM&S Europe Ltd v European Commission* (1983)⁴ this public interest,

"springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons real and legal, that they should be able to know what they can do under the law what is forbidden, where they must tread circumspectly, where they run risks."

39. There will always be a strong element of public interest inbuilt into the legal professional privilege exemption. However it is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest

⁴ (1983) QB 878, 913

in maintaining the exemption does not outweigh the public interest in disclosing the information.

In the 2007 case of Pugh⁵, the Tribunal provided a useful summary of the development of legal professional privilege starting with a quote from the Tribunal's earlier case of Bellamy⁶ (2005):

“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 ...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case.”

40. This view was confirmed by the Information Tribunal in the 2008 case of Calland v the Information Commissioner and the Financial Services Authority stating:

“what is quite plain, from a series of decisions beginning with Bellamy..., is that some clear compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.”⁷

41. In Pugh, the Tribunal went onto suggest that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information *“where the privilege holder no longer has a recognised interest to protect”*. The Tribunal also said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect *“a significant group of people”*. In the case of Shipton⁸, a differently constituted Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information *“when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming”* (para 14b).
42. The Department argued that government departments need to make decisions in a fully informed legal context. It argued that lawyers need to be able to present to the public authority including arguments in support of their final conclusions and in addition, any relevant counter arguments.
43. The Department considered that without such advice the quality of government decision making would be much reduced. Further the Department advised that it considered that it is not in the public interest to expose those arguments which seek to undermine or test the government's position. The Department considered that the continuing willingness of government to seek such frank advice is essential to upholding the rule of law.

⁵ Dr John Pugh MP v The Information Commissioner and the Ministry of Defence, EA/2007/0055

⁶ Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry, EA/2005/0023

⁷ Calland v the Information Commissioner and the Financial Services Authority, EA/2007/0136

⁸ Shipton v the Information Commissioner, EA/2006/0028

44. The Commissioner has also considered the following factors in relation to the specifics of the case:

a) How recent the advice is.

This factor is based on the principle that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes. The Commissioner recognises that these processes would be likely to be affected by disclosure. However, the older the advice, the more likely it is to have served its purpose and the less likely it is to be used as part of a decision making process. In this case the Commissioner has given weight to recent nature of the advice. At the time of request the Government was still in the process of implementing the Gambling Act 2005 and it is reasonable to consider the advice as 'live'. The Commissioner therefore also accords this factor significant weight.

b) Whether the advice is 'live'

Advice is live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted based on that advice. To disclose legal advice where litigation is in contemplation or in prospect would be to upset the delicate balance of fairness between legal adversaries. Also legal advice may not only consider legalities but also tactical and non-legal issues and it would be unfair to require a public authority to reveal its advice whilst their (private) opponent would not be so compelled. However whilst the prospect of litigation can never be completely ruled out, where it is not in contemplation, it may be possible to take this into account along with other factors within the public interest test although care will be needed to ensure fairness to public authorities who may face prejudice in possible future proceedings if previous legal advice is disclosed. As noted above at the time of request the Government was still in the process of implementing the Gambling Act 2005, other legal claims were possible and it is reasonable to consider the advice as 'live'. The Commissioner therefore also accords this factor significant weight.

Public interest factors favouring the release of the information

45. The Department confirmed that it had considered the public interest in disclosure of the information. The Department confirmed that it had considered the public interest in open government and in public understanding of how Government makes decisions. The Commissioner considers that there is a general public interest in transparency in decision making by a public authority.

46. The Commissioner recognises that there is a clear public interest in improving the accountability of the public authorities for the decisions they take, and the legal advice upon which the Department make decisions may aid understanding of the decisions taken by the Department. The Commissioner is satisfied that there is a public interest in the accountability of the Department for its decisions in relation to the issue of Women Empowering Women and similar schemes.

47. The number of people affected is an important consideration. In the Mersey Tunnel Information Tribunal decision⁹, this decision considered the impact upon all the users of the Mersey Tunnel (approximately 80,000 people per weekday) and to a lesser extent all the council-tax paying residents of the five districts of Merseyside (approximately 1,485, 900). In the Pugh case, some 19,500 people and their dependents would be affected by the material pension fund. In the case of Gillingham however the Tribunal indicated that the number of people affected by a decision concerning a public footpath was small and as such was not a significant factor to be taken into consideration.
48. The Commissioner notes that pyramid scams such as Women Empowering Women did affect a significant of people (it is estimated 150,000 people took part) and resulted in the loss of significant sums of money. One of the factors behind the prevalence of the schemes was the doubts over possible legal sanctions.
49. Significant weight has therefore been accorded to the disclosure of the information (legal advice) which would reveal the thinking that lay behind the approach taken by the Government to considering legal action against the schemes and options to close legal loopholes related to pyramid schemes. The Commissioner also notes that concerns were raised in 2001 and legislation was not passed until 2005, there is a public interest in understanding the legal deliberations that took place during this time period. Those affected by the schemes and wider public have a legitimate interest in understanding the legal approach taken.

Conclusion on public interest balance

50. The Commissioner therefore considers this to be a finely balanced case. On balance, however, whilst the Commissioner considers there are strong public interest arguments favouring the release of the information, these are not strong enough to override the long established doctrine of legal professional privilege and the specific factors related protecting LPP in this case. Therefore the weight placed on maintaining the exemption outweighs the public interest in disclosure.
51. The Commissioner therefore concludes that the public interest favours the maintaining the exemption under section 42.

The Decision

52. The Commissioner's decision is that the Department was entitled to refuse to provide the withheld information on the basis that it was correctly withheld under section 42 of the Act.

⁹ Mersey Tunnel Users Association v Information Commissioner and Merseytravel, EA/2007/052.

Steps required

53. In light of his findings on the application of the exemption under section 42 the Commissioner does not require any steps to be taken.

Right of Appeal

54. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Dated the 27th day of July 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

2. **Section 10** provides that:

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

3. **Section 17** provides that:

(1) A public authority which ... is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

4. **Section 42** provides that:

(1) 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.