

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 November 2009

Public Authority: The Common Council of the City of London
Address: PO Box 270
Guildhall
London
EC2P 2EJ

Summary

The complainant made a request to the City of London for legal advice which led to a decision by the public authority to grant the Church of Scientology Religious Education College mandatory relief in relation to the business rates it is charged. The public authority refused to disclose the information on the basis of the exemption contained in section 42 of the Act. The Commissioner has investigated the complaint and has upheld the public authority's application of section 42. The Commissioner requires no steps to be taken.

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.

The Request

2. On 4 February 2009 the complainant made the following request:

"Please provide a copy of the legal advice which led to the Corporation charging business rates at a reduced rate to Church of Scientology Religious Education College Inc, a US corporation."

3. City of London provided a response to the complainant on 3 March 2009 in which it confirmed that it held the information but refused to disclose it on the basis of

the exemption contained in section 42 which relates to legal professional privilege.

4. The complainant requested an internal review of the public authority's decision on 4 March 2009. In this request the complainant stated that he agreed with the application of section 42, however he would like a summary of the legal reasons behind the decision, in either a redacted or paraphrased form..
5. On 1 April 2009 the public authority responded with the result of the internal review it had carried out. City of London upheld its original decision to refuse the request on the basis of the exemption contained in section 42. It stated that it was not possible to redact, paraphrase or summarise the information as to do so would compromise the legal professional privilege which was being relied upon.

The Investigation

Scope of the case

6. On 1 April 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's application of the public interest test in relation to section 42. The Commissioner has considered whether section 42 was appropriately applied and if it would have been possible for the public authority to have redacted or paraphrased the information as the complainant suggested.

Chronology

7. The Commissioner wrote to the public authority on 13 July 2009 outlining the complaint and his investigation. In this letter the Commissioner asked City of London to provide a copy of the withheld information along with its arguments for applying section 42.
8. City of London responded to the Commissioner in a letter dated 20 July 2009. In its response the public authority stated that the document sought by the complainant was prepared solely for the purpose of providing legal advice and that the advice related to issues which were still live at the time of the request. City of London also provided a copy of the withheld information to the Commissioner along with its arguments for determining that the public interest favoured withholding the requested information under section 42. It stated that the ability to seek and receive legal advice on the understanding of confidentiality within a privileged legal relationship was greater than the public interest in openness and transparency in this particular case.

Analysis

Exemptions

9. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

Section 42(1) – Legal professional privilege

10. The public authority advised that section 42(1) was being applied to the requested information as it contains legal advice its solicitor has provided regarding issues that remain live.
11. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) 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 their parties if such communications or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
12. There are two types of privilege: legal advice privilege and litigation privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
13. Advice privilege will apply where no litigation is in progress or being contemplated. In these 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. Communications made between adviser and client in a relevant legal context will attract privilege.
14. On the basis of the above, and having reviewed the information withheld, the Commissioner is satisfied that the relevant type of privilege in this case is advice privilege and that it applies in this case. Having assessed the information the Commissioner has concluded that City of London is the party entitled to legal professional privilege and that this privilege has not been waived in this case.
15. As section 42 is a qualified exemption the Commissioner has gone on to consider the public interest test.

Public interest test

Factors in favour of maintaining the exemption

16. Having viewed the withheld information, taken into account the circumstances of this case and the submissions from the City of London the Commissioner has determined that the following factors in favour of maintaining the exemption are relevant:
- a. Protecting the ability of the City of London to communicate freely with internal and external legal advisors in order to obtain advice in confidence regarding matters related to business rates.
 - b. Preserving City of London's general ability to seek and obtain informed legal advice about matters related to its general functions, duties and responsibilities. The public authority argued that the accuracy and quality of the decisions it makes would be affected if legal advice upon which they are based were impaired by a lack of candour between the public authority and its lawyers.
 - c. Ensuring that public authorities make decisions on the basis of fully informed and thorough legal advice. The public authority further argued that if the legal advice was disclosed it would result in inaccurate or impaired advice being provided in the future which could in turn lead to wrong decisions being made and to expensive litigation potentially at a cost to the public purse.
 - d. Preserving the ability of the public authority to defend its decision in the event of legal challenge.
 - e. Preserving the general concept of legal professional privilege.

Factors in favour of disclosing the requested information

17. The Commissioner has also considered the arguments in favour of disclosing the requested information. He considers the following factors to be relevant in this particular case:
- f. Disclosure would inform public debate about which organisations should benefit from reductions in their business rates and on what basis.
 - g. Releasing the information would help the public to understand the legal basis for awarding mandatory relief to this particular organisation and to challenge that decision from a more informed position.
 - h. Disclosure would promote accountability and transparency for the decision taken by City of London in respect of this organisation which results in a cost to the public purse.

Balance of the public interest arguments

18. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public

interest.” In summary, legal professional privilege was referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.

19. In deciding the weight to attribute to each of the factors on either side of the scale and determining where the overall balance lies the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the following:
- The degree of concern and public debate regarding the decision to grant mandatory relief
 - The number of people impacted by the decision to grant mandatory relief and the amount of money involved
 - The information in the public domain regarding the decision
 - The timing of the request and the status of the advice
20. In the Commissioner’s view the arguments in favour of disclosure have significant weight in this case. There is considerable amount of public concern about the basis for awarding mandatory rate relief to this particular organisation. An article in the Daily Telegraph published on 10 December 2006¹ reported that the City of London had explained its decision to offer rate relief as being based on the Church of Scientology’s charity work. However, as the complainant has highlighted, the Church of Scientology was refused charitable status by the Charity Commission in 1999 on the basis that, “public benefit arising from the practice of Scientology and/or the purposes of Church of Scientology had no been established”². In view of this the Commissioner believes there is a considerable public interest in releasing the requested information to further inform the public about the City of London’s basis for its decision. This would ensure greater transparency and accountability for the decision and allow the public to determine the extent to which the decision is supported by legal advice.
21. The mandatory rate relief awarded to the Church of Scientology is worth approximately £274,000 per annum. According to guidance published by the Office of the Deputy Prime Minister on 5 December 2002 mandatory relief “is fully centrally funded, in that billing authorities are not required to pay the amount foregone into the national rate pool”³. The Commissioner is satisfied that the sum of money involved in this case is not insignificant and in view of the fact that it is met from the public purse and therefore impacts all taxpayers to some degree has attributed significant weight to the public interest argument that disclosure would ensure accountability and transparency for the decision.
22. The public authority has argued that the public interest arguments in favour of disclosure in this case have less weight because it has released some detail about the basis of its decision to offer mandatory relief. The information it pointed

¹ <http://www.telegraph.co.uk/news/uknews/1536494/Scientologists-get-270000-subsidy.html>

² <http://www.charity-commission.gov.uk/Library/registration/pdfs/cosfulldoc.pdf>

³ <http://www.local.communities.gov.uk/finance/busrats/nndr/01.htm>

to in this regard was released in response to a different request made under the Act after the date of this request. As the Commissioner must consider the public interest at the time the request is received, in this case February 2009, he has not taken that disclosure into account when balancing the various factors in this case. However he does note that some information was in the public domain at the time of the request in any event and that it went some way to explaining the basis of the City of London's decision. However, arguably this disclosure has in fact resulted in further questions and concerns being raised by the public about the basis for the decision. Therefore, in this particular case, the Commissioner considers that it in fact adds to the weight of the argument that disclosure of the requested information would inform the public by providing it with a fuller picture of the material used by City of London to reach its decision in this instance.

23. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight he has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exemption under section 42.
24. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition he considers that the timing of the request means that significant weight should be attributed to the argument disclosure of the requested information would harm the candour between the City of London and its legal advisors. The advice was obtained relatively recently, in 2006 and at the time of the request it remained live, in that the public authority was still relying upon it in relation to its decision to grant mandatory relief to the Church of Scientology. The Commissioner is satisfied that in view of this, disclosure would be likely to affect the candour of future exchanges between the City of London and its legal advisors and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
25. The Commissioner also considers that because the advice remains live the argument that disclosure may harm the public authority's ability to defend its position in the event of legal challenge also has significant weight.
26. The Commissioner is also conscious that legal advice is required in relation to a wide range of issues for which the City of London is responsible. This may include matters that involve a significant amount of public funds and/or which would have a substantial impact upon the public. Furthermore it is also possible that further advice on similar matters may also be required, for example applications for mandatory relief from other organisations. Therefore the harm arising from a reduction in candour of exchanges between it and its legal advisors is likely be significant and could arise relatively frequently. This argument is also deemed to have significant weight as a result.
27. Whilst the Commissioner recognises the weight of the arguments in favour of releasing the requested information he has, on balance decided that they are outweighed by the arguments in favour of maintaining the exemption. As explained above the timing of the request and the fact that the advice remains live

have both been key factors when reaching this decision. The Commissioner is satisfied that it is not possible to redact or paraphrase the information as the complainant has suggested so as to avoid disclosing information that would reduce the candour of exchanges between the public authority and its legal advisors.

The Decision

28. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

29. The Commissioner requires no steps to be taken.

Failure to comply

30. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

31. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of November 2009

Signed

**Jo Pedder
Senior FOI Policy Manager**

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

Legal Annex

Section 42 Legal professional privilege

(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.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.