

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 August 2012

Public Authority: The House of Commons
Address: London
SW1 0AA

Decision (including any steps ordered)

1. The complainant requested information about legal advice regarding the disclosure of MPs' expenses. The House of Commons confirmed it held information within the scope of the request, but withheld it citing legal professional privilege (the section 42 exemption).
2. The Commissioner's decision is that the House of Commons correctly withheld the requested information. He requires no steps to be taken.

Request and response

3. The complainant wrote to the House of Commons on 20 December 2011 and requested information in the following terms:
"Please could I have a copy of all communications from or to internal or external legal advisors regarding the release of MPs' expenses under the Freedom of Information Act?"
4. The House of Commons responded on 19 January 2012. It confirmed that it held information within the scope of the request but cited section 42(1) (legal professional privilege) as its reason for stating that it was exempt from disclosure.
5. Following an internal review the House of Commons wrote to the complainant on 16 February 2012 upholding that decision.

Scope of the case

6. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled. He told the Commissioner:

"I realise that claims under section 42 are normally upheld, but I believe there are strong reasons why the information should be released in this case. I outlined these in my original request and in my internal review request. In summary:

- The legal advice is now "dead" as the House of Commons has published the expenses it does hold and is no longer responsible for dealing with new expense claims.

- The political storm surrounding the release of these expenses, and in particular the repeated attempts the Commons made to block the release, create a strong public interest in transparency".

7. The Commissioner considers the scope of his investigation to be whether the House of Commons correctly applied section 42 of FOIA to the requested information.

Reasons for decision

8. In response to the Commissioner's request to be provided with a copy of the withheld information, the House of Commons cited section 51(5) of FOIA. That section provides that a public authority does not have to provide the Commissioner with legal advice between it and its legal adviser regarding its duties under the Act. The House of Commons confirmed that the information which it was withholding from the Commissioner was the same as that which it had withheld from the complainant.

Section 42 – Legal professional privilege

9. This exemption applies to information that would be subject to legal professional privilege (LPP). In other words, section 42 sets out an exemption from the right to know for information protected by LPP. LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice or documents created by or for lawyers for the dominant purpose of litigation.

10. LPP is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and to safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.
11. There are two categories of LPP – litigation privilege and legal advice privilege.
12. Litigation privilege applies when litigation (legal action before a court) is underway or anticipated. There must be a reasonable prospect of litigation – a real likelihood, not just a fear or possibility.
13. For information to be covered by litigation privilege, it must have been created for the main purpose of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Litigation privilege can cover a wide variety of information, including advice, correspondence, notes, evidence, reports or other documents.
14. Legal advice privilege may apply whether or not there is any litigation in prospect. In the Commissioner's view, this form of LPP covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice. The advice itself must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context.
15. During the course of the Commissioner's investigation, the House of Commons confirmed that it is relying on the fact that the withheld information is subject to legal advice privilege and to litigation privilege. It also confirmed that privilege had not been waived in relation to any of the information in question.
16. Clearly, in the particular circumstances of this case, where the disputed information has been withheld from him under section 51(5) of FOIA, the Commissioner is not in a position to review that information in order to establish whether it attracts either or both litigation privilege or advice privilege under section 42(1). Rather, he has simply had to accept the House of Commons' assertion that the information falls within the scope of the exemption contained at section 42(1). However, given the terms of the request and the House of Commons' description of the type of information that it holds on this issue, he considers that legal professional privilege is likely to attach to it.

The public interest test

17. As section 42 is a qualified exemption, the Commissioner must consider the public interest test.

Public interest arguments in favour of disclosing the requested information

18. Arguing in favour of disclosure, the complainant told the House of Commons, when making his request:

"I appreciate that much of this information will be captured by the s42 exemption but I would argue that in view of the public controversy about the House of Commons' actions in trying to avoid disclosure, and the fact that responsibility for expenses has now been removed to a separate body, mean that the public interest is firmly in favour of disclosure."

19. When requesting an internal review, he disputed how the House of Commons' arguments - that disclosure could undermine its position in a legal dispute – could apply to the situation in this case. Arguing that the issue of the release of MPs' expenses is essentially "dead", he said:

"... the battles have been fought, the information has (mostly) been released, and the situation is very unlikely to arise again given that the legal framework for expenses has moved substantially and is no longer the responsibility of the House of Commons".

20. The House of Commons acknowledged the public interest arguments around creating greater transparency around decisions relating to:

"actions taken by the House of Commons to test the application of privacy law in relation to FOI disclosures about the allowances claimed by MPs".

21. It told the complainant that it accepted the public interest in ensuring that public authorities are transparent in their actions and accountable for the decision-making process:

"particularly where this process results in decisions giving rise to expenditure".

22. Responding to the complainant's point about the controversy surrounding the complaints and appeals process, it brought to his attention the fact that such matters *"were played out in full view of public scrutiny"*.

Public interest arguments in favour of maintaining the exemption

23. In favour of maintaining the exemption, the House of Commons argued that:

"there is clearly a very strong public interest and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence".

24. In its view, disclosure would lead to *"a more guarded approach"* to the seeking and providing of advice which, in turn:

"could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions".

25. The Commissioner recognises that there is a strong public interest in protecting the doctrine of legal professional privilege. The doctrine has developed to ensure that clients are able to receive advice from their legal advisers in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality.
26. The Commissioner also accepts the principle, indicated by a number of Information Tribunals, that the passage of time will often be a factor that favours disclosure. This stance takes into account the principle that if advice has recently been obtained, it is likely to be used in a variety of decision-making processes. Similarly, 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.
27. In many cases, the age of the advice is closely linked to whether the advice is still live. Advice is said to be 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 on that basis.
28. In correspondence with the Commissioner, the House of Commons explained that it considers that the withheld information in this case remains relevant and therefore it does not accept the complainant's view that the legal advice is "dead".
29. The Commissioner accepts that the circumstances of a particular case will dictate whether advice is considered 'recent'. In his view, the public interest will be particularly strong if the advice is recent or still live: in other words, if it is still being relied upon or relevant to litigation in prospect.

30. However, as the Commissioner has not seen the advice in this case he does not know its date and origin, nor is he able to ascertain the extent to which it can be considered to have served its purpose.

Balance of the public interest arguments

31. The Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. However, the exemption is not absolute and he must therefore consider whether the public interest in disclosure in this case is strong enough to equal or exceed the public interest in LPP.
32. With regard to the public interest arguments in favour of disclosing the information, the Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision-making process. He also recognises that the issue of MPs' expenses has received significant attention.
33. However, notwithstanding the arguments outlined above, the Commissioner considers that the well-established public interest arguments in protecting legal professional privilege must be accorded due weight and importance. Therefore, on balance, and with the proviso that he has necessarily reached his decision without the benefit of having seen the withheld information, the Commissioner has concluded that in the circumstances of this case, the public interest arguments in favour of disclosure are insufficiently strong to override or equal the strong generic public interest arguments in favour of maintaining the section 42 exemption.

Right of appeal

34. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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