

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2014

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested a copy of the independent legal advice to HM Government referred to in the report, *'Intercept as Evidence'* (Cm 7760) (December 2009).
2. The Commissioner's decision is that the Home Office (HO) has applied correctly the section 42(1) FOIA exemption (legal professional privilege.) The exemption is engaged and the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require HO to take any further action.

Request and response

4. On 13 November 2012, the complainant wrote to HO and requested information in the following terms:

Please would you supply us with the following information: a copy of the independent legal advice ["the advice"] referred to in the report, 'Intercept as Evidence' (Cm 7760) (December 2009).
5. HO responded initially on 11 December 2012 to say that it was considering withholding the advice relying on the section 35(1)(a) FOIA exemption (Formulation of government policy) but needed further time to consider the public interest fully.
6. On 11 January 2013 HO told the complainant that the requested information was exempt from disclosure. HO relied on the FOIA exemptions in section 24(1) (National security), section 31(1)(a) (Law

enforcement), section 35(1)(a) and section 42(1) (Legal professional privilege). For the qualified exemptions relied upon HO decided that the balance of the public interest favoured maintaining the exemptions.

7. Additionally HO relied upon the section 23(5) FOIA exemption to neither confirm nor deny whether it held relevant information supplied by, or relating to, bodies dealing with security matters; this is an absolute exemption.
8. On 10 March 2013 the complainant requested an internal review of the HO decision. HO acknowledged the request saying that it aimed to reply with a full response by 10 April 2013.
9. Following an internal review HO eventually wrote to the complainant on 18 June 2013. HO said that it continued to rely upon all of the FOIA exemptions cited in its refusal notice. HO added that it could have made clearer that it applied the section 42(1) FOIA exemption to all of the withheld information.

Scope of the case

10. On 18 June 2013 the complainant contacted the Commissioner to complain about the way the request for information had been handled, referring to both the refusal to disclose the information requested and the length of time HO had taken to deal with the matter.
11. Subsequently HO dropped its reliance on the section 23(5), 24(1) and 31(1)(a) FOIA exemptions and the Commissioner did not consider them. Section 23(1) was applied to parts of the withheld information but HO maintained its stance that section 42(1) applied to it all.
12. During the course of his investigation, the Information Commissioner took account of the withheld information and the representations put forward by both the complainant and the HO in his consideration of both the engagement of the exemption and the balance of the public interest.
13. The Commissioner considered the application of the section 42(1) FOIA exemption in respect of the entirety of the disputed information. In the light of his decision regarding the section 42(1) FOIA exemption, the Commissioner did not proceed to consider HO's application of the other exemptions which HO continued to claim.
14. During the course of his investigation, HO referred the Commissioner to the brief summary of the legal advice, within '*Intercept as Evidence A Report*' 2009 (Cm 7760), which states:
<http://www.official-documents.gov.uk/document/cm77/7760/7760.pdf>:

"...However, independent legal advice is that a full return to the present position could not be guaranteed. This is because there are likely to be some subsequent trials in which a reimposed ban might be assessed by the court as not being justified (for instance where the intercept concerned was non-sensitive). By creating a precedent, this would in turn gradually undermine the re-imposed ban more widely." (paragraph 22).

Reasons for decision

15. Section 42(1) FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
16. 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.
17. In its representations to the Commissioner, HO relied on advice privilege to withhold the requested information. This privilege attaches to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.
18. The communication in question needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which is usually to be found by inspecting the documents themselves.
19. In this matter the Commissioner has examined the withheld advice and he is satisfied that it covers confidential communications between a legal adviser and client made for the dominant purpose of seeking or giving legal advice. Its principal purpose was to give advice to HO and it therefore merits the protection of legal advice privilege.
20. Information does not attract legal professional privilege if the contents of the legal advice have been disclosed and thus the privilege can be said to have been waived.
21. The Commissioner's approach to waiver cases is that a mere 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 with a careful examination and comparison of both the content of the legal advice and the evidence of waiver.

22. The Commissioner has seen that HO has disclosed a summary of the very detailed advice it received. However, HO said, and the Commissioner agrees, that it had not itself divulged the detail of the legal advice set out in the withheld advice; there is a clear distinction between disclosure of the summary of advice provided in the document *Intercept as Evidence A Report* (Cm 7760) and disclosure of the substance of the advice supporting that summary.
23. The fact of the complainant's request for the disputed information makes clear that the substance and scope of the withheld information remains unknown and confidential with the private nature of the relationship between legal adviser and client unaffected.
24. The Commissioner has considered the facts of this case and, after taking careful note of the parties' representations, and after viewing the content of the withheld information, he decided that HO had not disclosed the advice in an unrestricted way and had not waived privilege. He therefore decided that the section 42(1) FOIA exemption is engaged.

Public interest test

25. Section 42(1) FOIA is a qualified exemption and therefore the Commissioner must 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

26. There is an inherent public interest in disclosure of official information to ensure that public authorities are accountable for, and transparent about, decisions that they have taken and to enable the furtherance of public debate. It is also in the public interest to make available information that can enhance public understanding of governmental decision making. Disclosure of legal advice to government could contribute to a better informed debate of the issues of the day.
27. In this matter, there are weighty issues of considerable public importance regarding the use of intercept material as evidence in open court proceedings. Disclosure would provide the opportunity to study the advice provided to the government which would facilitate a fuller understanding of the thinking of government around the issues under dispute and of the advice it had received. Disclosure would enable other lawyers to engage in a better informed debate about the legal arguments made to government and address the specific legal issues raised in the advice.
28. The complainant has said that the UK is the only common law jurisdiction with a statutory bar against the use of intercept evidence;

the complainant added that this was something which had been the subject of wide-ranging criticism and that there had been repeated calls for the government to introduce legislation to provide for the admissibility of intercept evidence. The complainant said that the HO's conclusions in this matter appeared to be at odds with the broad consensus of legal opinion in the UK and in the Council of Europe and in other common law jurisdictions.

Public interest arguments in favour of maintaining the exemption

29. There are important public interest arguments in favour of maintaining the exemption and HO provided the Commissioner with submissions supporting its position that the public interest favoured maintaining the exemption.
30. HO said that a client's ability to speak freely and frankly with a legal adviser in order to obtain appropriate legal advice was a fundamental requirement of the English legal system. Disclosure would undermine the long standing convention which affords protection to confidential dialogue between legal advisers and clients. The Commissioner believes that this is of no less importance for a government department than for a private individual. The threshold for overturning the principle of legal professional privilege is necessarily set at a high level given its fundamental importance within UK law.
31. HO told the Commissioner that disclosure would prejudice its position by placing it at a disadvantage in developing and delivering potential policy options; in this regard HO confirmed to the Commissioner that its consideration of intercept as evidence remained a live policy issue at the time of the information request.

Balance of the public interest

32. The Commissioner recognises that in the matter of the use of intercept as evidence in open court proceedings there are issues of considerable public importance and therefore weighty arguments favouring disclosure. However he also notes that a summary of the advice has been made available to the public and that it is only the detailed reasoning underlying it has been withheld. He has also been assured that the policy issue remains live and considers that both of these considerations weaken the case for disclosure in this matter.
33. As regards maintaining the exemption, the Commissioner recognises that the general public interest inherent in this exemption will always be strong due to the importance of the principle of safeguarding openness in communications between a legal adviser and client to ensure that there can be access to full and frank legal advice, which in turn is

fundamental to the administration of justice. This has been recognised in a succession of Tribunal decisions, for example in the case of *Bellamy (Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023))* where the Tribunal said 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 public interest”.

34. In deciding this matter, while acknowledging the weight of the arguments for disclosure, the Commissioner nevertheless considers that the balance of the public interest favours maintaining the exemption.

Other matters

35. The complainant has raised with the commissioner the time taken by the HO to respond to his original request and the internal review. HO took some two months to respond in full to the information request and a further three months to conduct an internal review of the decision to withhold all of the information. While these timescales did not exceed statutory requirements, the time taken to complete the internal review exceeded that laid down in the Commissioner's guidance. The Commissioner is aware that the HO is taking active steps to speed up its handling of FOIA requests and internal reviews.

Right of appeal

36. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF