

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 July 2015

**Public Authority:** Competition and Markets Authority

**Address:** 6th Floor, Victoria House  
37 Southampton Row  
London  
WC1B 4AD

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on communications between the Competition and Markets Authority ('the CMA') and the Department of Energy & Climate Change ('DECC') relating to the Green Deal Home Improvement Fund and also internal communications at the CMA relating to the fund.
2. The Commissioner's decision is that the CMA has appropriately responded to the request in applying the section 42 exemption to the limited information held.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 30 October 2014 the complainant wrote to the CMA and requested information in the following terms:

"In relation to DECC and in particular the June/Nov 2014 Green Deal Home Improvement Fund we hereby request the following:

1. For the period 1 October 2014 to 30 October 2014, details of all communications passing between DECC and the Competition and Markets Authority (CMA) relating to the Green Deal Home Improvement Fund and/or complaints about the said fund and DECC's anti-competition activities. Also any internal communication at the CMA in relation to this matter.

2. The details request above should include:
  - a. Dates and times of all telephone conversations;
  - b. Copies of notes of telephone conversations;
  - c. Dates and times of all meetings;
  - d. Copies of agendas, minutes and notes of meetings;
  - e. Copies of emails, letters faxes or any other written form of communication;
  - f. All such material of which DECC was given a copy and communications to which it was party.

Full details as in 2a-2f above of any communications between DECC and the CMA or internally at the CMA that in any way refer to Crystal Windows and Doors Ltd (Crystal) or any of its staff.”

5. The CMA responded on 3 December 2014. It stated that it held information within the scope of the request and that the information was withheld under the exemptions contained in sections 21 and 42 of the FOIA.
6. Following an internal review on its application of section 42, as requested by the complainant, the CMA wrote to the complainant on 20 January 2015. It upheld its initial response but also provided further detail by explaining that no information is held relating to communications between DECC and the CMA in respect of the Green Deal Home Improvement Fund or 'Crystal', for the specified period.

## **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant explained his consideration that:

“using legal professional privilege would not encourage good governance; clearly it would encourage poor quality decisions and poor governance which was not the intention of the Act.”
8. The Commissioner accepted his complaint on 11 March 2015 following receipt of all relevant documentation from the complainant necessary for the Commissioner to commence his investigation.
9. On 31 March 2015 the Commissioner wrote to the complainant and confirmed the scope of his investigation to be the CMA's application of section 42 to withhold information within the scope of the request.

10. Notwithstanding the focus of the complainant's initial request, the Commissioner is clear that the withheld information is not environmental. He has therefore considered the application of legal professional privilege under the terms of the FOIA and not the Environmental Information Regulations 2004.

## Reasons for decision

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11. **Section 42 of FOIA** states that:

"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."

12. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of seeking or giving legal advice.
13. The CMA confirmed to the Commissioner that it was relying on legal advice privilege in this case.
14. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
13. The CMA confirmed that it is satisfied that the information meets the criteria for engaging the exemption in that the legal advice is the following:
  - a. confidential;
  - b. made between a client and professional legal adviser acting in their professional capacity; and
  - c. made for the sole or dominant purposes of obtaining legal advice or assistance.
14. Upon considering the information withheld under section 42 FOIA and the submissions provided by the CMA, the Commissioner considers that the section 42 exemption was correctly engaged. The information comprises communications between the CMA's legal adviser in his

professional capacity and internal colleagues following an established procedure for requesting advice. Furthermore, having considered both the withheld information and the CMA's representations on this point, the Commissioner is satisfied that the procedure is relevant to the interests section 42 is designed to protect. Therefore the withheld information meets the criteria for legal professional privilege. A confidential annex attached to this decision notice provides further clarification on this point. This is being issued to the CMA only as it reveals details of the withheld information itself.

15. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

16. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* in which it was stated:

*"...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 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..."*

*"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*

17. The Commissioner notes the complainant's opinion as set out in paragraph 7 and his comments in correspondence with the CMA with respect to "unlawful activity" and "wrongdoing". In requesting an internal review the complainant explained his view that he was acting in the public interest in making enquiries as to the lawfulness of the operation of the Green Deal Home Improvement Fund and whether the CMA was taking any enforcement action in relation to it.

18. In this respect the CMA explained to the complainant that details of its enforcement action could be found on the CMA website. However, the on-going matters between the complainant and the CMA, although related, are outside the scope of this decision notice. The Commissioner's investigation focuses on the CMA's application of section 42(1) to the withheld information.

### **Public interest arguments in favour of disclosing the requested information**

19. The CMA explained that it had considered:

“transparency, public accountability and acknowledgement of the fact that the public are interested in the work of the CMA, of DECC and in the Green Deal Home Improvement Fund.”

However, it found no other specific considerations with sufficient weight to favour disclosure.

### **Public interest arguments in favour of maintaining the exemption**

20. It is the view of the CMA that there is a strong public interest in maintaining the exemption in this instance to safeguard the openness of officials in all communications between the CMA's legal adviser in his professional capacity and internal colleagues following an established procedure for requesting advice.

21. It went on to explain that it had considered the Tribunal case of Fuller (EN2008/0005) which stated “there will be some cases in which there could be stronger contrary interests (than upholding legal professional privilege) for example if the privileged material discloses wrongdoing by or within the authority”. However, it found this not to be relevant in this case.

### **Balance of the public interest**

22. The Commissioner has viewed the legal advice and considers it is fairly recent information as it was obtained within the last 12 months. The Commissioner apportions less weight to the public interest in maintaining the exemption in relation to information which was created a number of years earlier and is no longer current. In this case the information relates to current, on-going matters and therefore remains relevant at the present time.

23. There is a strong inbuilt weight in favour of maintaining section 42 FOIA (*Bellamy v ICO (No 1)* [EA/2005/0023]), and this would require a significant public interest in the disclosure of the information in order to override that privilege. There must be some clear, compelling and specific public interest justification for disclosure which must outweigh the strong public interest in protecting communications which are intended to be confidential.

24. In considering the public interest, the Commissioner considered the complainant's representations as well as the withheld information. He is

satisfied that the content of the withheld information would add nothing to any debate on wrongdoing, unlawful activity or improper behaviour. As such he cannot determine a significant public interest to justify disclosure. The Commissioner's view is that the complainant appears to assume that the withheld information will uphold his allegations and concerns about the Green Deal Home Improvement Fund and evidence of wrong doing. The Commissioner does not consider there to be any indication of this within the withheld information.

25. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 42 was therefore correctly applied in this case.

### **Other matters**

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26. The Commissioner notes the complainant's view, as expressed in paragraph 7, regarding legal professional privilege. However, the Commissioner cannot consider whether such privilege should exist as an exemption to the provision of information within the FOIA. His consideration must focus on the application of the section 42 exemption in accordance with the FOIA in the specific circumstances of each case to which it has been applied.

## Right of appeal

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27. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

28. 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.
29. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**