

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2017

Public Authority: Chief Constable of South Yorkshire Police
Address: South Yorkshire Police HQ
5 Carbrook Hall Road
Sheffield
South Yorkshire
S9 2EH

Decision (including any steps ordered)

1. The complainant has requested copies of communications relating to the Hillsborough inquests from South Yorkshire Police ("SYP"). SYP refused to provide the information citing section 42(1) (legal professional privilege) of the FOIA. During the Commissioner's investigation it also introduced reliance on section 31 (investigations and proceedings). The Commissioner's decision is that SYP was entitled to rely on section 42(1). No steps are required.

Request and response

2. On 19 August 2016 the complainant wrote to SYP and requested information in the following terms:

"I would like to ask for the communications between David Crompton and the force's legal services/force solicitor in connection with the fresh Hillsborough inquests.

I suspect in reality it would tend to be mainly with the head of legal services/force solicitor though I do not know the management structure at SYP.

The time span would be from the ordering of the fresh inquests in December 2012 to when Mr Crompton was suspended in April 2016.

Given we are looking at direct communications between the chief constable and what is likely to be the senior office holder only in the

legal department I would expect it wouldn't be difficult to locate the communications.

If you were to consider section 42, I do think the public interest deserves particularly close consideration given the clear concerns about how the police approached the inquests".

3. SYP responded on 19 September 2016. It refused to provide the requested information citing section 42(1) of the FOIA.
4. Following an internal review SYP wrote to the complainant on 21 November 2016. It maintained its position.
5. On 25 April 2017, during the Commissioner's investigation, SYP disclosed some of the previously withheld information to the complainant. It maintained reliance on section 42(1) for the remainder and additionally cited section 40(2) in respect of some names and contact details.
6. During her investigation, SYP was unwilling to provide the Commissioner with a copy of the withheld information for her to consider. Therefore, on 13 July 2017, she issued an Information Notice requiring this, along with a full response to her enquiries. This was complied with on 7 August 2017.
7. Following some further queries, on 11 September 2017 SYP wrote to the Commissioner again. It introduced section 31 in respect of some of the information, advising:

"Please find attached a further copy of the emails with additional S31 exemptions that have been applied due to the new criminal cases that are now underway".

Scope of the case

8. The complainant contacted the Commissioner on 23 November 2016 to complain about the way his request for information had been handled. He asked her to consider the citing of section 42(1) and provided his reasons for disagreeing with its application.
9. Following the partial disclosure of information during her investigation, the Commissioner again contacted the complainant. He confirmed that he still wished to pursue SYP's citing of section 42(1) and made no reference to the application of section 40(2). The Commissioner will therefore not further consider any information withheld under section 40(2).

10. The Commissioner will consider the application of section 42(1). She has also commented on the late introduction of section 31 in "*Other matters*" at the end of this notice.

Reasons for decision

Section 42 – legal professional privilege

11. Section 42(1) of the 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. 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 DTA* (EA/2005/0023) 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 communication or exchanges come into being for the purpose of preparing for litigation".

13. There are two types of privilege: 'litigation privilege' and 'legal advice 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. Legal 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 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 therefore attract privilege.
14. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.

15. The withheld information in this case consists of two emails. SYP has confirmed that one is being withheld on the basis of litigation privilege and the other on the basis of legal advice privilege.

Litigation privilege

16. This has been claimed in respect of an email from the Force Solicitor to the Chief Constable dated 16 November 2015 relating to costs. SYP has advised that: *"At the time this email was sent adversarial litigation was already ongoing ... this email represents an Internal communication once litigation has commenced with the necessary dominant purpose and is therefore privilege"*.
17. The Commissioner has viewed the email and is satisfied that it is between the parties stated. It relates to legal costs and internal advice in respect of those costs.

Legal advice privilege

18. This has been claimed in respect of an email from the Force Solicitor to the Chief Constable dated 22 October 2015. SYP has advised that this concerns: *"confidential communications between the Force Solicitor and Chief Constable made for the dominant purpose of giving legal advice"*.
19. The Commissioner has viewed the email and is satisfied that it is between the parties stated; it relates to what has previously been disclosed as being "Hammond Suddards Material".
20. In respect of both emails, the Commissioner is satisfied that the withheld information represents legal advice provided to a client by their legal adviser. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently the Commissioner accepts that the withheld information attracts legal professional privilege on the grounds cited, and that on this basis section 42(1) is engaged.

The public interest test

21. As a qualified exemption, section 42(1) is subject to a public interest test. The information must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.
22. As joint arguments have been submitted in respect of both litigation privilege and legal advice privilege the Commissioner has considered these together.

Public interest arguments in favour of disclosure

23. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. This is particularly so regarding a case of such high public significance. The Commissioner accepts that any information which relates to Hillsborough remains of considerable interest.
24. The complainant's initial grounds of complaint, which reflect the significant public interest, were as follows:

"It is worth recalling the initial inquests after the Hillsborough disaster were quashed in 2012, in part because of police conduct.

The Hillsborough Independent Panel's findings, which led to the quashing of the inquests, included publication of all communications surrounding the handling of those initial inquests. The public interest was served by that disclosure, which included communications which would be covered by Section 42.

It is also the case that for most of the 28 years since the disaster the public interest was not served by a lack of transparency surrounding the actions of various public authorities.

In terms of the fresh inquests, concerns were raised about how the police had conducted themselves at the hearings in the immediate aftermath.

Those concerns were widespread and were publicly raised in Parliament. Those concerns about the conduct of the inquests were also directly linked to the public comments of South Yorkshire Police and its chief constable following the inquest findings.

I trust the ICO will be well aware of those concerns but I highlight one comment made by the Prime Minister, Theresa May, in Parliament on April 27, to provide just a flavour.

She said: "I think everybody will be disappointed and indeed concerned by some of the remarks that have been made by South Yorkshire police today".

Further, Mr Crompton ultimately lost his job over the force's handling of the inquests. In terms of the tortured history of this disaster and in particular the activities of the police, it is concerning that South Yorkshire Police would seek to withhold information surrounding its handling of the fresh inquests.

Surely the public interest here is overwhelmingly served by the kind of transparency sorely lacking for well over 20 years.

Given everything that has happened, why would South Yorkshire Police not want to fully disclose how it handled the fresh inquests?

In essence, this goes to the heart of what much of the concern about Hillsborough has been about all along”.

25. SYP itself has acknowledged that there is:

“... a legitimate and significant public interest in the Hillsborough Inquests generally and particularly in the Chief Constable’s legal conduct at the Inquests which has been subject to public debate following the Inquests conclusion. Disclosure would be seen as embracing an ethos of openness, accountability and transparency, as well as furthering understanding of the Force’s decision making and approach to the Inquests. Disclosure at this time would further inform the public debate and comment in ‘real time’. Additionally, the Inquests have now concluded, therefore any advice is not ‘live’”.

26. It acknowledged:

“In this case, the public interest arguments in favour of disclosure are considerable. The Hillsborough Inquests are a matter of great public interest and, considering the history of the Hillsborough disaster and the criticisms directed towards the Chief Constable following the conclusion of the Inquests, accountability and transparency of decision making regarding the Force’s handling of the Inquests weighs strongly in favour of disclosure”.

Public interest arguments in favour of maintaining the exemption

27. SYP has argued:

“There is a substantial inherent public interest in the section 42 exemption which protects the principle of legal privilege. The principle safeguards the confidentiality and openness of all legal or legally related communications and exchanges between legal advisor and client thus ensuring access to full and frank legal advice, which in turn is fundamental to the wider administration of justice. If communications between legal advisor and client were routinely disclosed there would be a disincentive to seek legal advice and advice may be diminished due to the fear of it being disclosed. The communications relate to the fresh Hillsborough

Inquests which are comparatively recent and surrounding issues that some communications touch upon, such as the ongoing IPCC and criminal investigations, are still ongoing”.

28. It added:

“The Chief Constable’s ability to communicate freely and frankly with legal advisors in confidence and receive advice in confidence is vital. Wider than that, the ability to access full and frank legal advice is a fundamental cornerstone to the British legal system. Additionally, whilst the Inquests have now concluded, the advice is recent and still current. Further, some communications touch on issues that are linked to the Hillsborough investigations, which are still ongoing”.

Balance of the public interest test

29. The Commissioner has considered the arguments put forward by the complainant, in addition to the stated position of SYP and the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege.
30. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their decisions, particularly in such a high profile situation as here.
31. However, there is also a strong opposing public interest in maintaining SYP’s right to communicate with its legal advisors in confidence. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
32. Following inspection of the withheld information and consideration of all the circumstances in this case, the Commissioner does not consider that there are factors present that would equal or outweigh the particularly strong public interest inherent in this exemption. It is clear that the legal advice is relatively recent, it is specific and it has not been waived by disclosure. It is also evident that related matters remain ‘live’ and, although it was not the case at the time of the request, that new criminal cases are now underway. In such a scenario it is not reasonable that SYP should be required to reveal its legal position in advance.
33. Although she appreciates the significant public interest in the disclosure of material related to Hillsborough, the Commissioner notes that where possible, disclosure has been made. She has therefore ultimately

concluded that the arguments for disclosure are not greater than the arguments for maintaining the exemption, and that the exemption provided by section 42(1) has been correctly applied.

34. As the Commissioner has found section 42(1) to be properly cited she has not found it necessary to consider the late citing of section 31(1). However, she has commented on it below.

Other matters

Circumstances at the time of a request

35. As set out in her guidance on the public interest test¹, the Commissioner will usually take into account the circumstances at the time that a request is made when making her decision on a case. However, paragraph 18 of the guidance makes it clear that she has the discretion to take a different approach where events after this time change the balance of the public interest test. Furthermore, in the High Court case of *OGC v Information Commissioner and HM Attorney General [2008] EWHC 737 (Admin)*, the High Court gave the example of a request which related to criminal proceedings that were commenced after the date of the request and where disclosure would prejudice the fairness of the trial. Although the High Court did not give a definitive ruling, it said that it would be "*undesirable*" for the Commissioner to order disclosure where the information was not exempt at the time of the request but became so thereafter.

36. The High Court went on to say at paragraph 98:

"...it seems to me to be arguable that the Commissioner's decision whether a public authority complied with Part 1 of the Act may have to be based on circumstances at the time of the request for disclosure of information, but that his decision as to the steps required by the authority may take account of the subsequent changes of circumstances..."

37. Therefore, had the Commissioner decided above that the public interest in disclosure outweighed that in maintaining the exemption in this case, she may have used her discretion to consider the application of section 31 where later events meant that disclosure may now be undesirable.

¹ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

Right of appeal

38. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

39. 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.
40. 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

Carolyn Howes
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