# Freedom of Information Act 2000 (FOIA)

## Decision notice

**Date:** **16 October 2012**

**Public Authority:** **Information Commissioner**
**Address:** **Wycliffe House**
**Water Lane**
**Wilmslow**
**SK9 5AF**

Note: This decision notice concerns a complaint made against the Information Commissioner (the Commissioner). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. He is therefore under a duty as regulator to make a formal determination of a complaint made against him as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

## Decision

1. The complainant made a freedom of information request to the ICO for correspondence with the Department for Culture Media and Sport regarding the changes to the e-privacy directive. The ICO disclosed some information falling within the scope of the request but other information was withheld under the section 36(2)(b)(ii) (inhibit free and frank exchange of views) and section 42 (legal professional privilege) exemptions. The Commissioner has investigated the complaint and has found that both exemptions are engaged and the public interest in maintaining each exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

## Background

2. The Privacy and Electronic Communications (EC Directive) Regulations 2003 cover the use of cookies and similar technologies. Cookies are small files which are downloaded onto a computer when a user visits a

website. They allow a website to recognise the computer and can do various things such as remembering your preferences.

3. The 2003 regulations originally implemented a European Directive – 2002/58/EC – which was concerned with the protection of privacy in the electronic communications sector ("the e-privacy directive"). In 2009 the e-privacy directive was amended by a further EU directive – 2009/136/EC – which included a requirement to obtain consent for the use of cookies and similar technologies. Governments in Europe had until 25 May 2011 to introduce the changes into their own law and the UK introduced the amendments through The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011. Further details are available from the Commissioner's guidance issued on the use of cookies and similar technologies.[1]

## Request and response

2. On 10 January 2012 the complainant made a freedom of information request to the ICO which read as follows:

   *"Please provide copies of all communications between the Department for Media, Culture and Sport (and/or Ed Vaizey) and the Information Commissioner's Office (and/or Christopher Graham) between January 1st 2011 and May 26th 2011 with regards to changes to the ePrivacy Directive due to be transposed into UK Law by 26th May 2011."*

3. The ICO responded on 7 February 2012 and provided some information within the scope of the request (with some personal information redacted). However it refused to provide other information that it held, stating that this information was exempt under sections 36(2)(b)(ii) and 42. Names of some officials and other personal data was redacted under the section 40 exemption (personal information).

4. The complainant requested an internal review on 8 February 2012.

5. The ICO presented the findings of its internal review on 2 March 2012 at which point it upheld its original position in relation to sections 36(2)(b)(ii) and 42.

[1] http://www.ico.gov.uk/for_organisations/privacy_and_electronic_communications/the_guide/cookies.asp

## Scope of the case

6. The complainant contacted the Commissioner to complain about the decision to refuse his request under section 36(2)(b)(ii) and section 42 of the Act. The complainant did not challenge the ICO's application of section 40.

## Reasons for decision

Section 42 – legal professional privilege

7. The Commissioner has first considered the application of section 42 which provides for an exemption for information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

8. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal 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 third parties if such communication or exchanges come into being for the purpose of preparing for litigation."*[2]

9. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the withheld information constitutes emails and minutes containing legal advice from a government legal adviser and the Department for Culture, Media and Sport (DCMS). The information was sent to officials within DCMS as well as staff members

[2] Bellamy v The Information Commissioner and the Secretary of State for Trade & Industry [EA/2005/0023], para. 9.

at the ICO. In this case the client is DCMS and it is clear that the information is legal advice sent in a professional capacity. The Commissioner is satisfied that the information is subject to legal advice privilege.

10. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost. In this case the complainant suggested that if privilege was being applied to advice between DCMS (the client) and their legal adviser then by also sharing the information with the ICO, privilege will have effectively been waived. The Commissioner does not agree with the complainant and takes the view that privilege is only lost where it is disclosed to the outside world without any restriction on its future use. Where information is only shared with a limited audience and restrictions are placed on its further use then the information will remain confidential and still attract legal advice privilege. At the internal review stage the ICO explained that there was a clear understanding in advance between the parties that the information was to be shared on a 'common interest privilege' basis, and that privilege would not be waived as a result, as the ICO had an obvious shared interest in drafting the regulations.

11. Having reviewed the information the Commissioner is satisfied that the information was shared on a restricted basis and remains confidential. The information retains its legally privileged status and so section 40(2) is engaged. The Commissioner has therefore gone on to carry out a public interest test for this information.

The public interest test

12. As regards the public interest in disclosure the complainant argued that the information would increase transparency over whether the ICO had been unduly influenced by the DCMS over how it would seek to enforce the new e-privacy directive. The ICO itself acknowledged that the public interest factors in favour of disclosure are increased transparency in the way in which it communicates with organisations important to its business and furthering understanding of the implementation of the new regulations.

13. In favour of maintaining the exemption the ICO said that it was in the public interest for the ICO to maintain its ability to be consulted on matters of importance to its interests and regulatory functions. It also said that there was a public interest in allowing organisations with shared interests the ability to consult and discuss complex legal issues

with the aim of better understanding each other's position which it said would allow the issues of concern to be discussed and debated in detail. At the internal review stage it also referred to what it described as the inherent public interest in protecting legal professional privilege.

14. When considering the public interest in maintaining the exemption under section 42 of the FOIA the Commissioner would agree that account needs to be taken of the general public interest in protecting legal professional privilege. The Commissioner's view is that there will always be a strong public interest inbuilt into the section 42 exemption. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case of Bellamy v Information Commissioner & Secretary of State for Trade and Industry in which it states:

*"…there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public 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 cut case…"*[3]

15. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right". Therefore the Commissioner finds that the ICO's arguments regarding the importance of allowing organisations with shared interests to discuss complex legal issues, carry particular weight. Furthermore, the public interest in protecting the principle of legal professional privilege has additional weight in this case because the legal advice was relatively recent; 10 – 11 months old at the time of the request. The Commissioner's view is that where legal advice is recent the public interest is more likely to favour it being withheld. This is based on the principle that where legal advice is recent it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure.

16. The Commissioner also considers that the public interest is served by allowing the ICO to be consulted on matters of importance to its interests. Clearly, if organisations felt that information they share with the ICO could be disclosed this would deter them from consulting with the ICO in future which would make it harder for the ICO to carry out its functions effectively.

[3] *Bellamy*, para. 35.

17. The complainant suggested that the arguments in favour of disclosure are strong because the legal advice would affect a significant number of people, i.e. the entire population of the UK who would all be affected by the new legislation. This was in reference to the Commissioner's guidance on section 42 which suggests one of the factors to consider when carrying out the public interest test is the number of people affected by disclosure. In particular the complainant highlighted the Commissioner's decision concerning the publication of the then Attorney General's advice on the legality of the war in Iraq.

18. The Commissioner accepts that the fact that the advice relates to a piece of national legislation is relevant and this increases the weight to be attributed to the arguments in favour of greater transparency. However, this factor alone is not decisive and he does not attach the same importance to this argument as the complainant does. Whilst every citizen of the UK would be subject to the new law this is not necessarily the same thing as every citizen being directly affected by the changes to the law. The consequences of the complainant's argument would be that the public interest must always favour disclosure of legal advice concerning the passing of national legislation. This cannot be the intention behind the exemption and such a scenario would not be in the public interest. Rather, the particular circumstances of each case need to be taken into account, and in this instance the Commissioner is of the view that whilst there is some public interest in disclosure the arguments are not sufficiently strong to outweigh the public interest in protecting the principle of legal professional privilege and the ICO's ability to be consulted on legislation affecting its interests.

19. The Commissioner has reviewed the withheld information and having done so he does not think that this would add much to public understanding of the legislation beyond the information already in the public domain. The Commissioner is also mindful of the fact that none of the additional factors which he highlights in his guidance as favouring disclosure are present in this case, namely the advice concerns a large amount of public money, there is a lack of transparency in the public authority's actions, there was misrepresentation of advice that was given or there has been a selective disclosure of only part of the advice that was given.

20. In light of the above the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 36(2)(b)(ii) – free and frank exchange of views

21. The ICO has also withheld some correspondence between officials within DCMS and the ICO under section 36(2)(b)(ii). This provides that information is exempt if in the opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

22. When deciding if the exemption is engaged the Commissioner has to first establish that an opinion was given on the application of the exemption by a proper qualified person. In this case the ICO has provided a copy of the written opinion of the Deputy Information Commissioner, David Smith, that disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The opinion was given on 7 February 2012.

23. The Commissioner notes that in normal circumstances he would himself, as Information Commissioner, act as the qualified person for the ICO. However, in this case he was unable to fulfil his duties at the time of the request. In these circumstances either of his deputies may act as the qualified person in his absence. This power is set down in the Data Protection Act 1998 (DPA) which provides the statutory authority for the Deputy Commissioners to exercise the Commissioner's functions when there is no Commissioner or when he is not able to fulfil his duties. The Commissioner is satisfied that a qualified person's opinion was properly obtained and so has gone on to consider whether the opinion was a reasonable one.

24. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following:

*"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*

25. In order to determine whether section 36(2)(b)(i) or (ii) is engaged the Commissioner will consider:

- whether the prejudice claimed relates to the specific subsection of section 36(2) that the ICO is relying upon;
- the nature of the information and the timing of the request; and
- the qualified person's knowledge of or involvement in the issue.

26. When deciding that section 36(2)(b)(ii) was engaged the qualified person gave his opinion that disclosure would be likely to inhibit government departments in their willingness to discuss the formulation and presentation of legislation and policy with the ICO. He explained that Ministers need to be able to share ideas or discuss other action with the ICO without fear that details of their discussions may be made public.

27. Having reviewed the withheld information the Commissioner is satisfied that the qualified person's opinion is a reasonable one. The qualified person had been given a submission including only relevant materials and had sufficient knowledge of the issues discussed to form a reasonable opinion on the application of the exemption. The withheld information is candid communications between government officials and the ICO and was still relatively recent at the time of the request. In the Commissioner's view it is reasonable to conclude that if it were disclosed it would inhibit officials from co-operating in a similar way for fear that such co-operation could be undermined.

28. The Commissioner has decided that section 36(2)(b)(ii) is engaged and he has now gone on to consider the public interest test.

Public interest test

29. The complainant argued that the public interest favours disclosure because the changes to the e-privacy directive are "designed to protect fundamental rights of the public" and therefore "any debate on the implementation of such law should be made available to the public". In asking for his internal review the complainant also noted that since the changes to the e-privacy directive had by this point passed into UK law and the ICO had issued its policy guidance, any deliberations on the changes would have been concluded and so therefore would not have been inhibited by disclosure of the information.

30. The ICO itself acknowledged that the public interest would be served by increased transparency in the way in which the ICO communicates with DCMS and increased understanding of the issues discussed. Disclosure would also further public confidence that issues of importance are discussed at the appropriate level and in appropriate detail.

31. As regards the public interest in maintaining the exemption the ICO highlighted the following points:

    - The public interest in the ICO and DCMS being able to discuss complex points in detail and share ideas prior to finalising these points.

- The public interest in DCMS being able to trust that they are able to consult and communicate with the ICO in a manner appropriate to the issues in the knowledge that information provided to the ICO or discussed with the ICO will not be disseminated prematurely or at all, where appropriate.
- The public interest in the ICO maintaining a position where it is able to engage with and be consulted by key external bodies in relation to matters which are of importance to its regulatory function.

32. The Commissioner has considered the competing arguments and has reached the view that the public interest favours maintaining the exemption. The Commissioner accepts that there is a general public interest in greater transparency as well as in shedding light on the way in which the ICO interacts with government departments. However, the withheld information is more concerned with presentational issues regarding the changes to the e-privacy directive rather than the legislation itself, therefore the arguments in favour of aiding public understanding of the legislation carry limited weight.

33. The complainant had argued that the issue of cookies had now passed into law and therefore deliberation would not be inhibited. On this point the Commissioner notes that whilst the changes had been made by the time of the request the issue regarding the use of cookies, which are discussed in the withheld information, was still a live area for policy formation and would be subject to review as it develops. Therefore disclosure at this point would have had a greater impact on these discussions.

34. Having accepted the reasonableness of the qualified person's opinion the Commissioner must also recognise the public interest in allowing the ICO to consult with government departments on future, unrelated issues. If discussion is inhibited the quality and effectiveness of legislation and policy will suffer and therefore the Commissioner has given particular weight to this factor when balancing the public interest.

35. Having considered all the circumstances of the case and having given due weight to the opinion of the qualified person the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## 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: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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 ……**

**Gerrard Tracey**
**Principal Adviser**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**