

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2013

Public Authority: The Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant requested information from the Crown Prosecution Service (CPS) about its decision to bring charges in the case of a named individual. In the circumstances, the CPS disclosed some information, relying on sections 30 (investigations and proceedings) and 42 (legal professional privilege) to withhold the remainder.
2. The Commissioner's decision is that the CPS correctly applied the exemption in section 42. He requires no steps to be taken.

Request and response

3. The complainant wrote to the CPS on 27 February 2012 about the decision to bring charges in the case of an individual who was arrested in December 2010 during a protest about the proposed increase in student tuition fees. He requested information in the following terms:

"It would appear that the CPS has instructions to charge student demonstrators with violent disorder, irrespective of the individual circumstances of the case, in the hope that a few high-profile trials will have a chilling effect on subsequent protests. In the interests of public accountability I assert my right under the Freedom of Information Act to request the names and departments of the officials involved in the decision to bring the charge of violent disorder against [named individual] together with the minutes of any meetings that may be applicable to his case".

4. The CPS responded on 3 April 2012, advising that it had received the request on 6 March 2012. It provided details of the lawyer involved in the charging decisions in the case referred to in the request. It also advised that it holds other information within the scope of the request. However, it stated that the information is exempt from disclosure, citing sections 30(1)(c) (investigations and proceedings) and 40(2) (personal information).
5. The CPS also told the complainant:

"The CPS does not accede to your observation that we follow a 'practice of over-charging' in any case".
6. Following his request for an internal review, the CPS wrote to the complainant on 26 June 2012 revising its position. It provided some additional information in scope of the request, disclosing a redacted copy of the charging decision. With respect to the remaining withheld information – relating to a pre-trial conference with counsel - it confirmed its reliance on section 30 and additionally cited section 42 (legal professional privilege).

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled, providing full details in support of his complaint on 20 August 2012. He told the Commissioner:

"While the disclosure of the charging papers in [named individual's] case is to be welcomed, it fails to meet the requirements of my original FOI request; namely, that the minutes of one case conference held in June 2011 be released into the public domain".
8. The Commissioner considers the scope of his investigation to be the CPS's citing of sections 30 and 42 in relation to that case conference material.

Reasons for decision

Section 42 Legal professional privilege

9. Section 42(1) 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."

10. In other words, section 42 sets out an exemption from the right to know for information protected by legal professional privilege (LPP).
11. 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.
12. In support of its citing of section 42(1), the CPS told both the complainant and the Commissioner that it considers that the information attracts legal professional privilege:

"as it contains advice from counsel".
13. The Commissioner recognises that there are two types of privilege within LPP: litigation privilege and advice privilege.
14. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation (legal action before a court). For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing the case. It can cover communications between lawyers and third parties so long as they are made for the purposes of the litigation.
15. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice.
16. Although, in the Commissioner's view, the CPS failed to state specifically which category of advice it considers the information attracts, he notes that it told the complainant:

"There is documentation referring to a pre-trial conference with counsel that relates to evidence gathering".
17. The Commissioner has viewed the withheld information and has considered the context in which it was recorded. Given that it relates to the pre-trial period, the Commissioner is satisfied that the exemption is engaged.

The public interest test

18. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether 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

19. The complainant did not make specific arguments about the legal professional privilege exemption. However, arguing generally in favour of disclosure, he told the CPS that he considered there is a strong public interest:

"in exposing a flawed, costly and pernicious process that runs contrary to the Crown Prosecution Service's own stated guidelines".

20. Referring to what he considers to be over-charging in this case, and noting the situation with reference to other cases involving allegations of violent disorder, he argued:

"..... It is therefore in the public interest to reveal the basis behind this evidently flawed decision".

21. The CPS acknowledged that disclosure would be in the public interest in that it would increase public understanding of the CPS decision making and prosecuting process. It also recognised that transparency may increase public confidence in the CPS.

Public interest arguments in favour of maintaining the exemption

22. In its internal review correspondence, when it first cited the exemption, the CPS told the complainant that it considered that the public interest arguments it had cited in relation to section 31 also applied to section 42. It argued that:

"Advice given relating to pre-trial preparations on individual cases is done so in confidence between legally qualified parties. Minutes of such meetings, with the sensitive personal data they contain, are held in confidence and it would be inappropriate to disclose that process to the public."

23. It also argued that there is a strong public interest in maintaining the confidentiality of communications between the CPS and Counsel as well as other public bodies.

Balance of the public interest arguments

24. In balancing the opposing public interest arguments in this case, the Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* which gave considerable weight to the public interest in withholding information which attracts legal professional privilege.
25. 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.
26. In line with the relevant case law, the Commissioner accords significant weight to the maintenance of LPP. Whilst the Commissioner remains mindful that this should not mean that this exemption becomes effectively absolute, it is the case that there will need to be very clear and specific public interest grounds for the public interest in the maintenance of LPP to be overridden.
27. In his view, in order to equal or outweigh that inherently strong public interest usually involves factors such as decisions that will affect a large number of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
28. In considering the balance of the public interest in connection with section 42(1), the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question.
29. In reaching his decision the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question.
30. The Commissioner recognises the genuine interest of the complainant in the CPS's decision in this case. He also accepts that there is a clear public interest in knowing that public authorities have reached decisions on the basis of sound advice. However, in his view this general principle does not in itself overturn the public interest in protecting the confidentiality of legal advice.

31. In the Commissioner's view, there are not sufficiently clear and specific grounds in favour of disclosure in this case: the complainant's countervailing arguments as to the public interest in disclosure do not carry the same or greater weight in relation to the withheld information. The Commissioner has therefore concluded that the public interest in maintaining the section 42 exemption in this case outweighs the public interest in disclosure. It follows that the CPS is not required to disclose the information at issue.

Section 30 Investigations and Proceedings

32. As the Commissioner has found that the information was correctly withheld by virtue of section 42, he has not considered the CPS's citing of section 30 in relation to the same information.

Right of appeal

33. 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

34. 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.
35. 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

Jon Manners
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