

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested any legal advice the Cabinet Office has received on the potential impact of TTIP (Transatlantic Trade and Investment Partnership).
2. The Commissioner's decision is that Cabinet Office has correctly relied on section 42(1) to withhold the requested information from the complainant.
3. The Commissioner requires the public authority to take no steps to ensure compliance with the legislation.

Background

4. The Transatlantic Trade and Investment Partnership (TTIP) is a proposed trade agreement between the European Union and the United States of America, with the aim of promoting trade and multilateral economic growth. The negotiations are currently on-going.

Request and response

5. On 23 October 2014, the complainant requested information of the following description:
 - "Any legal advice the Cabinet Office has received on the potential impact of TTIP (Transatlantic Trade and Investment Partnership)".

6. The Cabinet Office initially refused to confirm or deny that it held the requested information. After the Commissioner issued a Decision Notice¹ directing it to confirm whether it held the requested information it confirmed to the complainant that it did hold the requested information.
7. However it (in a letter dated 20 August 2015) refused to provide the complainant with the requested information by citing the following FOIA exemptions;
 - Section 35(1)(a)
 - Section 42(1)
 - Section 27(1)
8. The complainant contacted the Commissioner on 11 September 2015 to complain about the way his request for information had been handled. The Commissioner invited the Cabinet Office to review its own decision before he commenced any investigation.
9. Following an internal review the Cabinet Office wrote to the complainant on 11 December 2015. It stated that it upheld its decision as laid out in paragraph 7 above.

Reasons for decision

10. Section 1(1) of FOIA provides that:

“Any person making a request for information to a public authority is entitled:

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him”.

11. The Cabinet Office has informed the complainant that it holds requested information. However it relies on sections 42(1), 35(1)(a) and 27 not to communicate the information to the complainant.
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¹ FS50570791

Section 42(1)

12. The Commissioner has viewed the withheld information. He confirms that it is legal advice held, on the potential impact of TTIP, by the Cabinet Office as requested by the complainant.
13. Section 42 provides that information in respect of which a claim to legal professional privilege communications could be maintained in legal proceedings is exempt information.
14. The principle of legal professional privilege is based on the need to protect a client's confidence that communication with his or her legal advisor will be treated in confidence. There are two types of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated).
15. The complainant has submitted to the Commissioner that the application of the section 42 exemption is conditional on satisfaction of two pre – requisites: (i) that any advice concerns legal rights, liabilities, obligations or remedies (as opposed to financial, operational or strategic issues); and (ii) that any such advice has not been disseminated beyond the individuals to be regarded as the 'client' of the lawyer who gave the advice. He informed the Commissioner that in his view that the groups of individuals to be regarded as the lawyer's client will be narrowly drawn (see for example *Three Rivers District Council and Others v The Governor & Company of the Bank of England (No.5)* [2003] EWCA 474) and to maintain that the exemption from disclosure applies, the Commissioner needs to be satisfied that both of these pre – requisites are satisfied.
16. Notwithstanding the above (correct) submission by the complainant the Commissioner (having viewed it) accepts that the withheld information is information that attracts legal professional privilege. In that it is information from lawyers (acting in that capacity) for a "client" regarding the provision of legal advice for that client. The "clients" being the Joint Ministerial Committee on Europe and Cabinet Office. The privilege affixed being advice privilege. The Commissioner has no evidence that the Cabinet Office has disseminated, in whole or in part, the legal advice to third parties.
17. Section 42(1) of the FOIA is engaged it is a qualified exemption. Therefore the Commissioner is required to consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

18. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis of, and how, public authorities make their decisions. This in turn fosters trust in public authorities and may allow greater public participation in the decision making process.
19. The complainant has helpfully made to the Commissioner the following submissions why the public interest is served by releasing the withheld information:
- An area of great public interest in TTIP has centred on the impact the trade deal could have on the NHS.
 - The public interest for the NHS is clearly of great significance. A poll for the Daily Mirror and ITV found support for the NHS remains almost universal amongst people in England & Wales.
 - The level of public concern in TTIP has been widespread. All forms of media have covered the public interest in detail, and regularly. An EU-wide petition by campaigning organisation 38 degrees with the pretext to stop the trade deal has over 2.5 million signatures to date.
 - Public pressure forced the EU Commissioner for Trade Cecelia Malmström to write a letter² to Lord Livingston the UK Minister for Trade and Investment. 'I am writing to follow up our meeting in November 2014, when you suggested that it would be helpful for me to write to correct some of the misconceptions circulating about the Transatlantic Trade and Investment Partnership (TTIP) and the National Health Service (NHS) in the UK.'
 - Due to public pressure from grassroots public interest movement The People's NHS, which involved local groups throughout the country, the government responded to concerns raised. This response has also been refuted because of the legal advice provided to Unite and published. The fact that the government responded specifically to this movement, again highlights the depth of public interest and indeed concern over TTIP and the need for this information to be released.

² http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf

- The London School of Economics was commissioned to undertake an impact assessment for the UK government of the costs and benefits of including Investor-State Dispute Settlement as an element of investment protection in an EU-US agreement. The assessment concluded that such a move would expose the UK to an even greater number of disputes and costs than Canada has suffered under the North American Free Trade Agreement while being “highly unlikely” to bring in any additional investment, as no bilateral agreement with any industrialised nation has ever resulted in increased US investment flows.
 - The public have grave concerns over the lack of transparency of the trade deal and the potential negative implications in all areas of public interest from food to healthcare.
20. The Information Tribunal, in *James Kessler QC v Information Commissioner (EA/2007/0043)*, laid out with clarity (at paragraph 60 of its judgement) the following public interest factors in favour of maintaining the exemption at section 42 FOIA.
- “a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.
- b. Were legal advice disclosed routinely, there would be disincentive to such advice being sought and/or a disincentive to seeking advice based on full and frank instructions.
- c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between a public authority and its legal advisers.
- d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.
- e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced. Advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed.”
21. The Commissioner considers that there will always be strong arguments in favour of maintaining legal professional privilege. It is a longstanding,

well established and important common law principle. The Information Tribunal affirmed this in the Bellamy case when it stated:

"...there is a strong element of public interest inbuilt into 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..."

22. Having considered the content of the withheld information in the wider context of this case, the Commissioner whilst recognising there is strong public interest in disclosure has decided that the public interest arguments which favour maintaining the exemption in respect of the requested information are significantly greater than those which favour disclosure. In particular he takes cognisance that the relevant negotiations are still ongoing and therefore the withheld information remains pertinent and relevant. It is not legal advice upon matters that have long been concluded and in that sense the public interest in maintaining the exemption would or may have waned.
23. The Commissioner is satisfied for the reasons discussed above that the public interest in maintaining the exemption outweighs the public interest in disclosure.
24. Having reached his decision that section 42 was properly applied the Commissioner did not go on to consider the applicability of sections 27 (1) and 35.

Right of appeal

25. 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

26. 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.
27. 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
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