

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2019

Public Authority: Department for Communities Northern Ireland

Address: Causeway Exchange
1-7 Bedford Street
Belfast BT2 7EG

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Communities (DfC) in relation to an investigation. The DfC refused to disclose the information ('the withheld information') citing the exemptions as set out in sections 32, 40(2), 41 and 42 of the FOIA.
2. The Commissioner's decision is that the DfC has correctly applied the above exemptions to the withheld information, therefore the Commissioner requires no steps to be taken.

Request and response

3. On 24 April 2017, the complainant made a request to the DfC for sight of a report of an investigation which was carried out by [name redacted] of the Department of Education in December 2016.
4. The DfC responded to that request on 28 July 2017. It disclosed some of the requested information to the complainant, however it withheld the remainder, citing sections 32, 40(2), 41 and 42 of the FOIA as a basis for non-disclosure.
5. The complainant did not seek a formal internal review of the DfC's decision to withhold some information under the above exemptions, however he had ongoing contact with the DfC in relation to an investigation it was carrying out at his instigation. The Commissioner

has used her discretion to consider the complaint, so as not to incur further delays for the complainant.

Scope of the case

6. The complainant contacted the Commissioner on 3 May 2018 to complain about the way his request for information had been handled.
7. The Commissioner has considered the DfC's handling of the complainant's request, in particular its application of the above exemptions.

Reasons for decision

Section 32 – court records

8. Under section 32 of the FOIA:-
 - (1) information held by a public authority is exempt information if it is held only by virtue of being contained in-
 - (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
9. The DfC has confirmed to the Commissioner that it is relying on section 32(1)(a) of the FOIA to withhold part of the information requested by the complainant, namely information relating to a judicial review and an investigation carried out by the DfC, which it states is only held by it by virtue of section 32 of the FOIA.
10. Section 32 is a class based exemption. This means that any information falling within the categories described is automatically exempt from disclosure regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means or to information which is already widely available.
11. Section 32(1)(a) states that information is exempt if it is held only by virtue of being contained in any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter.

12. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Secondly, is this information held by the public authority only by virtue of being held in such a document?
13. In the Commissioner's view, the phrase '*only by virtue of*' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.
14. In its submission to the Commissioner, the DfC confirmed that the information withheld under section 32(1)(a) was held by it only in relation to ongoing judicial review proceedings.
15. During the course of her investigation, the DfC provided the Commissioner with a copy of the withheld information. The issue for the Commissioner to decide is whether the requested information meets the criteria as set out in section 32(1)(a)-specifically, in this case, whether it is held by the DfC for the purposes of proceedings.
16. The phrase '*for the purposes of proceedings*' is not defined in the FOIA. However, the Commissioner's published guidance on section 32 of the FOIA states:

"We believe that section 32 was drafted to allow the courts to maintain judicial control over access to information about court proceedings. This includes giving courts control to decide what information can be disclosed without prejudicing those proceedings. In effect, section 32 ensures that FOIA can't be used to circumvent existing court access and discovery regimes. Also, public authorities won't be obligated to disclose any information in connection with court, inquiry or arbitration proceedings outside those proceedings."

17. In accordance with her guidance, the Commissioner considers it reasonable to accept that a broad interpretation of the phrase '*for the purposes of proceedings*' will include any information that affects the proceedings of the court. The withheld information in this case consists, amongst other documents, of affidavits submitted in relation to judicial review proceedings. The Commissioner is satisfied that such information is information that is relevant to, and affects, the progress of a court case. It is a requirement of the court that such documents, which constitute evidence in a case, are filed with the court prior to the judicial review hearing taking place.
18. With regard to the purpose, or reason why, the information was filed with the court, the Commissioner is satisfied that it was placed on the

court file as part of the ongoing proceedings.

19. The Commissioner is therefore satisfied that the information was clearly held for the purposes of the proceedings of the court and that those proceedings were in a particular cause or matter.
20. From the evidence she has seen, the Commissioner is satisfied that the information withheld by virtue of section 32(1)(a) was filed with, or otherwise placed in the custody of, the court for the purposes of proceedings and that there is no reason for the DfC to hold it other than for the purposes of those proceedings. In relation to some of the affidavits held, the DfC has sought to apply section 32(2)(a) to these, however the Commissioner, having perused them, is satisfied that they were all filed with the High Court in Belfast as part of the same judicial review proceedings, therefore they would fall under the exemption at section 32(1)(a).
21. The conclusion of the Commissioner is that the exemption provided by section 32(1)(a) of the FOIA is engaged and so the DfC was not obliged to disclose the withheld information. The DfC also applied section 40(2) of the FOIA to the affidavits, as these constituted the personal data of third parties, however, since section 32(1)(a) applies to all of the affidavits, the Commissioner has not considered the DfC's application of section 40(2), save to note that one of the affidavits is that of the complainant himself, so section 40(1) of the FOIA would have applied in that instance, as the affidavit was the personal data of the applicant.
22. As section 32 of the FOIA is an absolute exemption, there is no requirement to consider whether there is a public interest in disclosure.

Section 41 – information provided in confidence

23. Section 41(1) of the FOIA states that:

Information is exempt information if–

- (a) *it was obtained by the public authority from any other person (including another public authority), and*
- (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Was the information obtained from another person?

24. The DfC states that it obtained the information from other persons, i.e. those who provided witness statements. Therefore, the Commissioner is satisfied that the DfC obtained the information withheld under section 41 from 'another person'.

Would disclosure of the information by the DfC constitute an actionable breach of confidence?

25. The Commissioner uses the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as a framework for assessing whether a disclosure would constitute a breach of confidence. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:
- the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
26. Dealing with the first bullet point, information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The DfC states that the information consists of important witness statements which form part of an investigation and is therefore not trivial. The information was not accessible to the public at the time of the request and this is still the case. Therefore, the DfC considers that the information withheld under section 41(1) does have the necessary quality of confidence and the Commissioner, having perused the withheld information, is satisfied that this is the case.
27. In relation to the second bullet point, the DfC has informed the Commissioner that, as part of the investigation process, the witnesses provided the statements in the expectation that they would be kept confidential and not disclosed to the public, given the references within the statement to sensitive and personal matters, and the views expressed regarding issues affecting the investigation. The Commissioner is satisfied that the information was imparted in circumstances importing an obligation of confidence.
28. In relation to the final bullet point, the Commissioner considers that it is not necessary for there to be any detriment to the confider in terms

of tangible loss in order for information to be protected by the law of confidence. The Commissioner considers that disclosure of the withheld information would cause detriment to those who provided the statements, as loss of privacy can be a detriment in its own right.

Is there a public interest defence for disclosure?

29. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test within the FOIA. However, disclosure of information provided in confidence, where there is an overriding public interest is a *defence* to an action for breach of confidence. The Commissioner is therefore required to consider whether the DfC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
30. The Commissioner recognises that the courts have taken the view that very significant public interest factors must be present in order to override the strong public interest in maintaining confidence.
31. Whilst the DfC acknowledges that there is a public interest in terms of applying openness and transparency, it is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. The Department considers this to be particularly strong in this case where the witness statements are sought in confidence. The Commissioner accepts that this is the case.
32. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. As the Commissioner finds that the exemption at section 41 does apply, she will not go on to consider the exemption at section 40(2)(third party personal data) which the DfC has also applied in relation to this part of the withheld information.

Section 40(2) -third party personal data

33. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the applicant and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
34. In this case the DfC cited section 40(2) in respect of the personal information it redacted, namely:-
 - the names of DfC staff;

- the names of business owners who applied for Urban Development Grant (UDG) support; and
 - witness statements, or extracts of witness statements, provided by departmental staff to a number of investigations
35. The DfC confirmed that it was applying section 40(2) in conjunction with the condition listed in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the DPA). The DPA was still in force at the time of the complainant's request, although it has now been superseded by the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. The DfC has confirmed its position that disclosure of this information into the public domain would be unfair and unlawful, which would contravene the first data protection principle as set out in the DPA.
36. The Commissioner considers that section 41 of the FOIA applies to the witness statements in their entirety, so has not considered the DfC's application of section 40(2) of the FOIA to these. She has considered its application of section 40(2) to the remaining redacted information listed in paragraph 34 above.
37. The Commissioner is satisfied that the information in question is the personal data of individuals other than the complainant. This is because the individuals could be identified from their names, initials and detail in the documents. The Commissioner has therefore gone on to consider whether disclosure of this information into the public domain would be unfair.
38. When considering the fairness and the first data protection principle the Commissioner has taken the following factors into account:
- the individuals' reasonable expectations of what would happen to their information;
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (i.e. the consequences of disclosure); and
 - whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects.
39. The Commissioner has first considered individuals' expectations. The DfC states that the individuals in question would have a reasonable expectation that the DfC would keep their personal information in

confidence and not disclose it into the public domain in this specific context. The names of DfC staff identify them as staff being investigated or staff who were interviewed as witnesses during the investigation. In other circumstances this information, included on documentation, could have been released but the context of this request must be considered. The request relates to an investigation into wrongdoing, in a number of different cases, and release of any staff names, along with the other information released, may identify a staff member as either a person accused of wrongdoing and /or the source of information provided to the investigators. The information withheld under section 40(2) also contains the names of persons from outside organisations, which, if disclosed, would identify them as being associated with the investigations.

40. The DfC considers that the individuals have a reasonable expectation that their employer, in its role as a responsible controller of personal data, would respect the implied confidentiality conferred by participation in an investigation. Staff were compelled to provide information and would have had the reasonable expectation that this information would not be processed outside the course of the investigation.

The data subjects named have not been asked whether they are willing to consent to the disclosure. However the DfC considers that, given the nature of the information, consent to release into the public domain would not be given by the data subjects.

41. The Commissioner, having perused the information withheld under section 40(2), accepts that the individuals concerned would not have had a reasonable expectation of disclosure and that disclosure would be likely to cause them damage or distress, given the nature of the information, which is not outweighed by any legitimate interest. The Commissioner is therefore satisfied that section 40(2) is engaged in relation to that information.

Section 42(1) – information subject to legal professional privilege

42. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
43. LPP 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 DTI* (EA/2005/0023).

"... 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 communications or exchanges come into being for the purposes of preparing for litigation."

44. There are two categories of legal professional privilege (LPP) – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both 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.
45. 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. With regard to litigation privilege, the information must it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
46. In this case the DfC has confirmed that it considers the withheld information to be subject to legal advice privilege apart from one document which it considers to be subject to litigation privilege. The communications covered by advice privilege are confidential, made between the DfC and its legal advisers, the Departmental Solicitor's Office (DSO) acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice regarding the ongoing investigation. The document covered by litigation privilege was created for the dominant purpose of use in preparing a case for litigation. The DfC has also confirmed that it is satisfied that privilege has not been lost by virtue of the advice losing any of its confidentiality.

47. Having considered the content of the information, the Commissioner accepts that the majority of the information withheld under section 42 is subject to legal professional privilege on the grounds of legal advice privilege as it consists of communications to and from a professional legal adviser for the purpose of seeking and providing legal advice. The Commissioner's guidance states that a communication under section 42 of the FOIA means a document which conveys information. The information subject to advice privilege in this case consists of correspondence between the DfC and its legal advisers, some with documents attached which have been compiled on the basis of the advice from the DSO, and which reflect that advice and therefore still attract privilege. The Commissioner also accepts that the one document to which litigation privilege applies, a report commissioned by the Departmental Solicitor's Office, was created for the dominant purpose of use by lawyers in preparing a case for litigation. On this basis, the Commissioner finds that section 42(1) of the FOIA is engaged in relation to the information withheld under it by the DfC.

Public interest test

48. The exemption provided in section 42(1) 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. The Commissioner has considered the factors in favour of maintaining the exemption and has balanced them against those in favour of disclosure of the information withheld under section 42(1) of the FOIA.

Factors in favour of disclosure of the information

49. The DfC accepts that public authorities should be accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability, and it would be in the public interest to know whether the DfC followed or went against legal advice when it comes to decision-making which will affect the public.
50. The DfC also accepts that transparency in the decision making process and access to the information upon which decisions have been made can enhance the accountability of public authorities.

Factors in favour of maintaining the exemption

51. The DfC states that it is vital for it, as a government department, to be able to obtain full and frank legal advice to aid it in complying with its legal obligations and conducting its business accordingly. As legal

advice has to be necessarily fair, frank and reasoned, it is inevitable that it is likely to highlight the strengths and weaknesses of a course of action. If legal advice were to be routinely disclosed, public authorities such as the DfC may be reluctant to seek advice as the disclosed advice could contain information which may damage their position. As a result, reluctance to seek legal advice may render the DfC less able to properly comply with its legal obligations.

52. Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness and frankness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn goes to serve the wider administration of justice. The legal adviser needs to be able to present the full picture to his or her clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. If a legal adviser is unable to provide this

comprehensive advice, without fear of subsequent disclosure, the quality of decision making may be adversely affected, which would not be in the public interest at any level, but especially at government departmental level, where advice needs to be of the highest quality.

53. The DfC is also wary that future legal interests could be prejudiced. It is well aware that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. As a consequence, legal advice may well set out the perceived weaknesses of the DfC's position whilst presenting arguments for and against certain courses of action. Without such comprehensive advice, the effectiveness of the DfC's decision-making processes would be reduced because it would not be fully informed, and this would be contrary to the public interest

54. The DfC is also conscious that disclosure of legal advice would produce a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest, as the former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

Balance of public interest factors

55. The Commissioner is aware that there is a strong element of public interest inbuilt into maintaining LPP. This position was endorsed in the case of *DBERR v Dermot O'Brien* ([2009] EWHC 164 (QB))

".....Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)...The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight"

56. In the case of *Calland v Information Commissioner & the Financial Services Authority* (EA/2007/0136) the Tribunal commented:

"What is quite plain, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

57. The Commissioner and the Information Tribunal have both expressed the view, in a number of previous decisions, that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the *Bellamy* case, as mentioned in paragraph 23 above, the Tribunal described legal professional privilege as, "a fundamental condition on which the administration of justice as a whole rests".

58. There will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept, and it is clear from previous decisions and from the Commissioner's guidance that, as was stated succinctly in the *Bellamy* case, that:

"there is a strong element of public interest inbuilt into the privilege itself and that at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest"

59. The Commissioner has considered the public interest arguments in favour of disclosure of the information withheld under section 42, and has concluded that, although significant weight can be attached to transparency and accountability in this case, also to the public interest in knowing the quality of legal advice received by the DfC and whether

it chose to follow or go against it, the weight of all of these arguments when added together is not enough to outweigh the public interest arguments in favour of maintaining the exemption, such as the vital importance of the DfC being able to obtain free, frank and high quality legal advice without fear of premature disclosure. The arguments are also not sufficient to outweigh or override the inbuilt public interest in information remaining protected by LPP.

60. In view of the above, the Commissioner considers that, in all the circumstances of this case, the public interest in maintaining the exemption at section 42 of the FOIA outweighs the public interest in disclosing the information.

Other matters

61. As one of the affidavits being withheld under section 32(1)(a) of the FOIA consists of the complainant's personal data, the Commissioner considers that the DfC should have given consideration to disclosing this to the complainant under the subject information provisions of the DPA 1998.

Right of appeal

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

63. 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.

64. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF