

FOI Request DHSSPS/2013-0023 – Application of Exemption under section 42, Legal Professional Privilege

1. Ministry of Justice Guidance¹

MOJ Guidance on Section 42 Exemption has been taken into consideration particularly the following extracts:

- *Section 42 applies to information that would be subject to legal professional privilege if litigation were in progress. Legal professional privilege covers confidential communications between lawyers and clients and certain other information that is created for the purposes of litigation. Section 42 ensures that the confidential relationship between lawyer and client is protected.*
- *Section 42 is subject to a public interest balance. However the Tribunal and the High Court have recognised that there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material, and that as such equally weighty factors in favour of release must be present for the public interest to favour disclosure.¹*
- *Legal Professional Privilege (LPP) is a rule of litigation that protects, in general terms, confidential communications between lawyers and their clients. It may also cover some communications between a lawyer and third parties (see paragraph 13) for the purpose of preparing litigation.*
- *The principle of LPP has been established by the Courts in recognition of the fact that there is an important public interest in a person being able to consult his or her lawyer in confidence. The courts do not distinguish between private litigants and public authorities in the context of LPP. Just as there is public interest in individuals being able to consult their lawyers in confidence, there is public interest in public authorities being able to do so.*

What material is subject to LPP?

- *LPP predominantly attaches to communications with lawyers. This may include communications between a public authority and:*
 - *external lawyers in private practice (solicitors or counsel),*
 - *its own salaried in-house legal advisers, including those retained or employed by public authorities such as government departments in their own legal departments, and*

¹ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-exemption-section42.pdf>

- *lawyers employed by other public authorities (including for example by the Treasury Solicitor's Department).*

2. Public Interest Test

The MOJ guidance also sets out possible reasons for withholding legal advice from disclosure under FOI in the public interest, although each case must be considered on its merits:

Public interest in protecting legal advice

- *It is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant. Government departments therefore need high quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of the facts.*
- *The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position.*
- *Without such comprehensive advice the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.*
- *Disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.*

3. Advice from Departmental Solicitor

██████████ discussed the Department's position with ██████████ on 29/03/2012, in particular the decision to withhold certain information under section 42. The following was explained:

- The Dept is processing an FOI request from ██████████ which is involved in a dispute with several HSC Trusts over prompt payment of invoices. ██████████ is seeking compensation and interest payments under the Late Payment of Commercial Debts Act. The Trusts are represented by

Directorate of Legal Services and the Department's position has been that the dispute should be resolved between those parties.

- Nevertheless the Dept holds some records relating to the issue, which are under consideration for disclosure. The Dept is seeking advice on whether it is appropriate to apply this exemption to an internal email which summarises a telephone call from Alphy Magennis (DLS), and basically relays in detail the legal advice which he had provided to the Trusts. Although DHSSPS is not the client of DLS, the Ministry of Justice guidance allows for communications between a public authority and lawyers employed by other public authorities to be exempted (see para 14):
<http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-exemption-section42.pdf>
- The guidance also states that use of the exemption is a question of law, hence the request for DSO advice
- The Dept feels that disclosure of the email in question would reveal the position adopted by the HSC Trusts and the advice received by their legal representative. This has the potential to affect any future litigation, and should therefore be withheld.

██████████ agreed with the Dept's proposed position and use of the s.42 exemption.

4. Conclusion

MOJ guidance allows a public authority to exempt communications between itself and the legal representative of another public authority. In this case DLS represents the HSC Trusts, and the advice it provided to the Trusts has been relayed to the Dept in a telephone call. An email summarising that advice is considered exempt as it would concede the Department's and Trusts' position in an ongoing dispute over prompt payment of invoices. As there is potential for litigation between the requestor ██████████ and several HSC Trusts, the disclosure of this information could adversely affect the outcome of that litigation.

The public interest in disclosure is therefore outweighed by the need to maintain the confidentiality of the advice provided to the HSC Trusts, in keeping with the reasons set out by MOJ.

Finally, the legal advice received by the Dept's own legal representatives (DSO) supports this position.

Ryan Wilson
Local Information Manager
DHSSPS Finance Directorate

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