

ICO Hearing 10 – 02310
Decision
Portfolio of Legal Affairs

Jan Liebaers
Acting Information Commissioner for the Cayman Islands
4 April 2011

Summary:

An Applicant was refused access by the Portfolio of Legal Affairs to correspondence between staff members of the Portfolio in relation to the prosecution of the FOI Applicant and occurring between 28 April 2008 and the date of the FOI request (1 September 2010).

The Acting Information Commissioner upheld the Portfolio of Legal Affairs' decision to refuse access to the responsive records, and found that the records requested by the Applicant are exempt from disclosure under the *Freedom of Information Law, 2007* as they would be privileged from production in legal proceedings on the ground of legal professional privilege.

Statutes Considered:

Freedom of Information Law, 2007
Freedom of Information (General) Regulations, 2008

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A. INTRODUCTION

- [1] On 1 September 2010 the Applicant made an FOI request to the Portfolio of Legal Affairs (the Public Authority or “PA”) for:

“...any correspondence (notes; emails; memos; messages; etc.) that deals with the prosecution of my case for the dates of April 28, 2008 to present (Summary Court; Grand Court; Court of Appeal). Specifically, I am interested in any and all correspondence of/between the Prosecutor, Mr. John Masters, the Solicitor General, Ms. Cheryl Richards, the Attorney General, the Honourable Samuel Bulgin, and Ms. Tanya Lobban. In addition, I seek any correspondence that deals with my case, for the same dates as mentioned above, of anyone else in the Legal Department who may have been marginally involved in my case (ie. Ms. Tanya Lobban to whom my attorney addressed letters to on the 21st of May 2008 and August 5th, 2008).”

- [2] On 30 September 2010 the PA responded to the Applicant granting partial access to the requested records, and withholding others under section 17(a) of the *Freedom of Information Law, 2007* (“FOI Law”); as records that ‘*would be privileged from production in legal proceedings on the ground of legal professional privilege*’. The Applicant requested an Internal Review of the response from the PA on 5 October, and on 4 November the PA granted access to previously unidentified records. Some records continued to be withheld under section 17(a) of the FOI Law.
- [3] On 27 November 2010 the Applicant appealed to the Information Commissioner’s Office and at the request of the PA the matter proceeded immediately to a formal Hearing before me.

B. THE PORTFOLIO OF LEGAL AFFAIRS

- [4] The Portfolio of Legal Affairs advises the Government, its affiliated bodies, statutory boards and corporations, on legal matters. It is responsible for criminal proceedings, legal drafting, law revision, law reform and local legal education through the Cayman Islands Law School. The Portfolio of Legal Affairs is headed by the Attorney General and includes the Office of the Solicitor General and the Legal Department.

C. PROCEDURAL MATTERS

- [5] It is the standard procedure of the Information Commissioner’s Office to try and resolve appeals through an informal mediation process, but this is only done with the agreement of both the public authority and the applicant. In this case, the PA declined mediation, and requested that the matter proceed directly to a formal Hearing before the Information Commissioner.

- [6] I note that the PA uncovered additional records in the process of conducting the Internal Review. This proves that the Internal Review truly took a fresh look at the request and the responsive records, but I question whether a more thorough search should not have been conducted earlier in process.

D. ISSUES UNDER REVIEW IN THIS HEARING

- [7] **Section 17(a)** – Are the responsive records exempt from disclosure because they would be privileged from production in legal proceedings on the ground of legal professional privilege?

E. CONSIDERATION OF ISSUES UNDER REVIEW

The position of the Portfolio of Legal Affairs

- [8] The PA submits that the responsive records fall into both categories of legal professional privilege – litigation privilege and legal advice privilege.

“In this instance, the records denied were created for the dominant purpose of actual or contemplated litigation. The applicant was before the court ... charged with a criminal offence. The records denied were records created in preparation of the criminal proceedings. This includes not only the communications between a professional legal adviser and his or her client but also other documents.”

- [9] In defense of this argument, the PA refers to, among others, Three Rivers DC v. Bank of England (No. 6) paragraph 10, where the court held that “*litigation privilege covers all documents brought into being for the purposes of litigation*”.

- [10] The PA states that, in practice, counsel must be able to decide which evidence will be adduced in trial without any fear or apprehension that the materials acquired in the preparation of a trial will be disclosed to the opposing party.

- [11] With respect to legal advice privilege, the PA submits that it is not uncommon for counsel to seek and give advice during the course of litigation. It draws reference to the relationship in a private firm where counsel seeks guidance from senior counsel in preparation of litigation. A disclosure of documents relating to such dialogue would limit the openness with which advice would be sought and given.

The position of the Applicant

- [12] While it is helpful for any applicant to put forward arguments to support their position, it is important to note that, as per section 43(2) of the FOI Law, in any appeal under section 42, the burden of proof shall be on the public authority to show that it acted in accordance with its obligations under this Law.

[13] The Applicant submits that the documents requested are not covered under “legal advice privilege” as the communication must be between a client (or his agent) and a legal advisor. It is the Applicant’s view that:

“the relationship between the various members of the legal Department is not one of “client/legal advisor” as there is no contract and no money paid in exchange for legal advice. The relationship between the various members of the Legal Department is that of “colleagues”, “bosses”, and “underlings”. As a result, the communication contained within the documents requested does not reflect a “client/legal advisor” relationship ... and does not qualify to be covered under legal professional privilege”.

[14] Also, the Applicant states that under common law, for legal advice privilege to attach to a document, the communication must be directly related to the seeking, formulating, or giving of legal advice. It is contended that this condition is not met as there is no client/legal relationship.

Discussion

[15] The wording of the exemption in section 17(a) of the FOI Law is such that the standard that I need to apply in determining whether legal professional privilege applies, is exactly the same as the one used by the courts in legal proceedings.

[16] I refer to Hearing Decision 2 – 01109 in which the Information Commissioner has set out, in simple terms, conditions to be met in order for legal professional privilege to attach to a document. There are two potential categories of legal professional privilege: litigation privilege and legal advice privilege. Either of these is sufficient for the privilege to apply.

- Litigation privilege

[17] As the Information Commissioner found in Decision 2, for this privilege to apply, the records must have been created for the dominant purpose of preparing for, advising on, or conducting litigation that is either underway, or is a reasonable prospect at the time the records were created. The privilege is particularly relevant in adversarial proceedings.¹

[18] It is clear to me that the dominant purpose of all the records in dispute is to prepare for, advise on, or conduct pending or contemplated litigation in adversarial proceedings. This has not been disputed by the Applicant.

[19] It appears that the litigation in question has been completed and, therefore, it could be argued that there is no further need to protect the records. However, it has come to our attention that, whereas the Supreme Court of Canada has limited the absolute nature of litigation privilege by holding that the privilege ends when the actual or anticipated litigation has truly come to an end,² the English and Caymanian courts have, thus far, not ascribed to this interpretation of the privilege, and continue to hold that it can “*only be overridden by legislation*”.³

¹ *Re L (a minor)(Police Investigation: Privilege)* [1997] 2 All ER 78 at 90-92

² *Blanks v Canada (Minister of Justice)* [2006] 2 S.C.R 319 2006 SCC 39 paras 34-41

³ *Three Rivers DC v Governor and Company of the Bank of England (No 5)* [2004] UKHL 48 para 25

[20] Section 17(3) of the UK *Freedom of Information Act*, 2000 statutorily subjects the exemption relating to legal professional privilege to a public interest test, and, as a consequence, the passage of time after litigation has occasionally been taken into account by the UK Information Commissioner and by the UK Information Tribunal in the balancing of public interests.

[21] However, the situation in the Cayman Islands is quite different. The *Freedom of Information Law*, 2007 does not subject the exemption relating to legal professional privilege to a public interest test. Although section 26 of the FOI Law extends a public interest test to a number of identified exemptions under the Law (providing that, notwithstanding the exemption, access shall be granted if it would be in the public interest to do so), the exemption relating to legal professional privilege is not one of the exemptions to which this provision applies.

[22] Therefore, under the FOI Law the exemption in section 17(a) is not subject to a public interest test, and I am not at liberty to bear in mind any public interest factors, including the passage of time, which would reduce the absolute nature of the legal professional privilege, once it applies.

I find that litigation privilege applies to the responsive records.

- Legal advice privilege

[23] As I have already concluded, above, that litigation privilege applies to the responsive record, it is not essential for the application of the exemption that legal advice privilege also applies.

[24] With respect to legal advice privilege, I do not accept the Applicant's claim that no "client/legal advisor" relationship exists in respect of the responsive record. The responsive record consists of confidential notes and communications between legal advisors acting in a legal professional capacity, the purpose of which is the provision of legal advice by the PA to their client, "Regina" or "The Crown".

[25] It would be inappropriate to contend that the Portfolio of Legal Affairs should, because it is a public authority under the FOI Law, be any less able to enjoy the protection given to it by legal professional privilege than a private law firm. As the UK Commissioner has advised: "*the legal advice would reveal the basis (and potentially the weaknesses) of the public authority's case, while a private opponent not subject to FOIA would not have to reveal their position.*"⁴ This would be unfair and unacceptable and I am not prepared to allow any applicant to use the FOI Law in any way to circumvent the normal discovery rules and proceedings of the courts, or erode the fundamental concept of legal professional privilege which clearly applies to the responsive records in this case.

I find that legal advice privilege also applies to the responsive records.

- Partial disclosure

⁴ Information Commissioner's Office *Freedom of Information Act. Environmental Information Regulations. The exemption for legal professional privilege* Version 2 11 November 2008 p 7 Available at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/legal_professional_privilege.pdf

[26] I do not believe that it is the case that the responsive records in this appeal are only partially covered by the exemption. If this were the case, the PA would be required to grant partial access, i.e. to “grant access to a copy of the record with the exempt matter deleted therefrom”, as per section 12 of the FOI Law. This provision could, for instance, apply where the exemption is claimed solely on the basis that a document forms part of a chain of communications,⁵ or where some information is purely factual in nature,⁶ possibly even where information that does not constitute legal advice is incorporated into the body of the legal advice.⁷ However, none of these conditions apply to the responsive records relevant to this appeal, and the PA has already provided access to a number of responsive records to which the exemption does not apply in the course of its initial response and Internal Review.

E. FINDINGS AND DECISION

Under section 43(1) of the *Freedom of Information Law, 2007*, I make the following findings and decision:

Findings:

The responsive records are exempt from disclosure under Section 17(a) of the *Freedom of Information Law 2007*, as they would be privileged from production in legal proceedings on the ground of legal professional privilege.

Decision:

I uphold the decision of the Portfolio of Legal Affairs to withhold the responsive records under section 17(a) of the *Freedom of Information Law, 2007*, and do not require the Portfolio of Legal Affairs to provide the Applicant with a copy of the records requested.

As per section 47 of the *Freedom of Information Law 2007* the complainant, or the relevant public or private body may, within 45 days of the date of this Decision, appeal to the Grand Court by way of a judicial review of this Decision.

If judicial review is sought, I ask that a copy of the application be sent to the Information Commissioner’s Office immediately upon submission to the Court.



Jan Liebaers
Acting Information Commissioner
4 April 2011

⁵ Information Commissioner’s Office *Home Office – Immigration and Nationality Directorate* FS50093501 30 August 2007 para 26 Available at: http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx

⁶ Information Commissioner’s Office *Department for Culture Media and Sport* FS501121684 3 December 2007 paras 30-40

⁷ Information Tribunal *AJ Maiden v Information Commissioner and Borough Council of King’s Lynn and West Norfolk* EA/2008/0013 15 December 2008 para 31 Available at: <http://www.informationtribunal.gov.uk/Public/search.aspx>