

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 11 July 2011

**Public Authority:** The University of Oxford  
**Address:** University Offices  
Wellington Square  
Oxford  
OX1 2JD

### Summary

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The complainant made a request for information relating to the requirements of a University Statute. The University provided the complainant with some information relevant to the scope of the request but withheld a piece of legal advice under section 40(2) and section 42(1). The Commissioner considers that the University was correct to withhold the legal advice falling within the scope of the request under section 42(1). He has not therefore considered the application of section 40(2).

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 2 July 2010 the complainant made a request to the University for the following information:

*"If the University issues a contract which states that the employee's rights are subject to Statute XII, the employee cannot be made redundant except by a decision of Congregation under Statute XII, 10 (2). The sole exceptions are contracts of the type which trigger the appointment of a Redundancy Committee and I am informed through an FOI request that this provision has never been used.*

*So what is being done to fulfil the requirements of Statute XII for staff to whom it applies and whom it is intended to make redundant?*

*I hope that is clearer but if it is not please ask again. This is an extremely important general question and I gather that UCU is no more able to reconcile the University's conduct with its statutes than I am."*

3. On 30 July 2010 the University responded to the complainant's request for information. The University provided the complainant with the following response:

*"Staff of the University are employed under the provisions of its Statutes. There is no presumption as to a default position as referred to in your request, and as appears to underpin your further clarification. The University acts in accordance with its Statutes at all times."*

However as the complainant was dissatisfied with the response she had received she asked the University to carry out an internal review.

4. On 8 October 2010 the University wrote to the complainant with the result of the internal review. The University provided the complainant with links to information contained on its website which was relevant to the scope of the request. It explained that it also held some legal advice it had obtained which was relevant to the scope of the request. It stated that this was exempt from disclosure under section 40(2) and section 42(1).

## The Investigation

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### Scope of the case

5. On 16 November 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the University had been correct to withhold the legal advice.

### Chronology

6. On 2 February 2011 the Commissioner wrote to the University to ask it to provide him with a copy of the withheld information and for further submissions in support of the application of the exemptions.
7. On 2 March 2011 the University provided the Commissioner with a copy of the withheld information and provided further submissions in support of its application of section 40(2) and section 42(1).

## Analysis

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### Exemptions

#### Section 42(1)

8. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
9. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
10. The University has explained that in this case the withheld legal advice was sought for two purposes. It said that it dealt with the lawfulness of the University's procedures in general terms as well as specifically dealing with an appeal by a named member of staff against the non-renewal of his fixed-term contract. The

- University therefore in this case wished to claim advice privilege and litigation privilege. The Commissioner will therefore first consider advice privilege in this case.
11. Advice privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. In this case the advice relates to an issue which is relevant to the University as a whole as well as to a particular case. Therefore whilst there may have been pending or contemplated litigation in relation to the particular case, as the advice was also relevant to a more general wider issue in relation to which there was no pending or contemplated litigation, the withheld information could attract advice privilege.
  12. The Commissioner also notes that the information must be communicated in a professional capacity and the communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
  13. The University has explained that the withheld information is a communication between the University and its legal adviser and the purpose of the communication was so that the legal adviser could provide legal advice on the lawfulness of its procedures for terminating the employment of staff engaged on fixed term contracts when those contracts expire. The information in the advice was communicated by the University's legal adviser solely in his professional capacity. It confirmed that it is satisfied that privilege attached to the withheld information has not been waived.
  14. After considering the withheld information in this case, the Commissioner considers that the advice was communication by the legal adviser in a professional capacity and that the communication was made for the principal or dominant purpose of seeking or giving advice. He therefore considers that it falls within the scope of the exemption.
  15. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
  16. The Commissioner is mindful of the Tribunal's decision in *Bellamy v ICO* (EA/2005/0023) in which it was stated:

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

*"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*

17. The Commissioner has therefore considered these comments in the context of this case, and considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional.

### **Public interest arguments in favour of disclosing the requested information**

18. The University has said that there is a public interest in transparency and accountability in relation to the University's decision-making processes. Disclosure of the advice would provide information to the public about the University's approach to a particular category of employee (those on fixed term contracts). It would help to inform the public as to the steps taken by the University to comply with its legal duties as an employer.

### **Public interest arguments in favour of maintaining the exemption**

19. The University did however counter that any public interest in disclosure is limited as the issues raised in the advice largely turn on the construction of the University's own Statutes which although are of considerable importance within the University itself, they are not matters of importance for employees generally, or even for the generality of those employed within the University sector. It said that there is nothing in the advice that is of particular public concern; it explained that there is nothing that discloses any wrongdoing by the University or by any individual.

20. The University noted that there is a strong in-built public interest in maintaining legal professional privilege; this applies whether the withheld information is protected by legal advice privilege, litigation privilege, or a combination of the two. That interest has been recognised by the Information Tribunal (and its successor the First-tier Tribunal) ever since the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* EA/2005/0023, and has been upheld by the High Court in *DBERR v O'Brien* [2009] EWHC 164. The same approach was recently reiterated by the Tribunal in *West v Information Commissioner* EA/2010/120.
21. It explained that there is a strong public interest in protecting the ability of a public authority (like any other person) to communicate candidly and freely with its legal advisers and to make fully informed decisions on the basis of legal advice. This in turn promotes compliance with legal obligations by public authorities, which is strongly in the public interest.
22. The University explained that the advice is dated 17 February 2009, and the request was made on 2 July 2010. It suggested therefore that the advice was still relatively recent at the time of the request. The University continues to rely on the advice generally when terminating the employment of individuals engaged on fixed-term contracts.
23. As the University continues to rely upon the legal advice, if there were any future dispute between the University and an employee, if the information were disclosed then the employee would have access to the legal advice that informs the University's position, but the University would not have access to any legal advice sought by the employee. This would be unfair and would adversely affect the course of justice.

### **Balance of the public interest arguments**

24. The Commissioner considers that there is a substantial public interest in transparency and accountability in relation to the University's decision-making processes. He also considers that there is a public interest in ensuring public authorities are complying with their legal obligations.
25. The Commissioner considers that there is a very strong public interest in the University being able to obtain free and frank legal advice in relation to its legal position, and that it should be able to do so without disadvantaging its legal position in the

process. Furthermore the Commissioner considers that it is vital that the University is able to participate in full and frank exchanges with its legal advisers in order to ensure that it complies fully with all of its legal requirements and responsibilities.

26. The Commissioner considers that the withheld advice in this case is recent and is still being relied upon by the University. The Commissioner considers that this significantly increases the weight given to the public interest in favour of maintaining the exemption.
27. The Commissioner is also mindful of the Tribunal decision of *Foreign & Commonwealth Office v ICO* [EA/2007/0092] in which it was stated:

*"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."*

The Tribunal went on to state that such arguments of misrepresentation should be supported by, "*cogent evidence*".

28. Upon viewing the information withheld under section 42(1), the Commissioner has not found evidence that the legal advice was misrepresented by the University.
29. In this case the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. Therefore section 42(1) was correctly applied to withhold the legal advice relevant to the scope of the request.
30. As the Commissioner has found that the category of advice privilege was correctly applied to the withheld information he has not gone on to consider the applicability of litigation privilege.
31. As the Commissioner has found that section 42(1) was correctly engaged in this case he has not gone on to consider the application of section 40(2). However he accepts that the

withheld information does contain the personal data of a named individual.

## **The Decision**

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32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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33. The Commissioner requires no steps to be taken.

## **Other matters**

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34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.



## Right of Appeal

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35. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 11<sup>th</sup> day of July 2011**

**Signed .....**

**Pamela Clements**

**Group Manager, Complaints Resolution**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**

## Legal Annex

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### General Right of Access

#### **Section 1(1) 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."

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **Legal Professional Privilege**

### **Section 42(1) provides 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.”

### **Section 42(2) provides that –**

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”