

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 November 2015

**Public Authority:** Government Legal Department

**Address:** 1 Kemble Street  
London  
WC2B 4TS

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information generated by a high profile criminal trial. Where it holds requested information, the Government Legal Department (GLD) relies on sections 42 (legal professional privilege) and 32 (court records) to withhold it from the complainant.
2. The Commissioner's decision is that GLD's reliance on the aforesaid sections was correct.

#### **Background**

---

3. The Treasury Solicitor's Department (TSol) was a non-ministerial government department that provided legal services to the majority of central government departments and often represented government departments and other publicly funded bodies in England and Wales.
4. On 1 April 2015, TSol became the Government Legal Department (GLD). For ease of reference, the Commissioner will refer to the public authority as 'GLD' throughout this notice.
5. R v Coulson, Brooks and others was a criminal trial at the Old Bailey arising from events colloquially known as the "News International phone hacking scandal".
6. At the end of the trial, various defendants made an application for their costs to be met from Central Funds.

7. Mr Justice Saunders (the trial judge) asked the Attorney General to appoint an Advocate to the Court in respect of a number of issues arising during the trial on which he wished to have assistance, including the issue of whether Ms Brooks should be awarded her costs from Central Funds following her acquittal. The GLD acted for the Attorney General in instructing the Advocate.
8. All the defendants, the prosecution and News International were asked by the Judge to produce written submissions as to their positions on costs. These submissions, as well as being sent to the court were then sent to the Advocate to the Court so he could consider his position and in turn produce his submissions to assist the Judge accordingly. In turn the parties' submissions and those of the Advocate to the Court were sent by him to the GLD.
9. Ultimately the defendants withdrew their applications for costs shortly before the hearing and thus no party was required to make any oral submissions on the issue. Accordingly, the written materials produced did not need to be spoken in open court.

## **Request and response**

---

10. On 6 November 2014, the complainant wrote to GLD and requested information in the following terms:

"I wish to know the following information regarding the costs from Central Funds applications made on behalf of Mrs. Rebekah Brookes, Mr. Charles Brookes, Ms Cheryl Carter, Mr. Mark Hanna, Mr. Stuart Kuttner, Mr. Clive Goodman and Mr. Ian Edmondson, heard at the Central Criminal Court before Mr. Justice Saunders between June 2014 and September 2014.

(Request 1)

What is the text of the correspondence and/or Skeleton Arguments between the Treasury Solicitors acting on behalf of HM Attorney General and the Central Criminal Court and/or Mr. Justice Saunders regarding the appearance of an "Advocate to the Court" at the then proposed hearings to determine the Defendants' applications for costs from Central Funds?

(Request 2)

If so, what is the text of that correspondence and/or Skeleton Arguments?

(Request 3)

What is the text of the correspondence and/or Skeleton Arguments between the Treasury Solicitors acting on behalf of the Ministry of Justice and the Central Criminal Court and/or Mr. Justice Saunders regarding the appearance of an "Advocate to the Court" at the then proposed hearings to determine the Defendants' applications for costs from Central Funds?

(Request 4)

If so, what is the text of that correspondence and/or Skeleton Arguments?

(Request 5)

What is the text of the correspondence between the Treasury Solicitors acting on behalf of HM Attorney-General and/or the Ministry of Justice and News UK and/or their legal representatives regarding the appearance of the Ministry of Justice at the then proposed hearings to determine the Defendants' applications for costs from Central Funds?

(Request 6)

If so, what is the name of their legal representatives?

(Request 7)

If so, what is the text of that correspondence and/or Skeleton Arguments?

11. GLD responded on 4 December 2014 and stated that -

- In respect of requests 3, 4 and 5, it held no information.
- In respect of 6, the information it held is that the solicitors acting for News UK were Arnold and Porter LLP and counsel was Robert Smith QC.
- In respect of requests 1, 2, 7, it held the following documents:
  - (a) Communications between the Treasury Solicitor and the Attorney General and the Advocate to Court.
  - (b) Costs Submissions by various parties and the Advocate to Court.
  - (c) Material provided by Mr Justice Saunders.

(d) A letter written to the Court from the Ministry of Justice dated 6 August 2014.

- As to (a) GLD averred it was exempt from disclosure under section 42 of the Freedom of Information Act 2000<sup>1</sup> and that the public interest favoured the maintenance of the exemption.
  - As to (b) (c) and (d): The documents held all fall within the exemption set out in section 32. This exemption is not subject to the public interest test.
12. Following an internal review GLD wrote to the complainant on 26 January 2015. It stated that it upheld its decision.
13. However it clarified that it relied on section 32(1)(a) to withhold the "communications between the Treasury Solicitor and the Attorney General and the Advocate to Court" and "the letter written to the Court from the Ministry of Justice dated 6th August 2014" .
14. It also clarified that it relied on section 32(1)(b) to withhold the "material provided by Mr Justice Saunders".

### **Scope of the case**

---

15. The complainant contacted the Commissioner, on 14 March 2015, to complain about GLD's reliance on sections 42 and 32 to withhold requested held information from him and its claim that it did not hold some of the requested information.
16. During the Commissioner's investigation the GLD informed him that it also relied on section 32(1)(a) to withhold "material provided by Mr Justice Saunders".

### **Reasons for decision**

---

#### **Scope of information held**

17. Section 1(1) provides that:
- 

<sup>1</sup> Hereafter, all references to sections of a statute are to sections of the Freedom of Information Act 2000, unless otherwise indicated, and references to "the Act" are references to that statute.

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

18. In respect of requests 3, 4 and 5, GLD maintains that it holds no information.
19. In scenarios where there is dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
20. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any (or any further) information which falls within the scope of the request (and/or was held at the time of the request).
21. In order to determine the above the Commissioner made a lengthy enquiry of the GLD. The GLD replied<sup>2</sup> as laid out as follows.
22. GLD has since 2010 had an electronic case management system, that provides for the opening and permanent record of documents when instructions are received to act on a case. Every case opened in this way is automatically added to the GLD wide database of cases which can then be interrogated irrespective of whether the case is 'live' or 'closed' using a number of different search criteria.
23. In respect of this request a search was made for any case (whether 'live' or 'closed') using the following search criteria in the title field: 'Coulson', 'Brooks', 'Brookes', 'Central Funds', 'Central Criminal Court', 'Saunders'. No cases were found where instructions were received from the MoJ concerning the subject matter relating to this request. One case was identified relating to the request to appoint an Advocate to Court where instructions were given by the Attorney General and information in respect of that client has been provided.

---

<sup>2</sup> Letter dated 13 October 2015

24. GLD also explained that if a case had been identified centrally through the search of the database, the case officer (who would be identified from the database) would be expected to consider the request and ensure that all relevant material was identified. That is all material held on the electronic case management system, held in a structured hard copy paper form or stored locally in that individual's own email account and/or stored on a local drive. GLD can also search across all individuals' email accounts, and local drives to extract information if such an extensive search is necessary.
25. GLD asserted that it follows from the above that as it does not hold any electronic or hard copy records for this request, it could not have destroyed any such records and thus do not have a date of destruction.
26. The Commissioner accepts that GLD has adequately searched for the information as per requests 3, 4 and 5 and that those searches have been fruitless. Accordingly the Commissioner, on the balance of probabilities, accepts that at the time of the requests GLD did not hold the information sought as per requests 3, 4 and 5.

### **Legal professional privilege**

27. GLD relies on section 42 to withhold from the complainant communications between the Treasury Solicitor and the Attorney General and the Advocate to Court.
28. 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.
29. 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).
30. The Commissioner understands that Mr Justice Saunders asked the Attorney General to appoint an Advocate to the Court in respect of a number of issues arising during the trial on which he wished to have assistance, including the issue of whether Ms Brooks should be awarded her costs from Central Funds following her acquittal. GLD acted for the Attorney General in this respect.
31. The Commissioner notes that a court may properly seek the assistance of an Advocate to the Court when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument.

32. The Commissioner accepts that the communications are information that attracts legal professional privilege. In that they are communications between lawyers (acting in that capacity) for a "client" regarding the provision of legal advice for that client: the "client" being the court and the privilege affixed being advice privilege.
33. Though 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.
34. GLD outlined its public interest test considerations as follows;
  - GLD considered whether notwithstanding the exemption against disclosure, disclosure could be made in this case, but the courts have long recognised that there is a strong public interest in withholding information to which legal professional privilege attaches.
  - This reflects the role of legal professional privilege as a fundamental condition on which the administration of justice as a whole rests, including the unique relationship within the administration of justice of the appointment and role of an Advocate to the Court.
  - An expectation that the communications between the GLD, its client, and counsel who may be appointed an Advocate remain confidential is central to the appointment of Advocates, and thus the public interest lies firmly in protecting this information from disclosure.
35. In his letter of complaint to the Commissioner the complainant made the following submissions about the application of the public interest test;
  - "In so far as the public interest is concerned, the case of R. v. Brooks and others was very widely reported in the media and there was massive media interest in the case and verdict.
  - Likewise, there was media interest in the costs applications, and I have already enclosed the details from the Guardian site and the BBC website for your information in relation to the application concerning HM Attorney-General's Office, although there are many others also available.
  - In addition, the CPS has confirmed to me in a FOIA response request that the prosecution costs of the trial are estimated at

£1.7000.000, copy enclosed with the application concerning HM Attorney-General's Office.

- In my view the balance lies in disclosure of the relevant documents connected to the costs applications made by News UK to the court, notwithstanding that their applications were withdrawn before any decision could be reached.
  - In so far as the Advocate to the Court was concerned, he was instructed by HM Attorney-General and was therefore acting in the public interest as an advocate to assist the court.
  - He wasn't acting to advise Mr. Justice Saunders, as had the matter proceeded to open court, he would have appeared to assist the course of justice and the court to arrive at the correct conclusion. Therefore, it cannot be said that he was acting for Mr. Justice Saunders in any personal capacity.
  - Therefore, due to the high public interest in the case and the extremely high costs being sought from public funds in this case, I would also submit that the fact that the matter didn't proceed to a hearing doesn't diminish in any way the public interest in having full transparency regarding this matter".
36. 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.
37. In his previous decisions the Commissioner has expressed the view that disclosure of information relating to legal advice would have an adverse effect on the course of justice through a weakening of the general important principle of legal professional privilege. This view has also been supported by the Information Tribunal.
38. 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."

39. The Commissioner considers that there will always be a strong argument in favour of maintaining legal professional privilege. It is a long-standing, well established and important common law principle. The Information Tribunal affirmed this in the Bellamy<sup>3</sup> 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..."

40. Undoubtedly the criminal trial that forms the background of this matter was of great public interest and importance. However the Commissioner does not consider there is a significant particular public interest in releasing this withheld information. The information sought does not immediately go to the main issues of press freedom and intrusions by the press. The information is on collateral matters concerned with defendants making applications, which were ultimately withdrawn, for

---

3

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

their legal costs to be met from public funds. The circumstances in which such applications generally succeed, or fail, are frequently considered in open court and in law reports. Accordingly little will be added to the existing public knowledge of the law about such applications by releasing this withheld information.

41. The court needed the benefit of legal advice on matters before it. Such advice must be given free of fetter or manipulation caused by the belief, or fear, that the advice at some stage in the near future may be seen by the public.
42. Having considered the content of the withheld information in the wider context of this case, the Commissioner 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. He is therefore satisfied that the public interest is best served in the maintenance of the exemption.

### **Court records**

43. The GLD relies on section 32(1)(a) to withhold the following;
  - Costs Submissions by various parties and the Advocate to Court.
  - Material provided by Mr Justice Saunders.
  - A letter written to the Court from the Ministry of Justice dated 6th August 2014.
44. Section 32(1)(a) states that,

“Information held by a public authority is exempt information 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.”
45. There are two main tests in considering whether information falls within this exemption. Firstly, is the requested information contained within a document filed with a court in relation to a particular cause or matter? Secondly, is this information held by the relevant public authority only by virtue of being held in such a document?
46. GLD has explained that the costs submissions by various parties and the Advocate to the Court, and the letter written to the Court from the Ministry of Justice dated 6th August 2014, fall within the exemption afforded by section 32(1)(a).

47. From his examination of the withheld documents the Commissioner is satisfied that the information is held only by virtue of being contained in the document as described in section 32(1)(a). He therefore finds that the section 32(1)(a) exemption is engaged. As this is an absolute exemption there is no public interest test for the Commissioner to consider.
48. The complainant has maintained to the Commissioner that "any copies of documents retained by the Treasury Solicitor's Department would not therefore be documents "filed with, or otherwise placed in the custody of a court". However the Act is concerned with the provision of information not documents per se. Therefore if "information" is held only as a result of it being contained in any document (for example) filed with the court then the exemption afforded by section 32 is not lost merely because the said document has been copied.

## Right of appeal

---

49. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**