

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 28 June 2007

Public Authority: Ministry of Justice
Address: Selbourne House
54 Victoria Street
London
SW1E 6QW

Summary

The complainant requested information from the Scotland Office relating to the Scottish Adjacent Water Boundaries Order. The Scotland Office withheld the information it held in relation to the request by applying the following exemptions:

- Section 35(1)(a) – Formulation or development of government policy
- Section 35(1)(b) – Ministerial communications
- Section 42(1) – Legal professional privilege

The Commissioner agrees that these exemptions are engaged in relation to the information but considers the public interest to favour the disclosure of the following information which had been withheld under section 35:

- i. Submissions/advice to Ministers
- ii. Correspondence between Ministers

The Commissioner has also decided that the Refusal Notice issued to the complainant did not conform to the requirements of section 17 of the Act.

The Commissioner's Role

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

2. The complainant wrote to the Scotland Office on 9 March 2005, in which he requested the following information:
 - i. Copies of all the relevant government papers and correspondence between UK Ministers and also between the UK Government and both the Scottish Executive and former Scottish Office in connection with the Scottish Adjacent Waters Boundaries Order (SI 1999 / 1126);
 - ii. Copies of any advice received by the UK Government in relation to this matter;
 - iii. All such communications from both prior to and following the decision to establish the boundary of the fisheries zone.

3. The Scotland Office responded to the complainant's request on 4 April 2005, in which it stated the following:

"The Scotland Office has reviewed the information we hold against the public interest test. The information is being withheld as it falls within the terms of three exemptions. These exemptions are:

- Section 35(1)(a) – Formulation or development of government policy
- Section 35(1)(b) – Ministerial communications
- Section 42(1) – Legal professional privilege

In applying these exemptions we have had to balance the public interest in withholding the information against the public interest in disclosing the information. It is our considered view that, in all the circumstances of this case, the public interest in maintaining these exemptions outweighs the public interest in disclosure."

4. The Complainant wrote to the Scotland Office on 13 April 2005 to request an internal review of its decision.
5. The Scotland Office responded to the complainant on 16 May 2005, in which it stated that the outcome of its internal review was as follows:
 - i. The Scotland Office complied with its responsibilities under the FOI Act, including timeliness and the duty to advise and assist;
 - ii. The exemptions cited in the reply from the Parliamentary Under Secretary of State of 4 April were applied properly;
 - iii. The Scotland Office considers that disclosure of the requested information remains against the public interest.

The Investigation

Scope of the case

6. On 27 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. Having reviewed the correspondence sent to him by the complainant, the Commissioner undertook to investigate whether the Scotland Office correctly applied the stated exemptions to the requested information.

Chronology

8. The Commissioner contacted the Scotland Office on 27 October 2005, in which he stated that having reviewed both the refusal notice and the outcome of the internal review, it was not clear to him which element(s) of the requested information the Scotland Office holds and further, which exemption(s) the Scotland Office had applied to each element of the requested information. The Commissioner therefore requested the following information from the Scotland Office in order to assist him in investigating the complaint:
 - i. Clarification on which part(s) of the requested information the Scotland Office holds;
 - ii. Which exemptions apply to each part of the requested information and why;
 - iii. In relation to each part of the requested information, further explanation with regards to the public interest test considerations which were taken into account by the Scotland Office.
9. The Scotland Office replied to the Commissioner on 6 December 2005, in which it made the following points (paragraphs 10 - 13 are direct quotes):
10. **Section 35(1)(a) – Formulation or development of government policy**
 - i. This exemption was applied to papers containing advice to Ministers and/or commentary and discussion on the development and implications of the 1999 Order. It is also relevant that at both the time of the original FOI request and now there was and is active consideration within Government of proposals for a new draft order that would likely be based on the 1999 Order. In our view the release of information relating to the 1999 Order would prejudice the development of the new Order.
11. **Section 35(1)(b) – Ministerial communications**
 - i. Copies of correspondence between Ministers in relation to the 1999 Order is held by the Scotland Office. This correspondence is principally a free

and candid exchange of views between Ministers as they deliberated the development of the Order.

- ii. Rigorous, frank and open debate about policy within Government, as between expert policy officials and Ministers, leads to better policy-making.
- iii. We acknowledge that there is a strong public interest in understanding how Government formulates policy and in ensuring that there is well informed public debate on important issues. There is, however, also a strong public interest in ensuring that policy decision-making is based upon the best advice available, and following full consideration of all the possible options. Release of this information would undermine this process.
- iv. It is important that all options, and their merits and demerits, are fully considered when formulating policy advice. While there is of course a place for public participation in the policy making process and for public debate of policy options, in our view it is not in the best interests of the policy making process, and consequently in the public interest, that every stage of the policy making process should be exposed to public scrutiny.
- v. Release of this information would also have the effect of inhibiting the candour of future discussions of this policy area – and indeed on policy discussions across government.

12. **Section 42(1) – Legal professional privilege**

- i. Much of the information relating to the complainant's request and held by the Scotland Office constitutes legal advice.
- ii. In assessing the public interest in releasing or withholding this information, the Scotland Office considered the important public interest in public authorities being accountable for the quality of their decision making. Transparency in the decision making process, and access to the information upon which decisions have been made – including legal advice – can enhance accountability.
- iii. However, there is a strong public interest in a person seeking access to legal advice being able to communicate freely with his legal advisers in confidence, and in being able to receive advice from his legal advisers in confidence. The House of Lords has said that legal professional privilege is “a fundamental condition on which the administration of justice as a whole rests” (*R v Derby Magistrates' Court ex p B* [1996] AC 487). The importance of the public interest in maintaining the confidentiality of communications between lawyers and their clients has been recently reaffirmed by the House of Lords in the *Three Rivers* case.
- iv. Underlying this is the need for clients to be able to seek legal advice as and when they choose, and the need to ensure full and frank exchanges between clients and their legal advisers. Lord Rodger's comments in the *Three Rivers* case sums up the need for such frankness and the damaging

consequences should such exchanges be revealed: “If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later.” Disclosure of such advice would also unfairly expose counter-arguments against the Government’s chosen position, thus prejudicing its ability to defend its legal interests.

- v. Further, the release of such information could lead to a reluctance on the part of public authorities to seek legal advice at all. This could lead to poorer decision making as decisions may not be taken on a fully informed basis, and could also attract successful legal challenges which could otherwise have been avoided. Additionally, disclosure of legal advice could lead to advice not being recorded for the written record; as policy develops or litigation decisions are made it is important to be able to refer back to advice given along the way. All of these public interest considerations weigh in favour of withholding the information exempt under section 42 in this case.
13. **Refusal Notice and Response to Internal Review**
- i. We fully accept that our responses to the complainant, both initially and at internal review stage, were not as comprehensive as they should have been....we have learned from experience and now routinely provide more detailed explanations of our decisions.
 - ii. We have also established in the course of re-examining the files for the purposes of providing this response that there are three papers held by the Scotland Office that are already in the public domain and one letter sent to the Secretary of State for Scotland by the complainant himself. We accept that we should have informed the complainant in our response to the original FOI request that we held these papers and that we considered these to be reasonably accessible to the complainant under the terms of section 21 of the Act.
14. Following its submission to the Commissioner, the Scotland Office then provided him with copies of all the information that had been withheld from the complainant.

Findings of fact

15. The Commissioner understands that the Scotland Office not a ‘government department’ in its own right for the purposes of the Act. However, it is subject to the Act by virtue of it being a ‘distinct part’ of the Ministry of Justice (‘Department of Constitutional Affairs’ at the time of the request). Although all references within this Notice refer to the Scotland Office, the Commissioner has therefore addressed it to the Ministry of Justice as the appropriate public authority in this case.

16. Having reviewed the information withheld from the complainant, the Commissioner notes that the material consists of the following:
- Legal advice
 - Submissions to internal lawyers
 - Ministerial correspondence – between Ministers
 - Ministerial submissions – from Officials
 - Correspondence between Officials
17. Further, the Commissioner's analysis of the withheld information led him to be satisfied that the complainant's request was administered under the correct piece of legislation, the FOI Act - as opposed to the Environmental Information Regulations 2004 (EIR). This is because the information relates to the need to distinguish between those parts of the internal waters and territorial sea which are to be treated as part of Scotland. This has an administrative rather than an environmental impact. Such a matter does not constitute a "measure" as defined in Regulation 2(1)(c) of the EIR, which is designed to affect or protect the elements or factors referred to in 2(1)(a) or (b) of the definition.

Analysis

18. The provisions of sections 17, 35 and 42 of the Act can be found in the Legal Annex.

The Commissioner's analysis of the Scotland Office's application of the exemptions is based upon whether it was correct to withhold the information at the time of its response to the complainant's request (April/May 2005).

Procedural matters

Section 17 - Refusal of request

19. Any public authority which relies upon an exemption(s) to withhold information that has been requested must, in its refusal notice:
- i. State that fact,
 - ii. Specify the exemption in question, and
 - iii. State (if that would not otherwise be apparent) why the exemption applies.
20. The Commissioner notes that the Scotland Office's Refusal Notice of 4 April 2005 did not satisfy the third condition as an adequate explanation was not supplied. The Scotland Office also did not inform the complainant of the information to which it considered section 21 to apply. These shortfalls constitute a breach of section 17 of the Act. However, the Commissioner accepts the Scotland Office's subsequent acknowledgement of these failings.

Exemptions

Section 42(1) – Legal professional privilege

21. Much of the information held by the Scotland Office that was withheld from the complainant constitutes legal advice from departmental solicitors to Officials.
22. Legal professional privilege (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*) as “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 communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
23. There are two types of privilege – legal advice privilege and litigation privilege. In these 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 attract privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
24. On the basis of the above, and having reviewed the information withheld, the Commissioner is satisfied that the correspondence from departmental lawyers constitutes legal advice privilege and that section 42(1) is engaged in respect of this information.
25. However, section 42 is a qualified exemption, meaning that the public interest must be considered in order for the exemption to be maintained. This test is set out in section 2(2)(b) of the Act and states that the obligation to disclose information under section 1(1)(b) does not apply if or to the extent that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”
26. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated that: “There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest.” It concluded that “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 cut case...” (paragraph 35).
27. In summary, legal professional privilege was referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. It also confirmed that when considering the public interest it is not relevant to consider the number of individuals affected by the

issue. (paragraph 35) The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale. (paragraph 35)

28. Against the arguments for maintaining the exemption in this case, the Commissioner considered a number of public interest arguments in favour of disclosure, namely:
- Informing debate on key issues, including allowing the public to feed into key policy decisions
 - Helping people understand and challenge decisions affecting them
 - Promoting accountability for decisions
 - Promoting probity
29. In respect of these points, the Commissioner notes that the matters discussed in the withheld information remained highly politicised at the time of the request and disclosure could therefore inform the public debate on the issue. The Commissioner also considers there to be a public interest in Officials being accountable for their decisions and conduct in their roles. Disclosure of the information withheld under section 42 would serve to promote this accountability.
30. The Commissioner considers all the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. However, in all the circumstances, the Commissioner considers that the arguments for disclosure are outweighed by the arguments in favour of maintaining the exemption under section 42 which are likely to apply whenever it is engaged.
31. The Commissioner has therefore concluded that in this case the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption under section 42(1).

Section 35 – Formulation of government policy, etc.

32. As the Commissioner is satisfied that the information constituting legal advice from lawyers was exempt from disclosure under section 42, he did not consider whether section 35 applied to any of this documentation. Instead, he proceeded to consider whether the remaining information was correctly withheld under section 35.

Section 35(1)(a) – Formulation or development of government policy

33. The Commissioner is satisfied that section 35(1)(a) is engaged in relation to the remaining papers containing:
- i. Commentary and discussion between Officials on the development and implications of the 1999 Order.
 - ii. Advice to Ministers.

34. It is evident from this information that its purpose is to formulate the government's policy in relation to the Order. No prejudice to this function is required to be demonstrated in order for section 35(1)(a) to be engaged.
35. However, Section 35 is a qualified exemption and the Commissioner therefore proceeded to assess whether the balance of the public interest test favours the maintenance of this exemption.
36. The Commissioner considered the following public interest arguments in favour and against the disclosure of the information to which section 35(1)(a) was applied:

In favour

- i. Public participation and debate in policy decisions
- ii. Accountability for decisions taken
- iii. Transparency
- iv. Time elapsed since information was produced
- v. Time elapsed since Order was passed/policy formulated

Against

- i. Loss of frankness and candour in policy making
 - ii. Impact on record-keeping
 - iii. Effect on policy decisions
 - iv. Effect on the relations between civil servants and ministers and to the role of civil servants in the formulation of policy
 - v. Timing of the review of the Order
37. In conducting his analysis the Commissioner also took into account the principles set out by the Information Tribunal in *DfES v the Commissioner and the Evening Standard* (EA/2006/0006, paragraph 75) which it stated should guide the weighing of the public interest in cases where section 35(1)(a) has been applied. They are:
 1. The information itself
 2. 'Status' of information not relevant
 3. Protection for Civil Servants not Politicians
 4. Timing
 5. When is policy formulation or development complete?
 6. Information in the public domain
 7. The robustness of officials

8. Junior officials
9. Relationship between Officials and Politicians
10. How will the public use the information?
11. Names of civil servants

i. Correspondence between Officials

38. The Commissioner made the following observations of the information withheld from the complainant constituting correspondence between Officials (excluding that to which section 42(1) applies):
 - i. The internal communications are more candid than the interdepartmental ministerial letters and departmental submissions to Ministers.
 - ii. Disclosing this information, taking into account its content and context, would be likely to make civil servants less likely to provide full and frank advice or opinions on policy proposals. This would harm the frankness of communications between Officials in the policy development process necessary to create effective legislation.
 - iii. Even though the documentation dates from 1997-99, given that the Order is being reviewed the matter remains highly politicised and relevant to current policy development. This increases the public interest in its disclosure, although disclosure of the internal communication may therefore also harm the process of policy development on this particular issue.
 - iv. The information identifies civil servants and their differing views. The Commissioner gives a low weight to the public interest in requiring they are made accountable to the public as the views are made in the course of their employment and represent opinions formulated from the perspective of their role, rather than a wider professional experience. They are not comments that have been sought from particular experts, where the consideration might differ. The Commissioner wishes to point out, however, that although there may be little public interest in identifying particular civil servants, this does not in itself diminish any public interest in knowing what issues were discussed.
39. The Commissioner considers the public interest factors favouring the disclosure of the commentary and discussion between Officials on the development and implications of the 1999 Order to carry weight. However, in all the circumstances, for the reasons outlined above, the Commissioner has concluded that the public interest in the disclosure of this information is outweighed by the public interest in maintaining the exemption under section 35(1)(a).

ii. Submissions / advice to Ministers

40. The remaining information withheld from the complainant under section 35(1)(a) consists of advice provided to Ministers. The Commissioner accepts that the

public interest arguments put forward by the Scotland Office in favour of maintaining the exemption to this information carry weight, in particular:

- i. At the time of the request (and its refusal) there was active consideration within Government of proposals for a new draft order that would likely be based on the 1999 Order.
 - ii. There is a strong public interest in ensuring that policy decision-making is based upon the best advice available, and following full consideration of all the possible options.
41. However, the Commissioner made the following observations of this information which he considers to favour the public interest in its release:
- i. The information largely consists of advice based on the outcomes of intra-departmental discussions put to Ministers for approval or information rather than details of those discussions themselves.
 - ii. The information is more formal in presentation and content than the communications between Officials.
 - iii. The information is less sensitive in nature than the communications between Officials.
 - iv. The information does not contain the personal opinions of Officials, nor does it contain internal differences of views.
 - v. The information provides the evidence upon which Ministers defended/justified the Order.
 - vi. Disclosure of the advice would assist the public's understanding of the rationale behind the policy.
42. The Commissioner has concluded that in all the circumstances the public interest in disclosing this information is not outweighed by the public interest in maintaining the exemption under section 35(1)(a).

Section 35(1)(b) - Ministerial Communications

43. The Commissioner accepts that the correspondence between Ministers in relation to the 1999 Order engages the exemption under section 35(1)(b) of the Act. He notes that the correspondence consists of letters setting out:
- Provisions of the draft Order
 - Proposals for comment
 - Ministerial views
 - Replies to the above from Ministers at other departments
44. The Commissioner accepts that this information consists of a free and frank exchange of views. However, against the arguments put forward by the Scotland

Office (as set out in paragraph 11), he considers that the public interest in disclosure of this information is not outweighed by that in the maintenance of the exemption for the following reasons:

- i. Ministers are accountable for the decisions they take and this information would increase the public's understanding of Ministers' views that underpin their decision-making.
- ii. The Commissioner considers these communications to imply ministerial accountability for their contents.
- iii. In the light of the time that has elapsed since it was produced, the disclosure of the nature and content of the communications would not, to the extent that they might have done nearer that time or even at all:
 - undermine the policy-making process,
 - undermine Cabinet collective responsibility, or
 - inhibit the candour of future discussions of policy discussions across government.
- iv. The Commissioner does not consider these communications to be of an intrinsically sensitive nature, even at the time they were first created. Nevertheless, he also acknowledges the Information Tribunal's view (see paragraph 37) that sensitivity of information reduces with the passage of time.
- v. The Commissioner does not consider the review of the Order which was taking place at the time of the request to influence the assessment of the sensitivity of these communications one way or the other.
- vi. The communications are interdepartmental, providing in insight into the views of departments as a whole, as opposed to debates between officials within departments which do not provide any accountability for, or clear background to, decisions taken.
- vii. The communications are more formal in presentation and status than the correspondence between Officials.
- viii. The communications are less candid than the correspondence between Officials.
- ix. The communications are more external facing than the correspondence between Officials and intended for a wider audience across government, as demonstrated by their circulation / distribution lists.
- x. The Commissioner considers the communications to aid debate and public understanding of the issues relating to the water boundaries and the 1999 Order.

- xi. More generally, although the Commissioner acknowledges the importance of the principles of Cabinet Collective Responsibility, he considers the following factors to weigh against the argument that these would be significantly eroded by the disclosure of the information in this case:
- The passage of time since the information was produced means that the desirability and need for collective responsibility reduces when balanced against the desirability of transparency and accountability.
 - The importance and expectation of increased scrutiny of how government policy is formulated in practice, which the Act is clearly designed to facilitate.
45. On the application of the public interest test the Commissioner believes that all information withheld from the complainant constituting communications between Ministers should be disclosed.

The Decision

46. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- i. Section 35(1)(a) in relation to commentary and discussion between Officials on the development and implications of the 1999 Order.
 - ii. Section 42(1) in relation to the legal advice withheld from the complainant.
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Section 35(1)(a) in relation to papers containing advice to Ministers.
 - ii. Section 35(1)(b) in relation to Ministerial Communications.
 - iii. Section 17(1)(c) in relation to the refusal notice of 4 April 2005.

Steps Required

48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- i. Disclose to the complainant all the information withheld from him under section 35(1)(a) (Formulation of government policy) constituting advice provided to Ministers.

- ii. Disclose to the complainant all the information withheld from him under section 35(1)(b) (Ministerial Communications).
49. The documents comprising the information to be disclosed are listed in a letter sent to the public authority from the Commissioner.
50. The Commissioner does not require the public authority to disclose any advice which he considers to be subject to Legal Professional Privilege.
51. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

52. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

53. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 28th day of June 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."

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.”

Extract from Regulation 2(1) of the Environmental Information Regulations 2004:

“environmental information’ has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c)”