

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 August 2007

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

Summary

The complainant requested from the Department for Constitutional Affairs (DCA), which has since been replaced by the Ministry of Justice, “the Attorney General’s advice over the ‘public interest’ test and its interpretation under the Freedom of Information Act.” The DCA refused to confirm or deny whether it held the requested information, applying section 35(1)(c) of the Act (Law Officers’ advice). The Commissioner has found that the DCA’s decision was in accordance with the Freedom of Information Act. However, he has also decided that the refusal notice issued by the public authority did not fully 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. On 5 January 2005 the complainant contacted the Department of Constitutional Affairs (DCA) (since replaced by the Ministry of Justice) to request “the Attorney General’s advice over the ‘public interest’ test and its interpretation under the Freedom of Information Act.”
3. The DCA responded to the complainant on 1 February 2005, informing her that it was unable to confirm or deny whether it holds the requested information and in 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 or

not the information is held. The DCA justified its decision by setting out the following points (the following are direct quotes):

- Section 35(1)(c) of the Act provides that information is exempt information if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice.
- Section 35(3) and section 2(1)(b) together provide that the duty to confirm or deny does not arise in respect of information which is exempt (or would be exempt) under section 35(1) if the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not this Office holds the information.
- Section 35 is a statutory recognition of the public interest in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of public political debate. This principle has also been judicially recognised.
- As part of this principle, there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding what sort of advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. This strong public interest is reflected in the long-standing convention, observed by successive Governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. This convention is recognised in paragraph 24 of the Ministerial Code. It is also an interest which is recognised by the particular form of words used in section 35(1)(c).
- Since the Law Officers are the government's most senior legal advisers, their advice has a particularly authoritative status within government. However, the need for government to obtain legal advice on a very wide range of matters is such that it would be impossible for such legal advice to be provided by the Law Officers in every case. Disclosure of the occasions when legal advice has been sought from the Law Officers would therefore have the effect of disclosing those matters which, in the judgment of the government, have a particularly high political priority or are assessed to be of particular legal difficulty. This would be directly counter to the strong public interest which underlies the whole of section 35.
- To disclose routinely whether the Law Officers have advised on particular issues would potentially create a two-fold detriment:
 1. To disclose that they have advised on an issue could be taken to indicate that particular importance was attached to it or even that the Government was in particular doubt about the strength of its legal position. Even if that impression were unfounded, the risk of creating it might deter the Government from consulting the Law Officers in appropriate cases.

2. To disclose that the Law Officers have not advised on an issue might expose the government to criticism for not having consulting them, and hence having failed to give sufficient weight to the issue or to obtain the 'best' advice. Again, even if unfounded this could lead to pressure to consult the Law Officers in inappropriate cases or in an unmanageably large number of cases.
- We recognise that there is a public interest in the Attorney General's advice over the 'public interest' test and its interpretation under the Act. However, in the circumstances of this case, this public interest does not outweigh the opposing public interest in maintaining the current convention.
4. On 8 February 2005 the complainant wrote to the DCA to request an internal review of its decision. In the request, she put forward the following views:
 - There is a compelling case on public interest grounds for the Attorney's views on the 'public interest' test under the Act to be made known.
 - His 'advice' in this case is central to the entire operation of the Act and informs how it will work.
 - It is not advice in the traditional sense of legal advice to a client; but rather the very basis of the policy underpinning a piece of legislation whose whole aim is to make information to the public. How this is to work is clearly a matter of public interest.
5. The DCA responded to the complainant on 8 April 2005, in which it informed her that following its review it remained satisfied that its original decision to neither confirm nor deny whether it hold such advice was correct.

The Investigation

Scope of the case

6. On 11 April 2005 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She confirmed that her complaint relates to both the refusal to supply the requested information and the refusal to confirm whether or not such information is held.

Chronology

7. On 23 January 2006 the Commissioner contacted the DCA to request the following:
 - i. A full justification and explanation for its application of section 35 of the Act, particularly details of the public interest factors both for and against confirming

- whether the information was held, and how the department came to its conclusion that the public interest weighed in favour of maintaining the exclusion to the duty.
- ii. Clarification of whether there have been any cases where the Government has confirmed or denied whether advice has been sought from the Law Officers and, if so, why the decision was taken in these cases not to adhere to the convention.
 - iii. Any other evidence or information it considers relevant to the complaint.
8. The Commissioner also informed the DCA that neither the refusal notice nor the outcome of the internal review communicated to the complainant provided the factors that the DCA took into account which would favour confirming or denying whether the information is held.
 9. The DCA responded to the Commissioner on 19 May 2006, in which it:
 - Stated that its response to the complainant on 1 February 2005 fully explained why it was unable to confirm or deny whether the information is held;
 - Set out its factors in favour of confirming or denying; and
 - Set out its factors in favour of neither confirming nor denying.
 10. The DCA also stated that “the Government has only confirmed that it had sought the Attorney General’s advice on a handful of occasions but that this has been where the particular circumstances have been exceptional with a clear and overwhelming public interest.” The DCA also quoted the Legal Secretariat’s advice on the provision of Law Officers’ advice to the Government and set out instances of where the actual advice of the Law Officers had been previously disclosed (see Analysis).
 11. The DCA also informed the Commissioner that it noted his observation in relation to the inadequacies of the refusal notice with regard to detailing the factors in favour of disclosure.
 12. On 21 August 2006 the Commissioner contacted the DCA to ask for confirmation as to whether the requested information is held and if this is the case to have it supplied to him. The Commissioner explained that he considered this necessary because section 35 is a qualified exemption, requiring an assessment of the public interest to be made on the merits of each individual case. In this case, he considered that he could only undertake this assessment if supplied with this information.
 13. The DCA responded to the Commissioner on 7 September 2006, in which it refused to accede to the Commissioner’s request, stating that “it is possible for you to judge the strength of our decision to neither confirm nor deny without knowing whether we hold any information and without inspecting any of the information which might be held.....we consider that this is an assessment which can be made by the Commissioner on an abstract consideration of the position, as the existence or non-existence of any information cannot be the key determinant in considering the public interest in respect of an NCND response.”

14. The DCA also informed that Commissioner that it was relying on section 51(5)(a) of the Act in its refusal to supply him with that which he requested, which provides that public authorities shall not be required to provide the Commissioner with any information in respect of any communication between a lawyer and a client in connection with the giving of legal advice with respect to the client's obligations under the Act.
15. On 20 September, the Commissioner wrote to the DCA to reiterate his request for, and reasons for requesting, the aforementioned information. In respect of section 51(5)(a), the Commissioner stated that he "does not consider this provision to be applicable in the context of information that does not relate to legal advice about a specific FOI case involving the DCA. Rather, it (the information requested in this case) would refer to more general advice on the interpretation of the Act, presumably issued before the legislation was enacted."
16. The DCA responded to the Commissioner on 5 October 2006 in which it again declined to accede to the Commissioner's request. It also rejected the Commissioner's interpretation of section 51(5), stating that the provision "is wide and covers both general and more specific advice."
17. On 29 January 2007, the Commissioner served the DCA with an Information Notice in order to obtain that which he had requested, setting out his grounds for doing so. The DCA issued a Notice of Appeal to the Information Tribunal under section 57 of the Act on 26 February 2007, in which it set out its grounds of appeal, focusing upon the justification for its application of section 51(5) of the Act.
18. The Information Tribunal promulgated its decision on 6 August 2007, in which it found in favour of the Ministry of Justice (successor to the DCA at the time of promulgation). The Tribunal considered that where a public authority holds legal advice relating specifically to the Act then section 51(5) is engaged and the Commissioner cannot inspect the information because of the unfair advantage it may give him. The Tribunal found that the capacity in which the DCA may have received the legal advice (whether as a public authority with its own obligations or as the sponsoring department providing advice to others) is irrelevant for the purposes of s.51(5)(a). The Tribunal concluded by stating that its decision does not prevent the Commissioner from continuing his investigation and making a decision in this case.

Findings of fact

19. The Commissioner notes that that the document "Procedures for Provision of Law Officers' Advice To The Government" produced by the Legal Secretariat to the Law Officer on 5 April 2004 contains the following paragraphs:

"4. There is a long-standing convention, adhered to by successive Governments, that neither the fact that the Law Officers have been consulted in relation to a particular matter, nor the substance of any advice they may have given is disclosed outside Government. The purpose of the convention is to enable the Government, like everyone else, to obtain full and frank legal advice in

confidence. There is a strong public interest in the Government seeking legal advice so that it acts in accordance with the law. If there were a risk that Law Officers' advice would be made public, this might inhibit the provision of full and frank legal advice. The rationale for the convention is the same as that which underpins the doctrine of legal professional privilege, which also applies to Law Officers' advice.

5. Parliamentary debates as long ago as 1865 refer to a general rule that Law Officers' advice is not disclosed. Erskine May mentions a number of cases in which the views of the Law Officers on a particular matter were disclosed to Parliament. As far as LSLO is aware, there are in fact only three examples in the past 100 years of the actual advice of the Law Officers being disclosed publicly. Two of these examples relate to the provision of documents in judicial proceedings, namely the Factortame litigation and the Scott Inquiry. In both of these cases, the advice given by the Law Officers was central to the issues in the proceedings. The third example arose from the Westland affair when the Solicitor General's letter to Michael Heseltine was disclosed. However, this followed a leak in breach of the convention, gave rise to serious consideration of prosecutions under the Official Secrets Act and led to, or contributed to, the resignation of two Cabinet Ministers."

20. The Commissioner also notes that in 2005 the Government published the Attorney General's view on the legality of military action in Iraq.

Analysis

Procedural matters

Section 17 – Refusal Notice

21. Section 17(3) of the Act states that where a public authority refuses to confirm whether information exempt under a qualified exemption is held, it must state the reasons for claiming "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."
22. In not setting out the factors considered that would favour confirming or denying whether the requested information was held, the Commissioner does not consider the refusal notice to sufficiently explain the decision taken in relation to the balance of the public interest. As such, the Commissioner does not consider the refusal notice to fully conform with the requirements of section 17(3) of the Act.

Exemption

Section 35(1)(c) – The provision of advice by any of the Law Officers or any request for the provision of such advice

23. The Commissioner considers the complainant's request to clearly constitute a request for the provision of the advice of a Law Officer. This is because section 35(5) defines "the Law Officers" as including the Attorney General. Further, section 35(3) of the Act states 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)."
24. The Commissioner therefore accepts that the information requested by the complainant engages the exemption under section 35 of the Act.

Public interest test

25. Section 35 is, however, a qualified exemption. Section 2(1)(b) of the Act states that for this exemption to be maintained in order not to confirm whether information is held, it must hold 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 public authority holds the information."
26. Further to the DCA's reasoning set out in the refusal notice of 1 February 2005, its submission to the Commissioner of 19 May 2006 set out the following additional public interest factors to support the exclusion from the duty to confirm or deny:
 - Ensuring that a government department is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers.
 - It is in the public interest that the decisions taken by government are taken in a fully informed legal context, to ensure good decision-making. Government needs high-quality, comprehensive legal advice, based on a full appreciation of the relevant facts, including arguments in support of final conclusions and also relevant counter arguments, for the effective conduct of its business.
 - Disclosure of whether or not the Department has sought the Attorney General's advice has a significant potential to prejudice the government's ability to defend its legal interests – both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the argument that the advice has been fully considered and presented without fear or favour. Neither scenario is in the public interest.
27. The DCA also set out the following public interest factors in favour of disclosure:
 - Openness of public authorities about the quality of their decision making, which includes:
 - ensuring that decisions have been made on the basis of good quality policy and legal advice,
 - transparency of the decision making process, and
 - knowing whether or not that advice has been followed.

28. Given the decision of the Information Tribunal in respect of his Information Notice, the Commissioner was required to reach a decision on the balance of the public interest based on an abstract consideration of the DCA's position. Whilst this is not the Commissioner's preferred approach, he has proceeded on that basis in this instance.
29. The Commissioner considers the totality of the DCA's public interest arguments to be full and comprehensive and, as such, there are no further factors he believes should have been considered.
30. The Commissioner considers that there is a public interest in disclosing both whether the Law Officers have provided advice to the Government and, where this is the case, the disclosure of that advice. However, the Commissioner accepts the DCA's public interest arguments supporting the exclusion of the duty to confirm or deny. As such, he has reached the conclusion that in the context of Law Officers' advice, there must be exceptional circumstances to support the public interest in disclosure in order for that in the exclusion from the duty to confirm or deny to be overridden.
31. The Commissioner does not consider the subject matter of the complainant's request to be of such exceptional public interest to match the DCA's arguments for the maintenance of the exclusion from the duty to confirm or deny. He believes this to be the case for the following reasons:
 1. The public interest in the disclosure of the Attorney General's advice in this case and, indeed, confirmation of whether it has been supplied falls significantly short of the public interest in the disclosure of the advice which has previously been disclosed – Factortame, Scott Inquiry, Westland affair and the view on the legality of military action in Iraq. The Commissioner believes that the circumstances of those cases were exceptional and therefore such that the public interest considerations supported the disclosure of the information;
 2. The Commissioner does not consider the public interest in transparency and accountability in the circumstances of this case to be sufficient to match that in maintaining the exclusion of the duty to confirm or deny. Specifically, he does not consider there to be any exceptional circumstances in this case to support confirmation of whether the requested information is held;
 3. Disclosure of whether the DCA holds the requested information would therefore lower the threshold above which such information would be considered appropriate for confirmation or denial. This would be likely to have the effect of inhibiting requests for and the provision of full and frank legal advice by the Law Officers in future. However, even where this would not be the case (because confirmation of the existence of the advice would not reveal the content of that advice), confirmation or otherwise would make it harder, as explained by the DCA, for the department "to be able to act free from external pressure in deciding what sort of legal advice

it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers.”

32. The Commissioner therefore accepts the DCA's decision in respect of the balance of the public interest in relation to the exclusion of the duty to confirm or deny the existence of the requested information.

The Decision

33. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

- i. Application of section 35(1)(c), including the exclusion of the duty to confirm or deny, in relation to the information requested by the complainant.

34. However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:

- i. The refusal notice of 1 February 2005 did not fully conform to the requirements of section 17 of the Act.

Steps Required

35. The Commissioner requires no steps to be taken.

Right of Appeal

36. 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 30th day of August 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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.”

Effect of Exemptions

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) 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 public authority holds the information

section 1(1)(a) does not apply.”

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.”