

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 December 2007**

**Public Authority:** Ministry of Justice  
(previously handled by the Home Office, responsibility transferred to Ministry of Justice (MoJ) on 9 May 2007)

**Address:** Selbourne House  
54 Victoria Street  
London  
SW1E 6QW

### Summary

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The complainant requested a copy of the legal advice held by the public authority following a public consultation into proposed new legislation. The public authority refused to confirm or deny that any legal advice was held under sections 42 and 35 of the Act. The Commissioner investigated the application of the exemptions in relation to the neither confirm nor deny response and found that the public authority was correct in its application of section 42. This being the case, the Commissioner did not go on to consider the application of section 35. However, the Commissioner did find that the refusal notice issued in response to the initial request did not meet the requirements of section 17 of the Act.

### 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. The complainant has advised that on 14 November 2005 he made three requests to the public authority. Quoted below is the element of the request being considered by the Commissioner:

*3.4 Request for any legal advice which confirms that the possession of consensual sado-masochistic violent sex can successfully be prosecuted and that Article 8 does not apply.*

*3.5 It seems extremely unlikely that violent sado-masochistic sex, which is consensual, and which is not life threatening, can be deemed to be criminal (See: 9.1, 9.3, and 9.4 below: Sexual Offences (Amendment) Act 2000: definition). Furthermore, it seems unlikely that the possession of real images depicting such acts could also be criminalised – because of the provisions of Article 8 of the Convention. I would therefore like to see any legal advice you have received with regard to this specific category of material.*

3. On 24 February 2006 the public authority issued a refusal notice in relation to the requests made. In relation to the request above the public authority stated that it does not normally release legal advice under the Act but outlined where the complainant could obtain a summary of the Human Rights considerations within the consultation paper.
4. The complainant wrote to the public authority on 19 August 2006 to request an internal review appealing against the decision to withhold the legal advice.
5. The public authority conducted an internal review and communicated its findings to the complainant on 25 October 2006. It explained that in relation to any legal advice that may or may not be held it was refusing to confirm or deny if any was held by virtue of section 42(2) of the Act 'Legal Professional privilege' and 35(1) (c) and (3) 'Formulation and development of government policy: the provision of advice by any of the Law Offices'. In applying the above exemptions the public authority outlined its reasons for refusing to confirm or deny that information was held and the public interest arguments considered for maintaining both exemptions.

## **The Investigation**

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### **Scope of the case**

6. On 16 November 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to review the refusal to neither confirm nor deny legal advice is held in relation to the second part of his request for legal advice.

### **Chronology**

7. On 8 May 2007 the Commissioner began his investigation by writing to the public authority to establish some further information regarding the application of section 42 to the refusal to confirm or deny that legal advice is held.

8. On 21 May 2007 the Commissioner received a letter from the Home Office informing him that from 9 May 2007 all Offender Management (Prisons and Probation) and Office for Criminal Justice Reforms work had transferred from the Home Office to the Ministry of Justice.
9. The public authority responded on 29 June 2007 providing the further information requested.
10. On 5 July 2007 the Commissioner wrote again asking a number of questions that related to the issue of the extent of public knowledge of whether or not advice had been sought.
11. On 11 July 2007 the public authority telephoned the Commissioner to state that if legal advice was received in relation to the request this would not have been made public.
12. The Commissioner wrote on 26 July 2007 to seek further arguments regarding the application of the exemption to neither confirm nor deny and an expansion on the public interest arguments considered. The Commissioner asked the public authority to explain how stating that advice had or had not been sought would reveal the content of the legal advice if obtained. The Commissioner also pointed out to the public authority that the public interest arguments appeared to focus on the public interest in maintaining the exemption in relation to the disclosure of advice and not the confirmation of the fact legal advice has or has not been sought. The Commissioner therefore asked the public authority to revisit the public interest test.
13. The public authority responded on 21 September 2007 providing further justification for its reliance on sections 42 and 35 to neither confirm nor deny any legal advice is held.

## Background

14. The complainant made his request for information following a public consultation carried out by the Home Office 'On the possession of extreme pornographic material.' The consultation document sought views on a proposal to make it illegal to possess a limited range of extreme pornographic material.
15. Within the consultation paper under the heading Human Rights Considerations was the following paragraph:

*"The proposals which we have set out will impact upon the freedom of individuals to view what they wish in the privacy of their own homes. However, the material which we intend to target with this new offence is at the very extreme end of the spectrum and we believe most people would find is abhorrent. There will be no restriction on political expression or public interest matters, or on artistic expression. It is not the intention that this offence should impact on legitimate reporting for news purposes, or information gathering for documentary programmes in the public interest and, in drafting the offence, we will give careful consideration to the best*

*means of ensuring this. In the light of this, we have considered whether there are implications for our obligations under the European Convention on Human Rights and our view is that both our domestic courts and the Strasbourg court will find our proposal compatible with Article 10 (freedom of expression) or Article 8 (private life) if that is raised.”*

16. The consultation generated a large number of responses and raised a number of issues; the complainant's request for information was contained within his response to the consultation.

## Analysis

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### Procedural matters

17. On 8 May 2007 responsibility for the case transferred from the Home Office to the Ministry of Justice (MoJ). MoJ has responded on this case and engaged with the Commissioner in explaining the application of the exemptions. The Commissioner finds that the MoJ is the appropriate public authority for the purposes of the Decision Notice.

### Section 17 'Refusal of Request'

18. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
  - (a) states the fact that information is exempt,
  - (b) specifies the exemption in question, and
  - (c) states why the exemption applies.
19. Section 17(3) states that if a public authority is relying on a qualified exemption it must state the reasons for claiming that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Section 17(7) states that any refusal notice must contain procedures provided by the public authority for dealing with complaint and contain details of the rights conferred by section 50, the right to complain to the Commissioner.
20. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing if the information is held and if so to have the information communicated to him. Full texts of the relevant sections are included in the 'legal annex' section of this notice.
21. The public authority did not respond to the complainant's request until 24 February 2006 outside of the 20 working days required under section 10. The refusal notice informed the applicant that the information in the second part of this request was not being disclosed but did not specify the exemption in question or

explain why it applied. The refusal also did not outline any public interest considerations given to withholding the requested information or inform the complainant of his right to complain to the Commissioner and the details by which to do so.

22. The Commissioner finds the refusal notice of 24 February 2006 was issued outside of the 20 working days as required by section 10 of the Act, this is in breach of section 17(1). The public authority also breached section 17(1) as the refusal notice of 24 February 2006 did not state the exemptions being applied or explain why they applied. In relation to the section 42 exemption the refusal notice did not explain the public interest arguments considered, this is in breach of section 17(3). The refusal notice also did not outline the rights of the complainant to complain to the Commissioner in breach of the requirements of section 17(7).

### **Exemptions**

23. Where a public authority has relied on an exemption which entails a refusal to confirm or deny whether information is held, the Commissioner needs to ensure that his Decision Notice does not give any indication as to whether or not information is held by the public authority. As a consequence, it is not always possible for him to comment in great detail on the reliance by a public authority on the exemption concerned, as to do so may provide an indication as to whether the requested information is held.
24. The Commissioner would also emphasise that his decision relates solely to the issue of whether the public authority should have confirmed or denied it held legal advice under section 42 of the Act and under section 35 of the Act. His decision does not relate to the issues of whether any such advice, if advice were held, should have been disclosed to the complainant.

### **Section 42 'Legal professional privilege'**

25. Section 42(1) states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. Section 42(2) states that the duty to confirm or deny does not arise if, or to the extent that doing so would involve the disclosure of any information which in itself attracts privilege.
26. The Commissioner must therefore consider if confirming or denying that the public authority holds legal advice in respect of the complainants request, does in itself attract legal professional privilege.
27. The Commissioner notes that legal professional privilege does not, in usual circumstances, attach to the fact that legal advice has been sought. However there are some circumstances where the fact that legal advice has been sought may be protected by legal professional privilege if the very fact that legal advice has been sought would disclose something of the substance of the advice.

28. The public authority stated that it could not confirm whether or not it holds legal advice confirming that the proposed new restrictions and the European Convention on Human Rights are compatible and that prosecutions could be successfully prosecuted. It went on to say that to do so, or to state that no such advice was held, would indicate the basic content of the legal advice that it may or may not hold.
29. The public authority went on to explain that the complainant's request was 'loaded' and that to confirm or deny there is advice may suggest a particular answer to his request. To avoid this it might be necessary to further extrapolate on the nature of any advice which, by implication, may undermine any claim to legal professional privilege it may wish to make.
30. The Commissioner has considered these arguments in light of the complainant's request and notes that the phrasing of his request was for 'any legal advice which confirms...'. If the public authority confirms it holds legal advice it would be informing the applicant that the content of the legal advice confirms a particular position therefore disclosing the basic content of the advice itself. Similarly if the public authority were to state no legal advice is held it could reveal one of two things: that no legal advice was sought; or that legal advice is held but that this legal advice does not confirm the position laid out in the complainant's questions.
31. The Commissioner considers that in most cases issuing a response denying legal advice is held would not in itself attract privilege as it would simply confirm that there is no legal advice. However, in this case, due to the phrasing of the request were the public authority to state no legal advice is held it could reveal that legal advice is held which does not meet the description of the legal advice requested by the complainant. In other words, if legal advice is held which meets the description of the complainant's request, confirming this would disclose the contents of the advice (i.e. that the legal advice confirms that the possession of consensual sado-masochistic sex can be successfully prosecuted and that Article 8 does not apply). If legal advice is held but the advice does not meet the description of that requested by the complainant, the public authority could either confirm advice is held and then explain that this advice does not meet the description or deny legal advice is held as described, thereby possibly confirming to the complainant that legal advice is held but that it does not meet the description he requested. Either scenario would disclose the content of any legal advice held.
32. The Commissioner finds that the either confirming or denying that legal advice is held, in the circumstances of this case, does in itself attract privilege as to do so would reveal the basic contents of the advice if held. The Commissioner finds that section 42 is engaged as the public authority has demonstrated that to either confirm or deny that legal advice is held attracts privilege in itself.

### **Public Interest Test**

33. Section 42 is a qualified exemption and is therefore subject to the public interest test. The public authority must therefore demonstrate that in all circumstances the

public interest in refusing to confirm or deny that legal advice is held outweighs the public interest in confirming or denying.

33. The public authority acknowledges that there are a number of public interest factors in favour of disclosure:

- Openness encourages good government by making civil servants more accountable for their actions.
- Disclosure provides evidence that decisions were taken properly and on the basis of the best possible advice.
- Any advice that may have been received would be vital to the decision making process and where the advice itself cannot be disclosed there is a public interest in the confirming of its existence for the same reasons.
- It is in the public interest to know whether or not legal opinion has been sought in relation to policy development and proposed changes to offences, and at what level.
- Openness in relation to such advice enables the public to make a more informed contribution to the public debate and to better understand the proposals.

34. The public interest considerations it considered in favour of maintaining the position to neither confirm or deny the existence of legal advice were:

- Confirming or denying would reveal the basic content of the legal advice, thus waiving privilege.
- The provision of fully comprehensive legal advice is essential to policy development and any reluctance on the part of lawyers to provide advice caused by the prospect of its disclosure is not in the public interest.
- Lawyers and other officials may avoid making a record of the advice or become reluctant to seek advice in the first place. This could lead to decisions being taken which are legally flawed and which could result in legal challenges being made which would otherwise have been unnecessary.

35. The complainant has stated that there is a public interest in the disclosure of any legal advice if held as the proposed legislation is in contravention of the Human Rights Act. He goes on to say that if enacted the proposed legislation will destroy thousands of people's lives and there is therefore a public interest in seeing the legal advice which supports the implementation of the legislation. The complainant also stated that if the legislation is enacted and found to be unlawful there will be a huge expense to the public purse in legal fees and compensation to the victims. He states that because of this it makes sense to compare the legal advice held before prosecutions are sought, police time expended and legal fees incurred.

36. In reaching a decision as to where the balance of public interest lies the Commissioner has considered that in determining that section 42 is engaged he has agreed that confirming or denying legal advice is held would in itself attract privilege. The Commissioner has found that in all scenarios confirming or denying

would reveal something of the content of the legal advice. The Commissioner must therefore decide if there is a public interest in confirming or denying if legal advice is held and if this outweighs the public interest in maintaining the exemption to neither confirm nor deny, being aware that to confirm or deny would reveal the basic content of any legal advice if held.

37. The Commissioner is mindful that there is a strong element of public interest inherent in legal professional privilege which must be taken into account when considering the application of section 42. The Commissioner notes the Tribunal case of *Bellamy v the Information Commissioner and the DTI (EA2005/0023)* in which the Tribunal concluded 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 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 cases”*

38. In reaching his decision as to where the public interest lies, the Commissioner has considered the arguments put forward by the public authority and feels these reasons demonstrate a strong argument for maintaining the exemption. These reinforce the strong public interest inherent in the notion of legal professional privilege. Whilst the Commissioner is mindful of the strong public interest arguments put forward by the complainant in relation to the implication of the legislation and its impact on members of the public, he also notes that the proposed legislation has undergone a public consultation and the responses to this consultation have also been published. In this case the Commissioner has found that to confirm or deny legal advice would reveal the basic content of the legal advice and he agrees with the public interest arguments put forward by the public authority that there is a risk that disclosing confidential legal advice could undermine public authorities ability to obtain this advice in a timely fashion and have confidence that the advice given is done so freely without the consideration of its wider disclosure.
39. For these reasons, the Commissioner has concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in confirming or denying legal advice is held. Accordingly, he finds that the public authority was correct to rely on section 42(2) to neither confirm nor deny that legal advice is held of the description requested by the complainant.
40. As section 42(2) has been found to apply the Commissioner has not gone onto consider the application of section 35(1) (c) and (3).



## The Decision

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41. 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:

The application of section 42(2) to neither confirm nor deny that legal advice is held.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The refusal notice of 24 February 2006 did not fully conform to the requirements of section 17 of the Act.

## Steps Required

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42. The Commissioner requires no steps to be taken.

## Failure to comply

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43. 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

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44. 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](mailto: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 5<sup>th</sup> day of December 2007**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

### Time for Compliance

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3)

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

## **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(4)** provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt 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.”