

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 March 2010

Public Authority: Attorney General's Office
Address: 20 Victoria Street
London
SW1H 0NF

Summary

The complainant made a freedom of information request to the Attorney General's Office for (i) any assessment about how the economic downturn would effect the department which was supplied to Downing Street; and (ii) details of any legal advice on government liability for the death of Dr David Kelly. In response the public authority refused to confirm or deny if the requested information was held by relying on the exemptions in section 35(3) (Exclusion from duty to confirm or deny) read with section 35(1)(a) (Formulation and development of government policy) and section 35(3) read with section 35(1)(c) (Law Officers' advice).

During the course of the Commissioner's investigation the public authority confirmed that it held no information falling within the scope of the first part of the request and therefore the Commissioner considered this element of the complaint to have been informally resolved. For the second part of the request the Commissioner decided that the information, if held, would fall within the scope of section 35(1)(c) and that 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 Commissioner also found that in its handling of the request the public authority breached section 17(1) (Refusal of request) but requires no steps to be taken.

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 1 September 2008 the complainant wrote to the public authority to make the following freedom of information request:

"Please disclose to me under the Freedom of Information Act, the content of any assessment by the Department supplied to Downing Street (whether no 10 or no 11) about how the economic downturn will affect the department. (I understand this was prepared by the Department in response to a letter from no 10 Downing Street asking how the economic downturn would affect the Department.)

Please disclose the personal details of any Department official who prepared or contributed to the assessment (and identify, as applicable, what their contribution was). (I assume the official is senior enough to expect his/her identity to be disclosed?)

Please also disclose whether the department gave, holds or received any legal advice, or was ever consulted, about the liability or otherwise of the Government or any Government department for the death of Dr David Kelly, the date when it gave or received the advice/was consulted and the contents of that advice, including whom the advice was from."

3. The public authority responded to the request on 24 September 2008 when it informed the complainant that it was unable to confirm or deny if it held information falling within the scope of the request. It explained that the relevant exemption was section 35(3) of the Act which read with section 35(1)(c) provides for an exclusion from the duty to confirm or deny for information which, if it were held, relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The public authority concluded that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing if the requested information was held.
4. On 26 September 2008 the complainant contacted the public authority to ask it to carry out an internal review of its handling of his request. In particular the complainant noted that the public authority's explanation of its decision to refuse to confirm or deny referred to the provision of Law Officer's advice and therefore he assumed that this

response only applied to the second half of the request. The complainant now asked the public authority to explain its basis for refusing to confirm or deny if it held the information falling within the scope of the first part of his request (“the assessment”). The complainant also said that he did not think the public authority had adequately explained its reasons for concluding that, in respect of the second part of the request, the public interest favours maintaining the exclusion of the duty to confirm or deny.

5. The public authority presented the findings of its internal review on 16 October 2008. In relation to the request for the assessment the public authority acknowledged that it should not have relied on section 35(3) and 35(1)(c) to refuse to confirm or deny. However the public authority said that it could still not confirm or deny if the information was held because it was now relying on the section 35(3) read in conjunction with exemption in section 35(1)(a). This provides for an exclusion from the duty to confirm or deny for information which, if it were held, relates to the formulation and development of government policy. The public authority went on to explain why the exemption applied and why the public interest favoured neither confirming nor denying if the information was held.
6. The public authority upheld its decision to refuse the request for legal advice regarding Dr David Kelly on the basis of section 35(3) and section 35(1)(c). The public authority went on to reiterate why the exemption applied and why the public interest favoured neither confirming nor denying if the information was held.

The Investigation

Scope of the case

7. On 14 December 2008 the complainant contacted the Commissioner to complain about the public authority’s decision to refuse to confirm or deny if it held the requested information. The complainant also asked the Commissioner to consider if the public authority had committed any procedural breaches of the Act in its handling of his request.
8. During the course of the Commissioner’s investigation the public authority confirmed that it held no information regarding the first part of the request for the assessment. The Commissioner communicated this to the complainant and therefore considers that this element of the complaint has been informally resolved. In line with his robust approach to FOI complaints the Commissioner has not considered

whether or not the public authority should have confirmed or denied if it held the information at the time the request was received.¹ The Commissioner's analysis will focus on the public authority's refusal to confirm or deny if it held information falling within the scope of the second part of the request.

Chronology

9. The Commissioner contacted the public authority with details of the complaint on 14 January 2010. As regards the request for the economic assessment, the Commissioner asked the public authority to explain why the information would, if held, relate to the formulation and development of government policy. The Commissioner also asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing if this information was held.
10. For the second part of the request the Commissioner asked the public authority to comment on the complainant's suggestion that another government department (Ministry of Defence) had already confirmed, in response to a separate FOI request from him, that no legal advice on the potential for government liability over the death of Dr David Kelly was ever sought or given. In doing so the Commissioner also asked the public authority to clarify whether the government had previously commented on the existence of any such legal advice. The Commissioner asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing if this particular information was held.
11. The public authority responded to the Commissioner on 19 February 2010. As regards the request for the assessment the public authority now said that it was prepared to confirm to the complainant that it holds no information falling within the scope of this part of his request. It maintained that it was correct to have refused the request at the time it was received but that circumstances had since changed. It explained that it had emerged, as the result of a leak, that a particular government department (The Home Office) had been asked to compile an assessment of how the economic downturn would affect that department. At the time the request was made an investigation into the source of the leak was, it explained, ongoing. However, it confirmed that that investigation had now been concluded. In light of

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/forms/a_%20robust_%20approach_%20to_%20foi_%20complaint_%20cases001.pdf

this, and in view of the fact that the economic situation had moved on since September 2008, it was now prepared to confirm it held no information.

12. The public authority maintained that it was correct to neither confirm nor deny whether it held any information falling within the scope of the second request by relying on section 35(3) together with section 35(1)(c). It provided further details about the factors it had taken into consideration when carrying out the public interest test. In response to the complainant's suggestion that the MoD had already confirmed it held no legal advice, the public authority said that this only indicated that that particular department does not hold the requested information and should not be taken to mean that other government departments do not hold relevant information. Therefore, in the circumstances it believed that it was appropriate to maintain a 'neither confirm nor deny' response.
13. On 10 March 2010 the Commissioner contacted the complainant to inform him that the public authority was now prepared to confirm that it held no information falling within the first part of his request.

Findings of fact

14. Paragraph 2.13 of the Ministerial Code describes the convention surrounding Law Officer's advice. It states:

"The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority".

Analysis

15. The full text of the relevant provisions of the Act referred to in this section is contained within a legal annex.

Exemptions

Section 35(3) – (Exclusion of the duty to confirm or deny)

Section 35(1)(c) – (Law Officers' advice)

16. Section 35(3) provides that the duty to confirm or deny if requested information is held does not arise in relation to information which is (or if it were held would be) exempt information by virtue of section 35(1). In this case the relevant part of section 35(1) is section 35(1)(c) which

provides for an exemption for information which relates to the provision of advice by any of the Law Officers or any request for the provision of such advice.

17. In this case the requested information is legal advice provided by the public authority on government liability in the death of Dr David Kelly. The public authority's view is that if this information were held it would constitute legal advice from the Attorney General, a UK Law Officer, thus engaging the exemption. The Commissioner is satisfied that this is indeed the case and would stress that the exemption only requires that information relates to Law Officer's advice or requests for the provision of such advice. The Commissioner considers that the term 'relates to' can safely be given a broad interpretation given that section 35 is a qualified exemption the Commissioner and therefore will still be subject to the public interest test.

Public interest test

18. Section 2(1)(b) of the Act provides that in the case of a qualified exemption section 1(1)(a) does not apply only where the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing if the requested information is held.

Public interest arguments in favour of disclosing the requested information

19. There is a general public interest in greater accountability and transparency. However disclosure would also serve the public interest as it would aid public understanding of the work undertaken by the Law Officers and the role they play in government.
20. The complainant has argued that the public interest in confirming or denying if information is held will be stronger in cases such as 'major political events...of the type that get widespread media coverage and relate to political events of major public interest significance'. The complainant suggests that the death of Dr Kelly falls into this category.

Public interest arguments in favour of maintaining the exemption

21. The public authority contends that there is a very strong public interest 'in 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 points to the 'long standing' convention that neither the advice of law Officers, nor the fact that

their advice has been sought is disclosed outside government as evidence of this strong public interest. The convention is recognised in the Ministerial code as set out at paragraph 14 above.

22. The public authority has explained that the Law officers are the government's most senior legal advisers and that therefore their advice has a particularly authoritative status within government. It goes on to say that the need for government to have legal advice on a wide range of matters means that it is not possible for Law Officers' advice to be obtained in every case. Therefore, to disclose the occasions when law Officer's advice has been sought would, it argues, disclose the matters which the government views as a particularly high political priority or to be of particular legal difficulty and that this would not be in the public interest.
23. Disclosing the issues on which the Law Officers have given advice could be taken to indicate that the government attaches particular importance to an issue or is in doubt about the strength of its legal position. The public authority's view is that this would not be in the public interest as it could dissuade the government from seeking such legal advice in appropriate cases. On the other hand, disclosure could put pressure on the government to seek the 'best' legal advice in inappropriate cases or in an unmanageably large number of cases and again this would not, in the opinion of the public authority, be in the public interest.

Balance of the public interest arguments

24. The Commissioner agrees with the public authority that there is a strong public interest in maintaining the exclusion of the duty to confirm or deny in respect of Law Officers' advice. The existence of the convention explained above demonstrates that disclosing when Law Officer's advice has been sought or provided would have an adverse effect on good government. The Commissioner also notes that the importance of the convention has been recognised by the courts in *HM Treasury v ICO* where Mr Justice Blake commented on the fact that Parliament had specifically sought to single out the advice from Law Officers as being worthy of protection:

'Parliament has precisely identified as exempt the issue as to whether or not the Law Officers have given their advice..... this was statutory language intending to reflect the substance of the Law Officers' Convention itself, a long-standing rule adopted by the executive for the promotion of good government. A consideration adopted by the draftsmen as a ground for exemption without having to prove specific

prejudice, naturally fits into a regime where there is an assumption of a good reason against disclosure.”²

25. The judgement went on to say that there is an in-built public interest in the exemption:

“...Parliament intended real weight should continue to be afforded to this aspect of the Law Officer’s Convention [and]...considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining an exemption even in the absence of evidence of particular damage.”³

26. Given the importance of the convention the Commissioner’s approach is to adduce an initial weight in favour of maintaining the exclusion of the duty to confirm or deny when balancing the public interest. Whilst the convention is an important factor to take into account the Commissioner is careful not to elevate section 35(1)(c) into an absolute exemption and there will be occasions where the public interest favours confirming or denying if information is held and indeed disclosing requested information. However, there must be equally strong factors in favour of confirming or denying if information is held in order to shift the balance of the public interest. No evidence or arguments to this effect have been presented in this case and the Commissioner cannot think of any arguments that are sufficiently strong enough.

27. The Commissioner recognises that there is some public interest in confirming or denying if the information is held but considers these to be more general in nature. The Complainant has argued that the death of Dr Kelly was an event of ‘major public interest significance’. The Commissioner’s view is that this event certainly attracted a great deal of public interest and media interest but it does not necessarily follow that there is a public interest in confirming or denying if the particular information is held. The Commissioner would stress that what is in the public interest is not the same as what is of interest to the public. In light of this the Commissioner has decided 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 confirming if the requested information is held.

² HM Treasury v The Information Commissioner and Evan Owen [2009] EWHC 1811 (Admin), para. 37.

³ *Ibid*, para. 54.

Procedural Requirements

28. When the public authority initially responded to the request on 24 September 2008 it explained that it could neither confirm nor deny if the information was held under section 35(3) read with section 35(1)(c). However, it was not until the internal review of 16 October 2008 that the public authority said that for the first part of the request it was in fact seeking to rely on section 35(3) read with section 35(1)(a). By failing to cite this exemption within 20 working days of receiving the request the public authority breached section 17(1) of the Act.

The Decision

29. 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:
- The public authority dealt with the request in accordance with the Act to the extent that it refused to confirm or deny if it held the information in the second part of the request by relying on section 35(3) and section 35(1)(c) of the Act.
30. However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:
- The public authority breached section 17(1) of the Act by failing to state that it was relying on section 35(1)(a) within 20 working days of receiving the request.

Steps Required

31. The Commissioner requires no steps to be taken.

Right of Appeal

32. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 23rd day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 2(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."

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 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(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).”