

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: The Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Summary

The complainant requested copies of legal advice considered by the Minister when determining legislation relating to the maximum age at which a child could be withdrawn from Sex and Relationship Education ("SRE").

The Department for Education (DfE) withheld information under sections 35(1)(a) (information relates to the formulation and development of government policy) and 42(1) (legal professional privilege). It also explained its belief that the public interest favoured maintaining each exemption. The complainant requested an internal review and the DfE maintained its position.

The Commissioner finds that the DfE was entitled to withhold the information by virtue of section 42(1). He has found that the exemption was engaged and that the balance of public interest favours maintaining the exemption. He has not therefore gone on to consider section 35(1)(a). He requires no remedial steps to be taken in this case.

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.

Background

2. Currently parents can decide that their children will not receive Sex and Relationships Education ("SRE"). Parents maintain the right to opt their children out of SRE up to the age of 19¹.
3. The previous Labour Government wished to reduce the age at which parents could opt their child out to 15. However, this was not enacted into law.
4. On 7 April 2010 Mr Ed Balls wrote an open letter to Mr Michael Gove. He said the following:

'... your insistence that parents should have a right to withdraw their children until they reach the age of 16 – the age at which they are in many respects considered adults – makes it impossible for us to proceed. Both British and European case law do not support an opt-out up to the age of 16. As I explained when we discussed yesterday, that amendment would have meant that the bill would not have been compliant with the ECHR. Your insistence that the age limit must be increased to 16 would have made the entire bill non-compliant with UK and European law and, therefore, our lawyers advised me that, as Secretary of State, I had no choice but to remove all the PSHE provisions...'

The Request

5. On 8 April 2010 the complainant requested the following information:

'Under the Freedom of Information Act 2000, I am writing to you to request a copy of the legal advice provided to the Secretary of State for Children, Schools and Families Ed Balls MP concerning the compliance of the Children, Schools and Families Bill with the European Convention on Human Rights (ECHR), specifically with regard to the age at which parents can withdraw their children from sex and relationships education. In a letter to Michael Gove MP dated 7 April 2010, the Secretary of State wrote that the Government was unwilling to accept an opt-out age of 16 for sex and relationships education, because it did not did not [sic] comply with provisions under the ECHR (as articulated in UK law through the Human Rights Act 1998): '... Both British and

¹ Section 405 of the Education Act 1996.

European case law do not support an opt-out up to the age of 16. As I explained when we discussed yesterday, that amendment would have meant that the Bill would not have been compliant with the ECHR. Your insistence that the age limit must be increased to 16 would have made the entire Bill non-compliant with UK and European law and therefore, our lawyers advised me that, as Secretary of State, I had no choice but to remove all the PSHE provisions.' I look forward to receiving a copy of the legal advice.'

6. On 6 May 2010 the DfE issued a holding response. It explained that it thought that both sections 35(1)(a) (information relates to the formulation and development of government policy)² and 42(1) (legal professional privilege) were engaged, but that it needed more time to conduct its public interest determination.
7. On 10 May 2010 the DfE issued a response. It confirmed that it held the information that was requested. However, it believed that it was entitled to withhold the information from disclosure, relying on the following exemptions:
 - Section 35(1)(a) – information relates to the formulation or development of government policy. The DfE acknowledged that there were public interest arguments that favoured disclosure, but that in its opinion these were outweighed by public interest arguments that favoured maintaining the exemption. In particular, the legal advice would be used in future decisions on the issue, there was likely to be a 'chilling effect' in the provision of advice and disclosure may reduce the 'safe space' required in government.
 - Section 42(1) – the information is legally professionally privileged. Again the DfE explained that while there were public interest arguments that favoured disclosure – such as accountability and transparency - it believed that these arguments were outweighed by public interest factors that favoured maintaining the exemption. In particular, it explained that it was important that the concept of privilege was not undermined, as this may lead to less comprehensive advice and less informed decisions. It explained that it was necessary for the DfE to receive advice that highlighted fully the strengths and weaknesses of its position. In addition, disclosure may lead to weaknesses being identified, which would

² The full wording of all the provisions of the Act mentioned in this Notice can be located in the legal annex attached to it.

mean additional legal challenges and further expenditure of public funds.

8. On 23 June 2010 the complainant requested an internal review. She challenged whether the exemptions were engaged and if they were, argued that the public interest favoured disclosure. She argued that section 35(1)(a) could not be engaged because the Bill that concluded the policy process received Royal Assent before the request was submitted. She also said that section 42(1) could not be engaged because the privilege was waived when the advice was shared with Mr Gove. She also provided a detailed rationale about why the public interest ought to favour disclosure.
9. On 30 July 2010 the DfE communicated the results of its internal review. It maintained that the information was exempt under both exemptions. It provided its view in relation to the points that were made by the complainant and explained its public interest determination in more detail. The relevant arguments will be considered in more detail in the analysis section of this notice.

The Investigation

Scope of the case

10. On 30 September 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She provided detailed submissions and specifically asked the Commissioner to consider the following points:
 - That the DfE was incorrectly withholding the information that it had identified.
 - The exemptions were not in her view engaged.
 - Even if they were, the public interest favours the disclosure of all of the information.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the Commissioner is not the correct forum to consider the lawfulness of the government's position on SRE.

Chronology

12. On 12 November 2010 the Commissioner wrote to the complainant and the DfE to confirm that he had received an eligible complaint under the

Act. He asked the DfE to provide him with a copy of the information that was being withheld.

13. On 7 January 2011 the Commissioner telephoned the DfE to repeat his request for the withheld information. He received a copy on 17 January 2011.
14. On 25 January 2011 the Commissioner wrote to the complainant to confirm the scope of his investigation.
15. The Commissioner wrote to the DfE on the same day, making detailed enquiries about the operation of the exemptions. He received detailed answers on 28 February 2011.

Findings of fact

16. Mr Balls showed Mr Gove a summary of the legal advice that is the subject of this request. The Commissioner has seen it.
17. The Commissioner has recently decided a case for the same withheld information in **FS50359170**. The Commissioner has decided that it is appropriate to undertake a separate analysis as he received novel arguments from the complainant in this case. However, for ease of reference, this other Decision Notice can be found at the following link:

http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50359170.ashx

Analysis

Substantive Procedural Matters

What relevant recorded information is held that is subject to this complaint?

18. For the avoidance of doubt, there are three pieces of withheld information that are the subject of this complaint. They are:
 1. Initial legal advice from external counsel.
 2. Further legal advice from internal lawyers.
 3. Additional legal advice from external counsel.

Exemptions

19. The public authority need only be correct in the application of one exemption to withhold the requested information. The Commissioner considered the operation of section 42(1) first.

Section 42(1)

20. The DfE has explained its view that all three items are covered by legal professional privilege and that they can apply section 42(1) to them all. It also explained that in its view the public interest in maintaining the exemption outweighed that in disclosing the material.
21. Section 42(1) of the Act says:

"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information".

22. The application of section 42(1) of the Act was considered by the Information Tribunal ("Tribunal") in the decision of *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] ("*Bellamy*") where legal professional privilege was described 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." (Paragraph 9)

23. Section 42(1) is a qualified exemption. The Commissioner must first consider whether the exemption is engaged and then, where it is, he will go on to consider whether or not the balance of public interest favours maintaining the exemption.

(1) *Is the exemption engaged?*

24. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
25. The category of privilege which the DfE is relying on to withhold this information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. This was considered in detail by the House of Lords in *Three Rivers*

District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants) [2004] UKHL 48 ("*Three Rivers*"). It explained that there were three requirements for material to be covered by legal professional advice privilege. The Commissioner has adopted that approach in this case and those factors can be summarised as follows:

1. The material must be between a qualified lawyer acting in their professional capacity and a client.
 2. It must be created with the sole or dominant purpose of obtaining or providing legal advice.
 3. It must be confidential.
26. The first requirement is one of fact. In this case all three items are between a lawyer acting in their professional capacity and a member of staff of the DfE (their client). This requirement is therefore satisfied.
27. The Commissioner is also satisfied that the fact that item two was in-house advice does not prevent the DfE from claiming that the information was privileged. This accords with the decision of the Tribunal in paragraphs 29 to 35 of *Calland v Financial Services Authority* [EA/2007/0136] ("*Calland*")³, which explained that in-house lawyers deserved the same protection as external ones. The Tribunal stated that:
- 'Such a result accords with the general policy giving rise to LPP. Just the same requirements for confidentiality and candour exist where an employed lawyer gives advice as when it comes from a member of the independent professions.'* (Paragraph 35)
28. The second requirement is also one of fact. The Commissioner has examined the withheld information and is satisfied that for all three items the sole purpose was obtaining or providing relevant legal advice. This requirement is therefore also satisfied.
29. The last requirement is an issue of law. The Commissioner considers that the three items can be deemed confidential. This is because the information is of substance and was imparted in circumstances that led to an expectation of confidence (formal legal advice between a lawyer and their client). The final requirement is therefore satisfied.

³ This decision can be found at:
http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

30. The Commissioner's also considers that the information has not lost its confidentiality. This is a situation of advice privilege. In circumstances other than litigation, partial disclosure, such as the issuing of Mr Balls' open letter, will not result in the loss of confidentiality and therefore the loss of legal advice privilege. His view is supported by the Information Tribunal in *FCO v Information Commissioner* [EA/2007/0092]⁴ ("*FCO*") which stated:

'There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.' (Paragraph 22)

31. The Commissioner is satisfied that the information that has been provided to the public does not falsely represent the withheld information. He has also considered the circumstances that led to Mr Balls showing the summarised legal advice to Mr Gove and the information that was shown to him. He is satisfied that the information was shown for a set specified purpose with restrictions and the confidentiality of the advice has not therefore been lost. In addition, the advice summary contained the key points, but not the substantial advice. After careful consideration, he is satisfied that the confidentiality of the advice remains and the exemption is engaged for all three items.

(2) *The public interest test*

32. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the

⁴ This decision can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

information. The Commissioner can only consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors.

33. It is important to note that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be disclosed. It is also important to note that just because some members of the public may be interested in the information, does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public⁵. It is also important to note that the Act is a public disclosure regime and therefore that the Commissioner can only consider whether the information can be disclosed to the public, rather than the complainant alone⁶.

Public interest arguments in favour of maintaining the exemption

34. In arguing that the public interest favoured withholding the information, the DfE reiterated that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice, there is also a public interest in public authorities being able to do so. Furthermore, the DfE highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1).
35. It explained that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with full appreciation of the facts. It explained that it was particularly important that Ministers were able to consult lawyers in confidence to ensure that the government receives necessary advice in a forum which is conducive to a free exchange of views. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments. As a consequence legal advice may well set out the

⁵ *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

⁶ *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) at paragraph 52.

perceived weaknesses of the public authority's position. Without such comprehensive advice, the DfE's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.

36. The DfE also explained that the disclosure of legal advice would be likely to have a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
37. The DfE concluded that the disclosure would be likely to have a corrosive effect on good Government. This could lead to decisions being taken that are legally unsound. Not only would this undermine the DfE's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided. The Commissioner acknowledges that there is a public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this. For example the Commissioner has considered Lord Taylor of Gosforth CJ's remark on this point in *R v Derby Magistrates Court, Ex p B* [1996] AC 487:

'The principle that runs through all of these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client [in this case, the Home Office], must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.
38. In addition, the DfE argued that it is proper that it is able to consider the wider picture and potentially rely on its advice in the future. This is particularly so given that the issue was likely to be reconsidered whoever formed the new government. It explained that it regarded the advice as being live at the date of the request because the issue is one to which the government may need to return. This adds further weight to the public interest in maintaining the exemption.
39. The DfE concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material, there are no factors that come close to tipping the balance towards disclosure. The Commissioner acknowledges the strength of the DfE's arguments. Indeed, there is a significant body of case law to support the view that

there is a strong element of public interest built into section 42(1). The Tribunal in *Bellamy* noted that:

'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'
(Paragraph 35)

40. The Commissioner has considered the complainant's contention that it is unlikely that this issue would be revisited in the near future. The DfE has confirmed that the advice was live at the time of the request. This was because the Minister announced his intention to address this issue through legislation in the next Parliament if the Labour party was re-elected. The DfE also argued that the advice was still live because this is a matter that will need consideration from the new government. In addition, the topic is one that will change in time as social mores evolve. It follows that the complainant's contention was not founded in fact.
41. The DfE has further clarified why the issue of parental opt out for SRE is likely to be returned to in the near future. Current government ministers will need to consider their position on this issue when amendments to the current Education Bill are laid before Parliament which it said were likely to call for statutory SRE or for changes to parental right of withdrawal. It also suggested that the National Curriculum review and a private members bill by Chris Bryant MP might also require Ministers to consider this issue further. The Commissioner is aware of the convention whereby Ministers are not allowed access to advice given to a previous administration of a different political complexion. However, the DfE has explained that the legal advice and the legal opinions contained in it would be drawn upon by those providing advice on future decision making in this area and so would continue to be relevant.
42. The Commissioner has also considered the complainant's alternative argument that even if the issue was to be revisited then this should be given little weight because *'many policy issues will be continuing rather than one-off issues for the government, and this status should not preclude the openness intended by the Act'*. The Commissioner cannot agree with this argument. He believes that it is important that the information concerns a current policy issue and that at the time of the request there was a full and reasonable expectation that the information would be kept confidential.
43. In addition, he has also considered the complainant's argument that the fact the original Bill has received Royal Assent, means that the

harm that would be caused by disclosing the disputed information is slight. The Commissioner does not accept that these arguments should be given any weight in this case for the reason given in paragraph 40 and 41 above. In addition, it is noted that the provision that hoped to deal with this issue was not passed and so the status quo remained. It would therefore be reasonable to expect that future legislation was likely to be required.

44. Finally, the complainant argued that the Commissioner should place little weight on the arguments about the prejudice to the Government in obtaining full and comprehensive legal advice. She explained that the *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* [EA/2007/0052] ("*Mersey Travel*") case contained the following quotes and argued that this case should follow them:
 1. *'Nor can we see that any professional lawyer would temper their advice for fear of later publication: that again would be self defeating, to both client and lawyer, to say nothing of the lawyer's professional obligations'* (paragraph 42); and
 2. [The Tribunal was not persuaded in that case that the public authority] *'would suffer a significant inhibiting effect from seeking advice by the fear of eventual, possible publication.'* (Paragraph 50)
45. The Commissioner does not agree with the complainant. Every case must be considered on its own merits and *Mersey Travel* had characteristics that are absent here. The applicant in *Mersey Travel* asked for information about a loan that was alleged to have occurred between 1988 and 1992. In relation to the first quote, the Commissioner agrees that a professional lawyer should not temper their advice. However, there is a necessity for advice to be obtained in a safe forum that is conducive to a candid exchange of views and the protection of that safe forum is significantly in the public interest. In respect of the second quote, the information in *Mersey Travel* was stale and therefore the weight in the public interest in maintaining the legal professional privilege was substantially reduced as was the inhibiting effect that may have been experienced. However, this does not reduce the potential inhibiting effect of disclosing live legal advice.

Public interest arguments in favour of disclosing the requested information

46. It is important to remember that these factors must be balanced against the arguments in favour of disclosing the legal advice which forms the requested information; Parliament did not intend the

exemption to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Travel* underlines this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. It placed weight on the fact that the legal advice related to an issue which affected a substantial number of people. The complainant explained that the Commissioner must place similar weight on the factors that favour disclosure because the information concerns a matter that may contravene the legal rights of every child in the country. The Commissioner is satisfied that this argument has some weight.

47. The complainant also explained that she believed that the following matters were public interest factors that favoured disclosure:

1. There is significant public debate about the central issue. There were public debates involving a large number of stakeholders.
2. These debates include the scrutiny that the Bill underwent in both the House of Commons and the House of Lords. There is a real and genuine concern that the current and previous position in relation to the opt-out is in possible conflict with the European Convention of Human Rights and the UN Convention on the Rights of the Child. There is therefore weight in the idea that the public have faith that their government is complying with its legal obligations.
3. The information would increase public knowledge of the way government works and how decisions are made in relation to the making of law and policy. This will enable the policy to be more effective and appreciated. There is an additional interest in transparency in this case because of questions about the way the 'wash up' process operated before the last election⁷.
4. The withdrawal of the child from education potentially has a significant impact on a child's development. The UN Committee on the Rights of the Child has confirmed that in its view young people should not be denied information on their health, including information of this sort and the European Court of Human Rights may find that Article 10 is being contravened. The complainant argued that this adds more weight to the public interest arguments that favour transparency.

⁷ The 'Wash Up' process is a negotiating process where the outgoing government negotiates with the opposition in order for the agreed measures to pass in the last day of session.

5. It should also be noted that it is likely to be difficult for a child whose rights have been infringed to take this matter to court themselves.
 6. The disclosure of the information would ensure that the public would be able to judge the quality of the decisions made in this policy arena and this further favours disclosure. In addition, the scrutiny may allow the Government to improve its own ways of working and assure the public that the decisions have been made on the basis of good quality legal advice.
 7. There are strong public interest arguments in understanding Mr Balls' decision to remove the SRE provisions from the legislation. This is intensified by Mr Balls' public letter blaming these events on the opposition and the current position that would not appear lawful in light of the contents of that letter.
48. The Commissioner accepts that this is a case where there are strong arguments on both sides. For points one and two, the Commissioner accepts that there is real public debate about SRE education. This is a public interest factor that favours disclosure.
49. For point three, the Commissioner believes that there is a strong public interest in people understanding the reasons for government decisions and in being able to assess the reasons for them. The DfE has argued that this can be countered because the public interest in the transparency of the decision-making process would be met through the Bill scrutiny process. The Commissioner has considered the situation and does not agree that the arguments can be countered as suggested. The scrutiny process in respect to the original bill was cut short by the 'Wash Up' process, while the scrutiny of future bills cannot be known at this stage. The Commissioner therefore places real weight on the need for transparency on the facts of this case.
50. For points four and five, the Commissioner appreciates that the potential adverse effect on individuals needs to be taken into account. The Commissioner is of the view that this is a weighty factor that favours the disclosure of the information. It is important in a democratic society that has signed up to conventions that potential compliance with those conventions is assured.
51. However, he does not accept the argument that disclosure of privileged material is necessary as a substitute for obtaining legal advice independently. Any individual could obtain independent legal advice about whether a claim would be worthwhile. Indeed, if the DfE was to be challenged in court then independent legal advice would be essential. The argument that the information is required to circumvent

acquiring legal advice has been declared weak by the Tribunal. It was originally observed in *FCO* that:

"The interest in disclosure is weak where it simply enables the requester to understand better the legal arguments relevant to the issue concerned. It is weaker still where there is the possibility of future litigation in which those arguments will be deployed. Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go. Disclosure of privileged opinions is not a substitute for legal aid." (Paragraph 30)

52. For point six, the Commissioner also accepts that disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the DfE's position.
53. For point seven, the Commissioner has carefully considered the contents of the letter and whether it could be said to present further compelling arguments for disclosure. Having considered the letter against the withheld information, the Commissioner does not believe that the withheld information is misrepresented by the letter. The protection that should be provided to the withheld information is not mitigated by the letter on the facts of this case.

Balance of the public interest arguments

54. The Tribunal in *Calland* explained its approach when considering the balance of the public interest in this exemption:

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.' (Paragraph 37)

55. This approach was developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164 ("*DBERR*"). In *Dr Thornton v Information Commissioner* (EA/2009/0071) ("*Thornton*"), the Tribunal usefully distilled the High Court's approach into six principles:

1. There is a strong element of public interest inbuilt into the exemption.

2. There need to be equally strong countervailing factors for the public interest to favour disclosure.
 3. These countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption.
 4. As a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption.
 5. There may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people.
 6. The most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
56. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the legality of the government's position in relation to SRE. Disclosure of the legal advice may assist the public's understanding of the legality of the current position. He has therefore placed significant weight on the fact that the subject matter of the withheld information affects a significant number of individuals.
57. There is also no doubt that this issue is a matter of public importance as it relates to the rights of every child in the country. There is some public anxiety about this matter and it is apparent from Mr Balls' letter that the relevant Minister shared it. The issue is likely to be controversial for the foreseeable future and concerns may well continue for some time.
58. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids public understanding and participation in debates on issues of public importance – especially, as in this case, where there has been a large amount of consultation and the government's position raises legal questions.
59. However, the Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept

behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in DBERR when he said:

“Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight” (Paragraphs 41 and 53).

60. Justice Williams also indicated that section 42 should not become an absolute exemption “by the back door”. Public interest favouring disclosure would need to be of “equal weight at the very least...” (paragraph 53). However, the Commissioner notes when considering the fourth principle (outlined in Thornton) the legal advice in this case was live at the time of the request. This intensifies the strength of protection that is to be expected.
61. The Commissioner has carefully considered the advice and does not think that its contents have been misrepresented by the DfE. In addition, because the issue is live it is not a case where the advice, if adverse, is continuing to be ignored. It is noted that there is no direct case-law on the matter at issue and thus the legal advice (whatever its content) consists only of the legal opinion of certain individuals. The Commissioner’s view is that the strength of the principle behind legal professional privilege has not been mitigated by either time or bad faith in these circumstances.
62. The Commissioner also accepts that on the circumstances of this case the weight of the public interest factor in ensuring transparency has been further mitigated by the possibility of the complainant obtaining independent legal advice about her concerns.
63. In considering where the public interest lies the Commissioner has taken into account the sensitivity and significance of the advice provided which, in his view, leads him to conclude that the inbuilt weight of legal professional privilege in relation to this information is very strong. Furthermore, the Commissioner has attached a significant weight to the fact that the legal advice affects the children of England and Wales. Disclosure of the advice would enable the public to further understand, challenge and debate the reasoning behind the DfE’s position on this issue. The Commissioner also notes that the advice remains ‘live’ in terms of the issues to which it relates and therefore at the time of the request the potential for harm to the privilege holder was significant. Taking all these factors into account, the

Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information under section 42(1).

64. For the avoidance of doubt, the Commissioner has also considered whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged. He has concluded that the weight of the arguments favours the maintenance of the exemption to the whole of all three items of withheld information.
65. For all the reasons above, the Commissioner has determined that the exemption in section 42(1) has been applied correctly.
66. As one exemption was applied correctly, he has not therefore been required to go on to consider the operation of section 35(1)(a).

The Decision

67. The Commissioner's decision is that the DfE dealt with the request for information in accordance with the Act.

Steps Required

68. The Commissioner requires no steps to be taken.

Right of Appeal

69. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

70. 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.

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

Dated the 29th day of June 2011

Signed

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

Legal Annex

Section 1 - 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."

Section 35 - 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 42 – 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.'