

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 August 2011

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

### Summary

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The complainant asked the Attorney General's Office (AGO) to provide copies of correspondence dated from 1 April 2004 to 30 July 2004 in which advice was either sought or given during the development of guidance to UK security and intelligence officers and service personnel on the detention of individuals overseas, the interviewing of those detainees and the passing and receipt of intelligence relating to detainees.

The AGO relied on section 35(3) by virtue of section 35(1)(c) (Law Officers advice) to refuse to confirm or deny whether it held correspondence of the nature requested. The Commissioner has investigated and concluded that the public interest under section 35(3) favours maintaining the exclusion from the duty to confirm or deny. The Commissioner also found that in its handling of the request the public authority breached section 17(3) (refusal of request). The Commissioner requires no steps to be taken.

### 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.

### Background

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2. On 6 July 2010, the Prime Minister gave a Statement to the House of Commons on the treatment of terror suspects. This was in response to

the allegations that had been made about the role the United Kingdom (UK) has played in the treatment of detainees held by other countries.

3. The Prime Minister also announced an independent Inquiry into UK involvement with detainees in overseas counter-terrorism operations.

## **The Request**

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4. The complainant wrote to the Attorney General's Office (AGO) on 14 September 2010 requesting information concerning Law Officer's advice about UK involvement during counter-terrorism operations overseas in holding detainees:

*"I would like to see copies of all correspondence held by the Attorney General's Office, dated from 1<sup>st</sup> April 2004 to 30<sup>th</sup> July 2004, in which advice was either sought or given regarding any aspect of the UK's involvement, during counter-terrorism operations, with overseas agencies holding detainees, or with detainees themselves.*

*I would also like to see copies of any correspondence of the same dates in which advice was sought or given during the development of guidance to UK security and intelligence officers, and service personnel, on the detention of individuals overseas, the interviewing of those detainees, and the passing and receipt of intelligence relating to detainees" .*

5. The AGO's reply of 8 October 2010 neither confirmed nor denied holding any information relating to the provision of advice by the Law Officers or relating to any request for advice by the Law Officers, citing section 35(3) with respect to section 35(1)(c).
6. The AGO upheld its decision in an internal review which was sent to the complainant on 5 November 2010.

## **The Investigation**

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### **Scope of the case**

7. The complainant contacted the Commissioner on 10 November 2010 to complain about the way his request for information had been handled.
8. In establishing the scope of his complaint, the complainant told the Commissioner:

*"Advice from the Law Officers is quite clearly exempt information".*

9. The Commissioner understands from this that the complainant accepts that, if the information were held, what the advice was, and whether it was acted on, would not be disclosable.
10. However, the complainant asked the Commissioner to consider the following points:

*"there may be reason to suspect that the AG's [Attorney General's] office was not consulted over the development of the government's interrogation guidance. .... Any failure to consult the AG would be a matter of the utmost concern";*

and

*"I believe the public interest in the disclosure of information – information which may help the public to understand whether such advice was sought and given or not – to outweigh the public interest in non-disclosure".*

11. Reading the correspondence in this case, it appeared to the Commissioner that the second part of the request is more important to the complainant than the information covered by part 1. As a result, when he wrote to him on 9 February 2011, the Commissioner advised the complainant that, unless he heard from him to the contrary, the scope of his investigation would only be in relation to part 2 of the request. In a telephone call on 14 February 2011 the complainant confirmed receipt of the letter and told the Commissioner:

*"I feel we should know whether or not the Attorney General's advice was sought when this guidance was being drawn up".*

12. The Commissioner's investigation has therefore been with respect to whether the AGO was correct neither to confirm nor deny it held information within the scope of part 2 of the request.

## **Chronology**

13. The Commissioner first wrote to the AGO on 6 January 2011 advising the public authority that he had received a complaint about its handling of this request for information. The AGO responded on 1 February 2011, confirming that it neither confirmed nor denied that it held the requested information.
14. The Commissioner commenced his investigation on 9 February 2011. He wrote to the AGO asking it for further explanation of its reasons for citing section 35(3) in relation to the request, including its reasons for

concluding that the public interest in maintaining the exclusion from the duty to confirm or deny outweighed the public interest in disclosing whether or not it held the requested information.

15. The AGO replied on 11 March 2011 maintaining its "neither confirm nor deny" response.

## Analysis

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### Exemptions

#### Section 35 Formulation of government policy

16. Section 35(1) states that:

*"Information held by a government department or by the Welsh Assembly Government 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 for the provision of such advice, or*

*(d) the operation of any Ministerial private office".*

17. 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)".*

18. In this case, the AGO is citing section 35(3) by virtue of section 35(1)(c). In other words, it is neither confirming nor denying that it held information relating to the provision of advice by any of the Law Officers or any request for the provision of such advice.
19. The 'Law Officers' are defined in section 35(5) of the Act as the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General of the Welsh Assembly Government and the Attorney General for Northern Ireland. The Law Officers can thus be regarded as the government's most senior legal advisers.
20. One of the functions of the Attorney General is Legal Advisor to Government.

*Is the exemption engaged?*

21. As the AGO is a government department and as the Commissioner is satisfied that the information, if it were held, would relate to advice requested from or provided by, the Law Officers, he finds the exemption engaged.

*The public interest test*

*Is the information already in the public domain?*

22. The impact of confirming or denying information is not held may be reduced where the information is already in the public domain. In this case, the Commissioner is mindful of the fact that, in response to allegations that had been made about the role the UK had played in the treatment of detainees held by other countries, the Prime Minister, David Cameron, made a Statement to Parliament on 6 July 2010.
23. In that Statement, the Prime Minister announced that the Government was publishing, that same day:
- "the guidance issued to intelligence and military personnel on how to deal with detainees held by other countries".*
24. The Commissioner understands this to be "*Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*" (the Guidance). That Guidance:
- "sets out the principles, consistent with UK domestic law and international law obligations which govern the interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees".*
25. According to the accompanying "*Note of Additional Information from the Secretary of State for Foreign and Commonwealth Affairs, the Home Secretary, and Defence Secretary*", the standards and approach outlined in the Guidance were not new. What was new was the fact that the standards were made public.
26. With respect to the Guidance, the Commissioner is not aware of any public acknowledgement as to whether or not the Law Officers were consulted about it.
27. Therefore, the Commissioner is satisfied, in this case, that it is not the situation that the existence or non-existence of Law Officers' advice is, or was, in the public domain.

28. Section 2(1) of the Act 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."*

29. In this case, as the information requested is subject to a qualified exemption, the public interest test must be applied.

30. In other words, unless, 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 information is held, the AGO must confirm or deny whether it holds the requested information.

31. When requesting a review of its decision, the complainant asked the AGO's reviewer to consider, amongst other things:

*"why the public should be prevented from learning whether the Attorney General was consulted during the development of the guidance and whether he offered any advice".*

32. The Commissioner notes that it was not until its internal review correspondence that the AGO explained to the complainant the public interest factors it had taken into account when reaching its decision with respect to confirming or denying whether it held the requested information.

*Public interest arguments in favour of confirming or denying whether the information is held*

33. At the internal review stage, arguing in favour of confirming or denying whether the information is held, the complainant asked the AGO to reconsider:

*"Whether there is not a clear public interest in the public learning as much as possible about the development of guidance that is widely alleged to have resulted in British nationals and others being*

*tortured, and is also alleged by some to have facilitated such torture”.*

34. In addition, he referred, amongst other things, to the independent review announced by the Prime Minister on 6 July 2010, which, according to the complainant, would consider the development of the Guidance.
35. The AGO told the complainant that it recognised that Gordon Brown, a former Prime Minister, and others, acknowledged the public interest in the public learning more about guidance regarding UK involvement during counter-terrorism operations overseas in holding detainees.
36. The AGO also recognised the public interest in citizens knowing:

*“that policies of this nature have been developed with the benefit of sound legal advice”.*
37. With respect to the AGO confirming or denying whether it held relevant information, the complainant told the Commissioner:

*“I believe that the public interest in learning more about this guidance, its development, and any advice over its legality, to be self-evident.”*
38. In particular, he told the Commissioner that, in his view, if the AGO does not hold the information, this would strongly suggest that its advice was not sought and that this would be of interest, and some concern, to some people.
39. In support of his argument, he brought the Baha Mousa Inquiry to the Commissioner’s attention. Baha Mousa was an Iraqi civilian who died in Iraq in September 2003 in the custody of British soldiers. The purpose of that inquiry, which was formally set up with effect from 1 August 2008, was to investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him.
40. In particular, the complainant referred the Commissioner to those aspects of the inquiry which related to the question of whether or not the Law Officer’s advice was sought on the legality of the interrogation technique known as “hooding”.
41. In considering the arguments in favour of confirming or denying whether the information is held in this case, the Commissioner notes that the information at issue again concerns Human Rights issues and that the context is one of the treatment of terror suspects. In this respect, he considers it likely that there would have been a widely-held assumption

that the Government should, and would, have sought the advice of its most senior lawyers.

42. On the other hand, if the advice of the Law Officers had not been sought on an issue such as this, then there would be a strong public interest in this being disclosed as it might raise important issues about the basis on which the Government satisfied itself that its guidance to the security and intelligence services and military personnel was correct.
43. The disclosure that advice had been sought from the Law Officers, if it had been sought, would therefore provide reassurance to the public that the Guidance was made on the basis of legal advice from the most senior lawyers within government.

*Public interest arguments against confirming or denying whether the information is held*

44. The AGO told the complainant that there is a strong public interest in ensuring that a government department is able to act "free from external pressure" in deciding what sort of legal advice it obtains, at what stage, and from whom. It told him that this strong public interest is reflected in the long-standing convention that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government.
45. It referred the complainant to the version of the Ministerial Code, current at the time, which was published by the Prime Minister in May 2010. That Code sets out the standards of conduct expected of Ministers and states at paragraph 2.13:

*"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".*

46. The AGO argued that because Law Officers are the government's most senior legal advisers, their advice "*has a particularly authoritative*" status within government. Therefore, the disclosure of whether or not advice was sought and/or received from Law Officers would potentially create a two-fold detriment. On the one hand, disclosure could be taken to indicate that the government attached particular importance to the issue or even that the government was unsure about the strength of its legal position. This could discourage the government from seeking Law Officers' advice in appropriate cases in the future. On the other hand, it might leave the government open to criticism for not having consulted the Law Officers and hence failed to give sufficient weight to the issue or obtain the best advice.

47. The Commissioner accepts that disclosure of the fact that Law Officers have not advised on an issue may expose the Government to criticism for not consulting them and thus not giving sufficient consideration to a particular issue. This could increase the pressure to consult Law Officers in inappropriate cases, or in an unmanageably large number of cases. This in turn might harm efficient government, which would not be in the public interest.

*Balance of the public interest arguments*

48. The Commissioner's approach to the public interest test under section 35(1)(c) is similar to the public interest test under section 42(1). That is to say, there will always be a strong element of public interest built into maintaining the Law Officers' advice exemption in the same way that there is a strong inherent weight in maintaining the legal professional privilege exemption.
49. With regard to the arguments advanced by the AGO, the Commissioner does not dispute the strong public interest in protecting the principle of confirm or deny surrounding Law Officer's advice. Moreover, the Commissioner accepts that the weight the exemption attracts is enshrined in the Act with regard to how section 35(1)(c) is drafted – i.e. providing a specific exemption for a particular type of legal advice - and also in the convention adopted by successive governments.
50. The Commissioner notes, however, that whilst there may be a long-standing convention, reflected in the Ministerial Code, not to disclose whether Law Officers' advice has been sought, the exemption in section 35 of the Act is not an absolute exemption: instead it is subject to a public interest test. In his view, therefore, Parliament clearly envisaged that it may be appropriate, in some circumstances, to disclose whether Law Officers' advice had been sought.
51. In considering the opposing public interest factors in this case, the Commissioner has the benefit of recent rulings by the High Court in the case of *HM Treasury vs ICO and Evan Owen* ([2009] EWHC 1811) and the Information Tribunal (EA/2007/0054) in the case of *Her Majesty's Treasury v Information Commissioner*, both of which addressed the issue of the public interest with respect to the application of section 35(3).
52. While acknowledging that sufficient weight must be given to the convention, in the Commissioner's view the operation of the convention is a consideration, rather than a deciding factor, in the assessment of the public interest test.

53. The circumstances in which ministers ought to consult the Law Officers are set out in paragraph 2.10 of the Ministerial Code. That paragraph states that:

*"The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations".*

54. The Commissioner gives significant weight to the argument that it would be impossible for the Law Officers to advise on every aspect of government policy having legal implications given the range of legal advice that government requires. If the government routinely disclosed the occasions on which the Law Officers had given advice, that could give rise to questions as to why they had not advised in other cases, thus creating pressure for them to advise in cases where their involvement is not justified.

55. The topic at issue in this case, and therefore the subject on which the Law Officers would have been asked to advise, had their advice been sought, is the guidance given to intelligence officers and service personnel on how to deal with detainees held by other countries. The Commissioner accepts that the issue was still essentially "live" at the time of the request or very recent, which makes the case for further weight to be added to maintaining the provision.

56. In his speech on 6 July 2010, the Prime Minister recognised that:

*"Public confidence is being eroded with people doubting the ability of our Services to protect us and questioning the rules under which they operate".*

57. The Commissioner notes that, also on 6 July 2010, the Prime Minister wrote to the Intelligence Services Commissioner, The Right Honourable Sir Peter Gibson, a retired British barrister and judge. Sir Peter had agreed to lead an independent Inquiry into UK involvement with detainees in overseas counter-terrorism operations.

58. As set out in the Prime Minister's letter the purpose of the inquiry is:

*"to examine whether, and if so to what extent, the UK Government and its intelligence agencies were involved in improper treatment of detainees held by other countries in counter-terrorism operations overseas, or were aware of improper treatment of detainees in operations in which the UK was involved. The particular focus is the immediate aftermath of the attacks of 11 September 2001 and particularly cases involving the detention of UK nationals and residents in Guantanamo Bay. The Inquiry should also consider the evolution of the Government's response to developing knowledge of*

*the changing practices of other countries towards detainees in counter-terrorism operations in this period. This should include how this response was implemented in departments and the intelligence services. This should include any lessons learned and the Inquiry is free to make recommendations for the future."*

59. In the Commissioner's view, without the announcement of the Inquiry, the public interest in confirming or denying would be higher. The fact that a mechanism was in place to provide accountability and scrutiny has some relevance. However, the existence of the Inquiry is not determinative and disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny.
60. The Commissioner has also taken into account the serious and sensitive subject matter of the request. In this case, the Commissioner considers that the public interest in confirming or denying should be accorded particular weight given the issues at the heart of this case, namely the development of guidance on the standards and practices to apply during the detention and interviewing of detainees overseas. He has taken account of the significant human rights issues raised by the allegations of improper treatment and the fact that these allegations have been deemed significant enough to justify setting up an Inquiry. There is also a particular public interest in knowing whether the Law Officers provided advice on these issues.
61. The Commissioner has considered some of the evidence in the Baha Mousa inquiry the complainant cited. The Commissioner notes that Baha Mousa Inquiry has not issued its report at the time of the request (and drafting this decision). The complainant referred to the witness statement of Martin Hemming.<sup>1</sup> The Commissioner acknowledges that the evidence raises questions about whether or when the Attorney General provided advice about the use of "hooding" but he does not find that this evidence clearly points to a concern that advice was not provided on the broader issues mentioned in his request. Therefore the complainant's point is not entirely persuasive.
62. In conclusion the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, he has concluded that, in all the circumstances of the case, the arguments in

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[http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/baha\\_mousa\\_inquiry\\_evidence/evidence\\_100610/bmi08460.pdf](http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_100610/bmi08460.pdf)

favour of maintaining the exclusion of the duty to confirm or deny outweigh those in disclosing whether Law Officers' advice is held.

### Procedural Requirements

63. When requesting a review of its decision, the complainant asked that consideration be given to:

*"Whether the Attorney General's office should offer a full explanation for the basis of the original decision and how the competing interests were weighed".*

64. The Commissioner notes that it was not until its internal review correspondence that the AGO explained to the complainant the public interest factors it had taken into account when reaching its decision with respect to confirming or denying whether it held the requested information.

65. Section 17(3) of the Act provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information 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 –*

.....

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

66. In failing to provide an explanation of its assessment of the public interest test within a reasonable time limit, the Commissioner finds the AGO in breach of section 17(3).

### The Decision

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67. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:

- the AGO correctly refused to confirm or deny whether Law Officers' advice had been provided or received; and
- it breached section 17(3)(b) in issuing an inadequate refusal notice.

## **Steps Required**

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68. The Commissioner requires no steps to be taken.

## Right of Appeal

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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: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 10<sup>th</sup> day of August 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### 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 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **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(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."

## **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(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).”