

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 December 2016

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the public authority for information relating to a drone strike in Syria by the United States which targeted and killed a British national fighting with the so called Islamic State.
2. The Commissioner has concluded that the public authority was entitled to withhold the information held within the scope of the request on the basis of the exemption at section 42(1) (legal professional privilege). She has also concluded that the public authority was entitled to rely on the exclusions contained at sections 23(5) and 24(2) (security bodies and national security) and 35(3) (Law Officers advice) to neither confirm nor deny whether it held relevant information within the scope of the request.
3. No steps are required.

#### Request and response

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4. The complainant wrote to the public authority on 17 February 2016 and requested information in the following terms:

"Context

On 24 August 2015, it was reported that Junaid Hussain [a UK national] died in a US drone strike in Syria (<http://news.sky.com/story/1543397/us-confirms-british-is-hacker-killed-by-drone>). It later emerged on 10th September 2015, according to The Guardian, that the UK government had been consulted over the

targeting of Hussain. Col Patrick Ryder told the Guardian, 'The US and British governments did consult with each other regarding the targeting of Junaid Hussain and both governments will continue to coordinate efforts to eliminate violent extremist organisations'.

(<http://www.theguardian.com/uk-news/2015/sep/10/former-navy-chief-expresses-concern-over-uk-role-in-syria-drone-strikes>).

On 29th January 2016, the Guardian further reported that an airstrike targeting Hussain on 13th August 2015 killed three civilians and wounded five more (<http://www.theguardian.com/us-news/2016/jan/29/sis-airstrike-syria-civilians-killed-us-military-junaid-hussain>)

The request:

I would like to request the following information:

-Internal correspondence and communications held by the Attorney General's Office relating to the strikes targeting Junaid Hussain.

-Correspondence and communications between the Attorney General's Office and the Cabinet Office relating to the strikes targeting Junaid Hussain.

-Correspondence and communications between the Attorney General's Office and US military officials relating to the strikes targeting Junaid Hussain.

By 'correspondence and communications,' I expect this to include, but not limited to:

-Briefings

-Letters

-Emails

-Memos

-Minutes taken during meetings

-Notes taken during telephone conversations

Concluding remarks:

I would like to receive the information electronically, or granted access to inspect the records in their original format. If you feel that a substantive response is not possible within a reasonable time frame, or the request is too broad or too vague, I would be grateful if you could

contact me by email or by phone and provide assistance as to how I could refine the request."

5. The public authority provided its response on 16 March 2016. It explained that it was withholding information within the scope of the request on the basis of the exemptions at sections 21 (information accessible to applicant by other means) and 42(1) (legal professional privilege) FOIA. It neither confirmed nor denied whether it held information within the scope of the request relating to the provision of advice by any of the Law Officers by virtue of the exclusion in section 35(3) FOIA (the provision of advice by Law Officers or any request for such advice).
6. The complainant requested an internal review of the public authority's decision on 21 March 2016.
7. The public authority wrote to the complainant with details of the outcome of the review on 13 May 2016. It clarified that it did not hold any information within the scope of the third part of the request for:  
  
"Correspondence and communications between the Attorney General's Office and US military officials relating to the strikes targeting Junaid Hussain."
8. The review however upheld the application of the exclusion contained at section 35(3) and of the exemptions contained at sections 21 and 42(1).

### **Scope of the case**

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9. On 13 January 2016, the complainant contacted the Commissioner to complain about the way her request for information had been handled. She provided the Commissioner with submissions to support her view that the withheld information was not exempt from disclosure under FOIA and that the public authority was not entitled to rely on the exclusion contained at section 35(3). The Commissioner has referred to these submissions at the relevant parts of her analysis below.
10. During the course of the Commissioner's investigation the public authority referred the complainant to the information it considered was exempt on the basis of section 21 and consequently withdrew its reliance on this exemption.
11. The public authority however additionally relied on the exclusions contained at sections 23(5) (bodies dealing with security matters) and 24(2) (national security) FOIA during the course of the investigation.

12. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemption at section 42(1) and the exclusions at sections 23(5) and 24(2), and 35(3).

## Reasons for decision

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### Section 42(1)

13. This exemption states:

"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."

14. The Commissioner considers that there are two types of privilege within the concept of legal professional privilege (LPP); litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Advice privilege applies where no litigation is in process or contemplated. It covers confidential communications made for the dominant purpose of seeking or giving legal advice.
15. The public authority has also drawn the Commissioner's attention to the case of *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 in which the Judicial Committee of the House of Lords endorsed the approach of the Court of Appeal in *Balabel v Air India* [1988] Ch. 317, and in particular the observation that legal advice should not be confined to telling the client the law. "It must include advice as to what should prudently and sensibly be done in the relevant legal context."
16. The Commissioner has inspected the withheld information and she is satisfied that it is subject to legal advice privilege. She shares the view expressed by the House of Lords in the *Three Rivers* case that information subject to LPP could include advice from a lawyer as to what should be done in a legal context and is not confined to interpreting the law to a client.
17. The Commissioner has therefore concluded that the public authority was entitled to engage the exemption at section 42(1).

## Public interest test

18. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner must therefore consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
19. The public authority acknowledged that there is a public interest in demonstrating to the public that the government sought and received appropriate professional legal advice in the circumstances of this case. It however submitted that there is a strong public interest in government being able to seek legal advice in confidence. It argued that this strong public interest in the government being able to seek legal advice in confidence is heightened in the context of matters such as this which engage national security issues of the utmost importance and sensitivity. It pointed out that the withheld information is relatively recent and the broader issues to which it relates remain very significant to government.
20. The complainant's view that the withheld information ought to be disclosed is generally premised on the public interest in the government being able to demonstrate at all times that it complies with the international legal framework that regulates the use of lethal force abroad outside of armed conflict.

### *Balance of the public interest*

21. The Commissioner considers that disclosure of the withheld information would enhance the public interest in transparency and accountability. This is especially important in view of the ongoing debate about the use of drone strikes to target British nationals abroad who are considered to pose a threat to national security. However, while a small part of the withheld information will be insightful, the substance of the rest of the information was generally already in the public domain at the time of the request and is therefore unlikely to be very revealing.
22. Nevertheless, there will always be a strong public interest in maintaining LPP due to the important principle behind it which is; safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice which is in turn fundamental to the administration of justice. The Information Tribunal (now First-Tier

Tribunal)<sup>1</sup> has commented in relation to assessing the balance of the public interest with regard to the application of this exemption that:

"...there is a strong element of public interest inbuilt into the privilege itself [ie LPP]. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

23. The Commissioner considers that the strong public interest already inherent in protecting LPP is significantly enhanced in the circumstances of this case in view of the fact that the withheld information relates to the security of the United Kingdom and its people. She also shares the view that it relates to broader issues of national security which remain very significant.
24. Therefore, while she considers that there is a public interest in disclosing the withheld information in view of the ongoing debate regarding these issues, she has concluded that on balance, the public interest in maintaining the exemption significantly outweighs the public interest in disclosure in all the circumstances of the case.

### **Section 35(3)**

25. Section 1(1) FOIA provides two rights to applicants. They are:
  - a) The right to be informed in writing by the public authority whether or not it holds the information requested by an applicant, and
  - b) If so, the right to have the information communicated.
26. Both these rights are subject to other provisions in the FOIA including exemptions. The right in section 1(1)(a) is commonly referred to as a public authority's "duty to confirm or deny" whether it holds information.
27. Section 35(3) is one of a number of provisions in the FOIA that a public authority may rely on to exclude itself from the duty to confirm or deny whether information requested by an applicant is held by the authority. It states:

"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) [ie section 35(1) FOIA]"

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<sup>1</sup> In *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* EA/2005/0023

28. Section 35(1) states:

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.
29. The public authority explained that to the extent the request could potentially include advice provided to the Law Officers, or requests for such advice, it was relying on section 35(3), by virtue of section 35(1)(c), to refuse to confirm or deny whether such information was held.
30. The Commissioner has concluded that the exclusion contained at section 35(3) was correctly engaged by the public authority because information within the scope of the request could include advice provided by the Law Officers or requests for such advice and this would be exempt from disclosure.<sup>2</sup>

### **Public interest test**

31. The exclusion contained at section 35(3) is however subject to the public interest test set out in section 2(1)(b) FOIA. Therefore, the Commissioner must determine whether in all the circumstances of the case the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in the public authority complying with the duty to confirm or deny whether it holds information which would be exempt on the basis of section 35(1)(c).
32. The public authority acknowledged that there is a public interest in being aware whether important matters such as those relevant to this request have been considered with the benefit of sound legal advice, including advice from the Law Officers. It however drew the Commissioner's attention to the long standing convention observed by successive

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<sup>2</sup> For the avoidance of doubt the Commissioner is not suggesting that information within the scope of the request which would be exempt on the basis of section 35(1)(c) is or isn't held by the public authority.

governments that neither the advice of Law Officers, nor the fact about whether advice has been sought or provided is disclosed outside government.

33. The public authority therefore argued that the Law Officers' convention promotes democratic accountability by ensuring that the focus of public scrutiny and debate is on a decision (which may include a legal position) taken collectively by the government rather than on the internal process by which that decision is reached. It subsequently submitted that the convention not only reflected the public interest in ensuring that the government is able to seek the most authoritative legal advice in confidence, it also reflects the importance of protecting collective Cabinet responsibility.
34. The complainant argued that it is important that the "public is assured that the government sought legal advice in its participating role in this US strike, as well as the legal framework this strike was carried out." She noted that the government did not always follow the Law Officers' convention and cited a number of examples including the recent statement by the former Prime Minister David Cameron MP to the House of Commons concerning drone strikes in Syria.<sup>3</sup>

*Balance of the public interest*

35. The Commissioner accepts that there will always be a strong public interest in neither confirming nor denying whether the government has obtained advice from the Law Officers in relation to an issue. The Commissioner recognises the weight the section 35(1)(c) exemption attracts from the way it has been drafted by Parliament – providing a specific exemption for a particular type of legal advice. The weight is reinforced by the convention of non-disclosure adopted by successive governments.
36. Furthermore, the Commissioner recognises that it would be impossible for the Law Officers to advise on every aspect of government policy that has legal implications, given the range of legal advice that government requires. If the government routinely disclosed occasions on which the Law Officers had or had not given advice that could give rise to questions as why they had advised in some cases and not in others. This could put pressure on the government to seek their advice in cases where their involvement would not be justified. The risk of creating an

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<sup>3</sup> <https://www.gov.uk/government/speeches/syria-refugees-and-counter-terrorism-prime-ministers-statement>



impression that it is not confident of its legal position regarding a particular issue could also deter the government from seeking the Law Officer's advice in cases where their involvement would be justified. Consequently, the Commissioner accepts that confirming or denying whether such information is held creates a potential risk which could undermine effective government.

37. Nevertheless, the exemption is not absolute, and the strong public interest in protecting Law Officers' advice may be overridden if there are particularly strong factors in favour of confirmation or denial. The Commissioner recognises that the use of drone strikes, particularly against British nationals, remains the subject of ongoing debate. Confirmation or denial whether Law Officers' advice was sought by the government in relation to this case could add important detail to the debate in the public interest.
38. The Commissioner however considers that the strong public interest in protecting the long standing convention on Law Officers' advice is significantly enhanced in the circumstances of this case in view of the fact that subject matter relates to the security of the UK and its people. She does not share the view that this significant public interest has been undermined by the fact that the convention has not always been observed by government. Clearly, each case must be considered on its own merits taking into account the prevailing circumstances.
39. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exclusion at section 35(3) outweighs the public interest in confirming or denying whether the government holds information within the scope which would be exempt by virtue of section 35(1)(c).

### **Sections 23(5) and 24(2)**

40. The public authority has also relied on the exclusions contained at sections 23(5) and 24(2) on the basis that it could neither confirm nor deny whether it holds any information within the scope of the request which would be exempt from disclosure on the basis of the exemptions contained at sections 23(1) and 24(1).
41. Information relating to security bodies specified in section 23(3) is exempt information by virtue of section 23(1). Information which does not fall under section 23(1) is exempt from disclosure under section 24(1) if it is required for the purpose of safeguarding national security.
42. Sections 23(5) and 24(2) exclude the duty of a public authority to confirm or deny whether it holds information which, if held, would be exempt under section 23(1) or 24(1) respectively.

43. By virtue of section 23(5) the duty to confirm or deny does not arise if, or to extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in section 23(3).
44. By virtue of section 24(2) the duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
45. The public authority explained that both sections 23(5) and 24(2) were engaged. The Commissioner does not consider the exclusions at sections 23(5) and 24(2) to be mutually exclusive and she accepts that they can be relied on independently or jointly in order to conceal whether or not one or more of the security bodies has been involved in an issue which might impact on national security. However, each exemption must be applied independently on its own merits. In addition, the section 24 exclusion is qualified and is therefore subject to the public interest test.
46. The test as to whether a disclosure would relate to a security body is decided on the normal civil standard of proof, that is, the balance of probabilities. In other words, if it is more likely than not that the disclosure would relate to a security body then the exemption would be engaged.
47. From the above it can be seen that section 23(5) has a very wide application. If the information requested is within what could be described as the ambit of security bodies' operations, section 23(5) is likely to apply. This is consistent with the scheme of FOIA because the security bodies themselves are not subject to its provisions. Factors indicating whether a request is of this nature will include the functions of the public authority receiving the request, the subject area to which the request relates and the actual wording of the request.
48. The requested information can reasonably be said to fall within the ambit of security bodies' operations. In light of the nature of the request (on the subject of terrorism), the Commissioner finds that on the balance of probabilities information within the scope of the request if held could be related to one or more bodies identified in section 23(3) FOIA.
49. With regard to section 24(2), the Commissioner again considers that this exclusion should be interpreted so that it is only necessary for a public authority to show either a confirmation or denial of whether requested information is held would be likely to harm national security. The Commissioner interprets the phrase 'required' in the context of this exemption to mean 'reasonably necessary'. In effect this means that

there has to be a risk of harm to national security for the exemption to be relied upon, but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

50. In relation to the application of section 24(2) the Commissioner notes that the First Tier Tribunal has indicated that only a consistent use of a 'neither confirm nor deny' (NCND) response on matters of national security can secure its proper purpose. Therefore, in considering whether the exemption is engaged, and the balance of the public interest test, regard has to be given to the need to adopt a consistent NCND position and not simply to the consequences of confirming whether the specific requested information in this case is held or not.
51. The Commissioner considers that the requested information falls within the territory of national security. In the context of section 24 the Commissioner notes that the threshold to engage the exemption is relatively low. Furthermore, as a general approach the Commissioner accepts that withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed. Moreover, it is not simply the consequences of revealing whether information is held in respect of a particular request that is relevant to the assessment as to whether the application of the exemption is required for the purposes of safeguarding national security, but the consequences of maintaining a consistent approach to the application of section 24(2).
52. On this occasion the Commissioner is satisfied that complying with the requirements of section 1(1)(a) would be likely to reveal whether or not the security bodies were interested in the subject matter which is the focus of these requests. The need for a public authority to adopt a position on a consistent basis is of vital importance in considering the application of an NCND exemption.
53. The Commissioner is satisfied that the public authority is entitled to rely on both sections 23(5) and 24(2) in the circumstances of this case. She accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if information is held is required for the purpose of safeguarding national security.

### **Public interest test**

54. Section 23 is an absolute exclusion. Therefore, a public interest test is not required once it is found to be engaged. However, this is not the case for section 24(2).
55. The public authority has argued that issuing a confirmation or denial as to whether it holds information in scope which is exempt on the basis of section 24(1) would not be in the public interest because it would undermine the safeguarding of national security for the reasons explained above.
56. The Commissioner considers that there is a general public interest in openness and transparency in all aspects of government because it increases public trust in, and engagement with, the government. However, this has to be weighed against the very strong public interest in safeguarding national security encapsulated in the Commissioner's assessment of the balance of the public interest in relation to the application of sections 35(3) and 42(1).
57. Therefore, in all the circumstances of this case, she has concluded that on balance, the public interest in maintaining the exclusion outweighs the public interest in revealing whether or not the public authority holds information in scope which is exempt on the basis of section 24(1).

## Right of appeal

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58. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.
60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Gerrard Tracey**  
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