Tribunals Service
Information Tribunal

Information Tribunal **Appeal Number: EA/2007/0054**

Information Commissioners Ref: FS50081525

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London, EC4V 6JL, on 13 – 14 March 2008

Decision Promulgated: 15 May 2008

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

DAVID MARKS

and

LAY MEMBERS

STEVEN SHAW

GARETH JONES

Between

HM TREASURY

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: **Clive Sheldon, of Counsel**
For the Commissioner: **Timothy Pitt-Payne, of Counsel**

Decision

The Tribunal upholds the Decision Notice of the Information Commissioner dated 22 May 2007.

Introduction

1. This appeal concerns a matter of relatively high constitutional importance. It has long been a convention within Government that the opinion of the Law Officers of the Crown, being confidential, are not generally made public which includes their not being made available to Parliament, without the Law Officers' consent. In this appeal this principle has been called in accordance with its long established description, the Convention. That term will be used throughout this judgment.

2. To all intents and purposes, the Law Officers of the Crown are Her Majesty's Attorney General and Solicitor General. However, as will be indicated below the Law Officers also include Scottish, Welsh and Northern Irish Law Officers. For the purposes of this appeal, however, no practical distinction exists between them and the expression "the Law Officers" will be employed throughout. In a recent article published in the Hertfordshire Law Journal (2003) at pages 73-94 by K Kyriakides, kindly provided by Her Majesty's Treasury as the Appellant in this appeal, reference is made at page 84 and following to the authoritative book on the Law Officers, namely Professor Edwards' work entitled "The Law Officers of the Crown" (1964) where the origin of the Convention is traced to a case called the "the Cagliari Case" in the 1850s. This matter resulted in the opinion of the Law Officers being laid before Parliament "under peculiar and exceptional circumstances" (Edwards at p.257).

3. According to Professor Edwards in February 1865 Lord Palmerston, the then Prime Minister, sought to justify the disclosure of the opinion of the

Attorney General in connection with the Belfast riots in 1865 with reference to the convention which then existed, namely that it was a matter for the discretion on the part of the government whether such opinion could be disclosed. As will be seen, this facet of the Convention has been fundamentally altered over time. By the time of the 1964 edition of Erskine May's Parliamentary Practice, the Convention had come to take the form of what Professor Edwards called "a flexible rule" in the following terms, namely:

"The opinions of the Law Officers of the Crown, being confidential, are not usually laid before Parliament or cited in debate."

4. The Convention as it exists today, takes a somewhat different form. It is set out in the present edition of a document published by the Cabinet Office called The Ministerial Code and will be recited in full below.

5. In essence the Convention as it now stands is reflective of a well-established practice that takes the form of making the disclosure of seeking the fact of Law Officers' advice as well as the content of their advice subject to the Law Officers' consent.

6. This is the not first time the Convention has come before the Tribunal. In a decision determined on paper on 17 July 2007 and promulgated on 6 August 2007, namely the *Ministry of Justice v Information Commissioner* (EA/2007/0016), the Tribunal determined that an information notice served on the Appellant then known as the Department for Constitutional Affairs ("DCA"), asking the DCA to confirm whether it held the Attorney General's advice given with regard to the public interest test and its interpretation under FOIA. The Tribunal upheld the DCA's appeal. It said that the DCA did not have to comply with the information notice. This was because section 51(5) of FOIA which allows a public authority not to provide information if it is legally privileged, was wide enough to cover the information sought. Although the Tribunal accepted the DCA's argument

that under section 51(5), not only the advice itself, but also information as to its existence should not be disclosed, it agreed with the Commissioner that the Convention which had been relied on by the DCA had "no bearing on the question of whether section 51(5)(a) entitles the DCA to refuse to inform the Commissioner whether it holds" the information sought (see paragraph 42). The Tribunal did, however, go on to say that it considered "but [*made*] no finding on the matter, that the convention is a factor that would need to be taken into account when considering the application of the public interest test.". The Tribunal is not aware that the Convention has been the subject of any considered judicial analysis at High Court level or above. It also comes at a time when as is publicly well known the constitutional role of the Attorney General is being reviewed: see eg the House of Commons' Justice Committee: Constitutional Role of the Attorney General: Government's response to the Committee's fifth Report of Season 2006/2007 (HC 242: 7 February 2008). The Tribunal wishes to state that nothing in or connected with the latter Report in any way bears upon the issues in this appeal.

7. The appeal concerns exchanges between the Appellant and the Information Commissioner ("the Commissioner") in the wake of a request made by a third party for sight of legal advice sought or obtained by the Government with regard to the financial services and markets legislation. The party making the request is not a party to the appeal. As will be made clear even though the Commissioner determined that the information sought is properly protected by the qualified exemption in the Freedom of Information Act 2000 ("FOIA") dealing with legally privileged material, the Appellant nonetheless maintains that an additional qualified exemption dealing in terms with the provision of Law Officers' advice is also engaged and should be applied to the facts of this case.

The Request

8. In an email dated 6 April 2005 a Mr Evan Owen made a formal written request to the Appellant in the following terms, namely:

"I would like to see Counsel's Opinion supporting Mr Gordon Brown's declaration of the Financial Services and Markets Bill compatibility with the Human Rights Act 1998. I would also like to see any documentation and communications the Treasury (Mr Brown in particular) has with regard to this compatibility with human rights."

9. By email dated 5 May 2005 the Appellant confirmed that some of the information sought was exempt under section 42(1) of FOIA. That provision deals with the qualified exemption that concerns legally privileged material. The Appellant claimed that in balancing the public interest in withholding the information against the public interest in disclosing the information the Appellant's conclusion was that the public interest in withholding the information outweighed the public interest in disclosure.

10. It was also contended that some of the information held by the Appellant was exempt under section 35(1)(b) of FOIA, being correspondence relating to ministerial communications. It was again contended that the balance of the relevant public interests favoured non-disclosure.

11. Finally, it was contended that the Appellant could neither confirm nor deny whether it held the information relating to the provision of advice by Law Officers or relating to any request for advice by the Law Officers by virtue of section 35(1)(c) of FOIA. That section provides in round terms that information is exempt if it relates to advice provided by the Law Officers. Moreover, by virtue of a joint reading of sections 35(3) and 2(1)(b) of FOIA it was provided that the duty to confirm or deny did not arise in respect of information which was exempt or would be exempt under section 35(1) of FOIA if the public interest in maintaining the exclusion of the duty to

confirm or deny outweighed the public interest in disclosing whether or not the Appellant held the information.

12. Yet again, the Appellant maintained that the balance struck between the competing public interests militated in favour of neither confirming nor denying that the Appellant held such advice, or in favour of disclosing that such advice had been required. This was because there existed what was said to be "a strong public interest" in ensuring that the Government was able to consult its "most senior legal advisers" without fear that the advice or the fact of seeking that advice would be disclosed. Disclosure it was claimed would have the effect of disclosing those matters "which the Government judges to have a particularly high political priority, or are assessed to be of particular legal difficulty". The Appellant meanwhile recognised that there was a public interest in the compatibility of "any legislation" with the European Convention on Human Rights, reference being made to a House of Commons debate on 28 June 1999.

13. Mr Owen sought a review of the Appellant's response. Although the review largely upheld the original response, it conceded that two documents did not fall within sections 42 and 35(1)(b) of FOIA but it maintained that section 35(1)(a) dealing with the formulation of Government policy and section 41 on dealing with information provided in confidence, nonetheless applied to those documents. The latter is an absolute exemption and need not be further considered here. The former involves a consideration of the balance of the related public interest and again the Appellant maintained that disclosure should be withheld.

Complaint to the Commissioner

14. By mid-January 2006 the Commissioner had received a complaint from Mr Owen. The Appellant had disclosed the documents it considered were susceptible to Mr Owen's request, to the Commissioner, but accepted that two specific documents, being already in the public domain, could be

released. However, as to the balance of the documents being requested, it was claimed that section 35(1)(a) applied to all the information held (ie Government policy) and for the first time reliance was placed on section 42(2) which specified that the duty to confirm or deny does not arise if or to the extent that compliance with section 1(1)(a) of FOIA would involve the disclosure of any information in respect of which a claim based on legal professional privilege could be maintained in legal proceedings. In the correspondence, the response which comprised neither confirming nor denying that the information existed was called the NCND response.

15. The contention that the Appellant was under no duty to confirm or deny echoed the earlier contention that such confirmation or denial would not promote full and frank exchanges between the Appellant as the client and its lawyers, particularly in relation to the type of legal advice or questions which were described as "concerning sensitive and difficult Government decisions". The public interest in maintaining the response which neither confirmed or denied that the information was held (ie. the NCND response) was therefore said to outweigh "strongly" the public interest in confirming whether the relevant information existed.

16. Although it might have been inferred from the Appellant's letter of 7 March 2006 that it did hold documents reflecting at least the fact that it had sought advice from the Law Officers, any such impression was firmly extinguished by a subsequent letter to the Commissioner dated 22 June 2006 then firmly refusing to admit that such advice had been sought at all and that the first and overriding need was to consider whether the balance of competing public interest lay in assessing whether the NCND approach adopted by the Appellant was justified.

17. The letter developed the public interest elements relied on to justify the Appellant's NCND policy. In short these were:

    (i) the existence of the Convention;

(ii) should such disclosure be made, then questions would arise as to why advice had not then been sought in other cases with the consequent attendant political pressure on other Government departments to seek advice in cases that might not otherwise be appropriate;

(iii) revelation of the fact of seeking advice might indicate a perception of weakness on the part of the Government coupled with the risk that such a view would deter further advice being sought; and

(iv) coupled with the above points confirming or denying that advice had been sought might equally create an impression of weakness on the part of the Government as a whole.

18. By letter dated 31 August 2006 in the light of the Appellant's contentions made with regard to the Law Officers' advice, the Commissioner informed the Appellant that he would wish to "frame" the request in the light of Mr Owen's original request and do so in the following way, namely that the Appellant provide:

"… a copy of any legal advice on which Mr Brown based his declaration that the financial services and markets bill was compatible with the Human Rights Act 1998, including any advice held by the Law Officers."

The Commissioner stressed, however, that his investigation was "broader than simply the issue around the advice from Law Officers." The letter, therefore, maintained that with regard to the broader enquiry the first thing that had to be established was whether the information requested could be withheld under the two exemptions cited by the Appellant, namely sections 35 and 42 of FOIA.

19. The Appellant replied by letter dated 12 October 2006. It pointed out quite naturally that it was assumed that by the phrase cited above, namely "including advice held by Law Officers" the Commissioner intended to

mean “including Law Officers’ advice held by HMT”. The Appellant provided one document not previously disclosed which constituted internal legal advice to which the Appellant had applied the legal privilege exemption in section 42(1) of FOIA. However, the letter stated that the Appellant remained of the view that assuming any advice from the Law Officers’ existed, there was no need for the Commissioner to see it. The letter then set out much the same contentions as to the appropriateness of applying the policy of NCND as had been set out in the earlier letter of 22 June 2006.

20. The Commissioner then served an Information Notice dated 19 October 2006. This was served on the Appellant. This occurred as a result of the Commissioner not being satisfied that the Appellant had provided him with sufficient information relating to Mr Owen’s original application and request. Under section 51 of FOIA the Commissioner is entitled to serve such a notice in order to be furnished with such information as he, the Commissioner, requires in relation to an application before him. The Information Notice sought the following, namely:

> “(1) Counsel’s Opinion supporting Mr Gordon Brown’s declaration of the Financial Services and Markets Bill’s compatibility with the Human Rights Act 1998 and any documentation and communications the Treasury (Mr Brown in particular) has with regard to this compatibility with human rights, other than that which it has previously supplied.
>
> (2) The information to be provided should include all legal advice obtained by HM Treasury on the Financial Services and Markets Bill’s compatibility with the Human Rights Act 1998, including any advice provided by the Law Officers other than that which it has previously supplied.

(3) HM Treasury should also furnish the Commissioner with confirmation that it does not hold any additional legal advice on this matter."

21. The material put before the Tribunal does not fully explain what response this Information Notice elicited. However it is not material since on 22 May 2007 the Commissioner issued his Decision Notice.

The Decision Notice

22. The Decision Notice sets out the relevant chronology as from the date of the original request. The relevant portions with regard to this appeal are at paragraphs 30-58 inclusive. Those paragraphs deal with whether or not section 35(3) applied. It is perhaps appropriate at this stage to set out the provisions of section 35. The section is headed "Formulation of Government Policy etc" and provides as follows, namely:

(1) Information held by a government department … 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 as for the provision of such advice, or

(d) the operation of any ministerial private office.

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(3) 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 sub section (1).

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(5) In this section –

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"The Law Officers" means the Attorney General the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government and the Attorney General for Northern Ireland;".

23. For the sake of completeness sections 1 and 2 of FOIA provide as follows, namely:

"1. (1) 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 a description specified in the request, and

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

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2. (1) 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 where either –

(a) the provision confers an 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.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision confirming absolute exemption, or

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

24. At paragraphs 35 to 43 the Notice sets out the public interest arguments against confirming or denying whether the information was held. There have already been brief references to these arguments above and the same were extensively developed during the appeal and will be dealt with below. However, they can be briefly summarised as follows for present purposes, namely:

(1) reliance was placed on the Convention which will be set out later in connection with the evidence presented to the Tribunal, as to whether the Law Officers' advice was sought should be disclosed and as, it was contended, reflected in the wording of section 35(1)(c) of FOIA;

(2) it was important that the Convention operated "with reasonable certainty" to avoid undermining the public interest in encouraging free and frank exchanges between the Government and its legal advisers;

(3) routine disclosure would raise questions about why the Law Officers had not advised in other cases;

(4) disclosure of the fact that advice had not been sought might expose the Government to criticism for not consulting the Law Officers as well as indicating that the Government was insufficiently concerned to seek such advice;

(5) in the present case, dealing as it did with the Financial Services Bill, disclosure of the fact that the Law Officers' advice did exist could lead to the possibility of disclosure of the advice itself leading in turn to a risk of "undermining" the legislation itself;

(6) release of the names of the advisers as well of the advice itself might give rise to a risk that the advice was not as full and frank as it might otherwise be;

(7) section 35 of FOIA itself was a statutory recognition of the public interest in allowing Government to have a "clear space"; and

(8) the advice of the Law Officers had a "particularly authoritative status" (see paragraph 43 of the Notice) so that disclosure of the fact of such advice being sought would reveal which matters the Government regarded as having a "particularly high political priority" or legal difficulty which would run counter to the "strong public interest" underlying section 35.

25. The arguments in favour of confirming or denying whether the information was held are at paragraphs 44 to 54 inclusive. Again these were canvassed at length in the appeal but they can be summarised for present purposes as follows, namely:

(1) the exemption was not an absolute one so that Parliament clearly envisaged that in some cases it may be appropriate to disclose whether the Law Officers' advice had been obtained;

(2) the Convention relied on by the Appellant had not been adhered to by the Government in every case;

(3) disclosure of the fact of the existence of such advice would "arguably" not impinge on the Government's ability to receive free and frank advice from its senior legal advisers;

(4) the Ministerial Code in which the Convention was set out itself envisaged that recourse to advice from the Law Officers would be justified where difficult legal issues arose;

(5) the Financial Services Bill was subject to a significant amount of public debate during its passage through Parliament, and many very distinguished lawyers had themselves expressed doubts over its compatibility with the human rights legislation; in addition the question of compatibility had been examined at length by the appropriate parliamentary committee on financial services and markets;

(6) in the light of the above matters there was likely to have been a "widespread assumption" (see paragraph 51) that the Government would have sought the advice of its most senior lawyers;

(7) disclosure of the fact of seeking advice from the Law Officers would have provided reassurance to the public that fully informed decisions were being made on the basis of the best possible legal advice; equally if advice had not been sought there would have been a "very strong" public interest (see paragraph 53) in that fact not being disclosed as it would have raised "legitimate and important issues" about the basis on which the Government was satisfied that the Bill was compatible with the Human Rights Act; and

(8) consequently and in all the circumstances, the Commissioner determined that the public interest in maintaining the exclusion of the duty to confirm or deny did not outweigh the public interest in disclosing whether the Government did in fact hold such information.

26. In his decision the Commissioner also found that with regard to the documents which had been seen by the Commissioner, the Appellant had itself applied the public interest test inbuilt into the applicability of section 42(1) of FOIA. As indicated above there is no appeal against that determination.

27. In paragraph 54 of the Decision Notice, the Commissioner resolved the issue against the Appellant by stating that he believed that:

"… in this particular case, the public interest in maintaining the exclusion of the duty to confirm or deny whether HMT held information related [sic] to the provision of Law Officers' advice did not outweigh the public interest in disclosing whether it held such information; [the Commissioner] therefore believes that HMT should have disclosed to the complainant whether or not it held Law Officers' advice. The Commissioner considers that paragraph 6.25 of the Ministerial Code requires some amendment to reflect the passage of the Act."

The Commissioner duly determined that section 35(3) was incorrectly applied and required the Appellant to confirm or deny that it held Law Officers' advice in relation to the subject matter of the request.

Notice of Appeal

28. The Notice of Appeal is dated 18 June 2007. Seven grounds are set out. Collectively they reflect the gist of the arguments set out in favour of maintaining the right neither to confirm nor deny as articulated in the

Decision Notice. However, again for the sake of completeness they will be listed here.

29. The first revisited the contention that the underlying assumption behind section 35(1)(c) when read together with section 35(3) of FOIA was that disclosure would be "damaging" to the workings of government and consequently to the public interest "unless the evidence pointed to the contrary". Secondly, the Convention itself was said to have an inbuilt "significant public interest". Third, the Commissioner himself stood accused of not affording any or any sufficient weight to the damage that would be caused to the Appellant and thus to the Government by disclosure. Fourth, the Commissioner's decision that disclosure was "unlikely to cause significant harm" in circumstances where as a result of the "level of concern expressed about this issue there was likely to have been a wide spread assumption" that the Government would have sought the advice of its most senior lawyers, would empty section 35(1)(c) of any real effect. The Decision Notice in other words raised "at the very least" a strong presumption that disclosure must be made whenever human rights issues were raised. Fifth, the Commissioner's assumption that the Law Officers would be consulted where serious concerns existed over where the proposed legislation might be open to challenge (see Decision Notice paragraph 48) was itself a strong reason <u>not</u> to require disclosure. This would in turn have the effect of making Ministers and other officials more cautious about seeking Law Officers' views and advice. Sixth, the Commissioner had ignored the Appellant's contentions that the information sought was also exempt from the duty to confirm or deny under section 42(2) of FOIA. Seventh and finally, the Commissioner had wrongly implied that the Convention itself was "somewhere insulated" from the public interest unlike section 35(1)(c): see generally Decision Notice paragraph 44.

The Commissioner's Reply

30. The Commissioner answered the seven grounds propounded by the Appellant as follows. With regard to the first ground he refuted the suggestion that there was any form of presumption in favour of maintaining the exemption. In particular he denied that there was an underlying assumption that disclosure of whether advice from the Law Officers was held would be damaging to the operation of government generally. Each case had to be separately addressed.

31. Second, the Commissioner contended that FOIA contained no provision which afforded any protection to any form of understanding or practice such as the Convention by way of exemption or otherwise. Third, the Commissioner maintained that he had "quite properly" taken into account the consideration that the substance of any advice would not be disclosed regardless of whether the Appellant were to confirm or deny that he had the requested information: that consideration went into the balance in assessing the competing public interests.

32. Fourth, it was denied that there would inevitably be an assumption whether widespread or otherwise that the Government would have sought the advice of its most senior lawyers whenever issues regarding human rights were raised. Fifth, on the facts of the instant case the existence of serious concerns regarding the financial services legislation was a matter of public knowledge. Sixth, the Commissioner maintained that the balance of public interest with regard to section 35(3) would apply equally in relation to section 42(2). Seventh the Commissioner claimed he had taken into account the fact that on occasion the fact that Law Officers had advised had been disclosed.

33. Finally, the Commissioner stressed that unlike the discretion which the Convention reflected to the effect that it was entirely for the Law Officers themselves as to whether they disclose the fact that they had been

consulted, by contrast under FOIA there was a duty to confirm or deny whether information subject to section 35(1)(c) was held, unless the competing public interests dictated otherwise.

The Evidence

34. The Tribunal heard from two witnesses who gave evidence on behalf for the Appellant. The first was Jonathan Guy Jones of the Attorney General's office. He is presently the Director General and head of that office (AGO). He has occupied that position since November 2004.

35. In his witness statement he explains the role of the Law Officers. He confirms that the Law Officers within England and Wales are the Attorney General and the Solicitor General. Since devolution the list has been added to by the Advocate General but as has been noted above the definition afforded to the term "the Law Officers" in FOIA includes Welsh and Northern Irish officials.

36. In the words of Mr Jones the Attorney General's office provides "support and advice to the Law Officers on all aspects of their official work". Additionally the Attorney General has both "Ministerial oversight" of the Government Legal Service ("GLS") which consists of about 2,000 lawyers in about 30 Government department and related entities.

37. The Law Officers are also responsible for the appointment of external independent counsel to advise Government departments or to conduct litigation on their behalf. In particular two Treasury Counsel are appointed to act exclusively for the Government in all civil law matters: there are also panels of junior counsel and a number of specialist Standing Counsel posts. Though not a member of Cabinet, the English Attorney General at least, does attend Cabinet meetings.

38. Mr Jones exhibited the July 1997 edition of the Ministerial Code as well as the July 2007 edition. The latter, of course, follows the enactment of

FOIA. It is important to set out the various passages in both editions in full insofar as they are relevant to the issues in this appeal. In the earlier edition the relevant paragraphs are paragraphs 22 to 24 which provide as follows, namely:

"22. The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations. It will normally be appropriate to consult the Law Officers in cases where:

(a) the legal consequences of action by the Government might have important repercussions in the foreign, European Union or domestic fields;

(b) a Departmental Legal Adviser is in doubt concerning

(i) the legality or constitutional propriety of legislation which Government proposed to introduce; or

(ii) the vires of proposed subordinate legislation; or

(iii) the legality of proposed administrative action, particularly where that action might be subject to challenge in the courts by means of application for judicial review;

(c) Ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations, which are likely to come before the Cabinet or Cabinet Committee;

(d) there is a particular legal difficulty which may raise political aspects of policy;

(e) two or more Departments disagree on legal questions and wish to seek the view of the Law Officers.

By convention, written opinions of the Law Officers, unlike other Ministerial papers, are generally made available to succeeding Administrations.

23. When advice from the Law Officers is included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this is done, the complete text of the advice should be attached.

24. The fact and content of opinions or advice given by the Law Officers, including the Scottish Law Officers either individually or collectively, must not be disclosed outside the Government without their authority."

39. The 2007 edition reflects very much the same language as quoted above, save for a much abbreviated version of paragraph 22. The relevant passages now appear in paragraphs 2.10 to 2.13 inclusive under a section which bears a sub heading "The Law Officers". The relevant paragraphs provide as follows, namely:

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

2.11 By convention, written opinions of the Law Officers, unlike other ministerial papers, are generally made available to succeeding Administrations.

2.12 When advice from the Law Officers is included in correspondence between Ministers, or in papers for the Cabinet or Ministerial Committees, the conclusions may if necessary be summarised but, if this is done, the complete text of the advice should be attached.

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."

40. Mr Jones accepts, as is clear from the Convention itself, that the Law Officers would not be consulted on every issue. Their time and services were therefore "rationed". Only those matters which are "politically or legally most difficult or sensitive" would be referred to them. Nonetheless, to paraphrase Mr Jones, in practice the Law Officers can be called upon to give advice to colleagues, individual or collectively in any given department on any matter involving either domestic, European or international legal issues.

41. Mr Jones then describes the role of the Law Officers with regard to the passage of parliamentary bills. He states that at any stage in the bill process the Law Officers might be consulted. This might arise in at least three ways. First, Parliamentary Counsel who are otherwise responsible for drafting the legislation might seek the Law Officers' views on "issues of constitutional importance". Secondly, department legal advisers throughout the GLS had a right to seek advice on such issues or where the legal position was not clear cut. Thirdly, as already indicated the Law Officers might be consulted where two or more Departments disagreed on a point of law. The fact remained, however, that on account of the rationing system already referred to, the Law Officers would be consulted "only on a very small proportion of the issues that may arise" (paragraph 16 of this witness statement) an echo of the fact that only cases of special sensitivity or difficulty would be dealt with.

42. Mr Jones emphasised that the function of the Law Officers in this area was not to make or decide policy. He said there was no set procedure as to how the advice would be sought. He also stated that the Convention (at least as to the need to obtain the Law Officers' consent) had been observed by "successive Governments" referring to examples drawn from

the late 1970s. As indicated at the outset of this judgment, the genesis of the Convention seems to be considerably older than that.

43. Mr Jones referred to a passage from the 2004 edition of Erskine May, the work also referred to in the introduction of this judgment, and which referred to the Convention. The passage cited from Erskine May stated expressly that the purpose of the Convention was "to enable the Government to obtain full and frank legal advice in confidence." The relevant passage went on to read as follows, namely:

"Therefore, the opinions of the Law Officers of the Crown, being confidential, are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused: but if a Minister deems it expedient that such opinion should be made known for the information of the House, the speakers ruled that the orders of the House are in no way involved in the proceedings".

44. Pausing there it can be seen that at least in the eyes of the editors of Erskine May, in a passage which appeared in a post FOIA edition of that work the essence of the Convention was to ensure that legal advice was obtained in confidence. The Tribunal feels that the considerations regarding the confidentiality of the advice could justifiably be regarded as more important than disclosure of the fact that advice had in fact been sought. The other curiosity from the passage above cited is that far from it being within the gift of the Law Officers themselves to allow disclosure of not only the fact of their advice but also its content, the suggestion is also made that historically it was the position that a Minister could regard it as expedient that Law Officers' advice be made known to the House and remain a matter outside the province or power of Parliament itself.

45. By way of confirming the fact that the Convention related to all forms of legal advice which the Law Officers might provide, including advice on

human rights compatibility, Mr Jones cited a question posed by Lord Lester of Herne Hill QC in 2000 as to whether the Government would "in practice" consult the Law Officers before making statements of compatibility under section 19 of the Human Rights Act 1998 and if not, why not. On 28 June 2000 Lord Bassam of Brighton on behalf of the Government stated that section 19 statements would be made by Ministers in the light of the legal advice they had received but if that advice emanated from the Law Officers "by a long standing convention, adhered to by successive Governments, neither the fact that the Law Officers have been consulted on a particular issue, nor the substance of any advice they have given on that issue, is disclosed outside government other than in exceptional circumstances" (Hansard, 28/6/2000 Column 80 WA [page 14]). Lord Bassam's statement does of course pre-date the introduction of FOIA.

46. In his witness statement, Mr Jones identifies what he calls "a number of detriments" were the Convention to be breached. These matters again were revisited in argument in the appeal and need only be touched on here. First, he states that to disclose the fact of advice would imply the importance of the matter in the eyes of the Government and thus, in this regard, suggest doubt. This according to him would deter reference to the Law Officers in future cases. In his words at paragraph 24:-

"What would be in jeopardy would be the practical ability of Government, under pressure from political considerations (which Ministers inevitably have to take into account), to have resort to a particularly useful source and clearing house for advising the Government, with a good strategic overview of general legal issues affecting Government. Over time, this could also diminish the effectiveness of the Law Officers and the AGO to fulfil that strategic legal advisory role within Government."

47. Secondly and in consequence of the first argument, to disclose the fact that no advice had been sought equally might risk exposing the

Government to criticism for not having consulted the Law Officers at all. This too might undermine the effectiveness of the Law Officers in fulfilling their proper role in advising in cases of what he has called, "particular political or legal sensibility" (see generally paragraph 25 of his witness statement).

48. Thirdly, Mr Jones claims that were the Convention not respected, Ministers might be inclined to obtain "cover" for reasons of "political expediency".

49. Fourth, adherence to the Convention promoted the political accountability of Ministers who would, as a result, not seek to hide behind the advice of Law Officers. This is a point that was made in the article referred to in the Introduction and is drawn from an observation made by a former Attorney General, Sir Elwyn Jones QC MP, in a work entitled "The Office of Attorney General".

50. Mr Jones stresses the extra practical political pressures which might arise and no doubt do arise and which bear upon Ministers and their officials whenever such signs of doubt on the part of Government appear. In his witness statement at paragraph 28 he says that these forces "cannot be quantified but are nonetheless real and powerful" basing this observation on his own experiences within Government.

51. Mr Jones claims that were disclosure to be made to the effect that Law Officers had or had not been approached on a particular matter, this may actually be "uninformative or potentially give a misleading impression" (see paragraph 29 of his witness statement). He goes on to claim that "the more detailed the question where the Law Officers have advised, the more the answer will tend to disclose (if they have advised) what the likely content of their advice was."

52. Mr Jones refers to an analogy drawn by Lord Morris of Aberavon QC, a former Attorney General, made in July 2007 on the relationship between

the Attorney General and the Government which he says is akin to that of a family solicitor and a client. The Tribunal pauses here to note, as it observed during the appeal, that it finds this analogy somewhat unusual to say the least. No real parallel exists between the two relationships, if only because the nature of advice which the Government will seek will by definition and of necessity have a public quality quite unlike the form of advice which a family would generally seek from its solicitors with its overwhelmingly private quality.

53. Mr Jones deals with the five occasions over the past 40 years when he says "special interest considerations" in favour of disclosure arose. Those considerations in his view outweighed what were perceived within Government to be strong arguments in maintaining confidentiality. The Tribunal finds it important briefly to revisit the circumstances relating to each of these five occasions, one of which post-dates the introduction of FOIA.

54. The first incident concerns the so-called Simonstown Agreement in 1971. That Agreement concerned the United Kingdom's obligation to supply arms to South Africa. The substance of the Law Officer's advice, but not it seems its content, according to Mr Jones, was published in a Command Paper, namely, Cmnd 4589. The Conservative Government of the day published the advice to justify the exports on the basis that the previous Labour Government had taken the view there were was no such obligation, having imposed an embargo on the export of arms to South Africa. In Mr Jones' view, this was a "very controversial issue" at the time.

55. The second incident concerns the Westland Affair in 1986. Here, there was a leak of the then Attorney General's Advice contained in a letter to the then Secretary of State for Defence without the prior approval of either the Prime Minister or the Law Officers. Later the full letter was disclosed in the words of Mr Jones' statement, "... with proper authority". It seems from the article to which reference is made in the Introduction to this

judgment that the Westland Affair confirmed that at least one adjustment had been made to the Convention, as it then existed. Prior to 1986, it had been believed that the advice of the Law Officers could not be disclosed without the consent of the Minister receiving the advice. The Westland Affair confirmed that such advice could not be disclosed without the consent of the Law Officer or Officers giving it.

56. The third example concerns the Scott Inquiry into arms to Iraq in 1992. As is well known Matrix Churchill was a firm involved in exporting machine tools (which it was said could be used for making military equipment to Iraq). The advice provided by the Law Officers relating to the legal regime governing arms sales and the operation of public interest immunity issues was disclosed as being regarded as central to the issues relevant to the Inquiry.

57. The fourth example concerns the equally well known series of cases which together constituted the Factortame litigation in about 1997. This was the first occasion that a Member State's liability for damages was in play in the context of a possible breach of Community Law. In the event, it was confirmed that the Merchant Shipping Bill, later the Merchant Shipping Act, was not compatible with Community Law thereby rendering the United Kingdom Government liable in damages. The Law Officers had in fact advised that there was a reasonably good prospect that the legislation in question would be compatible. To paraphrase Mr Jones' witness statement: "… the Law Officers' advice was on one view of the law (the view which the Government was arguing for in the proceedings) directly relevant to the issues in the litigation."

58. Finally, in 2003, extracts from the Attorney General's full Advice on the legality of the war in Iraq, which Advice was dated 7 March 2003, was leaked to the Press during the General Election campaign in 2006 to avoid a possible distortion of the terms of the debate. On 22 May 2006, the Government chose to publish the full text to the Attorney General's

Advice. Mr Jones confirms that in no case of which he is aware has the Convention been overridden simply to disclose whether or not the Law Officers have actually been consulted about a particular matter.

59. Mr Jones ends his witness statement with two further points he claims are relevant to the operation of the Convention. First, and again based on his own personal experience, he maintains that there are many occasions:-

"… where there would be political advantages to Government or a departmental minister in disclosing the fact that the Law Officers have advised on a particular issue …"

He goes on to maintain however that the Convention is "rigorously applied" to ensure that any department does not pick and choose on purely political terms to disclose whether or not the Law Officers have in fact advised. He adds that to his own knowledge, there have been many occasions when it would have been convenient for the AGO to be able to state that the Law Officers have not advised on a particular issue, for example, to deflect inaccurate media comments or speculation. In paragraph 43 of his witness statement he says:

"Nonetheless, successive Law Officers have considered that the public interest in maintaining the Convention is such that disclosure should not be made, even though this might otherwise be thought to be convenient in an individual case."

60. Secondly he refers to past inadvertent disclosures by Ministers or officials, as to those occasions on which the Law Officers have provided advice. He adds that in such cases, careful consideration was invariably given to corrective measures, eg by reminding departments and their Ministers of the importance of the Convention and where relevant, issuing retractions as to any prior inaccurate or misleading statements.

61. The Appellant's second witness was Paul Rankin, Director of Financial Services, within the Appellant. He has responsibility for managing the Government's relations with the financial services industry and for the regulation of financial services generally. He has occupied a range of positions in his 13 year term with the Appellant, including other posts connected with financial affairs and economic reform. In his witness statement he explains the background to the Financial Services and Markets Act 2000 ("FSMA"), and goes on to explain why the Appellant has taken the view that the public interest in maintaining the exclusion of the duty to confirm or deny whether the Appellant received Law Officers' advice outweighs the public interest in disclosing that information.

62. Mr Rankin therefore confirmed that by virtue of FSMA and the establishment of the Financial Services Authority, the United Kingdom for the first time benefited from a single financial regulator and supervisor. In particular, FSMA was responsible for the creation of the Financial Services and Markets Tribunal. The Act also provided the framework for not only a single Ombudsman and a variety of compensation schemes, but also for a host of other matters relating to the scope and content of all relevant regulated activities.

63. Mr Rankin confirmed that the Bill which led to FSMA was subject to "extensive Parliamentary scrutiny" on a wide variety of issues, including the Bill's compatibility with human rights legislation. In particular, two Parliamentary committees considered drafts of the Bill. The House of Commons Treasury's Select Committee in its Third Report of Session 1998-1999 on Financial Regulation had noted that it expected the Government "to respond in detail to the concerns about natural justice and the European Convention on human rights" expressed by those who had made representations to that Committee. The Government did so in a Response, published in March 1999. Secondly, a Joint Committee of both

Houses established to consider aspects of the Bill had also commented extensively on possible human rights issues in its First Report.

64. The latter Committee had heard evidence which included a legal opinion provided by Lord Lester QC and Javan Herberg of Counsel, and a subsequent Advice by Lord Lester and Monica Carss-Frisk of Counsel commissioned by various banking associations and other financial organisations, together with a number of leading City law firms.

65. The same Committee had also invited the Government to comment on issues raised in the Committee's Report. The Government duly did so in the form of a Memorandum from the Appellant itself to the Committee dated 14 May 1999. In that Memorandum which Mr Rankin exhibits to his witness statement, the Government contended that the disciplinary regime to be introduced by FSMA involved the determination of civil rights and obligations in terms of the applicability of the European Convention on Human Rights, rather than any imposition of a criminal penalty, although certain powers exercisable by the FSA could be regarded in terms of the latter characterisation.

66. The Joint Committee produced a Second Report on 22 May 1999, but not before it had first heard oral evidence including evidence from Leading and Junior Counsel instructed on behalf of the Appellant to advise on the human rights issues raised by the Bill. Memoranda were also received from Lord Lester QC and two distinguished Law Lords, namely Lords Hobhouse and Steyn, and a number of City law firms. The continuing debate monitored by the Committee was whether, and if so to what extent, the courts would regard disciplinary proceedings under the proposed legislation as constituting criminal proceedings for the purposes of the human rights legislation.

67. The Response to the Report is dated June 1999. It concluded that in the light of its "firm view" on the compatibility of the disciplinary regime with

the European Convention, no change was necessary. Even following the Bill's Second Reading and further scrutiny in Standing Committee, there was further extensive discussion of possible human rights concerns.

68. Without any disrespect to the detailed way in which Mr Rankin provided his evidence, including his witness statement to the Tribunal, it is fair to say that the remainder of his witness statement revisited issues already raised in correspondence and subsequently canvassed in further detail in the appeal. The Tribunal feels it sufficient to refer briefly to only four specific points he chose to make.

69. The first consists of his contention that it is difficult to see how confirming or denying the existence of the fact of legal advice being sought "would contribute in any significant respect to the promotion of the public interest in relation to an understanding of any issues arising in relation to the FSMA", at least not to such an extent as would outweigh what he called, just as Mr Jones did, "the strong public interest" in applying the Convention.

70. The second point he makes echoes one of the principal themes in Mr Jones' evidence, namely that admitting to the existence of legal issues suggested that the Appellant considered there were "human rights weaknesses in the implementation of the Act".

71. Thirdly, again, reflecting the arguments raised by Mr Jones, if the Appellant were to confirm it had sought advice from the Law Officers, this would, in Mr Rankin's view, lead to "further, more targeted [*Freedom of Information*] requests intended to establish the issues on which that advice had been requested …"

72. Fourthly and finally, he in effect invoked the entitlement of the Government and any of its departments to decide whether or not to seek legal advice "and if so, from whom, in confidence and without being subjected to outside pressure, which might otherwise distort the approach taken in

ways which tended to undermine optimal consideration of issues in the public interest."

73. Mr Jones was cross-examined by Mr Pitt-Payne on behalf of the Commissioner during the appeal. He also answered various questions put to him by the Tribunal. He explained that a committee called the Joint Committee on Human Rights considered the compatibility of every Government Bill which raised human rights issues and that that Committee would usually set out its reasons in a full and frank manner regarding the degree to which a particular Bill was otherwise compatible with the relevant legislation. This would then be passed to the appropriate department for any further reconsideration. He also referred to litigation that was ongoing (at least at the date of the hearing of this appeal) which involved the FSA and in which human rights' issues had been raised in the context of judicial review challenges as to decision of the Financial Ombudsman. The Tribunal was sent copies of all relevant documentation, but has not found their content relevant or helpful to the issues on this appeal.

74. He emphasised the extensive range of sources of legal advice available to Government departments generally. These included not only the membership of the GLS but also, where applicable, outside law firms sometimes with particular specialist expertise regarding those areas on which advice was being sought.

75. As for the legal advice provided by the Law Officers themselves, Mr Jones confirmed that their legal advice would be, as he put it, informed by the Law Officers' knowledge of the policy content of the issue under consideration. He stressed the very important role of the Law Officers and conceded that there existed a public interest in considering how they fulfil their role. However, he went on to say that the importance of Government being able to take proper legal advice carried with it a degree of importance that attached not only to their being confidentiality with regard

to the content of the advice, but also to the fact that the Government should be allowed to seek such advice without exposing any sensitivity it might otherwise feel.

76. He was asked about the reasons behind the changes in the wording of the Code as between the two editions which have been referred to. He explained that in the wake of the 1997 edition, it had been felt desirable to change the examples formerly set out into what he called a “shorter, snappier” Code which duly occurred. The present edition represented, as he put it, a “flexible” tool. This enabled the system to work so as to take account of the fact that the Law Officers sat at the “apex” of the governmental legal pyramid.

77. Mr Jones was asked questions about the rationing or screening system which has been referred to and which enabled the Law Officers to deal only with those matters which were properly considered appropriate. He said that whenever there arose a question as to whether the Law Officers should be consulted, there would be a dialogue between the relevant department and his department as to whether the matter should go to the Law Officers on a full-blown basis. It was a question of judgment. It followed that there were many important matters that were, in the event, not referred to the Law Officers.

78. As to the practicalities pursuant to which legal advice was sought from the Law Officers, Mr Jones confirmed that such advice would normally be sought by the senior legal advisers within the relevant Government department. Even though Ministers enjoyed a right of direct access to the Law Officers, Mr Jones confirmed that the “impetus” would generally come from the lawyers acting within or for the department concerned. Mr Jones laid stress on the need for the appropriate senior legal advisers to be expected to exercise judgment which he referred to without fear of adverse publicity.

79. Finally, Mr Jones was perhaps, not surprisingly, asked about the general need for the public to know where the Government got its advice from. As to this, Mr Jones responded that there was no necessity in the public knowing anything as to the particular issues, or as to which lawyer or law firm had been consulted, and that there was no need to know at what stage advice had been sought. He maintained that the Government's "legal" position on a particular issue could be in due course, if necessary, "tabled" in Parliament and/or in the courts. The public interest in probing the legal correctness of the Government's position on a particular issue was, he claimed, not advanced by knowing which particular law firm or lawyer had been consulted. When Mr Pitt-Payne suggested the public might well be concerned if the Government were to seem to be going to the "wrong" private law firm, for example, on a question on specialised advice, he conceded that there might well be a public interest in such circumstances, but that the answer would depend on the fact of the particular case. The Tribunal pauses here to observe that it entirely endorses the views of Mr Pitt-Payne. There is clearly a public interest in knowing where legal work is placed.

80. These considerations did not, however in his view, have any applicability to the role of the Law Officers. He repeated the assertion which he made in his witness statement that the Convention reflected in his words "a very strong presumption". If it did not apply, he claimed, it would risk drawing the Attorney General into a far greater number of cases.

81. Mr Rankin was also cross-examined by Mr Pitt-Payne for the Commissioner. The Tribunal, however, did not find that his answers in any way detracted from the general thrust of his witness statement or the arguments put forward, both by him and generally by Mr Jones.

The Appellant's Contentions

82. At the heart of the Appellant's contentions are allegations that the Decision Notice was not in accordance with the law and to the extent the Notice involved an exercise of discretion by the Commissioner as to the competing public interests he ought to have exercised such discretion differently: see generally section 58 of FOIA. In the present case, in the words of Mr Jones, the Appellant maintains that the at the very least the Decision Notice failed to reflect the "powerful public interest" in maintaining the Convention which plainly outweighed the limited public interest in favour of disclosure.

83. The "ingredients" said to constitute this powerful public interest can, in the Tribunal's view, be distilled into the following factors in the light of the evidence which it has heard.

84. First, a Minister or a Government department, as a general principle, should be free from any pressures emanating from outside the confines of the department as to what type of advice it seeks to obtain, when it should do so, and more importantly for present purposes, from whom and in particular, whether it should do so from the Law Officers in particular. On any view, this does no more than restate the terms of the Convention.

85. Second, the position of the Law Officers within Government enjoys in the words of the Appellant's Skeleton Argument "a particularly authoritative status". On the other hand, as Mr Jones confirmed, the rationing system which applies to the provision of such advice meant that if the fact of seeking such advice were disclosed, this would in the end lead to a disclosure of those matters or issues which the Government judged as having a high political priority or as containing some particularly difficult legal issue or issues.

86. Again, this would run counter to the strong public interest underlying section 35(1)(c). The Tribunal pauses here to note that it assumes that

the public interest in question is the very same public interest said to support the existence and maintenance of the Convention.

87. The same reliance on the rationing system led to the conclusion that routine disclosure of the fact of seeking advice would result in pressure to reveal why advice has not been sought on other matters thereby opening up the Government to undue criticism for having failed to consult the Law Officers on particular issues.

88. Third, and insofar as there can be said to be no overlap with the second argument, undue displacement of the Convention would undermine the public interest in ensuring that the Government could engage in free and frank exchanges with its legal adviser.

89. Fourth, even if there were no risk of the type of harm articulated in the second contention, the risk of such political harm would deter the Government in future from consulting the Law Officers in appropriate cases.

90. Fifth, one particular manifestation of the harm which has just been referred to would be in the context of litigation involving the Government, particularly in the form of challenges against the Government's decisions and policies. In such cases, prior disclosure of the fact of its having sought or not sought advice, as the case may be, would "suggest" to those who made such challenges that the Government itself felt there to be a weakness in its position, subject of course to the ability of the Government to claim legal professional privilege as to the content of the advice itself.

91. Sixth, and reflecting the argument advanced by Mr Jones referred to above at paragraph 51, disclosure of the fact of the advice could be interpreted in an appropriate case as disclosure of the substance of the advice dependent upon the scope and framing of the request. This would again undermine what in context could be called the free space which should exist between an official and his or her legal advisers.

92. Seventh, (and this point necessarily arises out of the evidence which the Tribunal has heard) on the facts of this case, the extensive amount of debate and analysis including the serious legal analysis devoted to the genesis of FSMA would have led to what the Decision Notice, at paragraph 51 called the "widespread assumption" that the Government would have sought the advice of its most senior lawyers.

Appellant's Grounds of Appeal

93. In the light of these ingredients which go, it is said, towards the constitution of the relevant public interest in favour of maintaining the exemption justifying non-disclosure, the Tribunal now turns to consider the eight grounds of appeal which are set out in the Appellant's Skeleton Argument.

94. The first ground takes issue with the Commissioner's alleged approach to section 35(1)(c) of FOIA in the Decision Notice, particularly when read together with section 35(3). The Appellant contends that those sections necessarily imply that disclosure *per se* would be damaging to the workings of Government and therefore inimical to the public interest "unless the evidence points to the contrary". In the Tribunal's view, this is not an uncommon argument in the context of FOIA and in particular with regard to the exempted categories of information set out in section 35 generally. This argument is tantamount to the propounding of a presumption of public interest in favour of non-disclosure generally. The fact remains that there is no such presumption and a similar contention was raised and rejected in a recent case which constitutes the first decision in the High Court which had considered in effect the applicability of FOIA and its exemptions, ie *Office of Government Commerce v Information Commissioner and HM Attorney General on behalf of the Speaker of The House of Commons* [2008] EWHC 737 (Admin) especially at paragraphs 75 – 79.

95. The second ground in the Tribunal's view is an argument which is in effect pre-empted by the first ground of appeal. It is alleged here that the Commissioner has misunderstood the significance of the Convention which it is said itself reflects a "significant" public interest and thus should weigh heavily in the balance against disclosure. Reliance is placed on the long-standing nature of the Convention and to the weight which in judicial terms should be afforded to the formal constitutional practice or custom which it represents: cf *Huang v Secretary of State for the Home Department* [2007] 2 AC167, where in particular Lord Bingham observed that tribunals should generally afford "appropriate weight" to those who have a responsibility for a given subject matter and who have access to "special sources of knowledge and advice". The Tribunal repeats the observations made in the preceding paragraph and rejects reliance on this ground.

96. Third, emphasis was placed on the damage which would be caused to the Appellant, and presumably the Government in general, by the request for disclosure. The Tribunal here refers back to those passages in the evidence noted above; see eg at paragraph 46. In particular, the Appellant takes issue with the terms of paragraph 46 of the Decision Notice (abbreviated above at paragraph 25) where the Commissioner found that disclosure of the fact of advice would "arguably not impinge" (emphasis added) on the ability of Government to receive free and frank advice. This is said to suggest that a contrary position could not only be "argued" but could in fact be more "likely" or even "probable". The Tribunal finds that reliance on the possibility of damage must be determined on a case-by-case basis. In this case, the Tribunal's view is that the degree of damage envisaged is likely to be minimal, if not non-existent. The Tribunal finds that as is perhaps already made clear from the facts in this case, disclosure of the fact of advice from the Law Officers in the light of all the debate for the Financial Services Bill engendered, would have had little, if any, impact on the overall public perception of the

Government's stance on the legislation. The issues were sufficiently canvassed in the debates which occurred outside the context of the Government and any dialogue it might have had with its Law Officers.

97. The fourth ground is the contention that on the specific facts of the present case, where there could be said to be the "widespread assumption" already referred to, that the Government would have sought the advice of its most senior lawyers, section 35(1)(c) read together with section 35(3) of FOIA would be devoid of real effect. In other words, the fact of extensive public debate on legal issues during a Bill's passage through Parliament would almost always lead to disclosure. The Tribunal pauses here to observe that in its view it is extremely doubtful that the evidence, at least in this case, leads to such a conclusion or anywhere near it. The Tribunal did not find anything in Mr Jones' evidence which suggested as much, and Mr Rankin could of necessity give his view only from "within". In the Tribunal's view and opinion, it is no doubt trite, but nonetheless true, to note that whether such an assumption can be made in a given case will depend on all the evidence. In this case, there is no doubt that the Bill in question was a high profile piece of legislation which would be expected to attract the degree of analysis and comment which it, in effect, did attract. This would not be true of every case, even one which combines such important public elements as the control of financial institutions and related bodies on the one hand, and on the other the interaction of such a measure with human rights considerations. The Tribunal is aware of the recent OGC decision which warns of the danger of trespassing on Parliamentary privilege. However, the Tribunal wants to make it clear that in coming to its conclusion, it is not in any way "questioning" the Parliamentary material which has been put before it. It is simply referring to the fact and extent of that material, and no more.

98. Fifth, issue is taken with paragraph 48 of the Decision Notice where the following statement appears, namely:

> "48. There is therefore an awareness that it is likely that the Law Officers will be consulted where serious concerns exist over whether a proposed legislation ought to be open to legal challenge."

99. As has been noted above, that passage appears in a section within the Decision Notice headed "Public interest in favour or confirming or denying whether the information is held". It follows a passage in which a quotation is drawn from the Ministerial Code. In the Tribunal's view, this argument is another variation as to the risk of potential or actual damage which would arise if disclosure were made. Such damage, it is claimed, would take the form of a perceived admission of weakness on the part of the Government and, in particular, could, as has already been mentioned, undermine the Government's position in any litigation. The Tribunal finds this a somewhat elusive argument. The context of the litigation referred to, be it European or domestic, would inevitably be subject to certain well-established and universally observed rules of procedure and practice, together with the application of the normal rules of evidence, not least of which would be the availability of legal professional privilege. It is difficult, if not impossible, to see what risk, if any, in terms of evidence such revelations might pose. Moreover, it is hard to imagine any real prejudice that such revelations might create in undermining the Government's formal position in such litigation. Litigation of the type envisaged would be resolved on the proper application of legal principles. As the *Factortame* litigation clearly demonstrated, the view of the Government may in the result prove to be quite irrelevant.

100. Sixth, as is apparent from the chronology set out earlier, and as the Commissioner acknowledged at paragraph 15 of his Decision Notice, the Appellant had also contended that the information requested was also exempt from the duty to confirm or deny under section 42(2) of FOIA. The Appellant alleges that that contention was simply ignored in the Commissioner's reasoning. It is fair to say that the Tribunal heard no

argument outside the scope of the issues relating to section 35(1)(c), which arguments could be said to be directly solely to section 42(2). In the Tribunal's view this is quite understandable. In most, if not many, of the cases where the two sections interact, the same considerations will apply. The Tribunal recognises that in a particular case differing public interests may well be in play with regard to both those subsections, but for the moment, the Tribunal is concerned solely with section 35(1)(c) and the considerations which apply to that subsection as well as the section 35(3). In any event, as is clear from this judgment, there has been no need for the Commissioner to rely on section 42 considerations in relation to the issues in this appeal. The Tribunal wishes to add at this point that it is not convinced by the arguments referred to in paragraph 85 above. Admittedly, it is not difficult to conceive a request that might be fashioned in such a way as to seek to elicit the content of the advice as well as the fact of the advice being sought. However, there seems no reason why in such cases the public authority cannot invoke any other exemptions which might be applicable, not least the exemption set out in section 42.

101. The seventh ground in the Tribunal's opinion clearly revisits the second ground in round terms by repeating the assertion that the Convention "is itself a manifestation of the public interest".

102. Eighth and finally, it is claimed that the public interest militating in favour of disclosure of the fact that advice has been sought is weak. In this regard, reliance is placed on the passage of time which has occurred since FSMA and the earlier Bill were passed and debated. In the Tribunal's view, this fails to respect one of the fundamental features of the exercise conducted by the Commissioner and this Tribunal with regard to requests under FOIA. The functions which the Commissioner and Tribunal are charged with involve the carrying out of the exercise with regard to the competing public interests as at the time of the request, subject to the observations made below in paragraph 114.

The Commissioner's Response

103. As to the first ground of appeal, the Commissioner contended that there was, and is, no presumption in favour of maintaining the exemption in question. The Tribunal respectfully agrees. The recent decision referred to above in the High Court involving the Office of Government Commerce at paragraph 71 endorses the observations of the Tribunal in its decision of *Secretary of State for Work and Pensions v Information Commissioner* (EA/2006/0040) at paragraph 29. That passage, without reciting the same in full, confirmed that there is always likely to be some public interest in favour of disclosure under the Act. The strength of the particular interest and the strength of the competing interests must be assessed on a case-by-case basis. See also in relation to section 35(1)(a), *DfES v Information Commissioner and Evening Standard* (EA/2006/0006) at paragraphs 62 and 63 to the effect that there is no general assumption that damage will occur.

104. As to the second ground and reliance upon the Convention, the Tribunal again respectfully agrees with the Commissioner that the existence of the Convention, let alone any similar or custom or practice which has crystallised over time (albeit of a constitutional nature) cannot of itself be a determining consideration (see the *Ministry of Justice* decision referred to above). The Tribunal remains mystified as to why the Convention took no express account of the evident impact of FOIA in the period leading up to the publication of the 2007 edition. At the end of this judgment, the Tribunal will make some recommendations as to the manner in which the Convention could perhaps be reviewed in the light of FOIA, mindful of the observations made by the Commissioner in his Decision Notice.

105. As to the third ground, the Commissioner admits that the issue of damage was a relevant matter in assessing the balance of public interest. The Tribunal's view is that it is important to reconsider those aspects of the

Appellant's evidence, particularly as articulated by Mr Jones, on which the Appellant places particular reliance.

106. First, as indicated above, there is presently a rationing system which means that the Law Officers are not consulted on every issue. If the Convention were undermined, it is alleged that there could be a resultant pressure upon the Government to consult the Law Officers either in many more cases than are presently in play, or not to consult them at all in the most important cases.

107. The Tribunal finds that this danger is far more apparent than real. The evidence before the Tribunal shows quite clearly not only that the decision to consult Law Officers in a particular case is invariably taken at a Ministerial level, or at least at a very senior level within a Government department. This suggests that there is already a degree of responsibility and indeed serious judgement in the decision-making process. To paraphrase the Commissioner's Skeleton Argument, those involved in such decision-making can be expected to, and in all probability, do in fact exercise independent judgement in making such decisions. In such circumstances, they should be well able to resist the type of pressure which is being referred to: cf *DfES v Information Commissioner* supra at paragraph 75(vii).

108. It is claimed that disclosure of those occasions when legal advice has been sought would result in revealing those matters which in the Government's view had a particularly high political priority, or undue legal sensitivity. The Tribunal feels this argument goes too far. Each case will need to be considered on its facts. No-one, least of all the Commissioner and the Tribunal, is suggesting there be routine disclosure. The present case is perhaps a very good example of a high profile case in which any consideration of the issues raised would almost inevitably lead to a detailed debate, or series of debates, on matters raised by the proposed legislation.

109. It was argued that the Government might be exposed to criticism if it were known that it had not consulted the Law Officers on a particular matter. The Tribunal finds this contention, with great respect, unconvincing. As the Commissioner has pointed out, the shielding of Ministers or the civil servants who work under them from criticism is not a valid public interest consideration in considering whether an exemption should be maintained. As the Appellant accepted by way of general proposition, Ministers are accountable in Parliament. This means they are accountable to the public at large. It is right that they should be. There is a clear public interest in the accountability and transparency of both decision-making by a public authority, as well as of the reasons for any such decisions made: see eg *Minister of Defence v Information Commissioner & Evans* (ES/2007/0027) especially at paragraphs 64 to 68. The Tribunal is not impressed by the warning in effect made by the Appellant, that over the course of time, there would be a diminution in the effectiveness of the Law Officers in fulfilling their proper role within Government. The Tribunal should add at this stage that it entirely recognises one of the claimed justifications for the Convention, namely that Ministers should not be allowed to hide behind their Law Officers' advice in accounting to Parliament. As indicated above at paragraph 104, this however has to be measured against the above considerations and is not of itself any form of a determining factor in favour of maintaining the exemption claimed here.

110. The fourth ground of appeal which maintains that given the "widespread assumption" that Government would have sought the advice of its most senior Law Officers, claimed that contrary to the Commissioner's finding, disclosure would cause no significant harm. Thus, it is said as indicated above, section 35(1)(c) and 35(3) of FOIA would be emptied of all content. Again, with respect, the Tribunal finds that the Appellant's concerns are overstated for much the same reasons as are set out above at paragraph 97. There was extensive public debate on the Bill that led to FSMA. There may be far less debate in future cases, even where important

issues might be in play. In such cases, proper consideration will need to be given on a case-by-case basis to what competing interests are in play for and against disclosure. There is simply no balancing test reflected in the Ministerial Code. The balance in this particular case and in the Tribunal's view has to be struck in favour of disclosure, even if the assumption is made that the Government would have consulted its Law Officers.

111. The fifth point revisits the possibility that disclosure will necessarily imply a serious concern felt by the Government. These arguments have been dealt with above at paragraph 107. In this case, such concerns were already well advertised and firmly embedded in the public domain.

112. The Tribunal now turns to the sixth ground being the alleged failure to deal with section 42(2), insofar as not already dealt with above. The Tribunal agrees with the Commissioner that no reason has been suggested why the Appellant should be in any different or better position under section 42(2) than under 35(3). The Tribunal stresses yet again that this is not the occasion to explore the extent to which the two sections inter-relate. For present purposes, this ground of appeal is rejected.

113. Seventh, it is claimed that the Commissioner erred in implying that the Convention is in someway insulated from the public interest. Even if the Commissioner did come to such a conclusion, the Tribunal is not prepared to endorse it at this stage. The evidence before the Tribunal serves to confirm in the Tribunal's view that the Convention has been applied in a manner which can be said to be tantamount to the application of a near-absolute exemption.

114. The eighth and final ground has been dealt with above at paragraph 107. The Tribunal should add that it was suggested in argument by the Appellant that disclosure of the fact of advice being sought would add nothing to the store of public information. The Tribunal is conscious of the

general principle that it must generally consider whether the Commissioner's decision in a given case is supportable based on the circumstances at the time of the request. However, as the OGC High Court decision confirmed (see in particular paragraph 98), the Commissioner's decision, and thus that of the Tribunal, can properly take into account subsequent circumstances. The Tribunal wishes to stress that it has taken into account all post-request matters in this case in coming to its overall conclusion.

The Way Forward

115. It is of course entirely matter for the Law Officers and the Government to consider whether the Convention, at least as expressed in its present form, in the Ministerial Code should be reformulated. The recent article on the advisory functions of the Attorney General referred to at the outset of this judgment, refers at page 90 to the following passage from a speech given by the then Attorney General, Lord Goldsmith on the occasion of the13th Annual Tom Sargent Memorial Lecture on 20 November 2001 where he said:

"… neither the substance nor the fact that there has been Law Officer's advice can be communicated without our consent, which is not often given. Whilst I am sure that Ministers and therefore the public interest are best served by a rule of non-disclosure on the substance of our advice – which promotes candid and full legal advice, examining the weaknesses as well as the strengths of the proposed course of action – there is an air of unreality in some areas in denying that advice has been given when it appears to be common knowledge, as for example, the fact that I have at least some involvement in legal advice relating to the fact and the conduct of the present armed conflict. It is therefore not surprising that there is

some pressure to give some further consideration to this latter part of the convention."

116. The Tribunal has already indicated its surprise at the omission of any reference to FOIA in the Code, let alone to any suggestion that freedom of information principles would have to be taken into account. Its surprise is not lessened by the fact that section 35(1)(c) specifically refers to the subject matter of the Convention itself.

117. At the heart of the Tribunal's concerns however, remains the question of consent. Quite apart from the effect of reviewing the history as to the party or parties whose consent was required in the period leading up to the Westland Affair in 1986, the fact that disclosure of information which is otherwise clearly the subject of the FOIA regime, should be dependant on the sole approval of the very party who holds the information is completely at odds with the spirit and letter of FOIA. There can be no doubt in the Tribunal's view that the Convention became subject to the 2000 Act and it wholly endorses the observations made in this respect by the Commissioner at paragraph 54 of his Decision Notice inviting changes to be made.

118. Moreover, in the light of Lord Goldsmith's remarks, the Tribunal also feels that there has been a failure properly to delineate the two principal considerations which underpin the Convention, namely the need to respect the privileged nature of the content of the advice on the one hand, and secondly on the other the long entrenched policy which now governs the discretion maintained by the Law Officers themselves as to whether the fact of their advice should be revealed.

119. If, as appears to be the position, one of the imperatives, if not the driving imperative behind the wish of successive Governments not to reveal the fact of advice being sought was, as suggested by Mr Jones, an otherwise well-established desire to prevent a Minister from hiding behind the

Attorney General's advice, as distinct from the undoubted right to protect the content of such advice, it is perhaps regrettable that these two strands have become indelibly bound together as one. At the very least, therefore, the Tribunal respectfully suggests that any revisiting of the Code should point out and possibly develop this distinction. There is no question of this Tribunal suggesting that the Code in any way should trespass upon the Government's undoubted right to invoke legal professional privilege. On the other hand, as is now well established in the Tribunal's decisions as a whole, section 42 does remain a powerful qualified exemption and recognition of that fact could be reflected in any revised Code.

120. At the very least, the relevant provisions of the Code should refer to the terms and effect of the Act. If any redrafted provisions within the Code were to go further, the Tribunal respectfully suggests that the following precepts be borne in mind.

121. First, the Tribunal would, as a general proposition, accept that any initial decision as to the fact of disclosure should remain vested in a party who is fully informed of all the relevant considerations. The Tribunal would accept that it is difficult to see any party fulfilling that role other than the Law Officers themselves.

122. Second, any such decision should have proper regard to the circumstances in which the advice was sought and should, in appropriate cases, take into account all those factors which could be said to relate to the public interests militating in favour as well as against the maintenance of the exemption.

123. Third, insofar as not already implied by the second precept mentioned above, any restatement of the Convention which expressly takes into account the effect of FOIA should reserve the right of the Law Officers as well as any other affected party to address the applicability of the

exemption set out in section 35(1)(c) on a case-by-case basis, mindful of such matters as the nature and extent of the particular damage which might be considered by disclosure and the degree of sensitivity attaching to the political and/or legal elements related to the advice which is sought.

124. Fourth, by way of respecting the inferences to be drawn from the Appellant's third and/or fourth grounds of appeal, any new code could perhaps state that in the main, a decision to remit a question for legal advice for the Law Officers should be taken at the highest level within any given Government department in consultation with the Law Officers, mindful of the pressure of work and other commitments borne by them. It should perhaps be added that no inference, whether adverse or otherwise, should be drawn as to the Government's policy and/or stance in relation to any particular issue or policy if disclosure is to be made.

125. The above factors cannot, in the Tribunal's view, be regarded as being exhaustive. It may be that the Law Officers may wish to consult with regard to any proposed amendments, should they feel any amendment desirable, with the Commissioner as and when appropriate.

Conclusion

126. For all the above reasons, the Tribunal dismisses the appeal.

Signed Date: 15 May 2008

David Marks
Deputy Chairman