

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 September 2016

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

#### Decision (including any steps ordered)

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1. The complainant has requested from the Attorney General's Office ("AGO") information relating to the airstrike targeting Mohammed Emwazi aka "Jihadi John". The AGO refused to confirm or deny whether it held information citing section 35(3) (Law Officer advice exemption) as its basis for doing so. It confirmed that it did hold press cuttings but argued that these were exempt under section 21 (information readily available to the requester). It upheld its position at internal review although withdrew reliance on section 21 during the course of the Commissioner's investigation having disclosed to the complainant the only media report it held within the scope of the request.
2. The Commissioner's decision is that the AGO is entitled to rely on section 35(3) as its basis for refusing to confirm or deny whether it holds information within the scope of the request.
3. No steps are required.

#### Request and response

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4. On 13 November 2015, the complainant requested information of the following description from the AGO:  
  
"This is a request for information under the Freedom of Information Act. My request relates to Mohammed Emwazi, also known as 'Jihadi John.'"

As announced by the US Department of Defense on 12 November 2015, US forces conducted an airstrike in Raqqa, Syria which targeted Mohammed Emwazi, otherwise known as 'Jihadi John.' Please

see:

<http://www.defense.gov/News/NewsReleases/NewsReleaseView/Article/628777/statementfrompentagonpresssecretarypetercookonairstrikeinraqqasyria?source=GovDelivery#.VkVfCvWuWfS.twitter>

Request:

Please note there are two parts to this request.

(1) From the 1st November 2015 to the day this request is processed, I would like to request all internal correspondence and communications relating to the airstrike targeting Mohammed Emwazi held by the Attorney General's Office.

(2) From the 1st November 2015 to the day this request is processed, I would like to request all external correspondence and communications between the Cabinet Office and the Attorney General's Office relating to the airstrike targeting Mohammed Emwazi.

By correspondence and communications, I define this as including, but not limited to:

Emails

Letters

Reports

Memos

Notes taken during meetings

Notes taken during telephone calls

Text messages

Research documents

Conclusion:

I would like to receive the information electronically. If you feel that a substantive response to this request 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. On 11 December 2015, the AGO responded. It refused to confirm or deny that it held information within the scope of the requests. It cited the following exemption as its basis for doing so:
  - Section 35(3)
6. It acknowledged that it held some "press cuttings" related to the information described in the requests but argued that these were readily available to the requester and therefore exempt from disclosure under the Act by virtue of section 21. It did not say which press cuttings it was referring to.
7. The complainant requested an internal review on 16 December 2015. The AGO sent her the outcome of its internal review on 1 February 2016. It upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 4 March 2016 to complain about the way her request for information had been handled.
9. The Commissioner has considered whether the AGO is entitled to rely on section 35(3) as its basis for refusing to confirm or deny whether it holds information within the scope of the request. She has also looked at whether the AGO would only hold Law Officer's advice within the scope of the request.
10. During the course of the investigation, AGO disclosed to the complainant the information to which it had applied section 21. This was included the phrase "(R5 0501 - not in today's brief)" at the end. It explained that this meant "the broadcaster (Radio 5), the time of the broadcast (05:01 hours) and that the story is not covered in the newsprint media which is generally because the event or story has occurred after they have gone into print (not in today's brief)". It explained that the information to which it had applied section 21 had been circulated in an email to a limited circulation list.
11. The Commissioner had disputed whether section 21 could apply to it because no one outside the email circulation list would have ready access to the summary. The AGO explained:

"The e-mail contained a summary of a number of news stories which had been featured in the newsprint and broadcast media. The only information from those news stories within the scope of the request is that which we have provided to [the complainant] and that which we quoted in our previous letter [to the Commissioner]. Whilst the factual

content of the two sentences has been widely reported and is clearly accessible by other means, we accept that the exact content of the two sentence summary we held may not have been and that it was a summary of a radio news broadcast and so it would not necessarily be easily accessible to the public sometime after the event. We therefore accept that section 21 does not apply in relation to the summary and no longer seek to rely on it."

12. Given that the information in question had been provided to the complainant and that the AGO has withdrawn reliance on section 21, the Commissioner has not considered it further in this case.

### Reasons for decision

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13. Section 1(1) sets out a right of access to information in two parts. Under section 1(1)(a), a public authority must confirm or deny whether it holds requested information. Under section 1(1)(b), a public authority must provide that information, if held. Exemptions can apply to each of the two parts. It also follows that if a public authority can rely on an exemption from its duty to confirm or deny whether it holds requested information, it is not obliged to provide that information, if held.

#### *Section 35(3) – Law Officers' advice*

14. The AGO explained that to the extent that 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.
15. Section 35(1)(c) of FOIA provides an exemption for information which relates to the provision of advice by any of the Law Officers or any request for the provision of such advice.
16. Section 35(3) of FOIA provides:

*'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).'*

17. The Commissioner is satisfied that as drafted the request could potentially include advice provided by the Law Officers or requests for such advice. Section 35(3) is therefore engaged.

#### *Public interest test*

18. Section 35 is a qualified exemption and so the Commissioner must consider whether, in all the circumstances of the case, the public

interest in neither confirming nor denying is greater than that in confirming or denying whether the AGO holds information which would fall within the exemption provided by section 35(1)(c).

*Public interest in maintaining the exemption*

19. The AGO argued that it was vital that the government is free from external pressure in deciding whether it should seek advice from the Law Officers. It is a long standing convention, observed by successive governments, that neither the advice of Law Officers, nor the facts about whether advice has been sought or provided, is disclosed outside of government. The AGO also argued that the Law Officers' convention also 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. Consequently, the AGO argued that the Law Officers' 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.

*Public interest in confirming whether or not Law Officers' advice is held*

20. The complainant noted that government did not always follow this convention and cited the example of the Prime Minister's statement to the House of Commons on 7 September 2015 concerning drone strikes in Syria.<sup>1</sup> The complainant did acknowledge that this statement post-dated her request. However, this was an example of waiving the convention of confidentiality.

*Balance of the public interest arguments*

21. 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. That weight is reinforced by the convention of non-disclosure adopted by successive governments.

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<sup>1</sup> <https://www.gov.uk/government/speeches/syria-refugees-and-counter-terrorism-prime-ministers-statement>

22. 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 to 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 impression that it is not confident of its legal position regarding a particular issue could also deter the government from seeking the Law Officers' 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.
23. 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 considerable debate and controversy. Confirmation or denial in this case could add important detail to the debate in the public interest. Consequently, in the Commissioner's opinion there is arguably a significant public interest in confirming whether or not the advice of Law Officers was sought by the government in connection with this matter.
24. However, the Commissioner is not persuaded that this public interest is sufficient to outweigh the public interest in maintaining the Law Officers' convention. The public interest therefore favours maintaining the exemption contained at section 35(3).
25. The Commissioner also notes that, on occasion and as exemplified by the Prime Minister's statement of 7 September 2015, confirmation is provided as to whether legal advice has been sought can be given. In the Commissioner's view, this does not undermine the public interest in protecting the Law Officers' convention.

*Would the AGO hold information other than Law Officers' advice within the scope of the request?*

26. Finally, the complainant had queried whether the AGO would hold information other than Law Officers' advice within the scope of the request which has not been considered. The Commissioner specifically asked the AGO about this. The AGO assured the Commissioner that, putting to one side its position as regards Law Officers' advice in this case, it had conducted thorough searches as to what other information it

might hold within the scope of the request. It had confirmed that it only held the information to which section 21 had been applied..

27. The matter of section 21 has now been dealt with informally as set out above. Having considered its submissions on this point, the Commissioner is satisfied with the AGO's assurances in this regard.

## Right of appeal

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28. 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)

29. 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.
30. 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**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**