

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 April 2023

Public Authority: Attorney General's Office
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested communications from the Attorney General's Office (the 'AGO') regarding the Post Office Horizon Inquiry. The AGO would neither confirm or deny whether the requested information was held, citing section 35(3) of FOIA (formulation of government policy, etc) by virtue of section 35(1)(c) (the provision of advice by any of the Law Officers or any request for the provision of such advice). It said that the public interest test favoured maintenance of the section 35(3) exemption.
2. The Commissioner's decision is that the AGO was correct to neither confirm nor deny if this information was held and the public interest in this case supports this position.
3. The Commissioner does not require the AGO to take any steps.

Request and response

4. On 15 January 2023, the complainant wrote to the AGO and requested the following information:

“According to evidence heard at the Post Office Horizon Inquiry, in 2013 the Attorney General’s Office was asked to make an inquiry into the Post Office’s handling of Horizon issues.

Please can you disclose communications between the Attorney General’s Office and the Department of BIS and/or the Post Office regarding this inquiry.

Please can you disclose the outcome of the Attorney General’s inquiry into this matter.”

5. The AGO responded on 10 February 2023 and refused to confirm or deny that the requested information was held (‘NCND’) citing section 35(3) – formulation of government policy etc by virtue of section 35(1)(c) - specifically the provision of advice by any of the Law Officers or any request for the provision of such advice. The AGO said that the public interest test favoured maintaining the section 35(3) NCND exemption.
6. Following an internal review the AGO wrote to the complainant on 15 March 2023. It maintained that section 35(3) applied.

Reasons for decision

Section 35 – formulation of government policy (neither confirm nor deny – ‘NCND’)

7. This section sets out why the Commissioner has concluded that the AGO correctly relied on section 35(3) to refuse to confirm or deny whether the information is held.
8. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
9. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point (and the main focus for NCND in most cases), will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

10. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication as to whether or not information is in fact held.
11. The AGO has issued a NCND response regarding whether it holds the information requested by the complainant, citing section 35(3) of FOIA. The sole issue for the Commissioner to consider here is whether or not the AGO is entitled to NCND whether it holds any information which would come within the scope of section 35(1)(c).
12. In reaching a decision, the Commissioner does not need to know whether the AGO does or does not hold the information requested in the request, as it is not necessary for his consideration of this exemption.
13. Section 35(3) states:

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) [ie section 35(1) of FOIA]”.
14. Section 35(1)(c) states:

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice...”.
15. Section 35(1)(c) provides that information held by a government department is exempt if it relates to the provision of advice, or any request for the provision of advice, by any of the Law Officers. Section 35 is a class-based qualified exemption which means there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. The classes are broad and will catch a wide range of information.
16. However, the section 35 exemptions are qualified by the public interest test. Even if an exemption is engaged, public authorities can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
17. The Law Officers are the government’s most senior legal advisers. ‘Law Officers’ are defined in section 35(5) of FOIA as the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord

Advocate, the Solicitor General for Scotland, the Counsel General of the Welsh Government and the Attorney General for Northern Ireland.

18. The core function of the Law Officers is to advise on legal matters, helping ministers to act lawfully and in accordance with the rule of law. They must be consulted by ministers or their officials before the government is committed to critical decisions involving legal considerations. They also have a role in ensuring the lawfulness and constitutional propriety of legislation.
19. Section 35(1)(c) reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.
20. The exemption covers advice which 'relates to' the provision of Law Officers' advice (or requests for advice) which is interpreted broadly.
21. This means that information does not itself have to 'be' Law Officers' advice or a request for Law Officers' advice. It will also be covered if it recounts or refers to such advice or any request for it. For example, any discussions about how to react to Law Officers' advice will relate to that advice, and will be covered.
22. In particular, any discussions about whether or not to seek Law Officers' advice will relate to the provision of advice and will be covered – even if in the end no such advice was sought. The Commissioner does not consider that there needs to be an actual request for advice in order for the exemption to bite. This would undermine the underlying purpose of the convention, which includes confidentiality over whether Law Officers have or have not advised. This means that departments can claim section 35(1)(c) for information that reveals that advice was requested, or for information that reveals no advice was requested. Departments can confirm that the information is held but refuse its content under section 35(1)(c). The refusal notice can explain that the use of the exemption does not imply that advice was in fact requested.
23. In refusing to confirm or deny that the requested information was held, the AGO told the Commissioner it had followed the approach set out above.

24. Based on the wording of the request and the type of information being requested, the Commissioner has concluded that the exemption at section 35(3) of the FOIA is engaged because information within the scope of the request, if held, could reasonably be expected to include advice provided by the Law Officers or requests for such advice.
25. The next step for the Commissioner is to consider the public interest test.

Public interest test

26. Section 35(3) of FOIA is subject to the public interest test set out in section 2(1)(b) of FOIA. This means that the Commissioner must determine whether, in all the circumstances of the case, the public interest in maintaining the exemption from the duty to confirm or deny, outweighs the public interest in complying with the duty to confirm or deny whether the AGO holds information, which would be exempt on the basis of section 35(1)(c).

Arguments in favour of confirming or denying whether or not the requested information is held

27. At the internal review stage, the complainant argued that there is a Public Inquiry underway into the Post Office Horizon IT scandal and that public interest in the case, said to be the greatest miscarriage of justice in British legal history, is intense and it is crucial that all decisions relating to the failed governance of a company solely owned by the Government are rigorously scrutinised.
28. The complainant has further argued that the requested information will be relevant to the Post Office Public Inquiry in due course so there seems no reason to delay its disclosure.
29. The AGO acknowledged that there is a public interest in citizens knowing whether matters have been considered with the benefit of sound legal advice.

Arguments against confirming or denying whether or not the requested information is held

30. The AGO has argued that the public interest is not in favour of confirming or denying whether any such information is held or whether any advice was given on this topic. It has argued that to do so would undermine the long-standing Convention, observed by successive Governments, that information about the seeking, preparation or

content of advice relating to the Law Officers' advisory function is not disclosed outside Government.

31. The AGO has further argued that the Law Officers' Convention protects fully informed decision making by allowing Government to seek, and Law Officers to prepare, legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. This, AGO submits, ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.
32. The AGO has clarified that it is also important to note that Law Officer advice is different from other legal advice within Government, not in its fundamental underpinnings, but because it may be sought in relation to issues of particular complexity, sensitivity and constitutional importance. The AGO considers that it is of obvious pressing importance that the seeking of and provision of legal advice in such circumstances should be facilitated and protected in the public interest.
33. In relation to the complainant's suggestion that it is public knowledge that advice was sought in this case, the AGO has argued that it does not consider that this falls into the category of where it would be standard procedure to obtain Law Officers' advice or where it is public knowledge that advice was given. It maintains that it is not a matter of public knowledge whether any request was made, action taken or advice given. AGO, therefore, maintains that this is a case where to confirm or deny would undermine the Law Officers' Convention.
34. The AGO has further argued that it considers there are no overriding public interest factors in this case. It has explained that, whilst there is a public interest in understanding fully the Post Office's handling of Horizon issues, an independent statutory inquiry is currently seeking to establish this. In light of this, the AGO contends, The Law Officers' Convention is given substantial weight given its constitutional importance, and the negative impact which breaching the Convention would have considering the approach taken by successive governments to preserve it.

Balance of the public interest

35. The Commissioner accepts that there will always be a strong public interest in confirmation or denial as to whether the government has asked for, or obtained advice from, the Law Officers in relation to an issue. The Commissioner recognises the weight that the exemption at section 35(1)(c) of FOIA attracts from the way it has been drafted by

Parliament – providing a specific exemption for a particular type of legal advice. The weight is reinforced by the convention of non-disclosure adopted by successive governments.

36. Furthermore, the Commissioner recognises that it would be impossible for the Law Officers to advise on every aspect of government policy that has legal implications, given the range of legal advice that government requires. If the government routinely disclosed occasions on which the Law Officers had, or had not, given advice, this could give rise to questions as why they had advised in some cases and not in others. This, in turn, 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 the government is not confident of its legal position regarding a particular issue could also deter it from seeking 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.
37. Having said that, 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.
38. In this case, though, the Commissioner considers that the Post Office Horizon Inquiry is seeking to address the very concerns raised by the requester and that its conclusions should serve the public interest in this matter.
39. In view of this, the Commissioner considers that the public interest in protecting the longstanding convention of confidentiality with regard to Law Officers' advice is particularly strong in the circumstances of this case.
40. In reaching his conclusions in this case the Commissioner has also referred to a previous decision notice he has issued which relates to a request to the AGO for comparable information¹. He considers that the arguments and conclusions reached in that notice are transposable to this case.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619814/ic-55601-c6w8.pdf>

41. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption provided by section 35(3) outweighs the public interest in confirming or denying whether the AGO holds information falling within the scope of the request, which would be exempt by virtue of section 35(1)(c).

Right of appeal

42. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

Christopher Williams
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