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Information Commissioner's Office

Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**4 November 2024**
Public Authority:	**Cabinet Office**
Address:	**70 Whitehall London SW1A 2AS**

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking legal advice to government Ministers which addressed the legislative basis for the first national Covid-related lockdown in late March 2020. The Cabinet Office confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure under section 42(1) (legal professional privilege) of FOIA.

2. The Commissioner's decision is that the advice is exempt from disclosure on the basis of section 42(1) of FOIA, but that in all the circumstances of the case the public interest in favour of disclosing the information outweighs the public interest in maintaining the exemption.

3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.

    - Provide the complainant with a copy of the information it has withheld on the basis of section 42(1) of FOIA.

4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The spread of the COVID-19 pandemic to the UK in 2020 prompted the Government to consider what, if any, measures should be implemented in response.

6. On 15 March 2020 the Department of Health and Social Care's (DHSC) legal advisers in the Government Legal Department provided legal advice on social distancing measures which could be instituted by the Government. Cabinet Office legal advisers provided the Government with legal advice on the subject of mandatory closure of social venues on 20 March 2020.

7. The UK COVID-19 Inquiry (the Inquiry) was established to examine the UK's response to, and impact of, the COVID-19 pandemic. It began work on 22 June 2022. Rt Hon Michael Gove MP gave oral evidence to the Inquiry on 28 November 2023.[1]

Request and response

8. The complainant submitted the following request to the Cabinet Office on 5 December 2023:

   "This is a request for disclosure under the Freedom of Information Act 2000.

   Please could you provide me with a copy of the legal advice provided in or around March 2020 to Government Ministers, including the then Cabinet Office Minister Rt Hon Michael Gove MP, which addressed the legislative basis on which the Government could or should order the first national Covid-related lockdown in late March 2020. If no such advice was ever provided in writing, please confirm this in your response.

   Please also provide any closely-related ancillary communications, including for example any record of a meeting in which that advice was provided to or discussed with Ministers, and any accompanying explanatory papers or presentations or other non-public source documents referenced therein which are pertinent to the legal advice.

[1] This background section is taken from the Cabinet Office's submissions to the Commissioner. He has included it in this decision notice as he considers that it is useful in setting this request, and complaint, into context.

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The existence of advice from government lawyers on the question of whether the statutory threshold for exercising powers under the Civil Contingencies Act 2004 had been met was explicitly referenced by Mr Gove in his oral evidence to the UK Covid Inquiry on Tuesday 28 November (see page 112 of the official transcript of his evidence). Mr Gove revealed the main substance of that advice in his public evidence when he said "And the general view was that, as I say, a terrorist attack, by definition, would be unforeseen but the gathering storm of a pandemic might not meet that threshold".

Though the Government may originally have sought to resist disclosure of that advice on the grounds that it is privileged advice (s.42, FOIA), by revealing the main substance or gist of that legal advice in a public forum, and moreover by putting the content of the advice at issue by referencing it to explain the state of mind of key decision-makers at that time, including himself, Mr Gove has waived legal professional privilege in that advice.

Even if privilege had not been waived, by discussing the substance and context of the advice at a public inquiry, on a topic of manifest material public interest (a legally significant aspect of a pivotal moment in recent national history, specifically raised by the lead counsel in a public inquiry into that period of history), Mr Gove would have put beyond doubt that the public interest in disclosing that advice outweighs any public interest in maintaining it as exempt information (s.2(2), FOIA).

Please therefore disclose the information that I have requested without delay and in any event within the statutorily prescribed period. Should you intend to resist disclosure by reference to section 42, FOIA, please declare this at the earliest opportunity so that the matter can then be dealt with promptly by the ICO."

9. The Cabinet Office contacted the complainant on 8 January 2024 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 35[2] and it required additional time to consider the balance of the public interest.

10. The Cabinet Office provided the complainant with a substantive response on 5 February 2024. It explained that it considered the legal advice

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[2] The Cabinet Office did not specify a sub-section of this exemption.

sought by the request to be exempt from disclosure on the basis of section 42(1) (legal professional privilege) of FOIA. Furthermore, it explained that it considered the other information sought by the request to be exempt from disclosure on the basis of section 35(1)(b) (Ministerial communications) of FOIA. For both sections the Cabinet Office had concluded that the public interest favoured maintaining the exemptions.

11. The complainant contacted the Cabinet Office on 26 February 2024 and asked it to conduct an internal review. He argued that section 42(1) did not apply to the legal advice because in his view privilege had been waived, and even if it had not, the public interest favoured disclosing the information. The complainant did not seek to contest the application of section 35(1)(b) to communications between Ministers, but that "closed-related ancillary communications or documents which are not subject to the section 35(1)(b) exception, including for example any briefing document prepared by civil servants, or communications between civil servants or between civil servants and spads which attach, explain or summarise the legal advice obtained for Ministers" should be disclosed.

12. The Cabinet Office informed him of the outcome of the internal review on 14 May 2024. It upheld the decision to withhold the legal advice sought on the basis of section 42(1) of FOIA. The review also explained that it had not identified any 'closely related ancillary communications' which are not exempt under section 35(1)(b) of FOIA.

Scope of the case

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13. The complainant contacted the Commissioner on 23 May 2024 in order to complain about the Cabinet Office's handling of his complaint. He raised the following grounds of complaint:

- He disputed the Cabinet Office's reliance on section 42(1) for the reasons set out in his request for an internal review.
- He considered it likely that the Cabinet Office would hold closely-related ancillary communications (excluding communications with Ministers) and that these should be disclosed.
- He was dissatisfied with the length of time it took the Cabinet Office to initially respond to the request and the time taken to complete the internal review.

Reasons for decision

Section 42 – legal professional privilege

14. Section 42(1) of FOIA states:

    "Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information".

15. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting legal professional privilege ("LPP") for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.

16. There are two types of legal professional privilege; advice privilege and litigation privilege. The Commissioner's view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

17. The Cabinet Office explained that the information it held within the scope of this request consists of legal advice provided to the government on 15 March 2020 by DHSC legal advisers and advice provided on 20 March 2020 by Cabinet Office legal advisers. The Cabinet Office argued that the information in question constitutes a confidential communication between legal advisers for the main or dominant purpose of providing legal advice.

18. The complainant did not dispute that the advice is, or was, in principle subject to LPP. However, he argued that this no longer applied to the advice in question because privilege had been waived and therefore the exemption contained at section 42(1) no longer applied to such advice.

<u>Has LLP been waived?</u>

19. The Commissioner's guidance on section 42 explains his approach to waiver:

“Waiver is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. In this context, ‘cherry picking’ (ie, revealing only part of the advice given) isn’t permitted. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under FOIA. This is because under FOIA we are concerned with disclosures to the world at large rather than disclosures to a limited audience.

In an FOI context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered confidential.

We recommend that you avoid referring to or thinking about whether privilege has previously been waived, and instead focus on the key question of whether privilege has been lost because previous disclosures to the world at large mean the information can no longer be considered confidential.

To assess this question, you must investigate whether or not the disclosure has been made in a restricted or an unrestricted way. This guidance considers these concepts, both within and outside the context of litigation.

Unrestricted disclosure

Unrestricted disclosure refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean it could enter the public domain. As a result, the original holder or owner of the legal advice can no longer expect it to remain confidential. An unrestricted disclosure can be made within or outside the context of litigation. Where confidentiality is lost, you cannot claim that section 42 applies.”[3]

The complainant’s position

20. The complainant provided the Commissioner with extensive references to case law which considered the concept of waiver. The Commissioner

[3] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/#lost

has not listed all of the cases cited in this notice, but has considered them as part of his consideration of this complaint.

21. However of particular note is the case law identified by the complainant which he argued established that privilege is waived if legal advice is deployed to justify or advance an argument or position relied on in public proceedings, or if other public reference is made specifically in such a context to the content or conclusion of the advice (as opposed to a mere reference to the existence of that advice).[4]

22. Furthermore, in the complainant's view of particular note was an Australian case of Bennett v Chief Executive Officer of the Australian Customs Service [2004] FCAFC 237 at [13] Tamberlin J said:

> "Various expressions are used in the formulation of principles relating to wavier of legal professional privilege, such as references 'the substance', 'effect' or 'content' of the advice. The weight of the authorities, in my view, supports the conclusion that the disclosure of the conclusion reached in or course of action recommended by, an advice can amount to waiver of privilege in respect of the premises relating to the opinion which has been disclosed, notwithstanding that this reasoning is not disclosed. <u>By way of illustration, if there is a disclosure that a client has been advised that interpretation 'A' is preferable to interpretation 'B' of a legislative provision, then even if there is no disclosure of the reasoning leading to that conclusion, the reasoning and content of the advice may be waived, including the factual premises and circumstances leading to that conclusion.</u>" (Complainant's emphasis)

23. The complainant argued that in his view it was clear that Mr Gove referred specifically to the main substance of the advice and its conclusion, and did so in an official public proceeding in order to explain or advance an argument as to the necessity of the Government's legislative action. More specifically, Mr Gove disclosed to the Inquiry that the Government had been given advice on the interpretation of a legislative process, namely the Civil Contingencies Act 2004 (CC Act). So when asked why the CC Act was not used in response to the pandemic the reply was that the Government's lawyers had advised that for that legislation to apply that the pandemic had to be "unforeseen" and "the general view was that, as I say, a terrorist attack, by definition, would

[4] The complainant submitted the following cases in support of this position: PCP Capital Partners LLP v Barclays Bank Plc [2020] EWHC 1393 (Comm), Mid-East Sales Limited v United Engineering & Trading Company Limited [2014] EWHC 892 (Comm), and ACD (Landscape Architects) Limited v Overall [2011] EWHC 3362 (TCC).

be unforeseen but the gathering storm of a pandemic might not meet that threshold."[5]

24. In view of the above case law, in particular, *Bennett*, the complainant argued that privilege had been waived in this case even if there was no disclosure of the reasoning and the content of the advice, including the factual premises and circumstances leading to that conclusion.

The Cabinet Office's position

25. With regard to the caselaw cited by the complainant in his internal review request, ie the details at footnote 4, the Cabinet Office noted that these are unconnected to the use of section 42(1) of FOIA to withhold advice from lawyers and whether there was a waiver of LPP in such a context. In its view the cases referred to did not advance his case.

26. Furthermore, the Cabinet Office noted that the complainant had argued that by revealing the main substance or gist of the legal advice that privilege has been waived. However, the Cabinet Office explained that it was very clear that from the reading of the content of the legal advice that this is a fallacious assumption from the complainant that only reinforces the point that LPP has not been waived. That is to say, in the Cabinet Office's view the statement from Mr Gove does not reveal the substance or gist of the legal advice. In order to support this position the Cabinet Office's submission to the Commissioner referred directly to the content of the advice. For obvious reasons, the Commissioner has not included these parts of the submission in this notice.

The Commissioner's position

27. In line with the approach set out in his guidance, the Commissioner's has considered whether there has been a disclosure to the world at large of the legal advice which means the information can no longer be considered confidential.

28. Having carefully considered Mr Gove's evidence to the Inquiry as highlighted by the complainant, and the content of the two pieces of legal advice which fall within the scope of this case, the Commissioner favours the Cabinet Office's position that Mr Gove's evidence does not reveal the substance or gist of the legal advice. The Commissioner is therefore of the view that the advice can still be considered confidential. Consequently, despite the case law cited by the complainant, the

[5] https://covid19.public-inquiry.uk/wp-content/uploads/2023/11/28214340/C-19-Inquiry-28-November-23-Module-2-Day-27.pdf (112/8)

Commissioner is satisfied that privilege of the advice has not been waived.

Public interest test

29. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in maintaining the exemption

30. In its initial response to the request the Cabinet Office argued that there was an inherent public interest in protecting the confidentiality of communications between lawyers and their clients. It argued that this confidentiality encourages clients to seek legal advice and allows for full and frank exchanges between clients and their lawyers. The Cabinet Office argued that it was also particularly important for the government to seek legal advice in relation to sensitive and difficult decisions, and for any advice to be fully informed and reasoned. The Cabinet Office argued that without confidentiality, clients might fear that anything they say to their lawyers, however sensitive or potentially damaging, could be revealed later. Clients may be deterred from seeking legal advice at all, or from disclosing all relevant material to their lawyers, or the advice given may not be as full or frank as it ought to be.

31. The Cabinet Office expanded on this position in its response to the Commissioner. It emphasised that there is a strong public interest in maintaining the importance of the principle behind LPP: safeguarding candidness in all communications between client and lawyer to ensure full and frank legal advice which in turn is fundamental to the administration of justice. It argued that there is particular importance in the Government being able to seek legal advice in relation to matters which can be considered sensitive and for any advice provided to be both fully informed and reasoned. The Cabinet Office argued that the Government must have assurances that it is acting lawfully and if it cannot rely upon LPP to maintain the confidentiality of communications with its legal advisers, the Government would be more reticent about seeking legal advice. Such an outcome is very clearly not in the public interest.

32. In support of this position the Cabinet Office cited the Tribunal view in Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023), in which it considered that:

> "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

33. The Cabinet Office noted that this point was underlined by the High Court in DBERR v O'Brien & Information Commissioner [2009] EWHC 164 QB in which Wyn Williams J stated that:

> "...it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under the Act. Section 42 cases are different simply because the in-built public interest test in nondisclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that the legal professional privilege attaches to the document in question."

34. The Cabinet Office argued that the complainant had not offered any specific contentions on the matter of the public interest which weigh in favour of disclosure beyond a general assertion in the request that:

> "...by discussing the substance and context of the advice at a public inquiry, on a topic of manifest material public interest (a legally significant aspect of a pivotal moment in recent national history, specifically raised by the lead counsel in a public inquiry into that period of history), Mr Gove would have put beyond doubt that the public interest in disclosing that advice outweighs any public interest in maintaining it as exempt information".

35. The Cabinet Office noted the view of the Tribunal in Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/0145) that a person wishing to overcome LPP:

> "…must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute".

36. The Cabinet Office argued that the above assertions from the complainant do not demonstrate any factors which equal or outweigh the public interest in maintaining the exemption. As a result the Cabinet Office argued that the factors in favour of disclosure are not strong enough to overcome the inherent public interest against disclosure.

37. Furthermore, the Cabinet Office explained that it had also considered the other factors referred to by the Commissioner in his guidance on section 42 in assessing the public interest balance: "[a]dditional weight may be added… if the advice is… recent [and] live".

38. The Cabinet Office argued that both pieces of legal advice could be considered to be 'live' and referred to the content of both pieces of advice in his submissions to support this argument. (Again, for obvious reasons, the Commissioner has not included these particular submissions here.)

39. In any event, the Cabinet Office argued the public interest in favour of upholding the principle of LPP is an inherently strong one. In this case it did not consider that strong public interest factors in favour of disclosure have been adduced that would overwhelm the inherently strong interest against disclosure, notwithstanding the fact that the legal advice can also be considered to remain 'live'.

Public interest in disclosing the information

40. The Cabinet Office acknowledged that there is a general public interest in the disclosure of information and that openness in government may increase trust in and engagement with government. It also accepted that there is definite public interest in understanding the legal justifications for decisions taken by the Government, particularly in this instance given the information's relevance to the ongoing Inquiry.

41. In his grounds for an internal review, the complainant noted that the Cabinet Office had essentially advanced two justifications for concluding that the public interest favoured maintaining the exemption: a) disclosure would discourage Ministers from seeking legal advice, and b) disclosure would compromise the quality of legal advice provided.

42. The complainant argued both positions were without foundation and failed to take into account the circumstances of this request. He argued that given the extraordinary and probably unique circumstances, disclosure of the advice would not set any legal precedent nor would it give raise to any implication of the routine disclosure of legal advice sought by the government.

43. More specifically, in respect of a), the complainant argued that if Ministers need legal advice they will seek it, and indeed are probably obliged to seek. In respect of b), the complainant argued that in line with their professional duties lawyers would also provide advice that is both accurate and complete.

44. The complainant expanded on his position in his submissions to the Commissioner. He argued that the significance of the requested advice was that if the nature of the emergency had been 'unforeseen' the Government could, in principle, have relied upon the emergency powers established by the CC Act. The complainant noted that based on Mr Gove's evidence, it now appears that the Government concluded that,

on the basis of the advice, these powers were not available and instead its pandemic response was based on the provisions in the Public Health Act 1984 and the subsequently introduced Coronavirus Act 2020.

45. The complainant argued that the powers used by the Government were a matter of public debate at the time they were used and continue to be debated in the Inquiry. The complainant also argued that there has been wider discussion in the media of this issue, in particular concern that the decision not to use emergency powers under the CC Act means that important safeguards and constitutional protections which had been carefully incorporated into that legislation were avoided.[6]

46. In support of this position the complainant also cited the following findings of the Public Administration and Constitutional Affairs Committee's report "Parliamentary Scrutiny of the Government's handling of Covid-19"

> "It is troubling the Paymaster General referred to these safeguards as a reason not to use that Act. Any separate legislation to deal with civil contingencies—and particularly legislation that needs to be passed very quickly—should include safeguards and scrutiny provisions that are equivalent to those in the CCA, with regular renewal of powers allowing for more detailed Parliamentary scrutiny that, due to expediency, cannot be given during the passing of emergency legislation.
>
> The Government's reticence to use the Civil Contingencies Act in response to a genuine national emergency calls into question how fit for purpose that legislation is."[7]

47. Furthermore, the complainant highlighted the comments of the Court of Appeal in R (Dolan) v Secretary of State for Health and Social Care [2021] 1 WLR 2326 which challenged the Government's response to the pandemic:

> "72. Finally, we should refer to Mr Havers' submission in reliance on the Civil Contingencies Act 2004 ("the 2004 Act"). Mr Havers submitted

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[6] https://www.spectator.co.uk/article/this-is-how-freedom-dies-the-folly-of-britain-s-coercive-covid-strategy/
https://www.bennettinstitute.cam.ac.uk/blog/history-emergency-legislation-and-covid-19-crisis/
https://www.lawgazette.co.uk/legal-updates/why-did-government-not-use-the-civil-contingencies-act/5103742.article

[7] https://committees.parliament.uk/publications/2459/documents/24384/default/ paragraphs 34 and 35

that regulations of the kind that were made in this case could have been made under the 2004 Act. Although we did not hear detailed submissions about this, that would appear to be correct. The meaning of an "emergency" in section 19(1)(a) would apply to the present circumstances: "An event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region …"

73. Under section 20(1) of the 2004 Act, Her Majesty may by Order in Council make emergency regulations if satisfied that the conditions in section 21 are satisfied. Under subsection (2) a senior Minister of the Crown may make emergency regulations if satisfied (a) that the conditions in section 21 are satisfied, and (b) that it would not be possible, without serious delay, to arrange for an Order in Council under subsection (1).

74. One of the conditions in section 21 is that (a) existing legislation cannot be relied upon without the risk of serious delay, (b) it is not possible without the risk of serious delay to ascertain whether the existing legislation can be relied upon, or (c) the existing legislation might be insufficiently effective: see section 21(5) of the 2004 Act.

75. As Sir James submits the 2004 Act is an Act of last resort. The existence of those emergency powers does not detract from the fact that the vires to make the regulations under challenge in this case exists under the 1984 Act, as amended in 2008."[8]

48. The complainant highlighted that both the Court and the submissions made by Sir James Eadie KC, on behalf of the Government, appear to accept that the CC Act could have been used which is not consistent with what Mr Gove said the content of the advice was.

49. As a result the complainant argued that the requested advice concerns matters of the highest constitutional importance and which have been, and continue to be, debated in a number of national fora.

50. The complainant argued that there were a number of factors in this case which lessened the weight that should be attached to the public interest in maintaining the exemption:

- He argued that there was no live policy making which could be impacted by disclosure of the advice. He noted that few provisions of the Coronavirus Act 2020 remain in force and no protection health

[8] https://www.judiciary.uk/wp-content/uploads/2020/12/Dolan-v-SSHSC-judgment-011220-.pdf

measures under the Public Health Act 1984 remain in place. The issues to which the advice relates to are therefore historical save for their relevance to the Inquiry which seeks to learn lessons from the pandemic.

- He argued that the fact that part of the advice had been disclosed, even if this did not amount to waiver, strengthened the public interest in full disclosure.

- The nature of the advice is relevant to the application of the public interest test. The advice goes beyond a question of pure public administration; the Government's response to the pandemic affected everyone.

- There is no possibility of litigation on these decisions now as the time for any judicial review proceedings in relation to the decisions in March 2020 has long since passed.

51. Furthermore the complainant argued that there were a number of factors that pointed to the particularly strong public interest in the disclosure of the information:

- The advice relates to a series of decisions which impacted on every person in the country and had immense, and enduring, consequences for the economy and health and well being of millions of people.

- The fact the purpose of the Inquiry is to examine the lessons learned and that both in that forum and in Parliament there is an ongoing debate about the Government's response to the pandemic supports the case for disclosure.

- The advice goes directly to the question of pandemic preparedness as it concerns the state of public health legislation to facilitate a proportionate and effective response and is a critical feature of preparedness. The complainant argued that if the Government received advice that the powers established by the CC Act were an unsuitable basis on which to respond to the pandemic, this could indicate:

    - That there is a need for legislation making provision for emergency powers to be available to the Government to respond to circumstances such as the pandemic. And/or:

    - That the Government used the wrong powers to deal with the situation. And/or:

    - That the Government received, or relied on, advice which might now be judged to have been inaccurate or incomplete advice, which could now be clarified for the benefit of future governments.

52. The complainant argued that disclosure of the advice is now important context and essential background to understanding and scrutinising the evidence given to the Inquiry. The complainant emphasised that the very fact that the advice was disclosed (in his view) by a senior minister in response to questioning by the Inquiry confirms that its contents are directly relevant to its objectives.

53. In view of the above, the complainant argued that even if privilege had not been waived, there is a particularly strong public interest in disclosure such as to outweigh the public interest in maintaining LPP.

<u>Balance of the public interest</u>

54. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in Pugh v Information Commissioner (EA/2007/0055) were clear:

> "The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption". (Para 41).

55. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

    - how recent the advice is; and
    - whether it is still live.

56. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of LPP diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

57. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented

or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

58. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

59. With regard to whether the advice is still live, as evidenced by both parties' submissions on this point, there is a clear disparity of views. However, for the purposes of this decision notice, as the Cabinet Office's submission on this issue made direct reference to the content of the withheld information itself the Commissioner is limited to the extent that he can comment on this issue.

60. The Commissioner acknowledges the complainant's point that few provisions of the Coronavirus Act 2020 remain in force and that no protective health measures under the Public Health Act 1984 remain in place. However, the advice in question considers issues beyond simply these particular and specific legislative measures. He therefore accepts that, for the reasons provided to him by the Cabinet Office, there is a case to be made for the advice still being considered to be 'live'. However, in the Commissioner's view there are some significant caveats to this conclusion which in his view mean that in contrast to other cases where advice is considered to be 'live', less additional weight should be afforded to the public interest in maintaining the exemption in the particular circumstances of this case. The Commissioner has elaborated on his reasoning behind this position in a confidential annex which makes direct reference to the content of the withheld information. As a result a copy of this annex will be provided to the Cabinet Office only.

61. In terms of whether the advice could be considered to be recent; as indicated above, this dates from March 2020, and therefore the Commissioner would accept that it could be considered to be recent, and this adds weight to the public interest in maintaining the exemption.

62. With regard to attributing weight to the public interest in disclosing the information, the Commissioner is somewhat surprised at the rather generic and limited arguments for disclosure considered by the Cabinet Office as set out at paragraph 40 above. In the Commissioner's view this suggests that the Cabinet Office did not seriously consider the public interest in the disclosure of this information.

63. In the Commissioner's view it is clearly a matter of notable media interest as to which legislative provisions could, or should, have been used to introduce restrictions during the Covid pandemic. This is evidenced by the sources cited by the complainant, which the Commissioner notes includes journalist commentary pieces, but also analysis by academics and lawyers. Furthermore, the Commissioner notes that this issue as well as being considered in court cases such as that cited by the complainant at paragraph 47, has also been the subject of Parliamentary scrutiny. In the Commissioner's view this range of fora in which this matter has been discussed, commented on and considered, points to the significance and importance of the issue, ie the legislative basis upon which restrictions were imposed during the pandemic. The Commissioner considers this point to be supported by the fact that this is one of the issues that the Inquiry is considering as part of Module 2 of its work.[9]

64. Furthermore, what is also evident from these various sources is that there is clear division in views as to which legislative route was appropriate for such restrictions. Consequently, in view of this the Commissioner accepts that there is a legitimate public interest in allowing the public to understand the nature of the legal advice the Government took into account when determining the legislative route to be used. Moreover, the Commissioner agrees with the complainant that this argument attracts very significant weight given the impact of such legislative measures; ie they affected everybody in the UK and virtually every part of society.

65. In reaching this finding the Commissioner recognises that this is a matter which is being considered by the Inquiry. However, in his view this does not negate or undermine the public interest in disclosure of the advice under FOIA. Conversely, in the Commissioner's view access for the public to such advice could in fact allow it to better understand the Inquiry's considerations on this point.

66. Furthermore, the Commissioner is also persuaded that there is value to the argument that disclosure of the information could not only provide an insight into the decision making in respect of the pandemic, but could also provide an insight into any debate on the effectiveness of existing public health provisions, particularly the CC Act.

67. Having reviewed the content of the withheld information the Commissioner considers that it would directly serve the above legitimate

[9] https://covid19.public-inquiry.uk/wp-content/uploads/2023/05/Module-2-Outline-of-Scope.pdf

interests. The Commissioner has elaborated on why he considers this to be the case in the confidential annex.

68. Taking the above into account, the Commissioner is persuaded that there are sufficiently strong public interest factors in favour of disclosure which outweigh the public interest in maintaining the exemption. In reaching this conclusion the Commissioner wishes to emphasise that it should not be taken from this finding that in his view there would be a compelling public interest in any/all legal advice about key decisions taken by the Government during the pandemic being disclosed under FOIA. Rather, in his view there a number of key features in this case, the cumulative weight of which mean that the public interest favours disclosure of the specific advice in scope. Namely the constitutionally fundamental nature of the advice – ie it concerns the legal basis for restrictions of movement; the fact there are genuine questions about the nature of the legislation used to introduce such measures; and because disclosure of the advice could provide an insight into the effectiveness of existing legal provisions, ie the CC Act.

Closely-related ancillary communications

69. As noted above, the complainant's request in addition to seeking access to the legal advice also sought copies of closely-related ancillary communications to this advice.

70. The Cabinet Office confirmed that it held such information but sought to withhold this on the basis of section 35(1)(b) (Ministerial communications). The complainant did not dispute the application of this exemption, but explained that he considered it likely that the Cabinet Office would hold information falling within the scope of this part of the request which would not constitute Ministerial communications.

71. In order to investigate this aspect of the complaint the Commissioner asked the Cabinet Office to clarify the nature of the searches undertaken to locate information which would fall within the part of the request seeking closely related ancillary communications, but which did not fall within the scope of section 35(1)(b) of FOIA.

72. In response, the Cabinet Office explained that searches were carried out by the Digital Knowledge & Information Management team, which has access to relevant inboxes and drives dating from the time in question. The Cabinet Office provided the Commissioner with an account of these searches. The Commissioner has reviewed these searches and is satisfied that they were sufficiently thorough to locate all information falling within the scope of the request, including any communications that would not be caught by the exemption contained at section 35(1)(b). He is therefore satisfied that the only information which the

Cabinet Office does hold falling within the scope of this request consists of information falling within the scope of that exemption, and of course, the exemption contained at section 42(1) of FOIA.

Procedural matters

73. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions: '(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.'

74. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.

75. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

76. Although the Cabinet Office extended the time it needed to consider the balance of the public interest test, it was allowed to under section 17(3) of FOIA, and completed these considerations within 40 working days.

Other matters

77. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.[10] The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working

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[10] https://www.gov.uk/government/publications/freedom-of-information-code-of-practice

days.[11] In this case the Cabinet Office failed to complete the internal review within this timeframe as it took 54 working days to complete the review.

[11] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal

Right of appeal

78. 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: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. 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.

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

Jonathan Slee
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