

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 May 2007

Public Authority: Her Majesty's Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Summary

The complainant requested copies of any legal opinions and other communications held by Her Majesty's Treasury regarding the compatibility of the Financial Services and Markets Bill with the Human Rights Act. The request was initially refused under sections 35(1)(b) (ministerial communications), 35(3) (refusal to confirm or deny the holding of Law Officers' advice) and 42(1) (legal professional privilege). The public authority subsequently sought to rely, in addition, on sections 35(1)(a) (formulation of government policy) and 41 (information provided in confidence). Following discussions with the complainant, the Commissioner was able to narrow the scope of his investigation to a consideration of the application of sections 35(3) and 42(1). The Commissioner has concluded that section 35(3) was not applicable and that the public authority should disclose to the complainant whether it holds Law Officers' advice in relation to the subject matter of the complainant's request. In relation to section 42(1), the Commissioner has decided that this exemption was correctly applied. In addition, he has determined that the public authority breached section 17(1), as it failed to state in its refusal notice that sections 35(1)(a) and 41 were applicable to some of the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. **On 6 April 2005.** The complainant requested the following information from HM Treasury ("HMT"):

“I would like to see Counsel’s Opinion supporting Mr Gordon Brown’s declaration of the Financial Services and Markets Bill’s 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.”

3. **On 5 May 2005.** HMT refused the request on the basis that the information was exempt from disclosure under the following provisions of the Act:

Section 35(1)(b) – ministerial communications

4. HMT argued that some of the information was exempt under section 35(1)(b) as it constituted Ministerial correspondence. The public interest in the ability of the Government to engage in full and frank discussion of policy, which led to better quality decisions, meant that the public interest in withholding the information outweighed the public interest in disclosure.

Section 35(3) – advice from the Law Officers

5. Under section 35(3), HMT refused to confirm or deny whether it held information relating to the provision of advice by the Law Officers or any request for the provision of such advice. It recognised that there was a public interest in any legislation being compatible with the European Convention on Human Rights (“the ECHR”) but pointed to a statement made to the House of Commons on 28 June 1999 regarding the compatibility of the Financial Services and Markets Bill (“the Bill”) with the ECHR. The public interest arguments advanced by HMT in relation to the exemption are considered in detail at paragraphs 34-42.

Section 42(1) – legal professional privilege

6. HMT stated that some of the information requested was legal advice in respect of which a claim for legal professional privilege could be maintained in legal proceedings. It considered that there was a strong public interest in withholding the information in order to protect the confidentiality of communications between lawyers and their clients, in this case the Government. This advice was necessary for government to be able to take decisions in a fully informed legal context, without which the quality of its decision-making would be reduced. In order that the freedom to seek confidential legal advice was not compromised, the public interest in withholding the information outweighed the public interest in disclosure.
7. **On 5 May 2005.** The complainant requested an internal review of the decision to withhold the information, pointing out that advice as to whether the ECHR is infringed is in a different category from normal advice.
8. **On 19 October 2005.** The complainant was informed that the internal review had concluded that all the information, with the exception of two documents, was exempt from disclosure under sections 42(1) and 35(1)(b). The remaining two documents covered by his request were exempt under sections 35(1)(a)

(formulation of government policy) and section 41 (information provided in confidence).

The Investigation

Scope of the case

9. **On 3 November 2005.** The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - (i) HMT's refusal to provide the information he had requested;
 - (ii) the length of time taken to respond to the initial request and to carry out the internal review.

Chronology

10. **On 24 June 2005.** The complainant forwarded a copy of the refusal notice to the Commissioner and complained that he found the response unsatisfactory. He was advised by the Commissioner to ask HMT to carry out an internal review of its decision.
11. **On 3 November 2005.** Following the completion of the internal review by HMT, the complainant informed the Commissioner that he still wished to pursue his complaint in relation to the refusal of his request.
12. **On 12 January 2006.** The Commissioner wrote to HMT concerning the complaint and sought further information regarding the application of the exemptions to the requested information.
13. **Between January 2006 and February 2007.** There were detailed discussions between the Commissioner and HMT concerning the application of the exemptions to the requested information. The main aspects of the discussions which took place are summarised below.
14. **On 7 March 2006.** HMT provided the Commissioner with copies of the documents which it had confirmed that it held, together with a schedule identifying which exemptions applied to each document. It indicated that it had identified some documents which, having reviewed the information requested, were to be released to the complainant as it believed these were now in the public domain. In addition to the exemptions claimed at the refusal notice and internal review stage, it also claimed that section 35(1)(a) (formulation or development of government policy) was applicable to all the documents which had been withheld.
15. HMT confirmed that it was maintaining its position that it was correct to neither confirm nor deny that it held information relating to the provision of advice by the Law Officers under section 35(1)(c) and 35(3). The public interest arguments it

raised are discussed at paragraphs 35-43. In addition, it claimed that this information was also exempt from the duty to confirm or deny under section 42(2).

16. In relation to the provision of a refusal notice to the complainant, HMT contended that this had been sent within the time period required under the Act.
17. **On 22 June 2006.** HMT wrote to the Commissioner expanding further on the public interest arguments regarding its refusal to neither confirm nor deny whether advice had been sought from or provided by the Law Officers.
18. With regard to the issue of the length of time taken for the internal review, HMT explained that the review was allocated to a person in a different directorate to improve the independence of the process. However as the subject area may have been new to the reviewer this delayed the completion of the review.
19. **On 12 October 2006.** HMT wrote to the Commissioner commenting further on the issue of its refusal to confirm or deny whether it held information on advice from the Law Officers.
20. **On 5 December 2006.** The Commissioner wrote to HMT seeking further clarification as to why it believed exemptions applied to particular documents. With regard to HMT's contention that the refusal to confirm or deny whether Law Officers' advice was held was a long standing convention within government, the Commissioner indicated that in his experience that this was not a convention which was always followed.
21. **On 18 January 2007.** HMT wrote to the Commissioner providing more information in relation to the application of exemptions to specific documents. It also indicated that, following a review of the application of section 41 to the withheld information, it now proposed to release a further two documents to the complainant.
22. With regard to the refusal to confirm or deny whether it held Law Officers' advice, it noted the Commissioner's comments but felt unable to comment on specific cases. It reiterated its arguments for neither confirming nor denying whether information was held in this case.
23. **On 29 January 2007.** The Commissioner wrote to HMT with further queries with regard to the application of the exemptions to certain documents.
24. **On 12 February 2007.** HMT provided further clarification of its views with regard to why it believed information was exempt. It also confirmed that after further review it proposed to release another two documents to the complainant.
25. **On 26 March 2007.** The complainant informed the Commissioner that he had received some documents from HMT. He indicated that these documents did not contain the sort of information which was of interest to him. There then followed some discussions between the complainant and the Commissioner to clarify the nature of the information the complainant was seeking.

26. **On 27 March 2007.** Following discussions with the Commissioner, the complainant confirmed that he wished to obtain copies of any legal opinions that HMT may have obtained from barristers or solicitors, who worked within central government or outside it, on the compatibility or incompatibility of the Bill with the ECHR and that he was not interested in other documents which might make reference to the issue of compatibility but were not legal opinions in themselves.
27. As a consequence of this the Commissioner narrowed the scope of his investigation to the application of section 42 to four documents which HMT had confirmed that it held which provided legal advice related to the compatibility of the Bill with the ECHR. He also considered HMT's decision under section 35(3) of the Act to refuse to confirm or deny whether it held Law Officers' advice on the issue.

Analysis

Procedural matters

Section 10

28. HMT responded to the complainant's request, which was made on 6 April 2005, on 5 May 2005. It therefore responded within twenty working days of the request as required by section 10 of the Act.

Section 17

29. In its refusal notice, HMT sought to rely on the exemptions contained in sections 42(1) (legal professional privilege), 35(1)(b) (ministerial communications) and 35(1)(c) and 35(3) (Law Officers' advice) of the Act. At the internal review stage it argued that, in addition to the previously quoted exemptions, sections 35(1)(a) (formulation or development of government policy) and 41 (information provided in confidence) were applicable to two documents. It subsequently argued that section 35(1)(a) was in fact applicable to all the information held. Section 17(1) requires a public authority to send, within twenty working days of the receipt of a request, a refusal notice specifying the exemptions it seeks to rely on and to state (if it is not otherwise apparent) why the exemptions apply. By not claiming in the refusal notice exemptions that it later sought to rely on, HMT was in breach of section 17(1).

Exemptions

Section 35(3) – refusal to confirm or deny whether Law Officers' advice is held

30. Where a public authority has relied on an exemption which entails a refusal to confirm or deny whether information is held, the Commissioner needs to ensure that his Decision Notice does not give any indication as to whether or not information is held by the public authority. As a consequence, it is not always

possible for him to comment in great detail on the reliance by a public authority on the exemption concerned, as to do so may provide an indication whether the requested information is held.

31. The Commissioner would also emphasise that his decision relates solely to the issue of whether HMT should have confirmed or denied that it held Law Officers' advice. His decision does not relate to the issue of, whether any such advice - if advice it were held - should have been disclosed to the complainant.
32. In this case, HMT has argued that, as the subject matter of the request relates to proposed legislation, it could encompass information related to advice given by or sought from the Law Officers. It refused to confirm nor deny whether any such advice existed.
33. HMT argued that it was important for it to be able to apply this exemption equally to cases where it held information and to cases where it did not. If it only cited section 35(3) in cases where it held information, it would effectively be confirming that, in those cases, information was held. This would make the use of section 35(3) redundant. For the sake of consistency, it therefore needed to be able to rely on this exemption whether or not it held information, if the public interest favoured that approach.
34. As section 35(3) is a qualified exemption, it is subject to a public interest test to determine whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the information is held.

Public interest test in relation to section 35(3)

Public interest arguments against confirming or denying whether the information is held

35. HMT argued that there was a long-standing convention, followed by successive governments, not to disclose whether Law Officers had been consulted or to disclose any advice received from Law Officers. The convention was expressly recognised in paragraph 6.25 of the Ministerial Code which states that

“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.”

It was also recognised in the wording of section 35(1) (c) of the Act. The rationale for this was that government was entitled to receive frank and confidential advice from its principal legal advisers. This was particularly applicable to legal advice concerning sensitive and difficult government decisions because of the public interest in governmental action complying with the law.

36. It was important that this convention should operate with reasonable certainty as, if its application were too readily displaced, this would undermine the public

interest in encouraging free and frank exchanges between government and its legal advisers which the convention is intended to promote.

37. HMT also believed that if the occasions on which Law Officers' advice had been sought or given was routinely disclosed, then that would give rise to questions about why they had not advised in other cases thus creating political pressure for advice to be sought in cases where it was not justified. This would undermine the constitutional position that the Law Officers only advise on matters that Ministers, Departments and devolved administrators consider to be of particular importance.
38. Disclosure of the fact that Law Officers have not advised on an issue may expose the Government to criticism for not consulting them and thus not giving sufficient weight to a particular issue. This would increase the pressure to consult Law Officers in inappropriate cases, or in an unmanageably large number of cases, and may harm efficient government.
39. It was also argued that confirming or denying that information was held may or may not indicate that the Government was concerned enough to seek Law Officers' advice in this particular case. This might highlight the legal weaknesses in the Government's case and, as a consequence, damage its prospects if any litigation were to ensue. Even if harm did not result from confirming or denying that information was held in this case, the risk of potential harm may deter the Government in the future from consulting the Law Officers in appropriate cases.
40. As this specific case concerned whether sensitive legal advice was given during the progress of the Financial Services and Markets Bill, any disclosure that Law Officers' advice existed, if it did exist, could to an extent disclose the substance of the advice by revealing that the Government considered it necessary to seek such advice. This could serve to undermine the legislation, which may have a detrimental impact on on-going FSA operations in this area.
41. HMT also believed that if the names of the advisers, or the advice itself, were released the pressure of political debate would be likely to give rise to a risk that the advice might not be as full and frank as it should be or that it might not be given at all.
42. Section 35 is statutory recognition of the public interest in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of public debate.
43. As the Law Officers are the government's most senior legal advisers, their advice has a particularly authoritative status within government. Disclosure of the occasions when legal advice has been sought would have the effect of disclosing those matters which, in the judgment of the government, have a particular high political priority or are assessed to be of particular legal difficulty. This would be counter to the strong public interest which underlies the whole of section 35.

Public interest in favour of confirming or denying whether the information is held

44. The Commissioner notes that, whilst there may be a long standing convention not to disclose whether Law Officers' advice has been sought, this exemption is subject to a public interest test, rather than being an absolute exemption. Parliament therefore clearly envisaged that it may be appropriate to disclose, in some circumstances, whether Law Officers' advice had been obtained. The Commissioner recognises that conventions develop over time and that the Act is a mechanism through which such conventions may be questioned. If the public interest favours disclosing that advice has been given by the Law Officers then this information should be disclosed.

45. The Commissioner is also aware, from his own experience in investigating complaints under the Act that the convention, regarding not disclosing whether Law Officers' advice has been obtained, is not adhered to by government in every case.

46. If HMT held Law Officers' advice, the disclosure of the fact that such advice is held would arguably not impinge on the ability of government to receive free and frank advice from its senior legal advisors as such a disclosure would not provide details of the substance of any advice that had been obtained.

47. It is apparent from publicly available government advice and guidance that there is an expectation that legal advice might be sought from the Law Officers where difficult legal issues arise. The Ministerial Code states that

“It will normally be appropriate to consult the Law Officers in cases where:

b. a Department Legal Adviser is in doubt concerning:

i. the legality or constitutional propriety of proposed primary or subordinate legislation which Government proposes to introduce;” (para 6.22)

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

49. The Financial Services and Markets Bill was subject to a significant amount of public debate during its passage through Parliament. Serious doubts were expressed as to its compatibility with ECHR by a range of commentators, including senior lawyers with expertise in human rights law, such as Lord Lester and Lord Hobhouse.

50. The issue of the compatibility of the Bill with the ECHR, was examined at length by the Parliamentary Committee on Financial Services and Markets. The Committee itself expressed concerns over the Bill's compliance with the ECHR and, as part of its investigation, questioned in considerable detail the Minister

responsible for the Bill and two senior barristers retained by HMT to advise it on the matter.

51. Given the level of concern expressed about this issue, there was likely to have been a widespread assumption that the Government would have sought the advice of its most senior lawyers, especially given the need for the Minister to sign a statement of compatibility of the Bill with the ECHR.
52. The disclosure that advice from the Law Officers had been sought, if it had been sought, would therefore have provided reassurance to the public that fully informed decisions were made on the basis of the best possible legal advice from the most senior lawyers within government, prior to a statement of compatibility being signed by the Minister concerned. Such a disclosure is unlikely to cause significant harm, given the likely widely held assumption that this is a case in which the Government should, and would, have obtained such advice.
53. On the other hand, if the advice of the Law Officers had not been sought on an issue creating such a significant amount of debate, there would then be a very strong public interest in this being disclosed as it would raise legitimate and important issues about the basis on which the Government was satisfied that the Bill was compatible with the ECHR.
54. The Commissioner believes that, in this particular case, the public interest in maintaining the exclusion of the duty to confirm or deny whether HMT held information related to the provision of Law Officers' advice did not outweigh the public interest in disclosing whether it held such information. He 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.

Section 42 – Legal professional privilege

55. HMT argued that legal professional privilege attached to some of the documents requested by the complainant. The Commissioner has seen the documents which are the subject of the request and is satisfied that they are all subject to legal professional privilege.
56. Section 42 is applicable to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The principle of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client.
57. There are two separate categories within this privilege which are legal advice privilege, which applies where no litigation is contemplated or pending and litigation privilege, which applies where litigation is contemplated or pending. The Commissioner is satisfied that documents in question were communications between professional legal advisers and their client, in this case the Government,

with the dominant purpose of seeking or providing legal advice and that they therefore attracted legal advice privilege.

58. Section 42 is subject to a public interest test. It is therefore necessary to consider 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 test in relation to section 42

Public interest arguments in favour of disclosure of the information

59. There is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of their decision making. Placing an obligation on authorities to provide reasoned explanations for decisions made improves the quality of decisions and administration. Part of that accountability and transparency includes ensuring that, where appropriate, legal advice has been sought and that good quality legal advice has been obtained.
60. The Commissioner recognises that there is a strong public interest in disclosing information which would demonstrate whether public authorities have acted appropriately. This is especially true where there are concerns over whether legislation accords with the principles contained in the ECHR. The Commissioner recognises the issues in this matter have been the subject of considerable public debate and speculation. The disclosure of the advice would have assisted the public to ascertain whether there was any incompatibility between the Bill and the ECHR and, also, whether any advice which had been provided was followed by the Government.
61. There is also a public interest in the public knowing that the legislature's sign off procedure for assessing the human rights compatibility of proposed legislation is genuine, objective and based on sound legal advice. The disclosure of the advice would have been of value in relation to this.
62. The Commissioner recognises that there is an inherent public interest in government being transparent and accountable in relation to the advice it has received. He believes that it is beneficial if views and representations which influence the legislative process are open to public scrutiny. In this case, access to any legal advice which might exist would have provided the public with an opportunity to understand and engage in the debate over the Bill's compliance with the principles contained in the ECHR, which is still a matter of some contention.
63. The Commissioner therefore acknowledges that there is a significant public interest in disclosure of the information requested.

Public interest arguments against disclosure of the information

64. The Commissioner is aware that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and

their clients, a view previously supported by the Information Tribunal. In *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*, the Tribunal stated 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” (para 35).

65. There is a need for reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it ought to be, if there were a risk that it would be disclosed in the future. In *Bellamy* the Tribunal observed

“it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...”(para 35).

66. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice necessarily highlights both the strengths and weaknesses of a particular position and so if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the Act. English law considers “privilege [to be] equated with, if not elevated to, a fundamental right at least in so far as the administration of justice is concerned” (*Bellamy*, para. 8). Therefore, there must be a strong public interest in ensuring that legal professional privilege applies equally to all parties, so that they are on a level footing.

67. The Commissioner is therefore satisfied that there is a strong public interest in maintaining the exemption under section 42 because the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. In this case, the potential harm that disclosure would have on limiting the effectiveness of the current system of legal professional privilege outweighs the factors in favour of disclosure. The Commissioner therefore agrees with the decision of HMT that the legal advice it holds is exempt from disclosure under section 42.

The Decision

68. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- section 10 as it responded to the request within twenty working days of receipt;
- section 42(1) (legal professional privilege) as the exemption was correctly applied.

69. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- section 17(1) as the refusal notice did not specify all the exemptions on which the public authority subsequently sought to rely;
- section 35(3) (refusal to confirm or deny whether Law Officers' advice is held) as the exemption was incorrectly applied.

Steps Required

70. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to confirm or deny whether it holds Law Officers' advice in relation to the subject matter of the request;

71. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

72. The Commissioner requires no steps to be taken in relation to the breach of section 17 as this was resolved when the public authority confirmed all the exemptions it sought to rely on in subsequent correspondence.

Other matters

73. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern.

74. Whilst not constituting a breach of any provision of the Act, the Commissioner is concerned that an internal review was requested by the complainant on 5 May 2005 and this was not completed by HMT until 19 October 2005, over five months later.

75. Whilst not available at the time of this request, the Commissioner has now issued guidance (Good Practice Guidance No. 5) indicating that a reasonable time for concluding an internal review is 20 working days from the date of the request for the review. He notes that there may be a small number of cases, which involve exceptional circumstances, where it may be reasonable to take longer but that no internal review should take longer than 40 working days.

Failure to comply

76. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

77. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 22nd day of May 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Time for Compliance

Section 10(1) provides that –
“Subject to subsections (2) and (3), 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.”

Refusal of Request

Section 17(1) provides that -
“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Formulation of Government Policy

Section 35(1) provides that –
“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(3) provides that –
“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).”

Information provided in confidence.

Section 41(1) provides that –
“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Legal Professional Privilege

Section 42(1) provides that –

“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.”