

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 January 2010

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

Summary

The complainant asked the Attorney General's Office (AGO) to provide a full version or summary of the advice the Attorney General provided on the application of human rights legislation regarding the operation of British armed forces in Iraq. The complainant also requested correspondence about this advice between the AGO and legal advisers at the MOD, FCO and the Armed Forces. The AGO refused to disclose the advice relying on section 35(1)(c) – Law Officer's advice and section 42(1) – legal professional privilege. The AGO also relied on these sections 35(3) and 42(2) to refuse to confirm or deny whether it held correspondence of the nature requested. The Commissioner has decided that the AGO was correct to withhold the advice itself on the basis of section 42(1) however he has also concluded that the public interest under sections 35(3) and 42(2) favours confirming whether the AGO holds correspondence of the nature requested by the complainant.

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. The complainant submitted the following request to the Attorney General's Office (AGO) on 11 June 2007:

‘Please disclose the full or a summary of the advice given by the Attorney General, or his law officers, on the application of the Human Rights Act and or the European Convention on Human Rights before and after the start of the war in Iraq in March 2003.

Please also disclose the correspondence on this subject with legal advisers at the MOD, FCO and the Armed Forces.’

3. In submitting this request the complainant noted that reference had been made to the fact that the Attorney General had given such advice at a Court Martial. The complainant argued that as the Court Martial was a public hearing the existence of the advice was already in the public domain and furthermore by allowing references to the advice in the evidence heard by the Court Martial ‘the state had waived legal privilege’.
4. The AGO provided the complainant with a substantive response to his requests on 3 December 2007. This response confirmed that reference had been made to the existence of the advice in the Court Martial in December 2006 however it did not accept that this constituted a waiver of privilege in relation to the content of the advice.¹ Therefore although the AGO confirmed to the complainant that it held advice falling within the scope of his request it considered it to be exempt from disclosure on the basis of sections 35(1)(c) – Law Officer’s advice and 42(1) – legal professional privilege. The AGO explained why it had concluded that the public interest favoured maintaining both exemptions. However, the AGO refused to confirm or deny whether it held any other information falling within the scope of the complainant’s requests. The AGO explained that it was relying on the interaction of sections 35(1)(c) and 35(3) along with 42(1) and 42(2) to support this position. Again, the AGO set out why it believed that that the public interest favoured neither confirming or denying whether it held any further information.
5. The complainant sought an internal review of this decision on 5 December 2007.
6. The AGO wrote to the complainant on 7 January 2008 and explained that an internal review had been conducted and all the decisions set out in the refusal notice had been upheld.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 7 March 2008 in order to complain about the AGO’s handling of his requests.
8. The Commissioner understood the nature of the complaint to be in two parts: Firstly the AGO’s refusal to disclose the full legal advice or (as an alternative to the full advice) a summary of that advice, and secondly the refusal to confirm or

¹ The Court Martial in question was held at Camp Bulford into the death of an Iraqi civilian, Baha Mousa.

deny whether the AGO held any correspondence with the MOD, FCO or Armed Forces in relation to the advice.

Chronology

9. Due to a backlog of complaints received under the Act, the Commissioner was unable to begin his investigation of this case immediately. Therefore it was not until 16 January 2009 that the Commissioner wrote to the AGO and asked to be provided with the detailed arguments to support the AGO's position as set out in the refusal notice. The Commissioner also asked to be provided with copies of any information held by the AGO which fell within the scope of the complainant's requests.
10. The AGO provided the Commissioner with a substantive response on 10 March 2009 which included detailed arguments to support its handling of these requests. However, the AGO explained that given the security marking of the information which it held which fell within the scope of these requests, it was not possible to provide the Commissioner with a copy of the advice. Instead the AGO invited the Commissioner to visit his office in order to view the advice.
11. The Deputy Commissioner visited the premises of the AGO on 17 April 2009 in order to view the advice which fell within the scope of these requests.²

Analysis

Exemptions

The request for the advice given by the Attorney General

12. The AGO has argued that the legal advice given by the Attorney General is exempt from disclosure on the basis of section 42(1) and 35(1)(a).
13. The Commissioner has considered the applicability of section 42(1) first.

Section 42 – legal professional privilege

14. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
15. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.

² This statement should not be interpreted to mean that the AGO holds correspondence about the advice between the AGO and the parties named in the complainant's request.

16. The Commissioner understands that the category of privilege which the AGO is relying on to withhold some information is advice privilege. This privilege attaches to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice from a lawyer to a colleague on a line management issue will not attract privilege.
17. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which can usually be found by inspecting the documents themselves.
18. Finally, information does not attract legal professional privilege if the contents of the legal advice have been disclosed and thus the privilege can be said to have been waived.
19. In relation to the information that the AGO has confirmed it holds and has withheld on the basis of section 42(1) the Commissioner has established that the dominant purpose of this information is the Government's law officers setting out legal advice in relation to the applicability of Human Rights Act and or the European Convention on Human Rights and/or documents whose dominant purpose is detailing the nature of this advice. Consequently the Commissioner accepts that this information attracts legal professional privilege.
20. Therefore the only question which remains in order to determine whether section 42(1) is engaged is whether privilege has been waived in respect of the advice.
21. The complainant has argued that the state has waived privilege because the Attorney General's advice was referred to in an email adduced to the Court Martial at Camp Bulford. This email was quoted by the complainant in his correspondence with the AGO and the Commissioner and is said to be from a Ms Rachel Quick a senior legal adviser to the Permanent Joint Headquarters at Northwood. The Commissioner has replicated this quote below:

'the Attorney General makes the following points. During Phase 3, *lex specialis* [when two laws contradict each other the more specific law takes precedence over the more general law] operates to oust ECHR (European Convention on Human Rights). At PJ HQ (Permanent Joint Headquarters) we only intend to concentrate on the impact of Geneva Conventions 3 and 4. When providing guidance to TELIC Phase 4 operations I would refer to the AG's advice. This concluded the better view was that the HRA was only intended to protect rights conferred by the convention and the court must look to international law to determine the scope of those rights. "If the internal law applied, the *lex specialis* to the exclusion of the ECHR then those Articles could not confer a right which the HRA would render enforceable. For your purposes, I would suggest this means no

requirement for you to provide guidance on the application of HRA/ECHR. I hope this is clear.'

22. The AGO has argued that as the Attorney General's advice was not lodged or read out in the Court Martial proceedings it had not lost the quality of confidence and thus privilege had not been waived.
23. In assessing whether advice has been waived, the Commissioner has taken into account the comments of the Information Tribunal in a two different cases. In *Kirkaldie v Information Commissioner* (EA/2006/01) the Tribunal stated that:

'waiver is an objective not subjective principle. Whether a party intended to waive privilege in a particular document is not the question. What matters is an objective analysis of what the party has done (Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529)' (para 42) and

'...the test for waiver is whether the contents of the document in question are being relied on. A mere reference to a privileged document is not enough, but if the contents are quoted or summarised, there is waiver (Dunlop Slazenger International v Joe Bloggs Sports Ltd [2003] EWCA Civ 901) (para 26).
24. And in the *Foreign & Commonwealth Office v Information Commissioner* (EA/2007/0092) the Tribunal relied on an analysis of comparisons between the legal advice and the letter purported to constitute a waiver of privilege prepared by the FCO to conclude that '...we are satisfied that the opinion covers points which do not appear in the letter although...we do not believe the applicant has been misled over the substantive legal position as a result of this...' (para 25). This is despite the fact that the letter in question '...referred expressly, indeed, in the second paragraph, verbatim, to advice received from 'our legal advisor' (para 2).
25. The Commissioner's approach to such cases is therefore that a mere reference to, or a brief summary of, legal advice in the public domain will not amount to waiver. Furthermore, if disclosure does not reveal the reasoning behind the conclusion or a considered examination of the relevant case law, precedent and the way they apply to the case, then waiver will not have occurred. However, if a substantial part of the contents of the advice has been disclosed, then there will have been waiver. Ultimately each case needs to be considered on its merits with a careful examination and comparison of both contents of the advice and the evidence of waiver.
26. The Commissioner has carefully considered the facts of this case. In his opinion although reference was clearly made to the Attorney General's advice in the email referenced by the complainant, having had the benefit of viewing the entire advice, he does not believe that the production of the email amounts to a waiver of that advice: the email focuses specifically on the treatment of prisoners whereas the full advice covered broader issues. Furthermore, the email referenced by the complainant is relatively short in nature compared to the totality

of the advice. The Commissioner is therefore satisfied that there has been no waiver of privilege in this case.

27. In reaching this decision the Commissioner notes that the complainant suggested that a similar argument about waiver of advice had been accepted in an earlier case considered by the Commissioner. In that case the requests, which again had been submitted to the AGO, sought the Attorney General's advice about the legality of war in Iraq after the advice was partially leaked to the media. However when considering these requests in an enforcement notice which was issued on 22 May 2006, the Commissioner did not in fact explicitly consider the issue of waiver.
28. For the above reasons the Commissioner is satisfied that section 42(1) is engaged.

Public interest test

29. Section 42 is a qualified exemption and therefore the Commissioner must 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 arguments in favour of disclosing the requested information

30. There is an inherent public interest in disclosure of information to ensure that public authorities are accountable for, and transparent about decisions that they have taken. Disclosure of the legal advice would contribute to informing the public about how the government reached the decisions it did in respect of the application of human rights legislation to UK forces operating in Iraq.
31. Furthermore, this issue is one which attracted particular controversy with allegations by human rights groups and international lawyers that the Attorney General's advice may have helped create a culture of abuse of Iraqis by British soldiers.³ Disclosure of the advice could inform the public as to whether such allegations had any basis.
32. Although disclosure of the information in the Court Martial referenced above has not resulted in waiver of privilege, it has arguably resulted in confusion in relation to what the Attorney General's advice actually was. The newspaper article referenced in the footnote in the previous paragraph focused on what the content of Ms Quick's email revealed about the Attorney General's advice. The Attorney General himself wrote to the newspaper and explained why a number of assertions in the article about the content of his advice were incorrect.⁴ It may well, therefore, be in the public interest to disclose the advice itself in order to ensure that the publicly available information is not taken out of context or misinterpreted.

³ ['Human Rights in Iraq: a case to answer'](#), The Independent, 29 May 2007

⁴ ['Lord Goldsmith to Editor'](#), The Independent, 30 May 2007

Public interest arguments in favour of maintaining the exemption

33. The AGO provided the Commissioner with detailed submissions to support its position that the public interest favoured maintaining the exemption. These are summarised below:
34. It is strongly in the public interest that a person or organisation is able to communicate freely with their legal advisers and also that that advice is provided in confidence.
35. This principle is underpinned by the following factors (as well as being supported by significant case law):
36. Non-disclosure of information covered by legal privilege encourages clients to seek legal advice in order to properly arrange their affairs and promotes full and frank exchanges between clients and legal advisers.
37. This argument attracts particular force when legal advice concerns difficult and sensitive decisions such as this one. There is a strong public interest that government action should respect the rule of law and thus decisions are taken on the basis of fully informed and balanced legal advice. If government legal advice or instructions were to be put in the public domain the pressures of political debate and criticism could lead such to instructions and advice being less free and frank.
38. Disclosure may lead to a serious risk that disclosure may result in lawyers and clients stopping making permanent records of their discussions which could result in advice not being properly followed (or instructions not understood) and moreover it would hinder those who wish to rely on the advice in the future.
39. The AGO also highlighted the fact that it was accepted that there is inherent and inbuilt public interest in protecting privileged information which must be taken into account when balancing the public interest test under section 42(1).
40. Finally, the AGO argued that the topic of the advice strengthened the public interest in non-disclosure: the application of human rights law in relation to Iraq is an important matter and thus it is clearly in the public interest for government to be able to receive legal advice about such matters in confidence to enable fully informed decisions to be made.

Balance of the public interest arguments

41. In considering the balance of the public interest under section 42, 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 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).

42. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine the particular weight which should be attributed to the inbuilt weight in this particular case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to two criteria: how recent the advice is and whether it is still live.
43. With regard to how recent the advice is, the Commissioner accepts the principle outlined by a number of differently constituted Tribunals that the principle of legal professional privilege diminishes with time. The logic of this argument is that if the advice had been recently obtained it is likely to be used in a variety of decision making processes (e.g. allowing the client to determine a course of action/issue court proceedings) and disclosure would be likely to affect these processes. Conversely 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 a decision making process.
44. In relation to the facts of this case, the advice dates from early 2003 and the complainant submitted his request in June 2007; so at the time of the request the advice was approximately 4 years old. In the Commissioner's opinion it would therefore be accurate to describe the advice as recent and thus still used by the government in inform decision making processes, particularly because at the time of the request British forces were still in Iraq.
45. This leads on to whether the advice in question is 'live'. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to be relevant in the event of any legal challenges, for example by those unhappy with the course of action informed by that advice. At the time of the request the Commissioner is satisfied on this basis that the advice could correctly be described as live.
46. Turning to the weight which should be attributed to factors in favour of disclosure, given the importance of the issue upon which the advice focuses the Commissioner believes that arguments in relation to accountability and transparency should be given significant weight. Furthermore, given the controversy surrounding the allegations as to what the Attorney General's advice may have been, and potential for misinterpretation, the Commissioner believes that this adds further weight to the public interest in disclosing this information.
47. However, despite the controversy surrounding the issues which this advice relates to, given strong inherent public interest in protecting privileged information and the fact that the advice is recent and at the time of the request was still being relied upon, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

48. In light of his findings in relation to section 42(1), the Commissioner has not gone on to consider whether the advice is also exempt from disclosure on the basis of section 35(1)(c).

The request for correspondence with legal advisers at the MOD, FCO and the Armed Forces

49. As noted above the complainant also asked the AGO to:

‘Please also disclose the correspondence on this subject [i.e. the application of human rights legislation in Iraq] with legal advisers at the MOD, FCO and the Armed Forces’.

50. The AGO refused to confirm or deny whether it held such information; the basis of this position was as follows:
51. Section 35(1)(c) provides that information is exempt if it relates to the provision of advice by any of the Law Officers or any request for such advice. Section 35(3) states 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. The exemption to confirm or deny contained at section 35(3) is a qualified one and thus subject to the public interest test, the relevant consideration being whether in all the circumstances of the case the public interest in maintaining the exclusion to confirm or deny outweighs the public interest in confirming whether or not the AGO holds such information.
52. The AGO argued that if it held information of the nature requested it would clearly fall within the scope of the exemption contained at section 35(1)(c) because it would relate to advice provided by the Law Officers. Furthermore the AGO argued that the public interest in fact favoured neither confirming or denying whether it held such information and thus it relied on section 35(3) to refuse to do so.
53. Similarly, section 42 also contains a qualified exemption at 42(2) which allows public authorities to refuse to confirm or deny whether they hold legal advice. The AGO argued that the exemption contained at section 42(2), in addition to that contained at section 35(3), also allowed it to refuse to confirm or deny whether it held information of the description requested.
54. The Commissioner has considered the applicability of section 35(1)(c) first:

Section 35(1)(c) – Law Officer’s advice

55. The Commissioner accepts that correspondence with the AGO and the legal advisers at the MOD, FCO and the Armed Forces would fall within the scope of the exemption contained at section 35(1)(c) because such correspondence, if held, would clearly relate to the provision of advice by Law Officers. The exemption contained at section 35(3) is therefore engaged.

56. However, as noted, this exemption is qualified and therefore must consider the public interest set out at section 2(1)(b) of the Act.

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

57. As discussed above, the issue of the application of human rights legislation to British forces operating in Iraq is a significant issue of particular public interest. There is a clear public interest in knowing whether the advice which the Attorney General was acknowledged to have given was in fact disseminated to the bodies which would clearly have had the greatest need for such advice, i.e. MOD, FCO and Armed Forces. Equally, it could be argued that any failure to communicate such advice should be revealed to the public in order to ensure transparency of what could be seen as flaws in the government's decision making processes.

Public interest arguments in favour of maintaining the exemption

58. The Commissioner has summarised below the public interest arguments advanced by the AGO to support its refusal to refuse to confirm or deny whether it holds any correspondence of the description requested:
59. Section 35 reflects a statutory recognition of the public interest in government having a clear space, immune from exposure to public view in order to debate matters internally with candour and free from the pressures of public political debate.
60. As part of that principle, there is a strong public interest in a government department being able to act freely and from external pressure in deciding what sort of legal advice it obtains, at what stage, and from whom, in particular whether it should consult the Law Officers.
61. This strong public interest is also reflected in the long-standing convention observed by successive governments, that neither the advice of Law Officers, nor the fact their advice has been sought is disclosed outside government. This convention is recognised in paragraph 24 of the Ministerial Code.⁵
62. Since Law Officers are the government's most senior lawyers, their advice has a particularly authoritative status within government. However, the need for a government to obtain advice on a very wide range of matters means that it would be impossible for the Law Officers to provide advice in every case. Consequently disclosure of the occasions on which legal advice had been sought from Law Officers would have the effect of disclosing those matters which, in the judgement of government, have a particularly high political priority or are assessed to be of particular legal difficulty. Such a consequence would directly undermine the inherent principles of section 35 referenced above.

⁵ [Ministerial Code published in 1997](#)

63. To routinely disclose whether Law Officers had advised on particular issues would create a two-fold detriment:
64. To confirm that they had advised on an issue could be taken to indicate that particular importance was attached to it or even that the government doubted the legality of its position. Even if the impression was unfounded, the risk of creating it might deter the Government from consulting the Law Officers in appropriate cases. Alternatively, to confirm that Law Officers had not been advised on an issue might expose government to criticism for not consulting them and hence having failed to give sufficient weight to the issue or to obtain the 'best' advice. Again, even if this impression was unfounded this could lead to pressure to consult the Law Officers in inappropriate case or in an unmanageably large number of cases.

Balance of the public interest arguments

65. In balancing these arguments the Commissioner has to remember it is not a question of whether the public interest favours confirming or denying whether advice was sought in respect of this particular issue; the AGO has already confirmed that advice was provided by the Attorney General. Rather, the focus of the balancing exercise is the public interest in confirming or denying whether that that advice was communicated by the AGO to legal advisers at the MOD, FCO and the Armed Forces.
66. Consequently, although in assessing the public interest the Commissioner has taken into account the recent High Court case involving the application of section 35(3) of the Act, he is conscious of differences between it and this present case. In the High Court case the public authority in question, HM Treasury, was relying on section 35(3) to refuse to confirm or deny whether advice of the Law Officers had even been sought on a particular issue, as opposed to this present case where the focus is whether advice was in fact communicated to certain parties.⁶
67. With regard to the arguments advanced by the AGO, the Commissioner does not dispute the strong public interest in protecting the principle of confirm or deny surrounding Law Officer's advice. Moreover, the Commissioner accepts that the weight the exemption attracts is enshrined in the Act with regard to how section 35(1)(c) is drafted – i.e. providing a specific exemption for a particular type of legal advice - and also in the convention adopted by successive governments.
68. However, as with the public interest under section 42(1), although there is a strong in-built weight in maintaining the exemption, this does not elevate the exemption to an absolute one.
69. Furthermore, in the particular circumstances of this case, in the Commissioner's opinion the weight that should be applied to maintaining the exemption is lessened by three factors:

⁶ [HM Treasury v Information Commissioner and Evan Owen \[2009\] EWHC 1811 \(Admin\) \(21 July 2009\)](#)

70. Firstly, confirmation or denial whether the advice was communicated to the MOD, FCO or the Armed Forces would not necessarily infringe the private space needed by Government departments in terms of whether to seek advice or not on particular issues; it is a matter of public record that such advice was given. In other words confirmation or denial would not necessarily result in the two-fold detriment identified by the AGO.
71. Secondly, confirmation as to whether or not the AGO holds information which falls within the scope of a request which reads 'Please also disclose the correspondence on this subject [i.e. the application of human rights legislation in Iraq] with legal advisers at the MOD, FCO and the Armed Forces' does not equate to confirming whether these three bodies actually sought such advice. It is only an indication as to whether the advice was communicated to these bodies; it is plausible that the Attorney General provided advice in relation to a request from another government body and the resulting advice was subsequently provided to the three bodies named in the complainant's request.
72. Thirdly, at the time of the complainant's request there was a not insignificant amount of information in the public domain about the advice given by the Attorney General in respect of this issue, the most significant fact arguably being the existence of the advice itself. Furthermore, the newspaper article referenced above strongly implied that the AGO and legal advisers in the MOD had exchanged emails in relation to the applicability of human rights legislation in Iraq. Moreover, the Attorney General gave evidence to the Joint Select Committee on Human Rights on 26 June 2007 about the issues surrounding the application of the ECHR as it applied to those held in UK controlled detention facilities in Iraq.⁷
73. Therefore, in the Commissioner's opinion given the amount of information already in the public domain about the Attorney General's advice it is unlikely that confirmation as to whether or not such advice was communicated in the fashion suggested in the complainant's request would be unlikely to create any particular (additional) prejudice or harm.
74. In attributing weight to the public interest arguments in favour of disclosure, the Commissioner is conscious of the scepticism expressed in the High Court case referenced above in relation to how simply confirming or denying whether Law Officer's advice was held would contribute significantly to the public interest. The Commissioner of course accepts that confirmation or denial in this case would not advance the public's understanding of, or debate about, human rights issues regarding detainees in Iraq to the extent that disclosure of the advice itself would. However, in the Commissioner's opinion the arguments summarised at paragraph 57 need to be given particular weight and recognition given the serious and sensitive subject matter of the request and the controversy surrounding how the advice was used.
75. Therefore, in the particular circumstances of this case the Commissioner believes that the arguments in favour of maintaining the exemption contained at section 35(3) do not outweigh the public interest in confirming or denying whether the

⁷ [Joint Committee on Human Rights, Nineteenth Report of Session 2006-07](#)

AGO holds information falling within the scope of the complainant's second request.

Section 42(2)

76. As noted above the AGO also argued that it was exempt from confirming or denying whether it held information falling within the second request on the basis of the exemption contained at section 42(2). The Commissioner accepts that information falling within the scope of the second request would fall within the scope of the exemption because such information, if held, would relate to communications attracting legal professional privilege.
77. In relation to the balance of the public interest test, the Commissioner believes that the arguments set out above in relation to sections 35(1)(c) and 35(3) are equally applicable to sections 42(1) and 42(2). Therefore the Commissioner does not intend to replicate his public interest considerations of whether on the basis of section 42(2) the AGO was entitled to refuse to confirm or deny whether the AGO communicated the advice to legal officers at the FCO, MOD or Armed Forces. For the reasons set out above the Commissioner believes that the public interest under section 42(2) favours confirming or denying whether information is held.

Procedural Requirements

78. The Act includes a number of procedural requirements which are relevant to this case:
79. Section 1(1) of the Act states that:
- ‘Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.’
80. Section 10(1) requires that a public authority must comply with the requirements of section 1(1) within twenty working days.
81. Furthermore, section 17 of the Act requires a public authority to provide an applicant with refusal notice stating the basis upon which it has refused a request for information. Section 17 also requires that this notice be provided within the time for compliance with section 10(1).
82. With regard to the request for the advice, although the AGO confirmed that it held such advice and thus complied with the requirements of section 1(1)(a) it breached section 10(1) by failing to provide this confirmation within 20 working days: the complainant submitted his request on 11 June 2007 and the AGO did not provide its confirmation until 3 December 2007. As the AGO was relying on exemptions contained within Part II of the Act to refuse to provide the advice this

delay also constitutes a breach of section 17(1) because the refusal notice was not issued within 20 working days.

83. Finally, as the Commissioner has concluded that the AGO should have confirmed or denied whether it held correspondence between the AGO and legal advisers at the MOD, FCO and the Armed Forces, the AGO has failed to comply with the requirements of section 1(1)(a). This also represents a further breach of section 10(1).

The Decision

84. 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:

- The AGO was correct to refuse to disclose the advice requested on the basis that it was exempt from disclosure by virtue of section 42(1) and the public interest favoured maintaining the exemption.

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

- The AGO was incorrect to refuse to confirm or deny whether it held correspondence between the AGO and legal advisers at the MOD, FCO and the Armed Forces about the advice. By failing to do this it breached section 1(1)(a) and 10(1) of the Act.
- With regard to the request for the advice the AGO breached section 10(1) and 17(1) by failing to respond and issue a refusal notice within 20 working days of the date of the request.

Steps Required

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

- Confirm to the complainant whether it holds any correspondence with the legal advisers at the MOD, FCO and the Armed Forces in relation to the Attorney General's advice which is the focus of this case.

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

Failure to comply

88. 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

89. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 11th day of January 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

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

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Effect of Exemptions

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information section 1(1)(a) does not apply.”

Section 2(2) provides that –

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

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

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

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, in relation to any request for information, 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 or 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).”

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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded)