

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 01 November 2011

Public Authority: The Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant asked the Ministry of Justice (MoJ) to provide him with the final versions of advice to Ministers and the final papers for Ministerial meetings in relation to amendments to the Freedom of Information Act (FOI Act) for communications with the Royal Family and Royal Household. The MoJ provided the complainant with some information but withheld the remaining information on the basis of 35(1)(a), 35(1)(b), 37(1)(a), 40(2), 41(1) and 42(1). The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 35(1)(a) and 42(1).

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.

Background

2. The Constitutional Reform and Governance Act (CRAG) received Royal Assent on 8 April 2010. In respect of the Freedom of Information Act the CRAG made a number of amendments to section 37(1)(a) including making it an absolute, rather than qualified, exemption for communications with the Sovereign, Heir to the Throne and second in line of succession for twenty years or until five years after their death, whichever ever is later. The changes would take effect when the Secretary

of State for Justice issued the necessary commencement order. Such an order was issued on 16 January 2011.

The Request

3. The complainant submitted the following request to the Ministry of Justice (MoJ) on 4 September 2010:

'Please provide copies of the final versions of advice to Ministers and final papers for ministerial meetings in relation to exemptions from the FOI Act 2000 for communications with the Royal Family and Royal Household.'

4. This was an amended version of an earlier request which had been refused by the MoJ on the basis of section 12 (exceeding the cost limit). In submitting that request the complainant had noted that he was particularly interested in knowing who proposed the change to section 37, the reasons for the change and who recommended it.
5. The MoJ responded on 30 September 2010 and confirmed that it held some information falling within the scope of his request but it was exempt from disclosure on the basis of sections 35(1)(a) and 35(1)(b). However, it needed further to time to consider the balance of the public interest test.
6. The MoJ provided the complainant with a substantive response on 29 October 2010. The response explained that the MoJ had concluded that the requested information was exempt from disclosure on the basis of sections 35(1)(a), 35(1)(b), 37(1)(a), 40(2), 41(1) and 42(1). For the qualified exemptions the MoJ had concluded that the public interest favoured maintaining the exemptions. The MoJ's response noted that the withheld information did contain the answers to the complainant's particular areas of interest, i.e. who proposed the change, the reasons for doing so and who recommended it.
7. The complainant contacted the MoJ on 30 October 2010 and asked for an internal review of this decision.
8. The MoJ informed the complainant of the outcome of the internal review on 3 March 2011. The review concluded that some information could be disclosed, namely relevant sections of briefing notes to Ministers when introducing the changes to section 37 in the Constitutional Reform and Governance Bill, and this information was provided to the complainant. However, the review explained that the remainder of the information was exempt from disclosure on the basis of the various exemptions cited in the refusal notice.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 26 March 2011 in order to complain about the MoJ's handling of his request. The complainant also emphasised that his primary interest was simply in knowing who proposed the changes (not necessarily which individual but which body or organisation), for what reason and who recommended the changes.

Chronology

10. The Commissioner contacted the MoJ on 6 April 2011 in order to inform it that he had received this complaint and asked to be provided with a copy of the withheld information.
11. The MoJ provided the Commissioner with this information on 29 June 2011. In providing this information the MoJ explained that the certain sections had been removed on the basis of section 51(5) of the Act which provides that a public authority does not have to provide the Commissioner with legal advice between it and its legal adviser regarding its duties under the Act. The MoJ confirmed that all of the information that had been withheld from the Commissioner on the basis of section 51(5) had been withheld from the complainant on the basis of section 42(1).
12. The Commissioner contacted the MoJ again on 8 August 2011 in order to seek clarification on a number of issues regarding the MoJ's application of section 35(1)(a) and reliance on section 51(5).
13. The MoJ provided the Commissioner with a response to his enquiries on 22 August 2011.

Analysis

Exemptions

14. The MoJ's position is that all of the information withheld from the complainant is exempt from disclosure by virtue of section 35(1)(a). However, as noted above, parts of the withheld information have not been provided to the Commissioner because of the effect of section 51(5) of the Act. Such information has been withheld from the complainant on the basis of section 42(1) of the Act. The approach the Commissioner has adopted in this case has therefore been to firstly consider whether the information that he has been supplied with is

exempt from disclosure on the basis of section 35(1)(a). The Commissioner has then gone on to consider whether the information that he has not been sent is exempt from disclosure on the basis of section 42(1).

Section 35(1)(a) – formulation and development of government policy

15. Section 35(1)(a) states 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'

16. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

17. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.

18. The MoJ has explained that the withheld information relates to policy discussions which ultimately resulted in the changes to the Act as set out in the CRAG. The Commissioner has reviewed the content of the withheld information and is satisfied that it clearly relates to the formulation and development of government policy on his issue. The exemption contained at section 35(1)(a) is therefore engaged.

Public interest test

19. However section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the Act 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 arguments in favour of disclosing the requested information

20. The MoJ accepted that disclosure would increase government accountability in relation to the development of amendments to section 37 of the Act within the CRAG.
21. It also accepted that there was a public interest in disclosure of information which leads to a better understanding of how government formulates and develops policy relating to the Act and the Royal Family and Household. Such disclosure can help inform public debate and increase public confidence that decisions are made properly.
22. The complainant emphasised that there was a strong public interest in informing the public about how these changes came about given that the extension of the section 37 was detrimental to the public's ability to access information under the Act.
23. The complainant also argued that the information that he was particularly interested – namely who requested the amendments, for what reason and who recommended that the changes be made – could be disclosed without the any particular prejudice to the government's ability to formulate and develop policy.

Public interest arguments in favour of maintaining the exemption

24. The MoJ's arguments for maintaining the exemption were threefold:
25. Firstly, it argued that it was important for Ministers and officials that the space needed to consider all policy options, including those received from outside government, is protected. For the development of effective policy, stakeholders, including Ministers, need to be able to discuss a range of policy options between them and express candid views on these options. They also need a safe space in which to debate the effectiveness of changes to important legislation such as the Act, without concern that their views will be prematurely disclosed, which may deter such discussions.
26. Secondly, although the requested information related to a previous administration, the information is still very recent and disclosure could

affect the candour of future discussions by Ministers and officials in this or other similar policy areas (i.e. a 'chilling effect' on future discussions). In support of this argument the MoJ emphasised the complex and sensitive nature of the discussions relating to this policy which meant, in its opinion, that in the circumstances it was too simplistic to suggest that the sensitivity of the information automatically diminished once the policy was announced or legislation implemented.

27. Thirdly, the MoJ argued that disclosure of this information would make third parties less willing to make candid contributions to government and this would undermine the quality of decision making in the future. In support of this point the MoJ explained that government departments frequently need to engage with the same stakeholders on a range of policy issues and over lengthy timeframes, even following a change of government.

Balance of the public interest arguments

28. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.¹
29. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:
30. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop **live** policy. The MoJ emphasised to the Commissioner that although the CRAG received Royal Assent in April 2010 this did not put an end to the policy discussions on the provisions of the Act. It explained that following the General Election in May 2010 the new government looked afresh at the changes made to section 37 in the CRAG and considered whether they should be pursued and commenced. These policy discussions culminated in the announcement on 7 January 2011 which confirmed that the changes to section 37 would be commenced along with a number of other changes

¹ *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

to the Act.² On the basis of this explanation the Commissioner accepts that at the time of the complainant's request in September 2010 the policy making process was still live.

31. In line with the comments of the Tribunal decision referenced above at paragraph 28, the Commissioner believes that significant and notable weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. As the Tribunal noted, in such scenarios the public interest is very unlikely to favour disclosure unless, for example, it would expose some level of wrongdoing. Furthermore in the Commissioner's opinion, it is clearly in the public interest that the MoJ is able to candidly discuss the various policy options for amendments to the Act away from external scrutiny. In attributing such weight in this case, the Commissioner notes that the information in question is of a genuinely free and frank nature and includes detailed discussions about the various different policy options.
32. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
 - The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
 - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
33. Clearly, in this case as the policy formulation and development was ongoing at the time of the request, the third scenario is of less relevance. In considering the weight that should be attributed to the other two scenarios in relation to this case, the Commissioner has taken into account the comments of a number of Tribunal and High

² <http://www.justice.gov.uk/news/press-releases/moj/press-release-070111a.htm>

Court decisions which considered the concept of the chilling effect. Taking account of these cases, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments has to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.

34. As noted above, the Commissioner accepts that the withheld information contains genuinely free and frank comments and therefore he accepts that some weight should be attributed to the suggestion that those involved in this policy making process would be less candid with their future contributions to this particular policy if their comments were disclosed in September 2010. However, in the Commissioner's opinion this weight should be limited to some extent because, as the Tribunal has argued, it is reasonable to expect civil servants to continue to provide independent and robust advice: 'We are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service' as they are 'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.'³ Therefore in respect of the first type of chilling effect, although the Commissioner is prepared to accept that officials who contribute to this policy discussion may be less candid in the manner in which they describe particular policy options, he does not accept that contributors would leave out entire policy options in submissions made to Ministers.
35. Although as a general rule the Commissioner is reluctant to attribute much, if any weight, to the broader types of chilling effect, in the circumstances of this case he accepts that the second scenario as described at paragraph 32 should be given some weight. This is because of the candid nature of the comments contained within the withheld information and the fact that the many of the politicians involved in the policy making process were still active in politics at the time of the request (and the officials in the same or similar posts within the civil service). Furthermore in this case the Commissioner accepts the sensitivity of the information was not reduced by the time of the request and thus it would be reasonable to accept that disclosure could affect the candour of the same contributors to other different policy discussions in the future.

³ See EA/2006/0006 paragraph 75(vii).

36. For similar reasons, the Commissioner accepts that some weight should be attributed to the argument that disclosure of the information could impact on the future contributions the government receives from external stakeholders in relation to future policies. The Commissioner accepts that it is in the public interest that the government is able to formulate policy on the basis of a wide range of candid contributions from a variety of stakeholders.
37. With regard to attributing weight to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon, i.e. they focus on openness, transparency, accountability and improving the decision making process. However, this does not diminish their importance as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances, again the key ones being the content of the information and the timing of the request.
38. In the Commissioner's opinion disclosure of withheld information would provide the public with a detailed insight into how the changes to section 37 originated, how the various different policy options were developed and also the context within which the section 37 amendments fitted in with other amendments to the Act and the Public Records Act being considered as part the government's response to the 30 Year Rule Review. Thus disclosure could genuinely contribute to the aims of transparency and accountability. Furthermore, if the withheld information had been disclosed at the time of the request in September 2010, then it could have helped inform the public debate at that time regarding the changes to the Act, including the amendments to section 37 and their implementation.
39. Moreover, disclosure of the withheld information might reassure the public that the amendments to section 37 were not made on the basis of inappropriate pressure from the Royal Household as implied by some press reports.⁴ Alternatively, depending on the actual content of the information, disclosure might reveal that such pressure was indeed applied. (The Commissioner cannot obviously indicate which of these two scenarios is more relevant without revealing something of the content of the information itself).
40. In conclusion, however, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in

⁴ [Royal pressure 'led to FoI ban on disclosure of lobbying by Charles'](#)

disclosure of the information for two primary reasons: firstly, the strong weight that should be attributed to the safe space arguments in the particular circumstances of this case identified by the MoJ and secondly the weight (albeit less significant) that should be attributed to the chilling effect arguments. In reaching this conclusion the Commissioner is not dismissing the significance of the arguments in favour of disclosure. It is simply that given the timing of the request, (i.e. the policy making process was very much live) and the candid nature of the discussions set out in the information, the Commissioner believes that this tips the balance in favour of maintaining the exemption.

41. In reaching this conclusion the Commissioner has given careful consideration to the complainant's argument that it is overwhelmingly in the public interest that certain key factual information about this policy, namely who proposed the change, the reasons for doing so and who recommended it, is disclosed. As part of this consideration the Commissioner has examined each of the withheld documents carefully in order to determine whether it would be possible to extract this 'factual' information for disclosure. Having undertaken this exercise the Commissioner concluded that given the way the withheld information is structured even disclosing a limited amount of information that would address the complainant's more specific queries would still result in the disclosure of sensitive discussions – i.e. detailed and candid contributions and discussions. In essence the basic factual details are embedded in more detailed information.

Section 42 – legal professional privilege

42. 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.
43. There are two categories of legal professional privilege: advice privilege and litigation privilege.
44. The Commissioner understands that the category of privilege the MoJ is relying on is advice privilege. This privilege is attached 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 to a colleague on a line management issue will not attract privilege. 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 and answer which can usually be found by inspecting the documents themselves.

45. Clearly in the particular circumstances of this case the Commissioner is not in a position to review the information withheld on the basis of section 42(1) in order to establish whether it attracts advice privilege. Rather he has simply had to accept the MoJ's assertion that the information falls within the scope of the exemption contained at section 42(1). However, given the terms of the request and the type of information that the MoJ would be likely to hold on this issue, he considers that legal professional privilege might well attach to some of it.

Public interest test

46. Section 42 is also qualified exemption and therefore the Commissioner must again consider the public interest test.

Public interest arguments in favour of maintaining the exemption

47. The MoJ argued that there was a strong public interest in a person or body seeking legal advice being able to communicate freely and frankly with legal advisors in confidence and in being able to receive legal advice from them in confidence. The underlying rationale being that this encourages free and frank exchanges being clients and legal advisors and this has been judicially recognised as being strongly in the public interest. The absence of comprehensive legal advice reduces the quality of government decision making.

Public interest arguments in favour of disclosing the requested information

48. The MoJ acknowledged that there was a general public interest in public authorities being accountable for the quality of their decision making and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability, particularly in important legislation such as the Act. Transparency in this decision making process, particularly for legislation that governs access to information, can enhance this accountability.

Balance of the public interest arguments

49. 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 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).

50. 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 whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
- how recent the advice is; and
 - whether it is still live.
51. 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.
52. 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 legal professional privilege 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.
53. 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.
54. As the Commissioner has not seen the advice he does not know exactly its date and origin. However, for the reasons discussed in his consideration of section 35(1)(a) he accepts that at the time of the

request the policy making in relation to changes to the Act, including section 37, remained ongoing despite the fact that the CRAG had already received Royal Assent. The Commissioner therefore accepts that the advice could be described as live when the request was submitted in September 2010.

55. With regard to the public interest arguments in favour of disclosing the information, the Commissioner notes that the Tribunal, in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052) felt that the disclosure of the requested legal advice was necessary because of the crucial lack of transparency by the public authority in question. In the circumstances of this case the Commissioner does not believe that the MoJ could be correctly accused of such a fundamental lack of transparency. In response to this request briefing notes for Ministers were disclosed which explain in reasonable detail the rationale behind the changes to section 37 of the Act. Nevertheless the Commissioner notes that the publication of this information did not directly answer the complainant's specific queries in respect of the origins of the amendments to section 37.
56. In the Commissioner's opinion it is difficult to argue that legal advice on an issue such as this has a direct or materially significant effect on particular individuals (beyond of course the members of the Royal Family affected by the exemption). It is not legal advice, for example on a decision to build a new by-pass or to close a hospital, where it would be easy to identify profound consequences for the local communities affected. Nevertheless, the Commissioner accepts that the legal advice does affect the public at large to a slight degree, as it alters the basis upon which public authorities will handle requests under the Act for information which relates to communications with the Sovereign and certain other members of the Royal Family and Royal Household.
57. In conclusion, taking into account the strong inbuilt weight in favour of protecting legal professional privilege and the fact that this information is recent and live, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

58. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

59. The Commissioner requires no steps to be taken.

Other matters

60. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

61. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant requested an internal review on 30 October 2010 and the MoJ did not inform him of the outcome until 3 March 2011. The Commissioner expects that the MoJ's future handling of internal reviews will conform to his recommended timescales.

Right of Appeal

62. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 1st day of November 2011

Signed

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

Legal Annex

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 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

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.”

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.”