Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2014

Public Authority: Department for Business, Innovation & Skills
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Business, Innovation and Skills (BIS) for a number of named documents regarding the *Kiobel v Shell* case heard in the US Supreme Court. BIS disclosed some of the requested information but withhed the majority of the information by relying on the exemptions in section 27(1)(a) (internal relations), section 35(1)(a) (formulation of government policy), section 40(2) (personal information) and section 42(1) (legal professional privilege). The complainant disputes BIS' application of all the exemptions and also argues that it should have provided a more specific indication as to how the exemptions had been applied to each redacted piece of information or withheld document.

2. The Commissioner's decision is as follows:

   - The section 27(1)(a) exemption is engaged and the public interest favours withholding the information.

   - Section 35(1)(a) is engaged but the public interest favours disclosure.

   - Section 40(2) is engaged.
   - Section 42 is engaged and the public interest favours withholding the information.

   - BIS breached section 17(1)(b) by failing to specify which exemption had been applied to each redaction or withheld document.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Where information has been withheld solely on the basis of section 35(1)(a) BIS must provide the complainant with a copy of the information.

   - Information redacted or withheld on the basis of section 40(2) should only continue to be withheld if it is genuinely personal data, as described in paragraph 100 below.

   - In order to comply with section 17(1)(b) BIS must now provide the complainant with a list specifying under what exemptions(s) information has been withheld. Where an entire document has been withheld BIS must confirm which exemptions were applied. Where information is redacted, either from the information already disclosed to the complainant, or where the Commissioner has ordered disclosure BIS must annotate each redaction to specify which exemption has been applied.

4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. This complaint relates to a request which sought information on the UK government's decision to submit two "amicus" briefs in the case *Kiobel v Shell* ('*Kiobe*l'). (An amicus brief is a document filed in a court by a party who is not directly related to the case under consideration). *Kiobel* was a case before the Supreme Court of the United States brought under the US Alien Torts Statute 1789 ('ATS'). The ATS allows foreign victims of human rights abuses to seek civil remedies in US courts.

6. The *Kiobel* case was brought against Shell by Nigerian citizens who alleged that the company had aided and abetted the Nigerian authorities in the torture and extrajudicial killing of unarmed protesters in the 1990s.

7. The UK government's first amicus brief was submitted to the US Supreme Court on 2 February 2012 and the second on 13 June 2012.

8. On 17 April 2013 the US Supreme Court issued its decision in which it concluded that the ATS could not be used to sue foreign entities for alleged violations of international law on foreign soil.

Request and response

9. The complaint relates to a request for information that was made to BIS on 30 July 2012 for copies of a number of documents whose titles had been released in response to a previous request from the complainant for a list of documents featuring the words "Kiobel" AND also one of the words "Alien Tort Statute" OR "amicus brief" OR "amicus curiae brief" OR "Netherlands" OR "Royal Dutch" OR "Shell" OR "State Department" OR "Supreme Court".

10. BIS responded to the request on 18 December 2012 when it disclosed some of the documents in redacted form. However, it explained that the remaining information was exempt under the following exemptions:

    Section 27(1)(a) (International relations)
    Section 35(1)(a) (Formulation of government policy)
    Section 40(2) (Personal information)
    Section 42(1) (Legal professional privilege)

11. On 4 February 2013 the complainant contacted BIS to ask that it carry out an internal review of its handling of the request.

12. BIS subsequently presented the findings of internal review which was undated. The internal review upheld the initial decision to refuse the request under the exemptions referred to above.

Scope of the case

13. The complainant contacted the Commissioner on 15 April 2013 to complain about the way her request for information had been handled. The complainant disputed the application of all the exemptions cited by BIS. The complainant also asked the Commissioner to consider BIS' failure to specify which exemption was being applied to which document or individual redaction.

14. The complainant has provided the Commissioner with detailed submissions to support her view that the various exemptions were either not engaged, or if they were engaged, the public interest favoured disclosure. The Commissioner has referred to the complainant's

submissions where appropriate in the analysis below. The fact that the complainant's submissions have not been reproduced in full in this notice is not an indication, and nor should it be seen as such, that the Commissioner did not carefully consider the submissions. Rather given the detailed nature of the submissions it is simply not possible to reproduce them in full in this notice.

Reasons for decision

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

15. BIS has withheld a certain amount of information falling within the scope of the request under the section 35(1)(a) exemption.

16. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation and development of government policy.

17. Section 35 is a class based exemption, therefore if information falls within the description 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.

18. 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.

19. 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.

20. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is

likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007)* at paragraph 75(v), and *DWP v Information Commissioner (EA/2006/0040, 5 March 2007)* at paragraph 56.

21. In describing these general principles the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.

22. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

BIS' position

23. BIS argues that the information withheld under section 35(1)(a) relates to the government's policy regarding the extra territorial application of ATS and not just its position on the *Kiobel* case. It explained that the decision by the government to submit an amicus brief in the Kiobel case was part of government policy on this issue but it said that the government would continue to take decisions on the principles of extraterritoriality and that those decisions would be guided by the outcome of the US Supreme Court proceedings.

24. BIS added that government policy on the extraterritorial application of ATS, business and human rights is still evolving and that the policy issues are linked to sensitive and complex legal issues.

The complainant's position

25. The complainant argued that section 35(1)(a) was not engaged because the information did not relate to the formulation or development of government policy.

26. Firstly, the complainant argued that the government's opposition to ATS dated back at least nine years to when it filed a previous amicus brief to the US Supreme Court on this issue. She suggested that the UK had developed and explored its ATS policy since 2004, which appears to have remained consistently in opposition to ATS throughout changes in government. Consequently, the complainant argued that the requested information relates to the implementation of a long established government policy regarding ATS, not the formulation or development of policy on that issue.

27. Secondly, the complainant argued that the government's policy on generic issues such as 'business and human rights' are likely to be developed for many years to come and touch on a vast range of issues and cases. She suggested that BIS was arguing for a policy making process with no clear end in sight and both the Commissioner and Information Tribunal had rejected this sort of 'seamless web' argument.

28. Thirdly, with regard to BIS' suggestion that the information related to the formulation and development of its position in the *Kiobel* case the complainant emphasised that the focus of her request, and the one that preceded it, was to specifically seek information concerning the government's intervention in the *Kiobel* case (ie the submissions of the amicus briefs). The complainant emphasised that for the purposes of section 35(1)(a) the intervention in *Kiobel* was distinct from any wider ongoing concerns. The complainant argued that the government's formulation and/or development of policy in terms of intervention was a finished product as represented in the filing of the second amicus brief on 13 June 2012. She argued that it was highly unlikely that there would be further opportunities for the government to intervene in the case after then.

The Commissioner's position

29. The Commissioner does not accept that the information withheld on the basis of section 35(1)(a) relates to the formulation and/or development of the government's policy on ATS. This is because the Commissioner understands that the government's position that a) corporations cannot be liable for alleged human rights violations under customary international law, as there is no such established rule of international law and b) that the US courts should not assert jurisdiction in respect of claims brought by foreign plaintiffs against a foreign defendant wholly committed on foreign territory with little nexus with the US are both long standing positions. Therefore, the Commissioner agrees with the complainant that the information withheld on the basis of section 35(1)(a) relates to the implementation of a long established government policy regarding ATS, rather than the formulation and development of a policy in relation to ATS.

30. Similarly, the Commissioner does not accept that the withheld information can be said to relate to the government's position on human and business rights, even in the specific context of ATS, given that, as the complainant suggests, policy formulation and development in the area of human and business rights is one that will continue to evolve for many years. In the Commissioner's view, the complainant is justified in suggesting that any argument that the withheld information relates to the formulation and development of policy on human and business rights is akin to arguing for a seamless web of policy making within this area. For the reasons explained above, the Commissioner does not accept that section 35(1)(a) can be applied so broadly.

31. This leads to the question as to whether the withheld information relates to the formulation and development of government policy in respect of the narrower issue, its intervention in the *Kiobel* case itself. Having considered the content of the information withheld on the basis of section 35(1)(a), the Commissioner is satisfied that the withheld information does relate to the formulation and development of the government's policy decision regarding the intervention in the *Kiobel* case, ie whether amicus briefs should be filed with the US Supreme Court. The Commissioner has reached this conclusion given that the government's decision to intervene in *Kiobel,* and indeed the nature of that intervention, followed a decision making process that meets all three of the key criteria listed above at paragraph 22. Whether or not this formulation and development was complete by the time the complainant submitted her request of 30 July 2013 does not determine whether section 35(1)(a) is engaged. Rather that is a matter which is relevant to the balance of the public interest.

Public interest test

32. Section 35(1)(a) is a qualified exemption therefore the Commissioner has carried out the public interest test under section 2, balancing the public interest in maintaining the exemption against the public interest in disclosure of the requested information.

Public interest arguments in favour of maintaining exemption

33. As regards the public interest in favour of maintaining the exemption BIS explained that the government's view on balance is that ATS should not be applied extraterritorially but that it acknowledged that there are differing views on this matter. Against this background it said that it needed to have the 'safe space' to consider all the relevant legal and policy arguments to reach an informed view as to where the balance lies. Publicly airing this consideration of all the arguments would weaken the government's ability to promote this position in its dealings abroad and at home.

34. The withheld information includes documents containing advice to Ministers and exchanges between officials on the position the government should adopt on the extraterritorial application of ATS, including the observations to be made in the amicus curiae brief submitted to the U.S. Supreme Court. A wide range of officials within BIS, the Foreign & Commonwealth Office, and other departments contributed to this debate. BIS argued that it was in the public interest to ensure that decisions are taken on the basis of the best available advice and based on a rigorous assessment of the pros and cons in this sensitive and evolving policy area.

35. In its response to the complainant BIS emphasised that the withheld information relates to proceedings that, at the time of the request, were still before the United States Supreme Court and where a hearing has not been held, nor a judgement issued. Therefore it argued that the sensitivity of the information had not diminished as the issue was still very much a live one and it was in the public interest for the government to be able to have time and space to explore these important policy options.

Public interest arguments in favour of disclosing the withheld information

36. In her submissions to the Commissioner the complainant identified four 'common' public interest arguments that she believed applied to all of the qualified exemptions, in addition to identifying further specific arguments for the public interest test under each of the qualified exemptions. The Commissioner has summarised these four common public interest arguments as follows:

37. Firstly, the circumstances of the *Kiobel* case and the nature of the information. The complainant argued that the case was exceptional for two main reasons: a) the severity of the allegations made against Shell; and b) the outcome of the *Kiobel* case would determine the future of ATS.

38. Secondly, the complainant argued that there were specific reasons in this case why disclosure was necessary to promote the accountability and transparency of public authorities. She argued that there were legitimate concerns around the proper functioning of government departments in the area of business and human rights. BIS has a wide range of commitments on corporate responsibility and the UK's intervention in the *Kiobel* case appeared to run counter to the UK's stated commitments to human rights and responsible business practices.

39. In particular, the complainant noted that the government had welcomed and promoted the UN Guiding Principles on Business and Human Rights (the GPs) which reiterate the State duty to protect human rights including, the requirement for States to take steps to ensure that people affected by corporate human rights abuse have access to an effective remedy. The complainant noted that whilst the government described its position on the GPs as nuanced, there was evidence that there are legitimate questions about the performance and priorities of government departments addressing these issues. It was important to know how the UK's wider commitments to the GPs and other initiatives were considered in discussions about *Kiobel*.

40. Thirdly, promoting the understanding of government decisions that affect people's lives. The potential impact of the intervention was significant as it could lead to a decision which will prevent victims of international crimes accessing justice. The complainant noted that the UK's position was that responsibility for protecting rights and providing redress lies with the plaintiffs home state of Nigeria. The complainant argued that whilst it was desirable for the plaintiffs to bring such cases in their home countries, in this case the government's position was unrealistic and should be measured against the realities of the Nigerian justice system. Furthermore it was unclear to what extent the government had considered the real challenges faced by the *Kiobel* plaintiffs, amongst others, whose home states do not provide effective redress at present. As the intervention may impact adversely on the individual rights of ATS claimants at present and in the future, and on an international scale, this weighed heavily in favour of disclosing the information.

41. Fourthly, furthering the understanding and participation in public debate. The complainant represents a network of interested parties with expertise and experience on UK corporate accountability in relation to international development, the environment and human rights. The network was keen to get a full picture of what went on in the intervention in order to better understand the reasons for it. The complainant argued that UK policy in this important case appeared to have been developed without any, or any adequate, consultation with key participants from civil society in order to balance the debate and enhance the rigour of the policy-making process.

42. The complainant also advanced three specific arguments relating to the balance of the public interest under section 35(1)(a):

43. Firstly, in terms of the safe space argument, the complainant noted this argument only applied if the formulation and development of policy was

ongoing at the time of the request and that therefore a safe space was in fact necessary. She argued that the government's formulation and development of its policy regarding the *Kiobel* case was complete by the date of her request as the second amicus brief had been filed 33 days previously.

44. The complainant argued that it was also relevant to consider what is included or excluded from safe space. She noted that the Commissioner's guidance described safe space as protecting government policy from the influence of lobbyists. However, the complainant suggested that it would appear that the government engaged with at least one lobbyist whose vested interests were clear. The engagement of such a lobbyist appears to call into question a) the argument that UK policy was being developed neutrally or at all, and, b) the integrity of the safe space required if it was indeed being developed.

45. Secondly, the influence of lobbyists: the complainant noted that the Tribunal found that there was a strong public interest in disclosing information that revealed how lobbyists were trying to influence policy so that others could participate in the debate by presenting counter balancing views. If the UK's policy development towards *Kiobel* was ongoing at the time of the request then disclosure would be required to promote meaningful debate.

46. Furthermore, the complainant argued that one of the requested documents was entitled 'CALL ON THE SHELL LEGAL ADVISER' and dated 3 March 2012, i.e. between the filing of the first and second amicus briefs. The complainant suggested that this implied active engagement/communication with Shell.

47. The complainant argued that there was a strong public interest in understanding the interaction between Shell and the government in relation to *Kiobel*. This was because by engaging with Shell, the UK may have compromised its independence and/or neutrality in this case. The complainant argued that it was necessary to disclose the withheld information in order to confirm or dispel concerns over the role Shell or any other parties may have played in this decision.

48. Thirdly, the complainant argued that disclosure would make the policy making process in the *Kiobel* case or similar cases in the future more robust, fair and balanced. If government officials were more aware of the need to engage a broad range of stakeholders when taking controversial policy decisions, the quality of decision making would improve. This would reduce the risks that decisions were or could be unduly influenced.

Balance of the public interest arguments

49. 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) exemption. 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: firstly the timing of the request and secondly the content of the requested information itself.[1]

50. The Commissioner has first considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption.

51. With regard to the safe space arguments, the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.

52. In the circumstances of this case the Commissioner is satisfied that by the time of the request the government's policy formulation and development regarding the *Kiobel* case was complete, and indeed had been implemented, with the submission of the second amicus brief some 47 days before the request was made. Therefore in the Commissioner's view there was no need for the government to have a space safe in which to discuss the formulation or development of its policy on the *Kiobel* case. Furthermore, although the Commissioner recognises that this was clearly a high profile issue which attracted significant interest, he is satisfied that by the time of the request the government's need to have a safe space in which to discuss how to explain and defend its decision had weakened considerably given that by that date the

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

government, in the form of an FCO minister, had written to a number of interested parties (Liberty, CORE, Amnesty International and the All Party Parliamentary Group on International Corporate Responsibility: Business, Human Rights and the Environment) in order to explain its decision to submit two amicus briefs. Consequently, in the circumstances of this case the Commissioner is of the opinion that the safe space arguments attract very little weight.

53. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

54. As discussed above, the Commissioner is of the opinion that the policy making in question was not live at the time of the request and thus he does not accept that disclosure of the withheld information could have had a chilling effect on the government's ongoing policy discussions regarding the *Kiobel* case. Nevertheless, although rejecting the concept of a seamless web of policy making, the Commissioner does recognise that disclosure of information such as this certainly has the potential to have a chilling effect on future contributions to similar policy making discussions in the future which focus on similar issues, e.g. business and human rights. Having considered the content of the information that has been withheld on the basis of this exemption the Commissioner recognises that it consists of detailed considerations of the various policy options, including the assessment of the potential counter arguments, and thus given the nature of the content the Commissioner accepts that some notable weight should be given to the chilling effect arguments. Furthermore, although the policy making was complete by the time of the request, it had only been completed relatively recently. In the Commissioner's opinion this adds weight to the chilling effect arguments.

55. The Commissioner does not intend to comment or attribute weight specifically to each of individual public interest arguments advanced by the complainant. However, taken together he fully accepts that they represent a forceful case for disclosure of the withheld information. In particular, the Commissioner considers that the public interest in

disclosing the information attracts notable weight given the potential of the *Kiobel* case in determining the future of ATS and the consequences that this could have for victims of human rights abuses (and indeed the potential liability of corporations under ATS). In light of the significance of the *Kiobel* case the Commissioner considers that arguments regarding transparency and accountability, and furthering the public debate, attract notable weight. With regard to the information that has been withheld on the basis of section 35(1)(a), the Commissioner is satisfied that its disclosure, at the time of the request, would certainly have served these public interests to a very significant degree.

56. In conclusion, the Commissioner has decided that the balance of the public interest under section 35(1)(a) favours disclosure of the information withheld under this exemption. The Commissioner has reached this finding given the limited, albeit not insignificant, weight that he believes can be attributed to the public interest in maintaining the exemption given that the policy making is now complete and moreover, the comprehensive and persuasive case for disclosure that the complainant has advanced. The Commissioner would note that the in the face of such submissions, BIS' arguments in favour of maintaining section 35(1)(a), appear generic and, as a consequence, relatively weak.

57. Much of the information to which BIS has applied section 35(1)(a) has also been withheld under the section 42 exemption. Therefore the Commissioner has next considered whether this exemption has been applied correctly. Where information has been withheld solely on the basis of section 35(1)(a) the Commissioner has ordered it to be disclosed.

Section 42(1) – Legal professional privilege

58. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim could be maintained in legal proceedings.

59. There are two categories of legal professional privilege: advice privilege and litigation privilege.

60. In this case BIS is relying on litigation privilege. This applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

61. In order for public authorities to determine whether LPP applies, they will need to be clear who the parties to the confidential communications are. Communications with third parties are not covered by advice privilege and are only covered by litigation privilege if they have been made for the purposes of the litigation.

62. The withheld information in this case consists of communications between legal advisers at the Foreign and Commonwealth Office (FCO) and FCO Ministers or officials and legal advisers in BIS and other Departments for the purpose of deciding whether to submit an amicus curiae brief and/or for the purpose of preparing that brief as the Kiobel case progressed. This accounts for the majority of the information although some of the documents include communications between the FCO legal advisers and officials and the U.S. Attorneys instructed on behalf of the UK government to conduct the proceedings in the US Supreme Court. There are also some documents where BIS legal advisers advise BIS policy officials on corporate liability issues, in connection with the preparation of the amicus curiae brief.

63. The Commissioner has reviewed the withheld information and finds that the dominant purpose is of the UK government deciding whether to submit an amicus curiae brief and preparing that brief. The information clearly relates to legal advice provided in a professional capacity and the Commissioner is satisfied that it attracts legal professional privilege.

64. The Commissioner notes that in her submissions, the complainant argued that it was not clear on what basis legal advice in the context of an amicus brief in which the UK is not party to the litigation is in fact covered by LPP. However, in the circumstances of this case the Commissioner accepts that whilst the UK was not a party to the litigation itself, it was, by the submissions of the amicus briefs, clearly an interested party to the proceedings. Moreover, although perhaps not overtly stated by the UK government, the purpose of the amicus briefs was essentially to influence or persuade the US Supreme Court as to the validity of the UK's position in respect of the issues it was considering as part of the litigation. In this context the Commissioner considers that litigation privilege is applicable given that the dominant purpose of the withheld information is the provision of legal advice regarding the *Kiobel* case.

Public interest test

65. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the

circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in favour of maintaining the exemption

66. In favour of maintaining the exemption BIS argued that there was a strong public interest inherent in the section 42 exemption due to the principle behind legal professional privilege of safeguarding openness in communications between legal advisers and clients and ensuring access to full and frank legal advice, which is fundamental to the administration of justice.

67. BIS also said that the decision taken on whether to submit an amicus curiae brief to the US Supreme Court and on the nature of the arguments and observations to be made in that brief are decisions which need to be taken in a fully informed context where legal advice is given freely and frankly. It argued that these considerations and the strong public interest inherent in the principle behind legal professional privilege outweigh any public interest in ensuring transparency or furthering public participation in the debate on the issues raised by the *Kiobel* case.

Public interest in favour of disclosing the information

68. The complainant noted that notwithstanding the 'in built' weight of legal professional privilege, the public interest in disclosure can outweigh the public interest in upholding the exemption if there is a clear, compelling and specific justification that at least equals protecting the information in question.

69. In addition to the four 'common' public interest arguments set out above, the complainant advanced the following specific arguments in favour of disclosing the information withheld under section 42(1):

70. Firstly, the complainant emphasised the large amount of money involved; the financial stakes in *Kiobel* were very high given the significant level of financial settlements brought under previous ATS cases and the potential for the *Kiobel* case to determine the future of the ATS.

71. Secondly, wherever public funds have been spent on legal advice there is a public interest in transparency and accountability, in particular whether or not the legal advice was followed is a relevant consideration. The complainant noted that the *Kiobel* case had involved the use of considerable government time and resources.

72. In a separate submission made during the course of the Commissioner's investigation the complainant raised concerns that the decision of the UK to submit an amicus curiae brief and its preparation was not sufficiently independent. She suggested that there were significant similarities with a separate Amicus brief submitted by Shell and argued that disclosure would demonstrate the extent of Shell lobbying and collaboration in the production of the brief.

73. In response to the inherent public interest arguments for upholding section 42(1), the complainant argued that when the authority is not a party to the litigation the force of legal professional privilege arguments are weakened. The complainant noted that the UK could not face any legal challenge in this case. It followed that disclosure of this particular information would not inhibit officials or Ministers from seeking legal advice more generally given that this case only concerned a very narrow pattern of amicus briefs in foreign legal proceedings where no legal challenges could apply. The complainant emphasised that the facts of each case must be considered on its merits and the intervention is distinct from what normally constitutes adversarial litigation for the purposes of legal professional privilege.

74. The complainant also argued that the legal advice had served its immediate purpose given that both amicus briefs had been submitted at the time of the request. Alternatively, should the information still be considered live given the UK's developing agenda on ATS and business and human rights, this factor cuts both ways and makes the public interest in disclosure more urgent and necessary in order to ensure a greater degree of transparency given the controversial nature of the UK's intervention in *Kiobel*.

Balance of the public interest

75. 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* 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'.[2]

76. 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 the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

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

77. 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.

78. 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 need to protect information on grounds of legal professional privilege is likely to diminish. 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.

79. 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.

80. In the circumstances of this case, the Commissioner considers that the legal advice can certainly be described as recent given that it was only a

[2] Pugh v Information Commissioner (EA/2007/0055), para. 41.

number of months before the request was submitted in July 2012 with the oldest piece of advice dating from December 2011. With regard to whether the advice could be considered as live, whilst the Commissioner accepts that it could be argued that at the time of the request the advice had served its immediate purpose given that the two amicus briefs had been submitted, in the Commissioner's opinion given that the advice relates not simply to the UK's position in *Kiobel*, but also ATS more broadly, the advice could still be correctly described as live at the time of the request. Furthermore, the Commissioner is not persuaded that simply because the advice focuses on one narrow issue, its disclosure would not inhibit officials or Ministers from seeking advice more generally. Whilst each case must be considered on its merits, the information withheld on the basis of section 42(1) although focusing on matters of ATS, is both detailed and candid and the Commissioner does not consider that it is realistic to assume that disclosure of such information would not in some way inhibit the provision of advice by government lawyers in the future, even on unrelated topics. In light of these findings the Commissioner considers that there is a significant and weighty public interest in upholding the exemption.

81. With regard to the public interest in disclosing the information withheld under section 42(1), as with his comments in relation to the public interest test under section 35(1)(a), the Commissioner recognises that they represent a strong case for disclosure of the withheld information. Furthermore, in terms of the specifics of this case the Commissioner accepts that given the wide-ranging implications of the *Kiobel* decision on the future of the ATS, further weight is attributable to the public interest in disclosure given the amount of money and number of individuals potentially involved in ATS cases in the future. The Commissioner also accepts that, given the UK's position in respect of the ATS focused on a relatively complex and contentious point of law, disclosure of the UK's legal advice on this subject could prove particularly informative in terms of the legal basis for the UK's policy in terms of *Kiobel* and ATS.

82. In light of the weight that can be attributed to the public interest in disclosure of the withheld legal advice, the Commissioner believes that the balance of the public interest in this case is finely balanced. However, he is satisfied that the public interest favours maintaining the exemption given that the advice is both recent and live and is sufficiently detailed in nature that its disclosure would be likely to significantly inhibit the provision of future legal advice both in relation to ATS and on unrelated matters. Such a consequence is firmly not in the public interest.

Section 27(1)(a) – International relations

83. Section 27(1)(a) provides that information is exempt if its disclosure would or would be likely to prejudice relations between the United Kingdom and any other state. The exemption has been applied to the following class of documents:

- Email exchanges revealing the initial thoughts of the governments of other states on the question of whether to submit an amicus curiae brief to the U.S. Supreme Court in the Kiobel case.

- Email exchanges which include information about the US Government's reaction to the decision of the UK and other countries to submit amicus curiae briefs in the Kiobel case. This also includes comments of U.K government officials on the US government reaction.

- Brief comments on the views of various other governments on the question of whether to submit an amicus curiae brief.

- Information concerning the decision of the government of the Netherlands to join with the UK in submitting an amicus curiae brief to the U.S. Supreme Court and exchanges between the two governments on reconciling differences of approach to the case and how these should be reflected in the draft brief.

84. The Commissioner's view is that this specific exemption will apply where disclosure makes relations more difficult between the UK and another state or calls for a particular damage limitation exercise. The nature of prejudice under section 27(1) was considered by the Information Tribunal in *Campaign Against the Arms Trade v The Information Commissioner* where it stated that they:

"…do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction…or to make them vulnerable to such a reaction, notwithstanding that the precise reaction…would not be predictable either as a matter of probability or certainty".[3]

[3] Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence, [EA/2006/0040], para. 81.

85. BIS argues that the exemption is engaged because disclosure would be likely to make these governments more reluctant to share information with the UK in future on cases with international implications or less likely to work jointly with the UK in future on interventions in such cases. It also suggested that other governments would be less likely to respect the confidentiality of the information the UK shares with them.

86. BIS explained that section 27(1)(a) had been applied because exchanges between UK government officials and officials from foreign governments were sensitive and any decision to release this information would be likely to prejudice the UK's relationship with the government concerned. The Commissioner must be careful not to release the substance of the withheld information in this Decision Notice and therefore he is limited as to what he can say about why exactly the exemption is engaged. However, the Commissioner would say that he is satisfied that releasing the information in response to a request under FOIA would likely not be welcomed by the countries concerned. It is apparent that the exchanges were conducted with the expectation of confidentiality and it is reasonable to conclude that disclosing information would not be welcomed by other governments given that the information contains a frank discussion of the approach taken by other countries in deciding how to respond to the Kiobel case as well frank discussions on the position taken by the US government. The content and nature of the information is such that the Commissioner accepts that disclosure of the information is likely to make the UK's relations with the states concerned more difficult both as regards the Kiobel case and ATS but also on other potentially unrelated issues. Therefore, the Commissioner finds that the section 27(1)(a) exemption is engaged in this case.

87. The complainant had argued that the Dutch government has already disclosed information regarding its involvement in the Kiobel case and that therefore this suggests that disclosure of requested information by the UK government would not have affected relations with the Dutch government substantially or at all. The Commissioner does not accept that the Dutch government's decision to release information is evidence that it would not react unfavourably were the UK to release information in response to a freedom of information request. In the Commissioner's view it is likely that it would perhaps react differently to the prospect of another state disclosing information which it had provided in the expectation of confidentiality. Moreover, the Commissioner considers that the information withheld under section 27(1)(a) is of a different character to the information released by the Dutch government.

Public interest test

88. Section 27(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

89. BIS argues that disclosure would not serve the public interest because it would undermine the atmosphere of trust between officials of the UK government and those of other governments, discouraging the latter from sharing information with the UK and undermining the government's ability to pursue objectives in the UK's interests.

Public interest arguments in favour of disclosure

90. The complainant referred the Commissioner to her four common public interest arguments.

Balance of the public interest

91. Again, for the reasons discussed under section 35(1)(a), the Commissioner considers that significant weight should be attributed to the public interest in disclosing the withheld information. In terms of the information that has been withheld under section 27(1)(a), its disclosure would shed considerable light on the nature of the UK's discussions with other states in relation to the Kiobel case.

92. However, the Commissioner considers that considerable weight should be attributed to the public interest in favour of maintaining the exemption given the inherent disservice to the public interest in flouting international confidences which this exemption is designed to protect. In the particular circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption attracts particular and notable weight given the UK received information from a number of states and thus disclosure of the withheld information would therefore undermine the UK's relations with a range of states in the international community. For this reason, in addition to the inherent important need to protect such confidences, the Commissioner has concluded that in the circumstances of this case the public interest favours maintaining the exemption.

Section 40(2) – Personal information

93. BIS has also applied the section 40(2) exemption to withhold personal information contained within the requested documents, such as names

of government officials and email addresses. Where the Commissioner has found that the information in a requested document is entirely exempt on the basis of one of the exemptions discussed above, he has not considered the application of section 40. However, where BIS has already released some information or the Commissioner has otherwise ordered disclosure, the Commissioner has considered whether BIS was or is correct to redact personal information.

94. Section 40(2) of FOIA provides that information is exempt is it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles or section 10 of the Data Protection Act 1998 (the right to prevent processing likely to cause damage or distress). In this case BIS argues that disclose of personal information would contravene the first data protection principle which requires that personal data be processed fairly and lawfully.

95. Where section 40(2) has been applied the first thing to consider is whether the information amounts to personal data. Personal data is defined in the Data Protection Act 1998 as:

"…data which relate to a living individual who can be identified—

(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"

96. The Commissioner is satisfied that the names of individuals, job titles, email addresses and telephone numbers can be classed as personal data as it is possible to identify individuals from this information. Therefore the next thing to consider is whether disclosure of this information would contravene the first data protection principle. In assessing whether disclosure would be unfair and thus constitute a breach of the first principle the Commissioner takes into account a number of factors such as:

- Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
- What reasonable expectations does the individual have about what will happen to their personal data?
- Does the public authority have consent to disclose the information?

97. In explaining why disclosure would be unfair BIS acknowledged that the information relates to the public lives of the individuals concerned (i.e. their work as civil servants). However, it said that in view of the government's policy on disclosing the names and contact details of junior officials in response to FOI requests, the individuals concerned would have a reasonable expectation that such information would be withheld. It also said that it did not consider that disclosure of the information would further the legitimate interests of the Department of the person who requested the information.

98. The Commissioner's understanding is that the officials concerned are junior in the sense that they are below the Senior Civil Service (SCS). The Commissioner's does not accept that just because an official is below the SCS there will always be an expectation that personal data will not be disclosed. Officials who are not members of the SCS can still be relatively senior within their department and hold significant responsibility. That said, in this case the officials would appear to not be in public facing roles and therefore the Commissioner accepts that it is reasonable for the individuals to have a degree of expectation that the information should not be disclosed. Where the information relates to individuals from outside the UK government such as representatives of foreign governments, the Commissioner considers that there is an even greater expectation that information will not be disclosed given the confidential nature of the discussions.

99. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public. In this case the Commissioner does not consider that disclosing the names of officials involved in preparing the government's amicus briefs would in any real sense add to public understanding on this issue. Moreover, proper accountability for government decisions lies with minsters and the Commissioner takes the view that it is not in the public interest for accountability for decisions to be seen as passing from the minister, the elected representative, answerable to Parliament, to the unelected official.

100. The Commissioner finds that disclosure of the information withheld under section 40(2) would contravene the first data protection principle and therefore the exemption is engaged. However, the Commissioner would stress that whilst he does not consider that releasing the names and contact details of individuals would increase public understanding of the issues involved in the government's decision to submit amicus

briefs, he does consider that it would add value to know which departments were involved in the communications and from which departments documents originate. This allows the complainant to place the communications in context. Therefore, where the Commissioner has ordered documents or parts of documents to be disclosed or else where BIS has already released the information in redacted form, the Commissioner requires BIS to only remove the names and contact details of individuals where this would actually identify the individual. For instance, BIS should disclose the second half of email address to allow for the complainant to know which departments are party to communications and similarly should include departmental addresses rather than redacting this information along with an individual's name and job title.

Section 17 – Refusal of a request

101. The complainant had also challenged BIS's failure to specify which exemption had been applied to which withheld document or redaction.

102. Section 17 of FOIA requires that:

"(1) 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."

103. By not specifying which exemption(s) have been applied to each redacted piece of information or document BIS has failed to properly explain why requested information has been withheld. Consequently the Commissioner finds that BIS has failed to meet the requirements of section 17(1)(b).

104. In order to comply with section 17(1)(b) BIS must now provide the complainant with a list specifying under what exemptions(s) information has been withheld. Section 17(1)(b) does not require BIS to provide the complainant with a description of the character of each piece of redacted information or each withheld document, which was suggested by the complainant in her submission to the Commissioner.

Right of appeal

105. 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: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

107. 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.

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

Signed .....

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