

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 August 2022

**Public Authority:** Attorney General's Office  
**Address:** 102 Petty France  
London  
SW1H 9EA

### Decision (including any steps ordered)

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1. The complainant has requested, from the Attorney General's Office (the "AGO"), information about advice it has given concerning the UK's nuclear deterrent and nuclear warheads. The AGO confirmed holding the requested information but refused to disclose it citing section 35(1)(c) (Formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that section 35(1)(c) is properly engaged and that the public interest favours maintaining the exemption. The Commissioner does not require the AGO to take any steps.

### Background

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3. In his request, the complainant has made reference to a Parliamentary Debate on the Integrated Review held on 22 March 2021 (HC Deb, 22 March 2021, c643). This can be found online<sup>1</sup>. The debate includes the citation that is part of his first request.

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<sup>1</sup> <https://hansard.parliament.uk/commons/2021-03-22/debates/49173AD7-1180-4251-8F29-58EB9E9D1C75/IntegratedReviewDefenceCommandPaper>

## Request and response

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4. On 30 April 2021, the complainant wrote to the AGO and requested information in the following terms:

"I should be grateful if you would provide me with the following information which I believe is held by the Attorney General's Office.

On 22 March 2021, during the Parliamentary Debate on the government's Integrated Review, the Secretary of State for Defence stated that "On the nuclear deterrent, we do not believe that the changes to the number of warheads in any way breach the nuclear non-proliferation treaty, and that advice is backed up by the Attorney General" (HC Deb, 22 March 2021, c643, available online at <https://www.theyworkforyou.com/debates/?id=2021-03-22d.643.2>)

Please advise me upon which date the request for advice on this matter was received by the Attorney General's Office, and by whom (job title and government department) the request was made".

5. The complainant made a further related request on 13 May 2021, as follows:

"On 30 April 2021 I wrote to the Attorney General's Office with a request for information relating to advice from the Attorney General on changes to the number of the UK's nuclear warheads.

I should now like to submit a further request relating to the same topic.

Please provide me with a full copy of the advice given to government by the Attorney General relating to changes in the number of the UK's nuclear warheads, as referred to by the Secretary of State for Defence during the Parliamentary Debate on the Integrated Review on 22 March 2021 (HC Deb, 22 March 2021, c643).

I consider there is a strong public interest in the release of this information".

6. On 3 June 2021, the AGO responded to both requests together. It refused to provide the requested information, citing section 35(1)(c) as its basis for doing.
7. The complainant requested an internal review on 7 June 2021.

8. The AGO provided an internal review on 5 July 2021, in which it maintained its position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 1 September 2021, to complain about the way his request for information had been handled. He advised that it was unclear whether or not the exemption cited had been applied to both of his requests in their entirety. He provided a detailed submission to support his view that the information should be disclosed.
10. On 1 July 2022, the complainant submitted further arguments in support of his view that the information should be disclosed. He asked the Commissioner to take into account the ruling in a case involving legal advice which was considered by the Scottish Information Commissioner<sup>2</sup> in which he ruled that there was a public interest in releasing a portion of the advice. He also argued that the Prime Minister had recently amended the Ministerial Code to the effect that ministers will not always be expected to resign if they breach the code of conduct<sup>3</sup>, which he considered meant it was "not set in tablets of stone and is subject to change at short notice on arbitrary grounds". He made this point as he said that the AGO had "made much of the significance and gravity of the Ministerial Code in its arguments for withholding the requested information".
11. In respect of the application of section 35 to both requests, the AGO advised the complainant, when it undertook its internal review, that:

"... the section 35 test was applied to both of your requests ... and that the section 35(1)(c) exemption was applied in each case".
12. As the requests were made within a few days of each other, and are on a linked subject, the Commissioner considers this to have been a pragmatic approach by the AGO. It has confirmed that all parts of both requests have been taken into consideration in its deliberations.

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<sup>2</sup> <https://www.theguardian.com/politics/2022/jun/08/snp-urged-come-clean-second-independence-referendum>

<sup>3</sup> <https://www.theguardian.com/politics/2022/may/27/boris-johnson-changes-ministerial-code-to-remove-need-to-resign-over-breaches>

13. The Commissioner will consider the application of section 35 to the requests below.
14. The Commissioner has recently viewed the withheld information in connection with a different complaint, and public authority, but covering the same subject matter<sup>4</sup>. He did not consider it necessary to view it again.

## **Reasons for decision**

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### **Section 35 – formulation or development of government policy**

15. The AGO has cited 35(1)(c) which states that:

“(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice”.

16. Section 35(1)(c) provides that information held by a government department is exempt if it relates to the provision of advice, or any request for the provision of advice, by any of the Law Officers. Section 35 is a class-based qualified exemption which means there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. The classes are broad and will catch a wide range of information.
17. However, the section 35 exemptions are qualified by the public interest test. Even if an exemption is engaged, public authorities can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
18. The Law Officers are the government’s most senior legal advisers. ‘Law Officers’ are defined in section 35(5) of FOIA as the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General of the Welsh Government and the Attorney General for Northern Ireland.
19. The core function of the Law Officers is to advise on legal matters, helping ministers to act lawfully and in accordance with the rule of law.

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020667/ico-127535-c6s1.pdf>

They must be consulted by ministers or their officials before the government is committed to critical decisions involving legal considerations. They also have a role in ensuring the lawfulness and constitutional propriety of legislation.

20. As per the Commissioner's guidance<sup>5</sup>, section 35(1)(c) reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice, albeit on this occasion the AGO has confirmed that it does hold the requested information. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.
21. The exemption covers advice which 'relates to' the provision of Law Officers' advice (or requests for advice) which is interpreted broadly.
22. This means that information does not itself have to 'be' Law Officers' advice or a request for Law Officers' advice. It will also be covered if it recounts or refers to such advice or any request for it. For example, any discussions about how to react to Law Officers' advice will relate to that advice, and will be covered.
23. In particular, any discussions about whether or not to seek Law Officers' advice will relate to the provision of advice and will be covered – even if in the end no such advice was sought. The Commissioner does not consider that there needs to be an actual request for advice in order for the exemption to bite. This would undermine the underlying purpose of the convention, which includes confidentiality over whether Law Officers have or have not advised. This means that departments can claim section 35(1)(c) for information that reveals that advice was requested, or for information that reveals no advice was requested. Departments can confirm that the information is held but refuse its content under section 35(1)(c). The refusal notice can explain that the use of the exemption does not imply that advice was in fact requested.
24. The AGO explained to the complainant that: "The documents held which relate to your request relate to the Attorney General's function as a Law Officer and chief legal adviser to the Government".

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<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

25. As the complainant has made particular reference to the requests being separate, the Commissioner has initially considered whether both properly fall within the remit of this exemption.
26. As regards the latter request for the advice itself, the Commissioner has already considered disclosure of this in the recent decision notice referenced in paragraph 14 above. He clearly found the exemption to be engaged so will not reconsider that point here.
27. However, the first request is more nuanced in that it seeks only a date and the name / role of the person seeking the advice. The Commissioner notes that these points were not specifically covered in the earlier decision notice so, as the AGO has included specific submissions, he has gone on to consider them here.
28. In respect of the date and role of the party who asked for the advice (the first request), the AGO advised the Commissioner:

“... AGO consider that releasing the information held, including the date the advice was sought or the role of the requester, would harm government decision-making processes in this case, and more broadly through the precedent it would set ...”.

29. The AGO considered that such a disclosure would be likely to have a chilling effect on the seeking of legal advice within government saying:

“Disclosure of the date of seeking Law Officer advice or the role of the requester would highly likely have such a chilling effect, both in the present complaint and more generally.

As regards the date of any request, officials and ministers should feel able to seek advice from the Law Officers at any time where it is appropriate to do so. AGO consider that the prospect of the timing of requests for advice in relation to any issue being subject to FOIA disclosure would likely have two effects. First, it would in some cases discourage the seeking of additional advice (perhaps to clarify an important aspect of earlier advice) for fear that an adverse inference would be drawn about the government’s confidence in its own legal position when this information was disclosed. Second, in other cases it would mean that officials or ministers actively sought legal advice from the Law Officers in cases where it was not warranted (thinking about the circumstances as set out in the Cabinet Manual), solely because they would be worried about not having sought or received advice before ‘X’ date. Either way, officials and ministers would be second-guessing themselves based on the risk of future disclosure of the circumstances of their seeking legal advice, rather than being properly focused on ensuring that crucial government decisions are underpinned by the appropriate legal advice, be that from

departmental legal advisers or the Law Officers. The Commissioner has previously accepted that routinely disclosing this type of detail about the Law Officers – including even the fact of the Law Officers having advised – ‘creates a potential risk which could undermine effective government’<sup>6</sup>.”

30. As advised above, the classes of information which are subject to this exemption are broad and will therefore catch a wide range of information. Based on the wording of the request, the submissions above and having viewed the withheld information, the Commissioner is satisfied that the exemption is properly engaged in respect of both requests.
31. The next step for the Commissioner is to consider the public interest test.

### **Public interest test**

32. Section 35 of FOIA is subject to the public interest test set out in section 2(1)(b) of FOIA. This means that the Commissioner must determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Arguments in favour of disclosure**

33. The complainant has argued that:

“The proposal to increase the warhead stockpile ceiling attracted considerable criticism and claims that it was inconsistent with the UK's obligations under international law ... Given this controversy and the conflict in opinions, there is a public interest in establishing how the government interprets its nuclear disarmament obligations under the Non-Proliferation and international law, and in explaining this to the international community”.

34. He said that there is a considerable global interest in the legality of nuclear weapons adding that:

“Nuclear-armed states remain under pressure to justify the legality of their arms from many states which have renounced the freedom to develop their own nuclear weapons... As a nuclear-weapon state, and also a member of the United Nations Security Council, there is considerable interest in and scrutiny of the UK’s actions with regards to its nuclear weapons programme and its compliance with

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<sup>6</sup> Case FS50558898, at para. 50

the pledge on disarmament ... Both the UK public and the international community are entitled to know the government's reasoning as to why it feels that changes in the numbers of its warheads are compliant with the NPT [Treaty on the Non-Proliferation of Nuclear Weapons], and its broader thinking on NPT matters”.

35. He also argued that withholding the information may damage both the national and public interests if this were to lead to governments of other nations concluding that the UK is acting unlawfully in its nuclear weapons policies.
36. The complainant considered that there is a public interest in citizens knowing whether important policy matters, with international implications, have been considered with the benefit of sound legal advice. He said that “scrutiny is of value” and that “[a] modern democracy should be prepared to reveal is [sic] thinking on matters of international legal significance. A strong public interest for release of this information thus outweighs concerns for maintaining the Law Officers' convention”.
37. The AGO recognised that: “there is a public interest in citizens knowing whether matters have been considered with the benefit of sound legal advice

### **Arguments in favour of maintaining the exemption**

38. The complainant recognised that there is an interest in maintaining confidentiality over advice provided by Law Officers.
39. The AGO referred to the strong public interest in maintaining the Law Officers' Convention. It considered that disclosure would: “undermine the long-standing Convention, observed by successive Governments, that information about the seeking, preparation or content of advice relating to the Law Officers' advisory function is not disclosed outside Government”.
40. It added: “AGO do not see what additional compelling public interest would be served by disclosing the date on which any individual instance of advice was sought and the role of the requester, in addition to the information already, exceptionally, disclosed in this case”.

### **Balance of the public interest**

41. The Commissioner recognises the weight that the exemption at section 35(1)(c) of FOIA attracts from the way it has been drafted by Parliament – providing a specific exemption for a particular type of legal advice. The weight is reinforced by the convention of non-disclosure adopted by successive governments.



42. The Commissioner accepts that there is a legitimate public interest in ensuring that public authorities are transparent in their actions. It is clear that the withheld information has the potential to affect a large number of people, given that it relates to the security and defence of the UK, as well as a significant amount of public money.
43. The Commissioner has had due regard to the content of the withheld information. He cannot describe it in detail since to do so would undermine the confidentiality provided for by application of the exemption engaged. However, he notes that the AGO has confirmed that it holds the requested information, ie the UK's nuclear deterrent in the context of its international legal obligations. This is clearly a very sensitive issue that was live at the time of the complainant's request (and remains live at the time of issuing this decision notice).
44. It is recognised that the complainant has argued that:

"Paragraph 2.13 of the Ministerial Code states that "The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority". With regard to advice given to government by the Attorney General relating to changes in the number of the UK's nuclear warheads, the Secretary of State has already revealed to Parliament the fact that a Law Officer has advised on this matter. This indicates that the Convention on information from Law Officers is not absolutely rigid".

And:

"Paragraph 2.11 of the Ministerial Code states that "written opinions of the Law Officers, unlike other ministerial papers, are generally made available to succeeding Administrations", again indicating that the convention is not absolute. In certain cases the government has voluntarily published information provided by Law Officers. In April 2005 the government published the Attorney General's advice to the cabinet on the legality of the war with Iraq on the 10 Downing Street's website. Other draft legal advice given to the government in 2002 and 2003 was declassified as part of Sir John Chilcot's Iraq Inquiry. More recently, in December 2018, the government published the Attorney General's Advice to the Cabinet on the EU Withdrawal Agreement and the Protocol on Ireland / Northern Ireland.

It is thus clear that there is discretion to release Law Officers' advice in the public interest when the circumstances warrant this".

45. In response to these arguments the AGO has countered them saying:

"... you are correct that the Law Officers Convention does not preclude the disclosure of Law Officer advice under any circumstances. It is clear from the section 2.13 of the Ministerial Code envisages that such advice may be disclosed with the authority of the Law Officers. However this has only occurred exceptionally, and in particular circumstances from which it does not follow that any information held should be provided in the present case".

46. It further advised the Commissioner:

"... AGO stress that it does not flow from the fact that the Defence Secretary has, exceptionally, made public the involvement of the Attorney General on this issue that the Law Officers' Convention will not be compromised through the release of further details of that involvement... It is already a rare instance for the Defence Secretary to have gone as far as he did, demonstrating the weight afforded to the issue in government and, we hope, providing a degree of assurance to the complainant about the seriousness of consideration given to legal aspects of this issue".

47. The complainant has been able to evidence above occasions where Law Officers' advice has been made public thereby showing that, on occasion, this will be deemed appropriate (although it is noted that none would appear to have been disclosed by virtue of a request under the FOIA). In respect of the disclosure of advice about the EU Withdrawal Agreement from 2018, the AGO drew attention to a related statement made by the Attorney General in Parliament<sup>7</sup> when he agreed to disclose the related Law Officers' advice:

"... I am today placing in the Libraries of both Houses a copy, in full, of the final advice that I provided to Cabinet...

... The release of this advice does not set a precedent for any future release of Law Officers' advice. It remains a fundamental Constitutional Convention that neither the fact, nor the content, of Law Officers' advice is disclosed outside Government without the Law Officers' consent. That Convention provides the fullest guarantee that the business of Governments is conducted at all times in the light of thorough and candid legal advice, which may also enter into matters of acute sensitivity to the public interest. The Leader of the House of Commons has asked the Committee of

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<sup>7</sup> <https://questions-statements.parliament.uk/written-statements/detail/2018-12-05/HCWS1142>

Privileges to inquire into the serious constitutional implications of Humble Address motions in such circumstances and I very much hope that it move to do so as swiftly as possible.

The constitutional tensions created between the expression of the will of the House of Commons by these means on the one hand, and the public interest in the Law Officers' Convention on the other, are not themselves conducive to the proper conduct of public affairs. It is necessary that the public has confidence in the ability of Government and Parliament to work together at a time of national decision-making of the most profound significance. The standing of the House of Commons is also of prime importance. For these reasons, having tested the will of the House twice, the Government will respect its decision and, in these exceptional circumstances and to resolve for the present those constitutional tensions, it has decided, with my consent, to publish this advice".

48. Whilst the complainant has used this as one example to evidence that such advice may be disclosed, there are clearly strong caveats when doing so and the decision is not taken lightly.
49. The Commissioner considers that the public interest in protecting the longstanding convention of confidentiality with regard to Law Officers' advice is particularly strong in the circumstances of this case; an argument with heavy weight against disclosure being the fact that the matter remains 'live'.
50. The underlying purpose of this convention of confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases. There is clearly a strong public interest therefore in maintaining the exemption and the Commissioner has given that inherent strong public interest appropriate weight.
51. In all the circumstances of this case, the Commissioner is not satisfied that there is sufficiently compelling and specific justification for disclosure such as would be required in order to equal or outweigh the obvious interest in protecting the Law Officer's advice on this occasion.
52. As in the decision referred to in paragraph 14 above, the Commissioner finds that the public interest in maintaining the exemption at section 35(1)(c) clearly outweighs the legitimate public interest in disclosure of the withheld information.

## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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 .....**

**Gerrard Tracey**  
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