

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 May 2022

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant requested legal advice which supported a statement made that the UK's nuclear deterrent and an increase in its stockpile ceiling is consistent with the UK's international legal obligations. The Ministry of Defence (MOD) confirmed that it held information falling within the scope of the request but that it considered this to be exempt from disclosure on the basis of sections 24 (national security), 26 (defence), 35 (Law Officers' advice) and 42 (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the MOD was entitled to rely on the exemption at section 42(1) in respect of all of the withheld information, and section 35(1)(c) in respect of some of the withheld information.
3. The Commissioner does not require the MOD to take any further steps.

Background

4. In March 2021 the UK Government published "Global Britain in a competitive age: The Integrated Review of Security, Defence, Development and Foreign Policy".¹

¹ <https://www.gov.uk/government/publications/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy> pp76-78

Request and response

5. On 18 May 2021, the complainant wrote to the MOD and requested information in the following terms:

“In your guidance to the UK’s nuclear deterrent and to the 2021 Integrated Review you state that our deterrent and the increase in its stockpile ceiling are fully consistent with our international legal obligations, including those under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons 1968.

Would you please provide me with a copy or details of the legal opinions obtained by the MOD to substantiate both of these statements.”

6. The MOD responded on 2 July 2021 and confirmed that it held information falling within the scope of the request but that it considered this to be exempt from disclosure on the basis of sections 24, 26, 35 and 42 of FOIA.
7. The complainant requested an internal review on 9 July 2021, and the MOD provided them with the outcome of that review on 2 September 2021. The MOD upheld its application on the exemptions cited and also sought to rely on section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 5 September 2021 to complain about the way their request for information had been handled. The complainant clarified that they did not require the names of any individuals, but argued that the remainder of the withheld information ought to have been disclosed.
9. In light of the above the Commissioner has excluded the names of individuals from the scope of his investigation.

Reasons for decision

Section 42(1): legal professional privilege **Section 35(1)(c): Law Officers’ advice**

10. Section 42(1) of FOIA provides an exemption from disclosure if the information in question is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. The

MOD maintained that all of the withheld information attracted LPP and thus engaged the exemption at section 42(1).

11. Section 35(1)(c) of FOIA provides an exemption if the information in question relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. Section 35(5) sets out that the Law Officers include the Attorney General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland. The MOD maintained that some of the withheld information engaged the exemption at section 35(1)(c) on the basis that it related to the Attorney General's function as a Law Officer.
12. Both section 35(1)(c) and section 42(1) are class based exemptions, so the information only has to fall within the scope of the exemption for it to be engaged. There is no need to consider the harm that would arise by disclosing the information, although this may be relevant when considering the public interest test.
13. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v The Information Commissioner and the DTI*² (Bellamy) as:

"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation".
14. There are two categories of LPP: litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

15. The MOD maintained that the withheld information in this case attracts legal advice privilege. The Commissioner's representative has inspected the information in question and consequently the Commissioner is satisfied that it constitutes communications between a legal adviser acting in their professional capacity and their client, or evidence of those communications, and that it relates to legal matters. He is also satisfied that the communications were made for the dominant (main) purpose of seeking or giving legal advice in the course of a legal process.
16. The Commissioner has seen no evidence to suggest that privilege has been lost or waived in this case. Consequently he finds that the exemption at section 42(1) of FOIA is engaged in respect of all of the withheld information.
17. The Commissioner is further satisfied, on the basis of having inspected the information in question, that the exemption at section 35(1)(c) is also engaged in respect of some of the withheld information.

Public interest in maintaining the exemption

18. Since section 35(1)(c) and section 42(1) provide qualified exemptions, information may only be withheld if the public interest in maintaining the exemption in question outweighs the public interest in disclosure.
19. The MOD emphasised that the concept of legal professional privilege reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients. It argued that such confidentiality promotes respect for the rule of law by encouraging clients to seek legal advice and allowing for full and frank exchanges between clients and their lawyers.
20. The MOD also maintained the importance of legal advice being "fully informed and reasoned", particularly in this case where the issues under consideration are sensitive and complex. It argued that disclosure of the withheld information would not serve the public interest because it would discourage officials from seeking full and frank advice on the broadest possible range of circumstances and using the fullest range of information.
21. The MOD provided additional arguments in respect of the exemption at section 35(1)(c). It set out that disclosure of the information exempt under section 35(1)(c) would undermine the long-established Convention that information about the seeing, preparation or content of advice relating to the Law Officers' function is not disclosed outside

Government. This Convention is acknowledged in the Ministerial Code,³ and should be attributed significant weight.

Public interest in disclosure

22. The MOD recognised that disclosure of the withheld information would demonstrate the Government's commitment to transparency and further public understanding of Government processes in nuclear deterrence decision making. It would also reassure the public and wider international community of the compatibility of UK actions with legal obligations.

23. The complainant also provided arguments in favour of disclosure. He advised the Commissioner that the Campaign for Nuclear Disarmament had obtained opinions from two legal experts who concluded that the Government's policy was in breach of international law. The complainant was of the opinion that

"The public would not countenance any knowledge that the UK's nuclear deterrent was inconsistent with our international obligations. If the information that I have requested is not disclosed this would infer doubt about the legality of the UK's deterrent."

24. The complainant also pointed out that the Commissioner's guidance advises that a suspicion of wrongdoing by the public authority is a reason in favour of disclosure. He argued that, if the Government was acting illegally, it would be

"...a clear wrongdoing that places our forces in danger of being prosecuted for war crimes".

25. The complainant was of the opinion that disclosure of the requested information was necessary to assure the public that the UK's nuclear deterrent was fully consistent with its legal obligations.

Balance of the public interest

26. The Commissioner's published guidance⁴ on section 42(1) states:

"As a general rule there is no inherent public interest in class based exemptions. However, there is an inherent public interest in section 42, which exempts legally privileged information. This is because of

³ <https://www.gov.uk/government/publications/ministerial-code>, paragraph 2.13

⁴ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

the importance of the principle of legal privilege; disclosing any legally privileged information threatens that principle.

The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice”.

27. In the case of Bellamy the Tribunal explained the balance of factors to consider when assessing the public interest test as follows:

“...there is strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”.

28. In balancing the opposing public interest factors under section 42 in this case, the Commissioner has attached considerable weight to the public interest in the maintenance of LPP. In his view, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP, namely safeguarding openness in communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner accepts that LPP is fundamental to the administration of justice and disclosing any legally privileged information threatens that principle.
29. 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. However, he must also take into account that there is a public interest in the maintenance of a system of law which includes LPP as one of its tenets.
30. 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 exemptions engaged. However, the Commissioner notes that the MOD has confirmed that it holds information which falls within the scope of the description of the information set out in the request, 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).
31. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of LPP is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that

public interest is equalled or outweighed by the factors favouring disclosure. Parliament decided that the exemptions at sections 42(1) and 35(1)(c) should be qualified because it considered that there would be some cases, however exceptional, where information should be disclosed in the public interest despite engaging the exemptions.

32. In all the circumstances of this case, however, 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 communications between legal adviser and client, which the client supposes to be confidential under legal professional privilege.
33. In conclusion the Commissioner finds that the public interest in maintaining the exemptions at section 42(1) and 35(1)(c) clearly outweigh the legitimate public interest in disclosure of the withheld information. Consequently the Commissioner is not required to make a decision in respect of the other exemptions claimed, although in the circumstances of this case he considers it extremely likely that the MOD was entitled to rely on them to refuse the complainant's request.

Right of appeal

34. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.

36. 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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