

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to legal advice on specific elements of the Government's response to the pandemic.
2. The Attorney General's Office (AGO) refused to confirm or deny whether it held the requested information on the basis of section 35(3) (formulation of government policy etc) of FOIA.
3. The Commissioner's decision is that the AGO was correct to neither confirm nor deny if this information was held and the public interest in this case supports this position.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 18 July 2020, the complainant wrote to the AGO and requested information in the following terms:

“(1) Has the Attorney-General been at any time requested to confirm that the government's lockdown regulations are in accordance with the UK's obligations under Human Rights Conventions?

(2) Has the Attorney-General specifically been asked to confirm whether imposition of mandatory face masks is in accordance with UK citizens human rights, given the government's previous

acknowledgement that the science is not clear enough to justify compulsion?

(3) If so, will the Attorney-General's advice on this issue be made publicly available?"

6. The AGO responded on 21 July 2020. It refused to confirm or deny that it held information within the scope of the request, citing section 35(3) (formulation of government policy) of FOIA.
7. Following further correspondence between the parties, the AGO sent the complainant the outcome of its internal review on 1 September 2020. It upheld its original position, confirming its application of section 35(3) by virtue of 35(1)(c) and confirming its view that the public interest in neither confirming nor denying outweighs the public interest in disclosing whether or not it holds information in scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 10 September 2020 to complain about the way her request for information had been handled.
9. In her correspondence, she explained her grounds for believing that disclosure of the requested information is a matter of overwhelming public interest.
10. Those grounds are considered below.
11. When considering a 'neither confirm nor deny' response, the single issue the Commissioner must determine is whether the public authority was correct neither to confirm nor deny whether it holds the requested information.
12. Accordingly, the Commissioner has considered whether the AGO was entitled to rely on section 35(3), by virtue of section 35(1)(c), to neither confirm nor deny holding the requested information. The Commissioner has not considered whether the information – if held – should be disclosed.
13. Nothing in this notice should be taken as implying that the AGO does, or does not, hold relevant information.

Reasons for decision

Section 35 – formulation or development of government policy

14. Section 35(3) of FOIA states that:

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

15. Therefore, in order to engage the section 35(3) exemption, the requested information, if held, would need to be exempt from disclosure on the basis of one of the exemptions contained in section 35(1).

16. In the circumstances of this case the AGO explained that the relevant exemption was section 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”.

17. The AGO argued that any information that may, or may not, be held, in relation to advice provided by the Attorney General, or the procurement of such advice, regarding the Government’s lockdown regulations or the imposition of mandatory facemasks, would relate to the Attorney General’s function as a Law Officer and chief legal adviser to the Government.

18. In that respect, it told the Commissioner that to confirm or deny whether information within scope of section 35(1)(c) of FOIA is held by the AGO would reveal exempt information, namely information as to whether Law Officers’ advice was sought or given in relation to aspects of the pandemic response. It considered that this would be contrary to one of the fundamental purposes of the Law Officers’ Convention.

19. As per the Commissioner’s guidance¹, 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. 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

¹ <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate case.

20. Based on the wording of the request and the type of information being requested, the Commissioner has concluded that the exemption at section 35(3) of the FOIA is engaged because information within the scope of the request, if held, could reasonably be expected to include advice provided by the Law Officers or requests for such advice.
21. The next step for the Commissioner is to consider the public interest test.

Public interest test

22. Section 35(3) is subject to a public interest test and therefore the AGO may only maintain this exclusion from its duty to provide confirmation or denial where the public interest in doing so outweighs the public interest in disclosure.
23. The Commissioner's guidance on section 35 states:

"Section 35(1)(c) protects legal advice from the Law Officers and decisions about whether to request this advice. Public interest arguments should focus on the extent to which disclosure would undermine the Law Officers' convention of confidentiality".

Public interest in confirming whether or not the requested information is held

24. The complainant considers that the government introduced coronavirus regulations which imposed extreme restrictions on UK citizens' human rights.
25. In the circumstances, she argued that there cannot be a greater or clearer public interest for UK citizens to know whether, in imposing the regulations, the government has acted in good faith in accordance with their legal and constitutional obligations.
26. The AGO acknowledged the public interest in citizens knowing whether matters have been considered with the benefit of sound legal advice.

Public interest in maintaining the exemption to confirm or deny whether the requested information is held

27. In support of its view that the public interest favoured neither confirming nor denying whether the requested information was held, the AGO told the complainant:

"[confirming or denying whether any such information is held] would undermine the long-standing Convention, observed by successive Governments, that information about the seeking, preparation or content of advice relating to the Law Officer's advisory function is not disclosed outside Government. This Convention is recognised in paragraph 2.13 of the Ministerial code".

28. It explained that the Law Officer's Convention protects fully informed decision-making by allowing Government to seek, and Law Officers to prepare, 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 also told the complainant that the Convention ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.

29. In its submission to the Commissioner, it said:

"Further, the Law Officers are often consulted when advice concerns issues of particular complexity, sensitivity or constitutional importance. It is very important that the seeking of and provision of legal advice in such circumstances should be facilitated and protected in the public interest".

Balance of the public interest test

30. In carrying out the balancing exercise, the Commissioner accepts that the exemption is not absolute, and the strong public interest in protecting Law Officers' advice may be overridden if there are particularly strong factors in favour of confirmation or denial.

31. He acknowledges that the issue of mandatory restrictions during the Covid-19 pandemic was a matter of significant public interest at the time the request was made.

32. Having taken into account the underlying purpose of the exemption and the timing of the request, 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 in view of the fact that the pandemic and how to manage it were ongoing at the time of the request.

33. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption provided by section 35(3) outweighs the public interest in confirming or denying whether the AGO holds information falling within the scope of the request, which would be exempt by virtue of section 35(1)(c).

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

**Laura Tomkinson
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