

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 October 2009

Public Authority: Scotland Office
Address: Dover House
London
SW1A 2AU

Summary

The complainant made a freedom of information request to the Scotland Office for information related to the Sewel Convention (the convention that the UK Government would not normally legislate in Scotland regarding devolved matters without the consent of the Scottish Parliament). The public authority initially refused the request by relying on the exemptions in section 35(1)(a) (Formulation and development of government policy), section 35(1)(b) (Ministerial communications) and section 42(1) (Legal professional privilege) of the Act. During the course of the Commissioner's investigation the public authority disclosed to the complainant some of the information falling within the scope of the request. In respect of the remaining undisclosed information the Commissioner has found that for the most part the exemptions were correctly applied by the public authority. However, the Commissioner has decided that some information was not exempt by virtue of any of the exemptions cited by the public authority or that the public interest favoured disclosure. The Commissioner requires that this information be disclosed to the complainant within 35 calendar days of the date of this notice. By failing to make this information available to the complainant at the time of the request the Commissioner found that the public authority also breached section 1(1)(b) (General right of access to information held by public authorities) and section 10(1) (Time for compliance with request).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 15 February 2005 the complainant wrote to the public authority to request information regarding the procedure whereby the UK Parliament may legislate on a matter which is devolved to the Scottish Parliament. The request read as follows:

“I wish to request such information that the Scotland Office or the Scottish Office possess or possessed, from 2 May 1997 until 10 July 1999, that relates to the Sewel Convention, including, but not exclusively, information on the procedure for the Parliament’s consent to legislation being dealt with by the UK Parliament under what became known as the ‘Sewel Motion’ procedure. In particular, this request includes material relating to the then junior Scottish Office Minister, Lord Sewel’s explanation of the ‘Convention’ during consideration of the Scotland Bill in the house of Lords in July 1998 (HL Deb vol.592 col 791, 21 July 1998); the First Minister’s statements to the Parliament on 9 and 16 June 1999; the first Sewel Motion debates in the Parliament on 23 June 1999); consideration within the Scottish/Scotland Office, and between it and the Scottish Executive, as to what bills or proposed bills were considered for such procedure, and the form of such parliamentary procedure.

“This information would presumably include material within the Scottish/Scotland Office itself (including its departments, Ministers and officials); and between the Scottish/Scotland Office and (a) the Scottish Executive (including their offices, ministers and officials), (b) other UK Government Departments (including their offices, ministers and officials) and bodies, (c) the Scottish Parliament (including its staff, offices, committees, Parliamentary Bureau, MSP’s, SPCB) and (d) the United Kingdom Parliament (including the staff, offices, committees of the two Houses, including the Speaker).”

3. The public authority responded to the request on 18 March 2005. At this point the public authority explained that the requested information was being withheld under the exemptions in section 35(1)(a) (the formulation or development of government policy); section 35(1)(b) (ministerial communications) and section 42(1) (legal professional privilege). The public authority concluded that the public interest in maintaining each of the exemptions outweighed the public interest in disclosure and provided the complainant with the factors it had taken into consideration when carrying out the public interest test.
4. The complainant wrote back to the public authority on 18 April 2005 to ask that it carry out an internal review of its handling of his request. In particular the complainant said that he was confused as to why the public authority had relied on section 42(1) and commented that information relating to Law Officers’ advice was dealt with elsewhere in the Act.
5. The complainant also put forward his arguments as to why he believed the public interest favoured disclosure of the information he had requested which he suggested was of great political and parliamentary interest.

6. The public authority carried out its internal review and presented its findings on 12 May 2005. The substance of the internal review was that the public authority upheld its earlier response to the request and concluded that it could find no grounds for departing from the original assessment that the public interest in maintaining the exemptions outweighed the public interest in disclosure.

The Investigation

Scope of the case

7. On 17 May 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse his request for information.

Chronology

8. On 22 June 2005 the Commissioner contacted the public authority with details of the complaint and asked that it provide him with copies of the withheld information together with an index of the documents supplied.
9. The Commissioner also invited the public authority to provide him with a further explanation regarding its application of the exemptions. In respect of the information withheld under the section 42 exemption the Commissioner asked the public authority to provide him with evidence demonstrating a client- lawyer relationship existed. Finally, the Commissioner asked the public authority to provide him with further background information on the 'Sewel Convention'.
10. The public authority responded to the Commissioner on 3 August 2005. At this point it provided an index of the withheld information. It said that the information itself was voluminous and it would discuss how best to make the information available to the Commissioner once he had had the opportunity to review the index. It reiterated that it considered all of the information to be exempt from disclosure but indicated that it had considered also applying the section 21 exemption (information available by other means) because it said that a significant amount of information regarding the 'Sewel convention' was already in the public domain.
11. The public authority provided a further explanation of why it considered section 35(1)(a) and (b) and section 42(1) to apply to the requested information.
12. The Commissioner wrote back to the public authority on 16 August 2005 to ask it to clarify what information, falling within the scope of the request, was already in the public domain.
13. The public authority responded to the Commissioner's enquiries on 21 November 2005. It said that a statement from the then Scottish First Minister, Donald Dewar, on 21 July 1998 was publicly available and went on to explain that a certain

- amount of the requested information related to this statement. It said that this was mostly background information, advice and a draft text that eventually became this statement. The public authority also outlined some further information that was in the public domain.
14. On 11 July 2006 the Commissioner contacted the public authority to once more ask that it provide him with copies of all the requested information. The Commissioner specifically asked the public authority to mark the information so as to show where each exemption applied and to show what information was already in the public domain.
 15. On 21 July 2006 the public authority provided the Commissioner with copies of the information.
 16. On 10 October 2006 the Commissioner contacted both the complainant and the public authority to confirm that he now had full un-redacted copies of the information and intended to review the information to see if the exemptions relied on by the public authority had been correctly applied. The Commissioner noted that the information was voluminous and confirmed that, as he understood it, the exemptions being relied on by the public authority were section 35(1)(a) and (b) and section 42(1).
 17. On 20 August 2007 the Commissioner informed the complainant that he had recently investigated a separate complaint which was substantially similar to his own complaint in terms of the subject matter, the exemptions applied and the reasons for their application. The Commissioner explained that the Decision Notice he issued in that case had recently been appealed to the Information Tribunal, which he explained had the statutory power to rule on formal decisions made by the Commissioner. Therefore, he suggested that he put his investigation on hold to await the Tribunal's findings and asked the complainant if he was prepared to agree to this proposal. The complainant was also provided with a copy of the Decision Notice which was issued in the previous case to assist him in determining whether he was happy for his investigation to be put on hold. The Commissioner also explained that if he were to issue a Decision Notice at this time it was likely that the decision would have been substantially similar in nature to the Decision Notice already issued. The complainant subsequently informed the Commissioner that he was prepared to agree to this proposal.
 18. The Information Tribunal promulgated its decision in the similar case on 8 August 2008. As a result the Commissioner contacted the public authority on 19 September 2008 and invited it to make any further representations on the case in light of the Tribunal's decision. The Commissioner asked the public authority to make any representations within 20 working days.
 19. The public authority replied to the Commissioner on 3 October 2008 when it said that it welcomed the opportunity to make additional representations and asked for an extension until 31 October 2008.

20. On 31 October 2008 the public authority contacted the Commissioner to acknowledge that it had been unable to meet the agreed deadline and asked for a further extension until 12 December 2008.
21. On 12 November 2008 the Commissioner informed the public authority that he was prepared to grant an extension until 12 December 2008 but stated that he would be unable to agree to any further extensions.
22. On 12 December 2008 the public authority contacted the Commissioner setting out its revised position on the complaint. It explained that it had reviewed all of the information considered under the terms of the original request and its current assessment was that the information could be separated into the following four categories:
 1. *Information that we do not consider to be within scope of the request*

The public authority said that it now considered there to be a substantial amount of information which, on review, it considered to fall outside of the scope of the request.
 2. *Information which based on a current analysis and review falls within the terms of an exemption(s) within the Act, and should continue to be withheld as the public interest falls in favour of withholding.*

The public authority considered that some information that was assessed in the original request was still covered by an exemption and the public interest still favoured withholding the information. It explained that this information fell within two categories: information relating to policy formulation and development (s.35(1)(a)) and legal professional privilege (s.42(1)).
 3. *Information which based on current analysis and review falls within the terms of an exemption(s) within the Act, but to which the public interest falls in favour of release.*

The public explained that some of the information, whilst covered by an exemption in the Act, no longer needed to be withheld. It stressed that this was based on a current assessment of the public interest.
 4. *Information that we consider to be readily available in the public domain already.*

The public authority said that it had discovered that there was additional information that had previously been withheld but which was in fact covered by the section 21 exemption (information accessible to applicant by other means) and therefore should have been brought to the attention of the complainant.
23. The public authority said that it would provide the Commissioner with an updated schedule detailing the information it holds against the four categories described

above as well as its arguments for withholding any information by Thursday 18 December 2008.

24. On 18 December 2008 the public authority contacted the Commissioner to say that it had been unable to carry out this extra work but would return to this task in the New Year.
25. On 30 January 2009 the public authority contacted the Commissioner by telephone to say that it intended to complete this work by the end of the following week (Friday 6 February 2009).
26. On 27 February 2009 the Commissioner and the public authority discussed the progress of the case by telephone and agreed on a final deadline of 13 March 2009 for the public authority to provide the Commissioner with an updated schedule of the information it holds against the four categories described above.
27. No response was received by 13 March 2009 and the Commissioner now informed the public authority of his intention to issue an Information Notice.
28. On 31 March 2009 the Information Commissioner issued an Information Notice in accordance with section 51 of the Freedom of Information Act. The Commissioner asked the public authority to provide him with a schedule of all the information which it had originally identified as falling within the scope of the request clearly marked to show which of the four categories identified at paragraph 22 applies to each piece of information.
29. The Commissioner also asked for a full explanation as to why the exemptions in section 35(1)(a) and section 42(1) of the Act apply to the information which continued to be withheld. The notice also requested an explanation as to why the public authority considered that the public interest in maintaining each exemption outweighed the public interest in disclosure.
30. The public authority responded to the Information Notice on 30 April 2009 explaining what its position was in respect of each piece of information it had originally identified as falling within the scope of the request.
31. On 11 May 2009 the Commissioner contacted the public authority and asked if it would release to the complainant copies of the information which it now considered suitable for disclosure. The Commissioner also encouraged the public authority to also disclose to the complainant on a voluntary basis the information which it considered was exempt under section 21 on the grounds that it was accessible by other means.
32. The public authority agreed to this proposal on 14 May 2009 and, under cover of a letter dated 9 June 2009, disclosed to the complainant a bundle of documents which had up until this point been withheld.

Findings of Fact

33. The Sewel convention applies when the UK Parliament legislates on a matter that would normally be dealt with by the Scottish Parliament as part of its normal business or when UK bills vary the legislative competence of the Scottish Parliament or the legislative competence of Scottish Ministers. This will only happen if the Scottish Parliament has given its consent.
34. The convention was named after Lord Sewel, the then Parliamentary Under-Secretary of State for State for Scotland who, during the passage of the Scotland Act 1998, announced in the House of Lords that the UK Government:
- "...would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the Consent of the Scottish Parliament".¹*
35. The Sewel Convention, given that it is just that; a convention, is not enshrined in the Scotland Act 1998. However the convention is recognised in the Memorandum of Understanding between the UK Government and the devolved administrations.²
36. The Commissioner understands that there has been some criticism of the frequency with which the convention has been used. It has been suggested that the Sewel Convention has been used controversially in circumstances where the Scottish Government has allowed the UK Parliament to legislate on potentially contentious issues, thereby restricting debate to Westminster. There have also been calls for more formalised procedures to be established.
37. The Procedures Committee of the Scottish Parliament has carried out its own Inquiry into the convention and how it operates. The Committee published a report detailing its findings and recommendations in October 2005.³
38. The Scottish Affairs Committee in the UK Parliament has also completed a review into the Sewel Convention with a remit of looking into the Westminster perspective of the convention. It issued its report on 19 June 2006.⁴

Analysis

39. A full text of the relevant statutory provisions referred to in this notice is included at Annex A.

¹ Hansard HL Deb vol 592 col 791 (21 July 1998)

² http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf

³ <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm>

⁴ <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmsscota/983/98302.htm>

Substantive Procedural Matters

Scope of the request

40. During the course of the Commissioner's investigation the public authority, as noted at paragraph 22 above, informed the Commissioner that some of the information which it had originally identified as falling within the scope of the request was, on reflection, not relevant to the request. This information was highlighted in the schedule that was provided to the Commissioner.
41. The public authority has explained that as a result of the way in which its files are structured it appeared that when it originally responded to the request it included material that contained some information within the scope of the request but also other information that was not in scope. The Commissioner has reviewed this information and it is clear that a great deal of the information which was originally deemed to fall within the scope of the request did not relate to the Sewel convention, the subject of the complainant's request. Some of this information relates to more general issues concerning devolution, administrative matters or else focuses on bills that were considered for a Sewel motion.
42. The Commissioner recognises that the complainant's request specifically refers to bills that were subject to Sewel motions. However, he is of the opinion that where the information focuses solely on policy issues related to a particular bill or the content of the bill the information is not in scope as it does not relate to the Sewel convention.
43. For the most part the Commissioner has agreed with the public authority's interpretation of what information does and does not fall within the scope of the request. However, for several pieces of information the Commissioner has decided that the information does in fact relate to the Sewel convention and that it should have remained within the scope of the request. The Commissioner has clearly highlighted this information in a schedule which is included at Annex B. The Commissioner will also go on to consider whether any of the exemptions cited by the public authority would have prevented disclosure of this information at the time that the request was received.

Exemptions

44. As stated at paragraph 32, the public authority has now disclosed to the complainant a substantial amount of information which it had previously identified as being exempt from disclosure. The decision to disclose this information in 2009 was based on a current analysis of the public interest. The Commissioner does not intend to make a decision on whether or not this information should have been disclosed at the time the request was received. Similarly the Commissioner will not make a decision on whether or not the section 21 exemption applied to any of the information which the public authority has identified as already being in the public domain as this information has also now been released to the complainant. This is in accordance with the Commissioner's robust approach to handling complaints under the Act.

45. The Commissioner will restrict his analysis to cover the information which the public authority continues to withhold from the complainant. This information is being withheld under section 35(1)(a), section 35(1)(b) and section 42(1) of the Act. The Commissioner wishes to stress that he can only base his analysis on whether or not the information should have been disclosed at the time the request was received.
46. For the information that continues to be withheld the Commissioner has considered each piece of information separately. However, for ease of reference in this notice the Commissioner has categorised the information as follows:
 - Correspondence between officials
 - Submissions from officials to ministers
 - Correspondence between ministers
 - Legal advice
47. The Commissioner notes that final versions of the submissions to ministers and final versions of ministerial responses to the development of the convention have now been disclosed to the complainant. Draft versions of these documents continue to be withheld.

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

48. Section 35(1)(a) is a class based exemption which provides that information is exempt if it relates to the formulation or development of government policy. Section 35(1)(a) has been claimed in respect of correspondence between officials and submissions from officials to ministers.
49. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
50. In this case the public authority has claimed that the information falls under the terms of the exemption as it relates to the formulation or development of policy surrounding the Sewel convention. Whilst the convention is not government policy in the sense that it was not a manifesto commitment or part of the legislative programme of the government of the time it was, and remains, an important element of the procedures that emerged as a result of Scottish devolution as set out in the Scotland Act 1998. It is a reflection of the government's plans on how best to avoid conflict between the UK and Scottish Parliaments whilst at the same time recognising that the UK Parliament retains the power to legislate on devolved matters. The Commissioner is satisfied that this amounts to a policy within the meaning of section 35(1)(a).
51. Having reviewed the information to which this exemption has been applied the Commissioner has found that it relates to the formulation of the policy on the

Sewel convention and that therefore the exemption under section 35(1)(a) is engaged. Moreover, the Commissioner considers that section 35(1)(a) can safely be given a broad interpretation given that the exemption only requires that information 'relates to' policy formulation or development.

Public Interest Test

52. Section 35(1)(a) is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act. This provides that information to which an exemption applies may only be withheld where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

53. The complainant has advanced the following arguments in support of the disclosure of the requested information.
- Increase transparency and accountability in the workings of the Sewel convention.
 - Aid public understanding of how the convention was expected to work.
 - Increase public understanding of how decisions affecting them are reached.
54. In addition the Commissioner also considers that the following factors are also relevant in this case.
- Encourage officials to ensure they provide quality advice in future.
 - Disclosure of all information provides the fullest possible picture of events.

Public interest arguments in favour of maintaining the exemption

55. The Commissioner considers that the relevant factors in favour of maintaining the exemption are as follows:
- Providing the public authority a safe space in which to develop and review the Sewel Convention which allows the government to focus on the development of the policy free from external pressure and debate.
 - Adverse effect on the policy making process.
 - Adverse effect on the candour of debate between civil servants – the 'chilling effect' argument.

Balance of the public interest arguments

i. Correspondence between officials

56. The Commissioner notes that the information which relates to correspondence between officials is different to other information falling within the scope of the request in that it is more candid than the submissions to Ministers and the Ministerial correspondence. The Commissioner considers that disclosure of this particular information would be likely to have an impact on candour of officials when providing advice and exchanging views on policy in future. This is the 'chilling effect' argument which has featured in several Information Tribunal decisions. The Commissioner believes that civil servants should not easily be deterred from doing their job properly and normally he is sceptical of cases where a public authority argues that disclosure would lead to a wider chilling effect on the candour of civil servants. However, given the nature of the information in this particular case, the Commissioner is prepared to give limited weight to this argument.
57. The Commissioner accepts that the public interest in maintaining an exemption will usually diminish over time and in this case between 6 and 7 years had elapsed since the policy was introduced when the complainant made his request. Whilst this is an argument in favour of reduced harm to the policy process it is clear that the operation of the Sewel Convention was still very much a controversial and 'live' issue at the time of the request. This is demonstrated by the two committees that were formed in order to look into the operation of the convention and in light of criticism and some controversy surrounding the manner in which the convention had been deployed up until that point. Disclosure at the time of the request may have undermined the development of the convention and prevented the committees from having a safe space in which to consider the convention without the distraction of premature disclosure.
58. The public authority has also explained that the convention is regularly triggered and that the government has to continually consider the desirability of recourse to the convention and its applicability to any given case. The Commissioner understands that these decisions can themselves be controversial and that it is the work of the public authority to manage the convention and provide advice to Ministers on its applicability to a particular case. Given the particular circumstances of this case the Commissioner believes that the Sewel Convention can be characterised as a 'live' issue and therefore the public interest in maintaining the exemption is stronger than in cases where the information is of a similar age and relates to a policy that was formulated several years ago and the operation of which is less contentious or more established. The continued development and evolution of a convention over an early period of its operation distinguishes this case from other section 35(1)(a) cases where a much clearer point between development and implementation can be established.
59. The Commissioner has decided that whilst disclosure of this information would lead to greater transparency of the policy development process and provide some further background and context, it would be unlikely to significantly further the public understanding of the convention beyond the information that had already

been disclosed. The information would give an insight into the way in which the convention was formulated internally by officials but the Commissioner considers that there is less public interest in this than in understanding the convention itself and its impact. The Commissioner also feels that the public interest in disclosing the early thinking of officials, in this case, is not as strong as disclosing the thinking of ministers as actual decision-makers. Therefore the Commissioner has concluded that the public interest in disclosure of this information is outweighed by the public interest in maintaining the exemption. The Commissioner has grouped this information together as he believes that his analysis applies to all of the information.

ii. Submissions to Ministers

60. As noted above, the Commissioner recognises that there is a public interest in greater transparency on how the policy regarding the Sewel Convention was developed. Information within the submissions would aid public understanding of this issue. However, the public authority has now disclosed final versions of the Ministerial submissions. It is the Commissioner's view that where both final and draft versions of documents of this kind exist then there is more of a public interest in releasing information in the form of final versions of documents. This is because the decision on the policy was taken by ministers and the submissions presented to ministers would be central to understanding the basis on which they made their decisions. However, given that the drafts were not sent to ministers there is less of a public interest in this information being disclosed. Any additional transparency that would result from the disclosure of earlier versions would not, in this case, sufficiently aid public understanding as to equal or outweigh the public interest in maintaining the exemption.
61. On this point the public authority has argued that the drafting process is a particularly important part of the policy making process because the preparation of drafts allows those working on a project from across a range of teams to share ideas in a concise and defined way. It is the public authority's view that the public interest favours respecting the ability of officials to prepare and share drafts as this allows for constructive working. In this case the Commissioner agrees with the public authority on the basis that disclosure would risk undermining the ability of officials to share drafts with fellow officials across government. Whilst there may be a public interest in understanding what officials considered when formulating the policy, the Commissioner considers that there is a greater public interest in knowing what was actually put to ministers. Consequently the Commissioner has decided that the limited public interest in the disclosure of earlier drafts of the submissions is outweighed by the public interest in maintaining the exemption.

Section 35(1)(b) – Ministerial Communications

62. Like section 35(1)(a), section 35(1)(b) is a class based exemption. In order for the exemption to be engaged the information must 'relate to' Ministerial communications. Therefore information does not necessarily have to be ministerial communications itself to fall within the scope of the exemption. In any event the Commissioner is satisfied that all of the information to which the

exemption has been applied, being letters and submissions between ministers, constitutes ministerial communications within the meaning of section 35(1)(b).

63. The public authority has also applied section 35(1)(b) to some of the information which has been considered above under section 35(1)(a). For the avoidance of doubt, the Commissioner wishes to stress that he does not intend to consider the application of section 35(1)(b) to this information as he has already established that this information is exempt from disclosure under section 35(1)(a).

Public Interest Test

64. Section 35(1)(b) is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act.

Public interest arguments in favour of disclosing the requested information

65. The arguments in favour of disclosure are as listed at paragraph 53 above because they are equally applicable to this category of information.

Public interest arguments in favour of maintaining the exemption

66. The Commissioner considers that the main public interest factor in favour of maintaining the section 35(1)(b) exemption in this case is the principle of collective Cabinet responsibility.

67. Collective Cabinet responsibility has been described by the Information Tribunal as:

“...the long standing convention that Ministers are collectively accountable for the decisions of the cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government Policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed.”⁵

68. Section 2.1 of the Ministerial code states that:

“Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in cabinet and Ministerial Committees, including in correspondence, should be maintained.”⁶

69. The public authority has argued that collective Cabinet responsibility would be undermined if any of the information to which section 35(1)(b) has been applied

⁵ Scotland Office v Information Commissioner [EA/2007/0070], para. 82.

⁶ http://www.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/ministerial_code_current.pdf

were disclosed. It has said that the ministerial correspondence shows the policy positions taken by Ministers during the time in which the convention was being developed. It considers that there should also be a Ministerial space for diverging opinions and that to remove this space could result in an unwillingness to express or record opinions properly, to the detriment of policy formulation.

70. The Commissioner has also considered the 'safe space' arguments and the extent to which the Sewel convention was a 'live issue' at the time of the request.

Balance of the public interest arguments

71. The Commissioner considers that arguments regarding accountability for decisions are stronger when it comes to the disclosure of ministerial correspondence as it is Ministers, rather than civil servants, that should properly be held accountable for policy decisions taken. In balancing the public interest the Commissioner has given this argument particular weight.
72. The Commissioner would add that the information is less candid and is more finalised as regards the opinions expressed by individual ministers compared to the communications between civil servants. The Commissioner has also taken this into account when reaching his decision.
73. However, at the same time there is a strong public interest in protecting the principle of collective Cabinet responsibility. First of all there is a general public interest in protecting this principle and not disclosing divergent views as this allows the Government to present a united front which ensures good government. If divergent views are disclosed then the Government would have to spend valuable government time defending the personal views of Cabinet members, rather than the Government's position, and this would not be in the public interest as it would slow down the business of government and the implementation of agreed policies.
74. At the same time there is a particular public interest in protecting collective cabinet responsibility in this case given that the Sewel convention was still a live issue at the time the request was received. In this case the Commissioner considers that there was a public interest in supporting the collective position of ministers and safe space to exchange views whilst the issue was live.
75. The Commissioner has also considered the timing of the request. Whilst generally speaking the Commissioner considers that the need for and desirability of protecting collective Cabinet responsibility will diminish over time, in this case the party in power at the time the information was created was still in power at the time the request was received and the Sewel convention was still controversial and topical at this point. Therefore the Commissioner has attributed weight to the public interest in protecting the principle of collective responsibility in the circumstances of this case.
76. The Commissioner has attributed limited weight to the public authority's arguments that disclosure would be likely to lead to ministers being unwilling to express or record opinions properly. The Commissioner believes that there would

still a strong incentive for ministers to exchange views fully even in the face of disclosure. Instead, the Commissioner considers that in this case the ability of ministers to collectively defend decisions is the key factor in favour of maintaining the exemption. Where disclosure would be likely to genuinely risk undermining this principle and disrupt the process of government the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

77. However, it is the Commissioner's opinion that some of the information withheld under section 35(1)(b), whilst engaging the principle of cabinet collective responsibility, would not undermine the convention if it were disclosed. In the absence of this argument the Commissioner considers that the public interest in disclosure now outweighs the public interest in maintaining the exemption.
78. In addition, some information, whilst engaging the principle of collective Cabinet responsibility, reflects the opinions of then Ministers who at the time of the request were either deceased or no longer in government. In these circumstances any harm that could be caused to the collective responsibility of the Government is reduced and when this factor is taken into account the Commissioner considers that the balance of the public interest shifts in favour of disclosure.
79. The Commissioner has clearly identified the information he considers should be disclosed in the schedule which he has provided to the public authority.

Section 42(1) – Legal professional privilege

80. A small amount of information has been withheld under section 42(1) of the Act. Section 42(1) provides that information in respect of which a claim for legal professional privilege could be maintained in legal proceedings is exempt information.
81. Legal professional privilege is a common law concept designed to protect the confidential relationship between a legal advisor and client. The Information Tribunal described legal professional privilege 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, or hers 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 communication or exchanges come into being for the purpose of preparing for litigation.”⁷
82. Information will attract privilege where it constitutes legal advice between a legal advisor and a client in a professional capacity and is held for the dominant purpose of providing legal advice. There are two types of legal professional privilege. Legal advice privilege can be claimed where no litigation is

⁷ Bellamy v Information Commissioner & The Secretary of State for Trade and Industry [EA/2005/0023], para.9.

contemplated or pending. Litigation privilege can be claimed where litigation is contemplated or pending.

83. The information withheld under this exemption constitutes advice provided by legal advisers within the public authority to other officials during the development of the policy surrounding the Sewel Convention. The public authority has provided the Commissioner with details of the legal advisers within the public authority who had responsibility for the Sewel Convention as evidence of a lawyer-client relationship. Having reviewed this information the Commissioner is satisfied that it attracts legal advice privilege.
84. It is noted that legal professional privilege can be waived where the party which owns the information decides to waive the privilege. Waiver of legal professional privilege occurs where permission is given by a client to make the information available to a third party without restriction or where the information is treated or presented in such a way that it can be implied from that action that privilege has been waived. However, the Commissioner has seen no evidence to suggest that legal professional privilege has been waived in respect of any of the information that has been withheld from the complainant under this exemption.
85. The Commissioner has decided that section 42(1) is engaged in respect of all of the information withheld under this exemption, with one exception. The Commissioner found that one piece of information, whilst originating from a legal adviser, did not constitute legal advice but was of a more administrative nature. The Commissioner considers that this information should be disclosed and has identified it in the schedule.

Public interest test

86. Section 42(1) is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act.

Public interest arguments in favour of disclosing the requested information

87. In addition to the arguments listed at paragraph 53 which he believes are equally applicable here, the Commissioner considers that disclosure would also serve the public interest in demonstrating the extent to which the Government takes important decisions based on sound legal advice.

Public interest arguments in favour of maintaining the exemption

88. The Commissioner believes that there is a strong element of public interest inbuilt into legal professional privilege and notes the comments of the Information Tribunal when it stated that:

“...there is a 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...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and

obligations with those advising them without fear of intrusion, save in the most clear cut case..."⁸

89. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right".
90. The Commissioner has also considered the age of the information and the fact that the issue to which the legal advice related to was still 'live' at the time the request was received.

Balance of the public interest arguments

91. The Commissioner's approach to cases where section 42(1) has been applied is to adduce an initial weighting in favour of maintaining the exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. The Commissioner will then go on to consider the circumstances specific to the case.
92. The information withheld under section 42(1) dates from November 1998 until June 1999 and therefore, in the context of this particular case, was still relatively recent at the time the complainant made his request. The Commissioner is of the view that the public interest in protecting legal professional privilege will be stronger in cases where the advice is recent. This is because the advice is still likely to be used in a variety of decision-making processes and the Commissioner accepts that such processes would be likely to be affected by disclosure. The Commissioner has given a certain amount of weight to this factor when balancing the public interest.
93. Similarly the Commissioner has also considered the extent to which the legal advice was still 'live' at the time the request was received. The public authority has explained that it is its responsibility to monitor, analyse and record the effects of the Sewel Convention and to provide regular advice to Ministers and officials on the general policy and how the convention is being applied in specific cases. In light of this the Commissioner considers that the information was still relevant at the time the request was received as the Sewel convention was still being implemented in individual cases and the nature of its operation was still relatively novel. Therefore it is likely that any legal advice relating to this would still have relevance within the public authority. Therefore the Commissioner has decided that the particular circumstances of this case also lead him to conclude that there is a strong public interest in maintaining the exemption.
94. The Commissioner accepts that there is a public interest in accountability, transparency and in aiding public understanding of when and how the Government commissions legal advice regarding decisions affecting them. However, having reviewed the withheld information the Commissioner has decided that the public interest arguments are not sufficient to equal the strong

⁸ Bellamy, para.35.

public interest in protecting the principle of legal professional privilege both in general and on the specific facts of this case.

95. In all the circumstances of the case the public interest in disclosure is outweighed by the public interest in maintaining the section 42(1) exemption.

Procedural Requirements

96. In respect of the information which the Commissioner has decided is not exempt by virtue of any of the named exemptions, the public authority breached section 1(1)(b) by failing to disclose this information to the complainant. By failing to disclose this information within 20 working days the public authority breached section 10(1) of the Act.

The Decision

97. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The public authority dealt with the request in accordance with section 1(1)(b) of the Act to the extent that it correctly withheld some of the requested information under the exemptions in section 35(1)(a), section 35(1)(b) and section 42(1).

98. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 1(1)(b) to the extent that it incorrectly withheld some of the requested information under section 35(1)(b) and section 42(1).
- The public authority breached section 10(1) of the Act by failing to disclose to the complainant the non-exempt information within 20 working days.

Steps Required

99. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- The public authority must disclose to the complainant the information identified in the schedule provided to it with this notice which the Commissioner has decided should be disclosed.

100. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

101. Failure to comply with the steps described above 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.

Right of Appeal

102. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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

Dated the 20th day of October 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Annex A

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 35(1) provides that –

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or

(d) the operation of any Ministerial private office.

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”