

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 8 August 2011**

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

### **Summary**

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The complainant requested information recording exchanges between the public authority and the Advocate General for Scotland concerning exemption for Orkney and Shetland constituency from Government plans to reduce the numbers of and equalise the size of Parliamentary constituencies. The public authority refused the request and cited the exemptions provided by the following sections of the Act: 35(1)(a) (information relating to formulation or development of government policy), 35(1)(b) (information relating to Ministerial communications) and 35(1)(c) (information relating to the provision of advice by the Law Officers). The Commissioner finds that sections 35(1)(a) and 35(1)(b) were cited correctly, but that section 35(1)(c) was not engaged. The public authority is required to disclose the information withheld under section 35(1)(c). The Commissioner also finds that the public authority breached the procedural requirements of the Act through its handling of the request.

### **The Commissioner's Role**

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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**

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2. The complainant made the following information request on 13 September 2010:

*“The content of any correspondence, emails, minutes of any meetings and notes of any communication in the period 5 May 2010 to 5 August 2010, between the Secretary of State for Scotland, or the Private Office of the Secretary of State, or Special Advisors to the Secretary of State for Scotland, or the Scotland Office Press Office, or officials at the Scotland Office, with the Advocate General for Scotland, the Private Office of the Advocate General for Scotland, and officials in the Office of the Advocate General for Scotland in relation to the exemption of Orkney and Shetland constituency from plans to reduce the size of Parliamentary constituencies in Scotland.”*

3. The response to this request was dated 13 October 2010. The request was refused, with the exemptions provided by sections 35(1)(b) (information relating to Ministerial communications) and 35(1)(c) (information relating to Law Officers' advice) cited. The refusal notice included no explanation as to why these exemptions were believed to be engaged, or for why the balance of the public interest was believed to favour the maintenance of these exemptions.
4. The complainant responded to this on 28 October 2010 and requested an internal review. The public authority responded with the outcome of the internal review on 20 December 2010. At this stage a small quantity of the information that had previously been withheld was disclosed, with the remainder withheld under sections 35(1)(b) and 36(2)(b)(i) (inhibition to the free and frank provision of advice), although during the Commissioner's investigation the public authority stated that it had not intended to cite this exemption. The balance of the public interest was addressed briefly at this stage. This response did not confirm whether the exemption provided by section 35(1)(c) was still cited at this stage.

## **The Investigation**

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### **Scope of the case**

5. The complainant contacted the Commissioner initially on 10 January 2011. The complainant indicated at this stage that his complaint concerned the refusal by the public authority to disclose the majority of the information requested.
6. The complainant was contacted by the Commissioner's Office on 29 March 2011 in order to clarify the scope of his complaint. The complainant was advised at this stage that the assumption was that his complaint related to the citing of the exemptions provided by sections 35(1)(b) and 36(2)(b)(i) and that the investigation would focus on whether these exemptions were cited correctly.

7. The complainant responded to this on 5 April 2011 and advised that his complaint did relate primarily to the citing of these exemptions. The complainant also at this stage asked that the Commissioner's investigation cover why there was a delay in the completion of the internal review.
8. The Commissioner's office responded to this on 12 April 2011 and advised that this case would focus on the citing of the exemptions provided by sections 35(1)(b) and 36(2)(b)(i). The complainant was also advised at this stage that, whilst the policy of the Commissioner is that internal reviews should be completed within 20 working days, or 40 working days in exceptional circumstances, a failure to meet this time frame did not constitute a breach of the Act. The complainant was therefore advised that no investigation into the conduct of the internal review would be carried out. The conduct of the internal review is, however, commented on further in the '*Other matters*' section below.

## **Chronology**

9. The Commissioner's office contacted the public authority on 14 April 2011. The scope of this case was set out and the public authority was asked to respond with further explanations for the exemptions cited. A copy of the information withheld from the complainant had been supplied to the Commissioner's office previously. The public authority was also asked to respond and confirm specifically whether sections 35(1)(c) and 36(2)(b)(i) were cited following internal review. Whilst 35(1)(c) had been cited in the refusal notice, the response giving the outcome of the internal review had not specified whether this exemption continued to be cited. In relation to section 36(2)(b)(i), whilst the copy of the internal review response supplied to the Commissioner's office by the complainant had cited this exemption, the copy of this response supplied to the Commissioner's office by the public authority, which appeared to be a different draft, did not cite this exemption.
10. The public authority responded to this on 16 June 2011. The public authority confirmed at this stage that it was citing the exemptions provided by sections 35(1)(a), 35(1)(b) and 35(1)(c). The public authority also stated that it was unable to explain why the complainant had received a different draft of the internal review response to that which had been provided to the Commissioner's office, but that it was not citing section 36(2)(b)(i) in relation to this request. Further explanation for the exemptions cited was also provided at this stage.

## Analysis

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### Exemptions

#### Section 35

11. The public authority has cited the exemptions provided by sections 35(1)(a), 35(1)(b) and 35(1)(c). These provide exemptions for information relating to the following:
  - the formulation or development of government policy (35(1)(a));
  - Ministerial communications (35(1)(b));
  - the provision of advice by any of the Law Officers or any request for the provision of such advice (35(1)(c)).
12. Consideration of these exemptions is a two-stage process; first, the exemption must be engaged as a result of the information falling within the class described in the relevant exemption. Secondly, these exemptions are qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
13. Turning first to whether these exemptions are engaged, the approach of the Commissioner to the term 'relates to' as it is used in section 35(1) is that this can safely be interpreted broadly. This is in line with the approach taken by the Information Tribunal in the cases *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006) and *Scotland Office v the Information Commissioner* (EA/2007/0070). Amongst other reasoning, the Tribunal in those cases noted that this approach can safely be taken as section 35(1) is qualified by the public interest, so a finding that this exemption is engaged does not necessarily mean that the information will not be disclosed.
14. Covering section 35(1)(a) first, this has been cited in relation to a submission prepared by officials for the Secretary of State for Scotland about the Electoral Reform Bill, a covering email to this submission and a record of an email exchange between officials concerning this Bill. As all of this information relates to a Bill, which is part of the process of converting government policy into legislation, the Commissioner considers it clear that this information can be accurately characterised as relating to the formulation or development of government policy. The exemption provided by section 35(1)(a) is, therefore, engaged in relation to this information.

15. Section 35(1)(b) was cited in relation to a draft of a letter from the Secretary of State for Scotland to the Deputy Prime Minister. The definition of Ministerial communications is given in section 35(5) of the Act, which notes that this includes communications between Ministers of the Crown. The Commissioner considers it clear that this communication between two Ministers is within the class specified in this exemption; that this is a draft of a letter does not preclude it being *related* to Ministerial communications. The exemption provided by section 35(1)(b) is, therefore, engaged in relation to this information.
16. The information in relation to which section 35(1)(c) has been cited consists of instructions to Parliamentary Counsel and related emails. Section 35(5) sets out the meaning of the "Law Officers" as it is used in this exemption. This includes the Advocate General for Scotland, which may be why the public authority believed that this exemption was relevant here. However, the information in question does not relate to the provision of, or a request for, advice from the Advocate General for Scotland, or any of the other Law Officers specified in section 35(5). Parliamentary Counsel are not amongst the Law Officers to which this exemption refers. As this information does not relate to the provision of, or any request for, advice from any of the Law Officers, the exemption provided by section 35(1)(c) is not engaged in relation to this information. At paragraph 35 below, the public authority is required to disclose this information.

### **The public interest**

17. In relation to the information which the Commissioner has found to be exempt, it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in improving the openness and transparency of the public authority, as well as those factors that apply in relation to this specific information, including arguments advanced by the public authority and by the complainant. The view of the Commissioner is that similar factors apply here in relation to sections 35(1)(a) and (b) and so the balance of the public interest in relation to both of these exemptions is, for the most part, addressed jointly. Where factors apply only in relation to one of these exemptions, or carry different weight in relation to each exemption, this is specified.
18. The mere fact that the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

*"The weighing [of the public interest] exercise begins with both pans empty and therefore level." (paragraph 65)*

19. A similar point was made by the Tribunal in relation to section 35(1)(b) in the case *Scotland Office v The Information Commissioner* (EA/2007/0128):

*"it is not possible to raise the exemption to a de facto absolute one simply because the information relates to, or is, ministerial communications." (paragraph 78)*

20. Covering first those factors that favour maintenance of the exemption, the public authority has argued that disclosure would result in harm to the policy-making process in that the participants in this process would be inhibited if they were aware that the record of their contributions may later be subject to disclosure via the Act. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the public authority about disclosure resulting in inhibition to participants in the policy-making process are relevant to two factors highlighted by the Tribunal: 'safe space' and 'chilling effect'.
21. The term 'chilling effect' refers to an adverse effect on the frankness and candour of participants in the policy-making process. Arguments about 'safe space' are related to chilling effect arguments but distinct, as the need for a safe space within which to debate policy exists regardless of any chilling effect that may result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy-making process. Safe space arguments are relevant where disclosure would erode the safe space in relation to an ongoing policy-making process.
22. The weight that the Commissioner affords to chilling effect arguments will depend on factors such as the content of the information and the circumstances at the time of the request. For example, an argument that disclosure would result in a chilling effect on policy making in general may often be less persuasive than an argument that a chilling effect would result to the specific policy area to which the information relates. 'Chilling effect' arguments should not be dismissed out of hand as "ulterior considerations" but should be given appropriate weight in the public interest test dependent on the circumstances of the case and the information in question. The term 'chilling effect' can cover a number of related scenarios, which argue a progressively wider impact on the frankness and candour of debate. As the impact of the 'chilling effect' argued gets progressively wider, the Commissioner considers that it will be more difficult for convincing arguments of this nature to be sustained.

Also key is the stage reached in the policy-making process at the time of the request. Policy formulation/development is a series of separate decisions rather than a continuous process of evolution. Once a decision has been made, the sensitivity of the information relating to it will generally start to wane. In general a chilling effect is less likely once a decision has been made.

23. The public authority has argued in this case that the policy making process to which the information relates was ongoing at the time of the request. The Commissioner notes that the Parliamentary Voting System and Constituencies Act 2011 received Royal Assent on 16 February 2011 and so accepts that the policy making process to which this information relates was ongoing at the time of the request. If the content of the information bears out the argument that a chilling effect may result through disclosure, the weight of this argument will be increased as a result of this process having been ongoing at the time of the request.
24. The Commissioner has considered the content of the information and what this suggests about the likelihood of a chilling effect on officials, under section 35(1)(a). Most of this content, which consists of emails and submissions to Ministers is not very discursive and is more focused on agreed intention of the policy in this area and administrative issues relating to how this policy would be given effect. Little of this content could be regarded as free and frank or expressing views or advice on substantive policy issues but it does reveal information about policy intentions. The content of the information has not been addressed in any detail by the public authority. The Commissioner therefore finds that the weight to be given to a chilling effect is limited and only carries more significant weight because the policy process was still live.
25. In relation to the information covered by section 35(1)(b), the content of this does record an expression of opinion made by one Cabinet Minister to another. However, the view of the Commissioner is that this content is not of particular sensitivity and that it is reasonable to expect that Ministers would not allow a chilling effect to disrupt their communications. Neither, therefore, does the Commissioner accept that the chilling effect argument represents a valid factor in favour of the maintenance of section 35(1)(b).
26. The Commissioner does, however, recognise an additional factor that applies in relation to the information covered by section 35(1)(b); that concerning the public interest in protecting collective Cabinet responsibility. This refers to the convention whereby all members of the Cabinet share responsibility for all policies of the Cabinet, regardless of any privately held or expressed disagreement. The Commissioner recognises that disclosing information that records the individual views

of Ministers on policy could harm this convention, and also that there is a public interest in the maintenance of this convention. The weight that this factor will carry in any individual case will vary according to the content of the information.

27. In this case the Commissioner notes that the information does record the individual views of one Cabinet Minister on an area of government policy and, therefore, that disclosure of this information could weaken the collective responsibility convention. The Commissioner accepts that this is a valid factor of some weight in favour of maintenance of the exemption provided by section 35(1)(b).
28. In terms of safe space arguments, as previously noted the policy-making process in question here was ongoing at the time of the request. Given this, the Commissioner accepts that the safe space argument is relevant and that this is a significant factor of some weight in favour of the maintenance of the exemptions.
29. Turning to those factors that favour disclosure of the information, the information in question here relates to an issue of importance in that it concerns the plans of the current government to alter how one geographical area of the electorate is represented in Parliament. The view of the Commissioner is that there is a strong public interest in openness in relation to information on this subject matter and he considers that this is a factor in favour of disclosure of significant weight. The information provides some insight into the decision making process and there is a public interest in disclosing the content of the information. This is in addition to the more general public interest in improving openness in relation to the government policy-making process.
30. Considering the combined weight of the safe space and chilling effect arguments the Commissioner has concluded that the public interest in the maintenance of the exemption outweighs the public interest in disclosure of the information covered by section 35(1)(a).
31. In relation to the information covered by section 35(1)(b), the Commissioner has recognised that the factor relating to collective Cabinet responsibility carries weight in favour of maintenance of the exemption, as well as the factor relating to the preservation of a safe space in which to carry out the policy-making process. The fact that the information related to a policy-making process that was live at the time of the request means that the factors recognised as valid in favour of maintenance of the exemption carry additional weight. Therefore, in relation to the information covered by section 35(1)(b), the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

## **Procedural Requirements**

### **Sections 1 and 10**

32. In failing to disclose within 20 working days of receipt of the request the information that the Commissioner now concludes should be disclosed, the public authority failed to comply with the requirements of sections 1(1)(b) and 10(1).

### **Section 17**

33. In failing to adequately address at either the refusal notice or internal review stage why the exemptions cited were believed to be engaged or why the balance of the public interest favoured the maintenance of these exemptions, the public authority did not comply with the requirements of sections 17(1)(c) or 17(3)(b).

## **The Decision**

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34. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemptions provided by sections 35(1)(a) and (b) correctly. However, the Commissioner also finds that section 35(1)(c) was not engaged and that this information should have been disclosed. In failing to disclose this information, the public authority breached sections 1(1)(b) and 10(1). The public authority also breached sections 17(1)(c) and 17(3)(b) through its handling of the requests.

## **Steps Required**

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35. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the information in relation to which section 35(1)(c) alone was cited;
36. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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37. 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.

## **Other matters**

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38. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. The public authority should ensure that internal reviews are carried out promptly in future.

## Right of Appeal

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39. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 8<sup>th</sup> day of August 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### **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 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 17(1) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

### **Section 17(3) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

**Section 35(1) provides that –**

“Information held by a government department or by the National Assembly for Wales 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.”