

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2023

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

Decision (including any steps ordered)

1. The complainant requested, from the Attorney General's Office (AGO), any legal advice provided about arms sales to Saudi Arabia, specifically any unpublished advice in relation to the arms trade and High Court cases involving the Campaign Against Arms Trade (CAAT) since 2015.
2. AGO refused to confirm or deny holding information within scope of the request, citing section 35(3) of FOIA with section 35(1)(c). Together those sections provide that the duty to confirm or deny holding information within scope of a request does not arise in relation to information which is (or would be, if held) exempt from disclosure because it relates to the provision of advice by any of the Law Officers.
3. The Commissioner's decision is that AGO was correct to rely on the provisions it cited and thereby neither confirm nor deny (NCND) holding information.
4. He does not require any further steps as a result of this decision notice.

Request and response

5. On 8 June 2023 the complainant wrote to AGO and requested the below information:

“... any legal advice provided by the attorney general’s office regarding arms sales to Saudi Arabia. Specifically any emails, written messages, or formal legal advice not publicly published in relation to the Saudi arms trade and any high court cases involving the Campaign Against the Arms Trade (CAAT) as a named party since 2015. I would be happy to take any advice on narrowing my information request at a later date if necessary”.
6. AGO responded on 6 July 2023. It cited section 35(3) with section 35(1)(c) and refused to confirm or deny whether it holds any information within scope of the request. It explained that “[a]ny legal advice that may or may not be held ... would relate to the Attorney General’s function as a Law Officer”, and that the public interest favours refusing to confirm or deny.
7. Comments made by the complainant in their internal review request of 10 July 2023 confirm the type of information they are seeking through their information request. The complainant specifically stated “the Attorney General’s advice”, arguing their advice relating to other, historic conflicts has been disclosed. The complainant also said that in this instance, disclosure of “the legal advice” would provide “some information as to **advice given to the government**” (emphasis added). As AGO’s website¹ makes clear, **the Attorney General** gives legal advice to government. The Commissioner also notes that the complainant, in their complaint to the Commissioner (see the following section of this notice), has not disputed that sections 35(3) and 35(1)(c) are engaged (they have not disputed that they are seeking any legal advice provided by a Law Officer). Rather, their comments focus on the subsequent public interest test. The complainant, then, is seeking any advice from the Attorney General to government on the issues specified in the request.
8. Following an internal review, AGO wrote to the complainant on 8 August 2023. It maintained its position, and emphasised the importance of a Law Officers’ convention recognised in the Ministerial Code (see analysis below).

¹ <https://www.gov.uk/government/organisations/attorney-generals-office>

Scope of the case

9. The complainant contacted the Commissioner on 18 October 2023 to complain about the way their request for information had been handled.
10. Their comments relate to the public interest test. They consider “too little weight has been given to public interest in divulging the information”. Similarly, in their internal review request to AGO, the complainant said “the public interest in this matter outweighs the interest in maintaining confidentiality”. They also argued that the Attorney General’s legal advice about arms sales and conflict has been disclosed in the past.
11. The Commissioner considers that the scope of his investigation is to decide whether AGO was correct to cite section 35(3) with section 35(1)(c) and NCND holding information within scope of the request.
12. The Commissioner has not asked AGO for any submissions in this case, because he considers he is able to make his decision without seeing any.

Reasons for decision

NCND

13. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds information of the description specified in the request.
14. However, section 2(1)(b) of FOIA provides that section 1(1)(a) does not apply, where an exemption contains an exclusion from this duty and in all the circumstances the public interest in maintaining the exclusion outweighs the public interest in disclosing whether information is held.
15. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
16. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
17. In the present case AGO has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety,

citing sections 35(3) and 35(1)(c). The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held by AGO. It is solely the issue of whether AGO was entitled to NCND holding information of the type requested by the complainant.

Sections 35(3) and 35(1)(c)

18. Section 35(3) provides that the duty to confirm or deny holding information does not arise in relation to information which is (or would be, if held) exempt from disclosure under section 35(1). Section 35(1)(c) provides that information held by a government department is exempt from disclosure if it relates to "the provision of advice by any of the Law Officers or any request for the provision of such advice ...".
19. Section 35(5) explains 'the Law Officers', in England, are the Attorney General and Solicitor General.
20. The Commissioner's guidance explains how the NCND exemption applies to Law Officers' advice².
21. The guidance notes the constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue.
22. The Ministerial Code³ says (paragraph 2.13) the fact that the Law Officers have advised or have not advised must not be disclosed outside government without their authority.
23. AGO has said "[a]ny legal advice that may or may not be held ... would relate to the Attorney General's function as a Law Officer and chief legal adviser to the Government".
24. As paragraphs 5 and 7 above show, the request specifically targets any advice provided by the Attorney General.
25. This type of information would, if held, fall under section 35(1)(c).
26. The Commissioner is therefore satisfied that section 35(3) is engaged, based on the type of information being requested. He will now consider the public interest test. The exclusion from the duty to confirm or deny holding such information can only be maintained if the public interest in

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#ncndlawofficers>

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

doing so outweighs the public interest in confirming or denying whether such information is held.

Public interest test – complainant's position

27. The complainant said the Attorney General's advice has been disclosed in the past, and listed the following:

"... in 1971 the substance of legal advice about supplying arms to South Africa; in 1992 regarding the legal advice of arms sales to Iraq; in 2003 and 2006 in relation to the invasion of Iraq; and in 2011 in relation to the intervention in Libya ... releasing legal advice in relation to arms sales and conflict is not a novel event ...".

28. They said 8,983 civilians have been killed by bombing in Yemen, and "[t]he enormity of the issue, and I argue the consequent public interest, dwarfs the rather limited information requested". They also consider that the requested legal advice "merely provides some information as to advice given to the government".

29. The complainant quoted the Commissioner as having previously ordered disclosure of the Attorney General's advice about the invasion of Iraq.

Public interest test – AGO's position

30. AGO acknowledged some public interest in citizens knowing whether matters have been considered with the benefit of sound legal advice.

31. However, it determined that on balance the public interest does not favour confirming or denying whether the requested legal advice is held by AGO. It said this would undermine the long-standing convention that information about the seeking, preparing or content of advice relating to the advisory function of the Law Officers is not disclosed outside government. It explained the convention allows any such advice to be sought and prepared in private, without fear of any adverse inferences being drawn from the content of the advice or whether it was sought at all.

32. It said the convention ensures that government "is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases". It noted that Law Officer advice may be sought in relation to issues of particular complexity, sensitivity and constitutional importance, and it is important that "the seeking of and provision of legal advice in such circumstances should be facilitated and protected".

33. AGO disagreed with the complainant's comments minimising the significance of disclosing any such legal advice if held – AGO emphasised the constitutional significance of the convention.
34. It does not accept that historic disclosures put forward by the complainant at internal review "offer any sort of precedent". It said previous disclosures will have been considered on a case-by-case basis.

Public interest test – Commissioner's position

35. The Commissioner's guidance acknowledges that where a request specifically targets Law Officers' advice, there is a strong public interest in maintaining section 35(3) and preventing the Law Officers' convention being undermined.
36. However a public authority should always consider the circumstances of the particular case. Furthermore, the strong public interest in protecting the Law Officers' convention may still be overridden, by strong factors in favour of confirming or denying.
37. The Commissioner recognises a degree of public interest in the general issue that the request relates to, over recent years. A simple internet search reveals there has been some controversy and media coverage around arms sales to Saudi Arabia, and some related legal proceedings.
38. However the Commissioner also notes that the complainant has not argued any reasons why it might be less sensitive in this case (bearing in mind the Law Officers' convention) for AGO to confirm whether a Law Officer's advice was provided.
39. Nor has the complainant made any specific arguments about why it is important to know whether government received legal advice from the Attorney General in this case, either in relation to the "Saudi arms trade" in general or any High Court cases involving CAAT since 2015.
40. The complainant's arguments instead focus on the general "enormity of the issue" behind the request, and previous disclosures of advice.
41. The complainant said, in their internal review request, "[t]he release of the legal advice ... **merely** provides some information as to advice given to the government" (emphasis added).
42. The Commissioner notes the fairly recent outcome of a judicial review, in the High Court, of the lawfulness of a government decision to continue licensing arms exports to Saudi Arabia. The judgment rejected

CAAT's grounds of challenge and dismissed the claim. There are some background details, and the judgment itself, on CAAT's own website⁴.

43. The general topic behind the request (the "arms sales to Saudi Arabia", or "the Saudi arms trade", to use the complainant's words) has, therefore, already been subject to scrutiny in the courts. This includes the judicial review referenced above (paragraph 42) and earlier cases.
44. The Commissioner considers there is no compelling public interest in AGO revealing whether the Attorney General provided any legal advice to government on the issue, or on the legal proceedings themselves.
45. He therefore considers there is no overriding public interest in confirming or denying whether the requested information is held.
46. As noted above, there would have to be strong factors in favour of confirming or denying, that override the strong public interest in protecting the Law Officers' convention. The Commissioner finds no such factors in this instance.
47. Regarding the complainant's comments referenced at paragraphs 27 and 29 above, about historic disclosures of the Attorney General's advice, the Commissioner highlights his own comments at paragraph 17 above and emphasises that the issue in this case is not one of disclosure of any requested information that may be held. He would also make the general point that even if the Attorney General's advice has been disclosed in other cases, it does not automatically follow that AGO should confirm or deny holding the information requested in the present case.
48. For the avoidance of doubt, nothing in this decision notice should be taken to mean that AGO does or does not hold the requested information. The Commissioner does not know whether it holds the requested information (as noted above, he has not asked AGO for any submissions in this case). The Commissioner has focused on AGO's position in light of the type of information the complainant seeks and the considerations outlined above.
49. In conclusion, the Commissioner agrees with AGO's position and finds that in all the circumstances, AGO was correct to give a NCND response.

⁴ <https://caat.org.uk/homepage/stop-arming-saudi-arabia/caats-legal-challenge/>

Right of appeal

50. 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

51. 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.
52. 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

Daniel Kennedy
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