

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2024

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

Decision (including any steps ordered)

1. The complainant requested information on any legal advice provided by the Attorney General's Office ('the AGO') regarding the UK government's response to the current Israel-Gaza war. The AGO would neither confirm nor deny whether it held some information, citing section 35(3) with section 35(1)(c) of FOIA. Together, these sections provide 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 because it relates to the provision of advice by any of the Law Officers. The AGO also confirmed that it held some information relating to advice provided by AGO officials, but that this was exempt from disclosure under section 42(1) (Legal Professional Privilege) of FOIA.
2. Commissioner's decision is that the AGO cited both exemptions correctly.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. The request concerns the current Israel-Gaza war¹, which followed Hamas' attacks on Israel of 7 October 2023.
5. On 29 December 2023, South Africa instituted proceedings against Israel through the International Court of Justice (ICJ), alleging that its actions in Gaza were in violation of the Genocide Convention².
6. On 26 January 2024, the ICJ ordered Israel to take all measures to prevent genocidal acts in Gaza³.

Request and response

7. On 16 October 2023, the complainant wrote to the AGO and requested information in the following terms:

"I want to submit a freedom of information request regarding the current Israel-Gaza war and the UK's response.

First, whether or not the government has sought legal advice regarding the government's possible complicity in war crimes in its military and diplomatic support of Israel. Second, if so, what advice has been provided by the attorney general's office regarding the government's response to the Israel-Gaza war and the possibility of complicity with war crimes.

Specifically, inter alia, I would like to know if any advice was given for the public or private statements of government members, the decision to move naval forces into the eastern Mediterranean, and any current or additional military aid being provided to Israel."

8. The AGO responded on 15 November 2023. It explained it had interpreted the request as follows:

¹ <https://www.bbc.co.uk/news/world-middle-east-67039975>

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).

³ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>

"We note that your request concerns legal advice that might or might not have been sought by the government and what advice has been provided by "the attorney general's office". We have interpreted your request to include legal advice that might have been sought from the Law Officers (i.e. the Attorney General or Solicitor General), but we note that in terms of advice actually provided, you have limited your request to advice that has been provided by the "office", not by the Law Officers."

9. The AGO would neither confirm nor deny whether it held information on advice sought from the Law Officers (ie the Attorney General or Solicitor General), citing section 35(3) by virtue of section 35(1)(c) (Formulation of government policy etc) of FOIA.
10. It confirmed that it held some information relating to advice provided by AGO officials, which it exempted from disclosure under section 42(1) (Legal professional privilege) of FOIA.
11. The complainant requested an internal review on 20 November 2023, arguing that the public interest balancing test had not given sufficient weight to transparency:

"...little to no consideration has been given to the serious implications of complicity in war crimes, diplomatic actions (at the UN for instance) for delaying a ceasefire, and most recently complicity in possible genocide as a case has been submitted to the International Criminal Court. These are not small issues - among others - and they warrant some mention and consideration against the interest of the government in its decision-making process."

12. The AGO provided the internal review on 19 December 2023. It maintained that the exemptions had been applied correctly, stating:

"It remains of fundamental importance that the government must be able to seek and obtain confidential legal advice on the most sensitive issues of the day and where strong public opinions (on both sides) are held. Disclosing the information you sought would, in our view, have a material and detrimental impact on the government's ability to seek and receive legal advice on these most difficult issues."

Scope of the case

13. The complainant contacted the Commissioner on 23 January 2024 to complain about the way his request for information had been handled.

He did not dispute the engagement of the exemptions, but considered that the public interest favoured disclosure. He also believed that the AGO had failed to take account of the specific points he had raised when conducting the internal review. He commented:

“The legality of Britain's support for Israel's war has now reached the level of genocide, as the ICJ is considering a credible case raised by South Africa. It calls into question the government's responsibilities under the Genocide Convention, not to mention its indirect responsibility towards international humanitarian law and relevant domestic law”.

14. When considering whether a request was handled in accordance with FOIA, following an Upper Tribunal decision⁴, the Commissioner will assess the public interest based on how matters stood at the time of an authority's decision on a request. This is the time when an authority is required to respond in accordance with the requirements and statutory timeframes in Part I of FOIA (in most cases, twenty working days after receipt). The Upper Tribunal commented that:

“The public authority is not to be judged on the balance of the competing public interests on how matters stand other than at the time of the decision on the request which it is has been obliged by Part I of FOIA to make.”

15. The analysis below therefore considers the AGO's application of sections 35(3) and 42(1) of FOIA in its response of 15 November 2023. The Commissioner has commented on the conduct of the internal review in the 'Other matters' section.

⁴ Montague v Information Commissioner ('IC') and the Department of International Trade ('DiT') [2022] UKUT 104 (AAC)
https://assets.publishing.service.gov.uk/media/6273a6ec8fa8f57a41d53ee9/UA_2020_000324_000325_GIA.pdf

Reasons for decision

Neither confirm nor deny ('NCND')

16. 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.
17. 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 where the public interest in maintaining the exclusion outweighs the public interest in disclosing whether information is held.
18. 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.
19. 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.
20. In this case, the AGO would neither confirm nor deny whether it holds information on whether advice was sought from the Law Officers, citing sections 35(3) and 35(1)(c) of FOIA. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held by AGO. Rather, it is solely the issue of whether AGO was entitled to NCND holding information of the type requested by the complainant. Whether or not the information (if it exists) is suitable for disclosure under FOIA, is a different matter, and not one that is considered here.
21. For the avoidance of doubt, nothing in this decision notice should be taken to mean that the AGO does, or does not, hold the information to which section 35(3) had been applied.

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

22. Section 35(3) provides that the duty to confirm or deny whether information is held does not arise in relation to information which is (or would be, if held) exempt from disclosure under section 35(1) of FOIA.

23. 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 ...”.
24. Section 35(5) explains ‘the Law Officers’, in England, are the Attorney General and Solicitor General.
25. The Commissioner’s guidance explains how the NCND exemption applies to Law Officers’ advice⁵. The guidance notes the constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue.
26. The Ministerial Code⁶ says the fact that the Law Officers have advised or have not advised must not be disclosed outside government without their authority.
27. The AGO noted that the wording of the request included within its scope legal advice that might have been sought from the Law Officers. This type of information would, if held, fall under section 35(1)(c).
28. The Commissioner is therefore satisfied that section 35(3) is engaged, based on the type of information being requested.

Public interest test

29. Section 35 is subject to a public interest test under section 2(1)(b) of FOIA. An NCND response can only be maintained if the public interest in doing so outweighs the public interest in confirming or denying whether the information is held.

Public interest arguments in favour of confirming or denying

30. The complainant believes that the public interest favoured disclosure because of the serious nature of the matters being considered by the ICJ:

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#ncndlawofficers>

⁶ <https://www.gov.uk/government/publications/ministerial-code/ministerial-code> paragraph 2.13

"The legality of Britain's support for Israel's war has now reached the level of genocide, as the ICJ is considering a credible case raised by South Africa. It calls into question the government's responsibilities under the Genocide Convention, not to mention its indirect responsibility towards international humanitarian law and relevant domestic law (a fact proved by the ongoing arms trade case). I would also point out this issue bears on the UK's relationship with allies in the region who view its support of Israel as illegal and detrimental to diplomatic cooperation. Material support in the form of airforce/naval/and special forces has been deployed in support of Israel and diplomatic support via the United Nations including a veto vote has been deployed. Such actions are not tangential, and given the charges of genocide, are of the highest public interest. Disclosing advice under the current circumstances does not abrogate the government's rights under the convention as a whole when it comes to foreign policy matters. Instead, a unique situation exists where a concrete and legal standard is the arbiter for a proper application of the public interest test. If there isn't public interest in complicity in possible genocide, I wonder when there will ever be sufficient public interest to override an FOI exemption: if not now, when?"

31. The AGO acknowledged that that there was a public interest in citizens knowing whether matters have been considered by Government with the benefit of sound legal advice.

Public interest arguments in favour of maintaining the exemption

32. The AGO explained that the public interest is not in favour of confirming or denying whether information is held because:

"It would undermine the long-standing Convention, observed by successive Governments, that information about the seeking, preparation or content of advice relating to the Law Officers' advisory function is not disclosed outside Government. This Convention is recognised in paragraph 2.13 of the Ministerial Code.

The Law Officers' Convention protects fully informed decision making by allowing Government to seek, and Law Officers to prepare, legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.

It is also important to note that Law Officer advice is different from other legal advice within Government, not in its fundamental underpinnings, but because it may be sought in relation to issues of particular complexity, sensitivity and constitutional importance. It is of obvious pressing importance that the seeking of and provision of legal advice in such circumstances should be facilitated and protected in the public interest.”

Balance of the public interest

33. Public interest arguments under section 35(1)(c) should focus on harm to government decision-making processes and good government.
34. The key public interest argument for this exemption relates to protecting the Law Officers’ convention of confidentiality. The Commissioner’s guidance on section 35 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.
35. The Law Officers are the principal legal advisers to the government. Their core function is to advise on legal matters, helping Ministers to act lawfully and in accordance with the rule of law. They must be consulted by Ministers or their officials before the government commits itself to critical decisions involving legal considerations.
36. Section 35(1)(c) reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The purpose of this confidentiality is to protect fully informed decision-making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.
37. However, a public authority should always consider the circumstances of the particular case and the strong public interest in protecting the Law Officers’ convention can be overridden if there are sufficiently strong factors in favour of confirming or denying.
38. The complainant said that the Foreign Secretary had confirmed that advice had been provided, but he did not cite a source for this claim and the Commissioner has not located it. The Commissioner is therefore

unable to place any weight on the suggestion that the information is already in the public domain.

39. The Commissioner recognises the general public interest in the matters the request relates to. In his submissions to the Commissioner, the complainant repeatedly cited the ongoing ICJ proceedings as demonstrating the public interest in disclosure, and, clearly, those proceedings are concerned with grave matters. However, the Commissioner notes that the proceedings only commenced **after** the AGO had responded to his request and that the ICJ did not then issue its decision for several weeks.
40. As set out in paragraph 14, the Commissioner must assess the public interest based on how matters stood at the time of an authority's decision on a request (in this case, 15 November 2023). Therefore, he is unable to place weight on the complainant's specific arguments about the ICJ proceedings, and the matters they considered, as the proceedings were not 'live' at that time and would not be for several weeks.
41. 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. Although he recognises the general public interest in informing the public about how the UK evaluated its response to the Israel-Gaza war, he finds it insufficiently strong to overcome the clear public interest in protecting the Government's ability to seek and obtain legal advice on a confidential basis. In this case, the request was submitted a week after 7 October 2023, when the situation was ongoing, highly volatile and changing rapidly. In such circumstances, the Commissioner fully accepts the importance of the Government feeling able to seek and receive, where necessary, full legal advice across the most complex and sensitive areas, without that process being subject to outside interference and distraction. The public interest in good government lies with protecting the Government's ability to make fully informed decisions on matters of significance.
42. The Commissioner's decision is therefore that the AGO was entitled to rely on section 35(3) of FOIA to NCND whether it holds information on whether legal advice was sought from the Law Officers.

Section 42 – Legal professional privilege

43. The AGO confirmed that it held information on advice provided by AGO officers, and applied section 42(1) of FOIA to withhold it.

44. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
45. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
46. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of *Bellamy v The Information Commissioner and the DTI (EA/2005/0023) (Bellamy)* as:

“ ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation.”
47. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
48. The AGO said that the information attracted legal advice privilege. It explained that the information relates to legal advice provided by AGO officers to policy officials in other government departments. It is information which the AGO considers to be advice which has a legal function, was given by a legal adviser in a legal context, is about legal rights and liabilities and which remains confidential. Its dominant purpose is the giving of legal advice.

49. The Commissioner has viewed the withheld information and is satisfied that it falls within the definition of LPP. It is further noted that the complainant does not dispute that the exemption is properly engaged.

Public interest test

50. As with section 35, above, section 42 is subject to a public interest test.

Public interest arguments in favour of disclosing information

51. The complainant's views are set out in paragraph 30, above.

52. The AGO acknowledged:

"...there is a public interest in the public understanding legal issues considered by the government, and of transparency in the legal position underpinning government policy-making and decision-making generally. There is also a public interest in the public understanding the legal positions underpinning the government's foreign policy, especially at challenging times in global affairs".

Public interest arguments in favour of maintaining the exemption

53. It was the AGO's view that, precisely because of the importance of the matters at issue (and the public interest in those issues) the government's ability to receive full and frank advice remains fundamental. It told the complainant:

"...we maintain that there is a strong public interest in ensuring that legal advice can be frank and sought freely. The subject matter of the information you have requested is live and very sensitive. It is crucial that the government should feel able to seek and receive full legal advice across the most complex and sensitive areas. Not to do so could have a chilling effect and significantly detrimental impact on those policies and decisions. We do not consider that this would be in the public interest."

54. At internal review, it added:

"It remains of fundamental importance that the government must be able to seek and obtain confidential legal advice on the most sensitive issues of the day and where strong public opinions (on both sides) are held. Disclosing the information you sought would, in our view, have a material and detrimental impact on the government's ability to seek and receive legal advice on these most difficult issues."

55. Its submissions to the Commissioner (which cannot be reproduced here as it would undermine reliance on the exemption being cited) emphasised the likelihood of prejudice being caused by disclosure of the withheld information and the severity of the effect of that prejudice, in light of the age, currency and relevance of the information.
56. The AGO also argued that disclosure would have a chilling effect, with officials and Ministers being less likely to seek full and frank legal advice if that advice may be published. It referred the Commissioner to his guidance on this point:

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

57. The AGO also said that the public interest in transparency and accountability is served by:

“...a number of [official] statements about the UK’s policy towards Israel and Gaza. Those statements have taken a variety of forms – from Ministerial statements from the Despatch Box to other formal public statements reported in the press and otherwise. There is, therefore, no absence of information about the Government’s position which may have weighed in favour of disclosure of this advice (so as to fill a vacuum where there is high public interest).”

Balance of the public interest

58. The Commissioner accepts that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. However, in balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.
59. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
60. The Tribunal explained the balance of factors to consider when assessing the public interest test in Bellamy:

“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”.

61. The Commissioner acknowledges the complainant’s belief that disclosure is required to address public concerns about the UK’s position regarding the Israel-Gaza war. For the reasons set out above, he is unable to place weight on the complainant’s specific arguments about the ICJ proceedings, and the matters they considered, as the proceedings were not ‘live’ at that time of the request.
62. Nevertheless, he recognises that the matters covered by the request are highly scrutinised, and that there will be differing and deeply held viewpoints among the public, regarding the UK’s response to the conflict and its humanitarian impact.
63. However, he must take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
64. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information, which remains ‘live’, and has balanced this against information which has already been disclosed in order to keep the public informed.
65. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
66. However, in all the circumstances of this case, the Commissioner is not satisfied, from the evidence he has considered, that there are factors that would equal or outweigh the strong public interest inherent in this exemption.
67. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. It follows that the AGO was entitled to rely on section 42(1) of FOIA to refuse to disclose the information on advice provided by AGO officers.

Other matters

68. The complainant believed that the AGO had failed to conduct the internal review properly. He felt that it had failed to explicitly respond to the particular points he made in his internal review request. He said:

“My contention is that the AGO incorrectly conducted the public interest test in failing to adequately take into account the issues I raised. No mention was made in their reply that would suggest they took serious note of my arguments beyond saying "we recognise the additional matters raised in your request". I submit this is not adequate evidence of undertaking a public interest test on such an important issue. One might expect some mention of international law, the laws of war, or our obligations under the genocide convention given the challenge I posed. Perhaps an explanation as to how our obligations under these categories including our obligation to prevent genocide do not rise to the level intended by the public interest test in such matters. Perhaps a reference, as is done in the case law, to a situation that would warrant disclosure and how this case doesn't rise to that standard. But there was no mention of my arguments and no mention of the laws, treaties, or conventions of international law from one of the highest legal bodies in the state. How can the balance of public interest be tested if the right of government is not counterbalanced against anything? It appears to me a complete erosion of the purpose of the public interest test for the body responding to an FOI request not to put any plausible case against its own when conducting such a test.”

69. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one, the code of practice established under section 45⁷ of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and “...provide a fair and thorough review of procedures and decisions taken in relation to the Act. This includes decisions taken about where the public interest lies if a qualified exemption has been used.”

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https://assets.publishing.service.gov.uk/media/5bacc7eb40f0b62dbe5321ba/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

70. From the AGO's submissions, the Commissioner is satisfied that it acted in accordance with the requirements of the code when conducting the internal review. Following the complainant's request for an internal review, it looked at the request again, concluded that its original decision had been correct, and it communicated that to the complainant. It was not under an obligation to communicate its decision in the level of detail the complainant had expected.
71. The Commissioner therefore finds no failure to conduct the internal review properly, or to comply with the section 45 code.

Right of appeal

72. 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

73. 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.
74. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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