

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 March 2014

**Public Authority:** Attorney General's Office (AGO)  
**Address:** 20 Victoria Street  
London  
SW1H 0NF

### Decision (including any steps ordered)

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1. The complainant requested information about legal advice given to the UK government in relation to its decision to enter into military action in Kosovo in 1999. The AGO refused to confirm or deny whether it held the requested information, citing the exemption at section 35(3) by virtue of section 35(1)(c). The Commissioner concluded that although section 35(3) is engaged, the public interest favours confirming or denying whether the information is held.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Confirm or deny whether information falling within the scope of the request is held, and disclose or refuse any information identified.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### Request and response

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4. On 30 July 2013 the complainant made the following request for information to the AGO:

*"I write to request details about the advice given to HMG in respect of its decision to take military action against the Serbian/FRY authorities in Kosovo in 1999.*

*...*

*Please forward that advice to me together with any documents that were material to the decision of HMG to commence aerial bombardment of Kosovo and Serbia."*

5. The AGO responded on 27 August 2013. It refused to confirm or deny whether it held the requested information, citing the exemption at section 35(3) by virtue of section 35(1)(c).
6. The AGO provided an internal review dated 17 September 2013 in which it maintained its position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 9 October 2013 to complain about the way the AGO handled her request for information.
8. The Commissioner has considered whether the AGO was correct to rely on section 35(3) by virtue of section 35(1)(c) to neither confirm nor deny whether it held the information described in the request.

### **Reasons for decision**

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9. Section 35(1) FOIA states 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 for the provision of such advice, or*

*(d) the operation of any Ministerial private office".*

10. Section 35(3) FOIA provides that:

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

11. In this case, the AGO relied on section 35(3) by virtue of section 35(1)(c) to neither confirm nor deny holding information relating to the provision of advice by any of the Law Officers.
12. The '*Law Officers*' are defined in section 35(5) as the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General of the Welsh Assembly Government and the Attorney General for Northern Ireland. The Law Officers are thus the government's most senior legal advisers.
13. The AGO is a government department and the Commissioner is satisfied that the information described in the request would relate to advice requested from or provided by, the Law Officers. He therefore found that the exemption at section 35(3) is engaged.

### **The public interest test**

14. Section 35 is a qualified exemption and so the Commissioner must consider whether, in all the circumstances of the case, the public interest in neither confirming nor denying is greater than that in confirming or denying whether the information is held.
15. Confirming or denying whether information is held can itself reveal exempt information. The purpose of section 35(1)(c) when applied with section 35(3) is to conceal whether, in any particular case, the Law Officers have been asked for or have given legal advice. The Commissioner recognises the weight of the exemption from the way in which it has been drafted by Parliament, providing as it does a specific exemption for a particular type of legal advice.
16. It would be impossible for the Law Officers to advise on every aspect of government policy that has legal implications, given the range of legal advice that government requires. If the government routinely disclosed the occasions on which the Law Officers had given advice, that could give rise to questions as to why they had not advised in other cases, thus creating pressure for them to advise in cases where their involvement would not be justified.
17. The Commissioner's approach to the public interest test under section 35(3) and 35(1)(c) is similar to the public interest test under section 42(1) (Legal professional privilege). That is to say, there will always be a strong public interest in maintaining the Law Officers' advice exemption in the same way that there is a strong inherent weight in maintaining the legal professional privilege exemption.
18. There is a clear public interest in government departments being able to have a safe space in which to seek and receive frank and candid advice from their legal advisers in confidence, and to be free from external

pressure in deciding what sort of legal advice to obtain, when, and from whom. This strong public interest is reflected in the long-standing convention that neither the advice of Law Officers, nor the fact that their advice has or has not been sought, is disclosed outside government.

19. However, section 35(3) is not absolute and there will be occasions where the public interest favours confirming or denying whether information is held. For this to happen, there must be compelling public interest arguments in favour of confirming or denying if information is held in order to shift the balance of the public interest.
20. In this case, the complainant has pointed out that the Attorney General has made statements confirming that the Law Officers were consulted with regard to military action in Kosovo in 1999. The Attorney General's draft advice on military intervention in Iraq, dated 12 February 2003 and made public in June 2010 by the Chilcot Inquiry, states:

*"In taking this position, I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo in 1999, UK forces have participated in military action on the basis of advice from previous Law Officers that the legality of the action, under international law, was no more than reasonably arguable"<sup>1</sup>.*

21. In the final version of the advice, dated 7 March 2003 and published in April 2005, the wording has changed slightly, but the implication remains the same:

*"I have taken account of the fact that on a number of previous occasions, including in relation to Operation Desert Fox in December 1998 and Kosovo 1999, UK forces have participated in military action on the basis of advice from my predecessors that the legality of the action under international law was no more than reasonably arguable."<sup>2</sup>*

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<sup>1</sup> <http://www.iraqinquiry.org.uk/media/46490/Goldsmith-draft-advice-12February2003.pdf> - paragraph 13

<sup>2</sup>

[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28\\_04\\_05\\_attorney\\_general.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf) - paragraph 30

22. Although at the time they were created these documents were classified 'secret', they were subsequently de-classified and released to the public. The Commissioner has considered whether they meet the criteria of being "in the public domain" (that is, that they were realistically accessible to a member of the general public at the time of the request and were available in practice, not just in theory).
23. An internet search using the term "Attorney General UK advice Kosovo 1999" returns multiple links to sites hosting the 12 February 2003 and 7 March 2003 documents and the Commissioner is satisfied that these sites were in existence at the time the complainant made the request. He is therefore satisfied that the Attorney General's confirmation that the Law Officers gave advice on military action in Kosovo is in the public domain.
24. The Commissioner's view is that, in general, where information is already in the public domain, it will be difficult to justify refusing to disclose it in response to an FOIA request. Any confidentiality previously attached to it will be permanently lost when it entered the public domain. Disclosure of the same information is unlikely to cause additional harm, and there will always be some residual public interest in disclosure.
25. When conducting the internal review the AGO said it had taken account of the Attorney General's statements when considering the public interest. However, it concluded that confirming or denying whether it held the information described in the request "*would clearly harm the public interest*". It has not explained how it reached this view in the particular circumstances of this case; its response to the Commissioner's enquiries consisted largely of referring him to its correspondence with the complainant and it offered no further analysis of its position.
26. The Commissioner is of the view that any harm to the public interest, either specifically or in more general terms related to the convention, would have occurred at the point the Attorney General's confirmation was published. The documents containing the Attorney General's confirmation had an extremely high profile and have been subject to detailed scrutiny and received extensive media coverage. The confirmation that the Law Officers had previously provided advice on military intervention in Kosovo is therefore not something which would, prior to this request, have gone unnoticed. Confirming or denying whether the information described in the request is held (and thus, acknowledging the existence of the advice) would therefore not constitute a disclosure of new information.
27. There is a general public interest in public authorities being open and transparent. Given the absence of harm, in specific and general terms, this general public interest prevails. Taking all the above into

consideration, the Commissioner finds that while section 35(3) is engaged, there is information already in the public domain which confirms that the Law Officers provided advice on military action in Kosovo. In view of this, and in the absence of any cogent arguments to the contrary by the AGO, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny does not outweigh the public interest in disclosing whether the public authority holds the information.

## Right of appeal

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28. 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: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.

30. 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 .....**

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