

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2021

Public Authority: Attorney General's Office

Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested information about any advice given by the Attorney General's Office (the 'AGO') in relation to Dominic Cummings and the alleged breach of Covid-19 lockdown regulations. The AGO would neither confirm or deny whether the requested information was held, citing section 35(3) of FOIA (formulation of government policy, etc) by virtue of section 35(1)(c) (the provision of advice by any of the Law Officers or any request for the provision of such advice). It said that the public interest test favoured maintenance of the section 35(3) exemption.
2. The Commissioner's decision is that the AGO was correct to neither confirm nor deny if this information was held and the public interest in this case supports this position. The Commissioner therefore requires no steps to be taken by the AGO as a result of this notice.

Request and response

3. On 29 May 2020, the complainant wrote to the AGO and requested information in the following terms:

"I wish to know the following information regarding any advice given by HM Attorney-

General to the Prime Minister and the Cabinet concerning concerning [sic] the alleged recent breach of the Health

Protection (Coronavirus Restrictions) (England) Regulations 2020 by the Prime Minister's Special Adviser, Mr. Dominic Cummings:

- 1. Did HM Attorney-General or HM Solicitor-General give written advice to the Prime Minister and the Cabinet concerning the alleged recent breach of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 by the Prime Minister's Special Adviser, Mr. Dominic Cummings?*
- 2. If so, was the advice given by HM Attorney-General or HM Solicitor-General?*
- 3. If so, what is the text and contents of the advice?*
- 4. If so, is the advice going to be published in due course?*

I make this application under section 1(1) and 8(1) of the Freedom of Information Act 2000."

4. The AGO responded on 23 June 2020 and refused to confirm or deny that the requested information was held ('NCND') citing section 35(3) – formulation of government policy etc by virtue of section 35(1)(c) – specifically the provision of advice by any of the Law Officers or any request for the provision of such advice. The AGO said that the public interest test favoured maintaining the section 35(3) NCND exemption.
5. Following an internal review the AGO wrote to the complainant on 3 August 2020. It maintained that section 35(3) applied.

Scope of the case

6. The complainant contacted the Commissioner on 8 September 2020 to complain about the way his request for information had been handled. He asked the Commissioner to determine whether the AGO had correctly applied section 35(3) of FOIA to his request.
7. The Commissioner has considered whether the AGO was entitled to rely on section 35(3) by virtue of section 35(1)(c).

Reasons for decision

Section 35 – formulation of government policy (neither confirm nor deny – 'NCND')

8. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request.

9. 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 the 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.
10. 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 as to whether or not information is in fact held.
11. The AGO has issued a NCND response regarding whether it holds the information requested by the complainant, citing section 35(3) of FOIA. The sole issue for the Commissioner to consider here is whether or not the AGO is entitled to NCND whether it holds any information which would come within the scope of section 35(1)(c).
12. In reaching a decision, the Commissioner does not need to know whether the AGO does or does not hold the information requested in the request, as it is not necessary for her consideration of this exemption.

13. Section 35(3) states:

"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) [ie section 35(1) of FOIA]".

14. Section 35(1)(c) states:

"(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice..."

15. The AGO said:

"[The complainant's] request asks directly if advice had been provided by the Law Officers and, if so, the content of any such advice in relation to the alleged breach of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 ("the Regulations") by Mr Cummings."

16. Furthermore, the AGO explained that to the extent the requested information could potentially include advice provided to the Law Officers,

or requests for such advice, it was relying on section 35(3), by virtue of section 35(1)(c), to NCND whether such information was held.

17. Section 35(1)(c) provides that information held by a government department is exempt if it relates to the provision of advice, or any request for the provision of advice, by any of the Law Officers. Section 35 is a class-based qualified exemption which means there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. The classes are broad and will catch a wide range of information.
18. However, the section 35 exemptions are qualified by the public interest test. Even if an exemption is engaged, public authorities can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
19. The Law Officers are the government's most senior legal advisers. 'Law Officers' are defined in section 35(5) of FOIA 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 Government and the Attorney General for Northern Ireland.
20. The core function of the Law Officers 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 is committed to critical decisions involving legal considerations. They also have a role in ensuring the lawfulness and constitutional propriety of legislation.
21. As per the Commissioner's guidance, 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 underlying 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 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.
22. The exemption covers advice which 'relates to' the provision of Law Officers' advice (or requests for advice) which is interpreted broadly.
23. This means that information does not itself have to 'be' Law Officers' advice or a request for Law Officers' advice. It will also be covered if it recounts or refers to such advice or any request for it. For example, any discussions about how to react to Law Officers' advice will relate to that advice, and will be covered.

24. In particular, any discussions about whether or not to seek Law Officers' advice will relate to the provision of advice and will be covered – even if in the end no such advice was sought. The Commissioner does not consider that there needs to be an actual request for advice in order for the exemption to bite. This would undermine the underlying purpose of the convention, which includes confidentiality over whether Law Officers have or have not advised. This means that departments can claim section 35(1)(c) for information that reveals that advice was requested, or for information that reveals no advice was requested. Departments can confirm that the information is held but refuse its content under section 35(1)(c). The refusal notice can explain that the use of the exemption does not imply that advice was in fact requested.
25. In refusing to confirm or deny that the requested information was held, the AGO told the Commissioner it had followed her guidance set out above.
26. Based on the wording of the request and the type of information being requested, the Commissioner has concluded that the exemption at section 35(3) of the FOIA is engaged because information within the scope of the request, if held, could reasonably be expected to include advice provided by the Law Officers or requests for such advice.
27. The next step for the Commissioner is to consider the public interest test.

Public interest test

28. Section 35(3) of FOIA is subject to the public interest test set out in section 2(1)(b) of FOIA. This means that the Commissioner must determine whether, in all the circumstances of the case, the public interest in maintaining the exemption from the duty to confirm or deny, outweighs the public interest in complying with the duty to confirm or deny whether the AGO holds information, which would be exempt on the basis of section 35(1)(c).

Arguments in favour of confirming or denying whether or not the requested information is held

29. At the internal review stage, the complainant submitted the following in support of his view that the public interest test favoured disclosure:

"I would submit that in this particular matter, the public interest to deny whether the information is held outweighs any other considerations to not disclose and that the exemption under section 35(1)(c) of the Freedom of Information Act 2000 has not been correctly applied in this case and the exercise of discretion

under section 35(4) of the Freedom of Information Act 2000 was disproportionate.

Further, if that is correct, I would also contend that the public interest requires disclosure of the advice in the circumstances of this particular case.

This is a matter that has attracted enormous media and public interest, and it has also been reported that the Attorney-General in fact advised the Cabinet to support Dominic Cummings and that no offence had in fact been committed by him.

At the time, the matter was being investigated by Durham Constabulary with a view to a possible prosecution, and there is now also the possibility of a private prosecution being brought.

It has also been commented on that the Attorney-General's advice if given in the reported terms was wrong in law and was given for party political purposes and has brought the office of HM Attorney-General into disrepute.

I enclose details of the reported comments for your information."

30. The AGO acknowledged that there is a public interest in being aware whether important matters such as those relevant to this request, have been considered with the benefit of sound legal advice, including advice from the Law Officers.
31. Furthermore, the AGO said the public interest in favour of maintaining the trust and confidence of the public was considered.
32. The Commissioner has also assessed the points raised by the complainant.
33. The Commissioner considers that the public interest in public authorities being transparent and accountable with regard to the way they make decisions would be served by confirming or denying whether information of this type is held.

Arguments against confirming or denying whether or not the requested information is held

34. In its response to the request, and in support of its view that the public interest favoured neither confirming nor denying whether any such documents as set out in the request are held, the AGO explained:

"It would undermine the longstanding 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."

35. In its internal review, the AGO advised the complainant:

"While recognising that there is a public interest in citizens knowing whether matters have been considered with the benefit of sound legal advice, there is also a strong public interest in upholding the long-standing Law Officers' Convention, observed by successive Governments and recognised in paragraph 2.13 of the Ministerial Code, as well as by the Courts and the ICO, that prevents information about the fact and / or substance of Law Officers' advice being disclosed outside Government. Further detail in respect of the Convention was included in our letter to you dated 23 June, but in short the Convention protects fully informed decision making and ensures that Government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases. Furthermore, we do not comment on purported leaks of Cabinet discussions such as that cited in your request."

36. In its submissions to the Commissioner, the AGO said:

"These factors [ie in favour of disclosure] were weighed against the constitutional importance of the Law Officers' Convention. The importance of the Convention to good governance within the rule of law cannot be overstated. The ICO guidance on section 35 notes that significant weight is afforded to the Convention due to the strong public interest in the Government being facilitated in governing to the highest possible standards. The Convention helps ensure that the Government can confidently seek full and frank legal advice away from the public eye, enabling it to govern

well within the rule of law. As noted above, the Convention's importance is recognised by its explicit inclusion in the Ministerial Code and Erskine May.

Confirming or denying the existence of the information would breach the Convention which successive governments have sought to preserve, and would have impacts in terms of the confidence of the government in seeking legal advice in the knowledge that the Convention would protect it from being disclosed."

37. In relation to the media reports submitted by the complainant, and with reference to another related complaint being considered by the Commissioner¹, the AGO reiterated the arguments relied on there, arguing that:

"For the reasons set out above regarding the Law Officers' Convention, the AGO does not comment on media speculation concerning whether the Law Officers have been asked for or given advice to the Government. We do not believe that the existence of such speculation alters, or is in any way relevant to, our analysis of the applicability of the s.35(1)(c) and (3) exemptions or the balance of the public interest.

We disagree with your assertion that the Prime Minister's statement of 24 May 2020 'implies strongly that he had received professional advice probably from Law Officers'. The Prime Minister said he 'believed' Mr Cummings acted 'responsibly, and legally, and with integrity, and with the overwhelming aim of stopping the spread of the virus and saving lives'. He did not refer to having received professional legal advice, let alone from the Law Officers. Moreover, even if his statement did imply that he had taken 'professional advice', which we do not accept, the Law Officers are not the sole sources of legal advice to the Prime Minister or the Government. As with the media speculation referred to above, the Prime Minister's statement neither alters, nor is relevant to, the application of the FOIA in this case."

Balance of the public interest

38. The Commissioner accepts that there will always be a strong public interest in confirmation or denial as to whether the government has

¹ IC-55563-Q7XO

asked for, or obtained advice from, the Law Officers in relation to an issue. The Commissioner recognises the weight that the exemption at section 35(1)(c) of FOIA attracts from the way it has been drafted by Parliament – providing a specific exemption for a particular type of legal advice. The weight is reinforced by the convention of non-disclosure adopted by successive governments.

39. Furthermore, the Commissioner recognises that 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 occasions on which the Law Officers had, or had not, given advice, this could give rise to questions as why they had advised in some cases and not in others. This, in turn, could put pressure on the government to seek their advice in cases where their involvement would not be justified. The risk of creating an impression that the government is not confident of its legal position regarding a particular issue could also deter it from seeking Law Officers' advice in cases where their involvement would be justified. Consequently, the Commissioner accepts that confirming or denying whether such information is held creates a potential risk which could undermine effective government.
40. Having said that, the exemption is not absolute, and the strong public interest in protecting Law Officers' advice may be overridden if there are particularly strong factors in favour of confirmation or denial. The Commissioner recognises that the issue of Mr Cummings' travel to Durham during a period of 'lockdown' due to the Covid-19 pandemic was the subject of significant public interest at the time the request was made. The Commissioner must consider the public interest at the time of the request. Confirmation or denial as to whether Law Officers' advice was sought, or obtained, by the government in relation to this matter, could add important detail to the public interest as to whether a government official had breached lockdown regulations. The Commissioner is also mindful of the publicly available information on the subject.
41. However, the Commissioner considers that the public interest in protecting the longstanding convention of confidentiality with regard to Law Officers' advice is particularly strong in the circumstances of this case in view of the fact that the pandemic and how to manage it were ongoing at the time of the request, and remain so now.
42. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption provided by section 35(3) outweighs the public interest in confirming or denying whether the AGO holds information falling within the scope of the request, which would be exempt by virtue of section 35(1)(c).

Right of appeal

43. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

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