

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 22 March 2010**

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

### Summary

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The complainant made a request to the Attorney General's Office for information concerning the Legal Services Bill and the Joint Committee's recommendations 26 and 29. In particular the complainant was looking for information relating to the regulation of lawyers and the exemption for government lawyers from paying practising fees. The Attorney General's Office refused to disclose the requested information citing the exemption at section 35(1)(a) of the Act. The Commissioner found that the exemption at section 35(1)(a) was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner therefore found that the Attorney General's Office had acted correctly in withholding the information.

### 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.

### Background

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#### Legal Services Reform

2. In 2001 the Office of Fair Trading (the OFT) published a report recommending that rules governing the legal professions should be

- subject to competition law and that unjustified restrictions on competition be removed. Following this, the Government carried out a consultation, and published a report into competition and regulation in the legal services market.
3. In 2004 an independent review of the regulation of legal services instigated by Government found that many areas were in need of restructuring and development, and concluded that the current regulatory model was 'inflexible, outdated and over-complex'.
  4. In October 2005 the Government published a White Paper, The Future of Legal Services: Putting Consumers First. The White Paper set an agenda for reforming the delivery of legal services. It proposed a new regulatory framework that would direct regulation to those areas where it was needed.
  5. Subsequently, the Legal Services Bill (the Bill) was introduced in the House of Lords on 23 November 2006. The Bill established a new framework for the regulation of legal services in England and Wales, the Legal Services Board, an independent Office for Legal Complaints (OLC) and Alternative Business Structures (ABS) to enable lawyers and non-lawyers to work together on an equal footing to deliver legal and other services.
  6. During the passage of the Bill through Parliament several amendments were tabled and considered. One such amendment, section 193, proposed the removal of the exemption that applies to government lawyers from the need to hold a practising certificate and thus payment of practising fees. This amendment was put forward in the belief that all those subject to regulation should contribute to regulation.
  7. The Ministry of Justice assumed responsibility for the Bill on 9 May 2007. After several amendments the Bill received Royal Assent on 30 October 2007. The Ministry of Justice is now responsible for managing the implementation of the Legal Services Act 2007 to ensure a smooth transition to the new regulatory regime.

## **The Request**

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8. On 23 Jan 2007 the complainant contacted the Attorney General's Office (the AGO) to request information in relation to the Government's response to recommendations 26 and 29 of the Joint Committee report on the draft Legal Services Bill. Recommendation 26 related to the potential effect of creating 2 classes of lawyers in terms of their regulation and Recommendation 29 related to concerns that

Government lawyers could be automatically exempted from the scope of the regulatory regime.

Specifically he requested the following:

*(a) "Please can you let me have the recorded information regarding the consideration and assessment of the regulation of all lawyers including the removal of any exemptions and the implications of having different classes of lawyers in terms of regulation?"*

*(b) Please can you provide me with the recorded information about the consideration of the implications of the proposal to remove the automatic exemption of lawyers in Government from the regulatory regime including any information derived or obtained including advice and correspondence and financial information in respect of this proposal together with any recorded information including legal advice and opinion as to the regulatory status of Government lawyers that is held?*

*(c) Please provide the recorded information regarding the advice to Ministers regarding the regulation of lawyers and any instructions given by Ministers in respect thereof.*

*(d) Please can you provide me with the recorded information held by or on behalf of the Attorney-General regarding all the privileges and exemptions of lawyers in Government compared with practising lawyers that it is contended by the Attorney-General currently exist and/or have been preserved and any information as to the effect of those privileges and exemptions."*

9. On 20 February 2007 the AGO responded to the complainant advising that some or all of the information that it held might be exempt under section 35 (formulation of government policy) and section 42 (legal professional privilege) of the Act. As these exemptions were subject to the public interest test the AGO indicated that it needed to extend the time limit beyond 20 working days to consider where the public interest lay. The AGO indicated that it hoped to provide a substantive response by 20 March 2007.
10. On 20 March 2007 the AGO responded to the complainant outlining that it had interpreted part (a) of his request as relating to recommendation 26 of the Joint Committee and parts (b), (c) and (d) as relating to recommendation 29. The AGO explained that the information held related only to the exemption of solicitors to government departments, excluding Crown Prosecutors, from the requirement to hold a practising certificate under section 88 of the Solicitors Act 1974. Therefore, in relation to part (a) of the request the

AGO advised that it did not hold any information relevant to the Joint Committee's recommendation 26 nor the Government's response to this. In relation to parts (b), (c) and (d) the AGO confirmed that it held a briefing note, two submissions, several emails and two items of correspondence, however it was withholding this information under section 35(1)(a) of the Act. The AGO confirmed that it was no longer seeking to rely upon the exemption at section 42.

11. In relying upon section 35(1)(a) the AGO argued that government required a clear space in which to debate matters internally with candour and free from the pressures of public debate. Citing relevant case law, the AGO added that this principle had been judicially recognised.
12. In relation to the requested information, the AGO stated that the disclosure of information which discussed within government various available options whilst the draft legislation was in the process of being scrutinised by Parliament would be premature and would have a 'chilling effect', inhibiting improperly the uninhibited discussion of the issues. Furthermore, the AGO asserted that the public interest favoured maintaining the exemption.
13. On 20 March 2007 the complainant requested an internal review of the AGO's decision not to disclose the requested information.
14. The AGO relayed the outcome of the internal review to the complainant on 27 March 2007. The internal review upheld the AGO's original decision not to disclose the requested information.

## **The Investigation**

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### **Scope of the case**

15. On 13 April 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider that:

*"the matter has some urgency in that the information was highly relevant to legislation passing through Parliament in respect of which the disclosure may have a material bearing to what is enacted".*

## Chronology

16. Regrettably, due to the heavy workload at the Commissioner's office, the investigation into the complaint did not get under way until October 2009. On 1 October 2009 the Commissioner contacted the AGO and asked for its representations regarding the handling of the request.
17. The AGO was also asked to provide to the Commissioner a copy of the withheld information in order to assist in his considerations of whether the exemption cited had been applied correctly.
18. On 19 November 2009 the AGO responded to the Commissioner on the issues raised and enclosed a copy of the withheld information. The AGO confirmed that all of the documents held were directly connected to the development of policy regarding the decision to exempt government lawyers from the need to hold practising certificates. This policy was being discussed in relation to the draft Legal Services Bill which was being debated in the House of Lords.
19. The AGO contended that since the request was received whilst the Bill was still under active debate in Parliament, the disclosure of information contributing to the policy development or formulation process during the stages of the Bill would not be in the public interest.

## Analysis

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### Exemptions

#### **Section 35(1)(a): formulation or development of government policy**

20. Section 35(1)(a) provides that information that relates to the formulation or development of government policy is exempt information. The task in determining whether this exemption is engaged is to consider whether the information in question can be accurately characterised as relating to the formulation or development of government policy.
21. The Commissioner's view is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. At paragraph 58 of *DfES v the Commissioner & Evening Standard (EA/2006/0006; 19/02/07)*, the Information Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of that information, rather than on a line by line dissection.

22. In this case the Commissioner's decision is based on whether the overall purpose and nature of the information requested on 23 January 2007 supports the characterisation of relating to formulation or development of government policy, rather than on a detailed consideration of the documents themselves.
23. Information relating to the formulation of government policy can be separated into two broad categories; (i) exchanges within the public authority and (ii) discussions between the public authority and third parties. However, the Commissioner notes other information may also fall within this exemption such as notes on an issue or draft documents.
24. In this case the information fell within both categories as it included submissions to Ministers, letters between heads of departments, emails between government officials and senior civil servants and briefing notes to Ministers.
25. The information discussed policy issues in relation to the exemption of government lawyers and the AGO argued that Ministers and officials needed to be briefed on the issue in order to establish and adopt a position for debating the Legal Services Bill in Parliament.
26. The Commissioner understands that government ministers leading legislation through Parliament are supported in policy development options, including briefing on the impact of possible issues and recommendations.
27. The Commissioner therefore accepts that the process recorded in the requested information constitutes the formulation and development of government policy and, therefore, falls within the class of information specified in the exemption.
28. Section 35 is a qualified exemption and is therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought.

**Public interest arguments in favour of disclosing the requested information**

29. The complainant argued that the requested information should be disclosed because it was '*highly relevant to legislation passing through Parliament*'.

30. The AGO acknowledged that there is a strong public interest in understanding generally how Parliament works and the need for ministerial accountability. The AGO also recognised the general public interest in the transparency of policy formulation and specifically in relation to the regulation of the legal profession, the strong interest in ensuring good standards and the proper use of taxpayers' money.
31. The Commissioner's view is that the public interest in disclosure must be considered with reference to the actual information requested, ie, does the information warrant a particularly high level of public interest in disclosure over and above the general public interest in transparency of how government operates. In disclosing the information the public would gain an understanding of how government lawyers are regulated and would also be aware of the implication of the exemption from practising fees on the public finances. The Commissioner also understands that in knowing that advice might be subject to future disclosure under FOIA it could actually lead to better quality advice being provided.
32. The Commissioner recognises there is also a public interest in facilitating public understanding of, debate on, and participation in policy making and the democratic process.

### **Public interest arguments in favour of maintaining the exemption**

33. The AGO highlighted the need for 'space' to discuss arguments for and against regulating government solicitors freely and frankly and to offer the best advice available to Ministers to help them make considered policy decisions. Had the requested information been disclosed the AGO contended that there would be a 'chilling effect' on the ability of officials to enter into meaningful and safe discussion about possible options which would present the risk of distorting or restraining those discussions in future.
34. The AGO argued section 35(1)(a) provides 'statutory recognition of the public interest in allowing government to have a clear space, immune from the exposure to public view, in which it can debate matters internally with candour ....'. In view of this the AGO contended that disclosure would not be in the public interest as it would not be conducive to good government and effective government depends on good decision making based on the best advice available. Furthermore the AGO asserted that the disclosure of interdepartmental communications and communications between Ministers might undermine the collective responsibility of government.
35. The Commissioner notes the comments of the Tribunal in *Scotland Office v the Information Commissioner (EA/2007/0128)* with respect to

not regarding information falling under section 35(1)(a) as being routinely exempt from disclosure, otherwise such information would have been protected in the Act under an absolute exemption rather than a qualified one.

36. The Commissioner's view also is that there is no inherent public interest in withholding information that is covered by a class based qualified exemption. Thus consideration of maintaining section 35(1)(a) must take into account the potential harm any disclosure would have on the process of policy formulation or development. Such harm is likely to decrease once the process has been completed but this does not mean that the public interest in maintaining the exemption disappears completely.
37. In this instance the AGO's arguments centred around the importance of preserving 'space' to discuss policy options in the interests of good government. The AGO also highlighted the potential for the frankness and candour of such discussions to be inhibited through disclosure – the 'chilling effect'. These arguments have been commented on by the Tribunal in the *DfEs* case and the Commissioner looks to the Tribunal's comments for the guiding principle in this respect.

### **Safe space**

38. In relation to the need for 'safe space' the Tribunal stated that consideration needs to be given to the timing of the request and the stage of policy formulation/development ie whether it is ongoing or complete.
39. In the *DfES* case the Tribunal recognised the importance of Ministers and officials being entitled to time and space to hammer out and explore options whilst formulating policy without the threat of 'lurid headlines' (para 75). The Commissioner recognises that this entitlement is strongest in the earlier stages of policy formulation but that the public interest diminishes as the policy becomes more certain and then is made public. In this case the requested information was at a later stage of policy formation as the Bill had already been introduced and so the need for safe space had diminished.
40. In the Scotland Office case<sup>1</sup>, the Tribunal stated that timing is likely to be of paramount importance and that where the Ministerial communication is in relation to an issue that was 'live' when the request was made, the public interest in preserving safe space for Ministers to have a full and open debate and in allowing government to come together to determine a potentially contentious policy issue, may weigh in favour of maintaining the exemption. The Commissioner is

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<sup>1</sup> Scotland Office v The Information Commissioner EA/2007/0070



conscious that in order to accord weight to this argument the information would need to reveal the positions of Ministers and not just the opinions of officials.

41. The Commissioner also recognises the importance of the need for safe space to debate policy and reach decisions without being unduly hindered by external comment. Furthermore he considers that an important determining factor in relation to the 'safe space' argument will be whether the request for information is received whilst a safe space is still needed in relation to that particular policy making process.
42. In this instance the information regarding options for the regulation of government lawyers was requested whilst Ministers and officials were debating the impact of each option. These discussions would inform the position to be adopted during Parliamentary debate of the issue and thus there was a requirement for safe space to be maintained until this process was complete.

### **Safe space and collective responsibility**

43. The AGO argued that disclosure of the information might have undermined collective responsibility insofar as it constituted interdepartmental communications and communications between Ministers.
44. Collective responsibility was described by the Tribunal in the Scotland Office case as 'the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings....or through correspondence, Ministers may express divergent views but once a decision is taken, the convention dictates that they must support it fully'. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed' (para 82). In relation to collective responsibility, the Commissioner accepts the Tribunal's comments but believes that each case must be assessed in its own circumstances.

### **Chilling effect**

45. In the AGO's view it was important that officials could engage with Ministers in a free and frank debate about the arguments for and against the exemption for government lawyers, even where such options might not have been controversial. These options would inform the position to be adopted by Ministers and presented to the House in the debate. Consequently the release of information revealing the detail of such arguments would result in officials being less likely to put

them forward so freely and frankly in future thus being detrimental to the policy process.

46. In relation to any 'chilling effect' on the free and frank advice provided by officials that might result in poorer decision making, the Commissioner agrees with one of the guiding principles from the *DfES* Information Tribunal decision; the robustness of officials, i.e. they should not be easily discouraged from doing their job properly.
47. However, the Tribunal's view is that such arguments should not be dismissed out of hand as there is a legitimate public interest in maintaining the confidentiality of advice between Ministers and officials on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. What is important is that the weight to be given to those considerations will vary from case to case depending again on the information requested and the timing of the request. In the current case the Commissioner does not attach much weight to this position.

### **Balance of the public interest arguments**

48. The Commissioner recognises the public interest in ensuring frank debate and advice in the interests of well-considered policy making and robust legislation.
49. However, on the information available to him, the Commissioner is also cognisant that the disclosure of information that relates to on-going policy development in advance of such policy being formalised and publicised is not in the public interest.
50. The Commissioner understands that the existence of other mechanisms for scrutinising or debating an issue is not an alternative to public participation via the Act. Whilst disclosure would encourage public understanding and participation in debate, there is a wider public interest in the transparency of the process of reaching a policy position and ensuring the quality of the advice given to Ministers that cannot be addressed by parliamentary discussions on the specific provisions of the draft bill.
51. The complainant's request was received whilst ministers and officials were still considering policy options and deciding upon a position to be adopted regarding the exemption for government lawyers.
52. In view of this the Commissioner is persuaded that disclosure of the requested information, at the time of the request, would have damaged the formulation/development of policy and would not have been in the public interest. Therefore the Commissioner finds that the

public interest in maintaining the exemption outweighed the public interest in disclosing the information.

## **The Decision**

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53. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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54. The Commissioner requires no steps to be taken.

## Right of Appeal

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55. 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)

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.

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

**Dated the 22<sup>nd</sup> day of March 2010**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled

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- (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 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.”