

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2015

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

Decision (including any steps ordered)

1. The complainant requested information about Law Officers' advice given to the UK government in relation to its decision to enter into military action in Kosovo in 1999. The AGO withheld the information, citing section 35(1)(c) (Law Officers' advice).
2. The Commissioner's decision is that the Attorney General's Office has applied section 35(1)(c) appropriately.
3. The Commissioner does not require the Attorney General's Office to take any steps.

Request and response

4. On 30 July 2013, the complainant wrote to the Attorney General's Office (AGO) and requested information in the following terms:

"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 ... together with any documents that were material to the decision of [HMG] to commence aerial bombardment of Kosovo and Serbia."
5. Initially the AGO responded to the complainant's request on 27 August 2013 refusing to confirm nor deny whether it held the requested information, citing section 35(3) by virtue of section 35(1)(c). The complainant complained to the Commissioner. In his decision notice

[FS50515929](#) the Commissioner ordered the AGO to either confirm or deny whether it held the requested information.

6. On 26 March 2014 the AGO contacted the complainant, confirming that it did hold the requested information. The AGO refused to provide the requested information citing section 35(1)(c) (Law Officers' advice).
7. On 3 April 2014 the complainant requested an internal review. She explained that she considered that there was a significant public interest in knowing whether the government of the day received sound legal advice and whether it acted in accordance with that advice.
8. Following an internal review the AGO wrote to the complainant on 20 May 2014. It upheld its application of section 35(1)(c).

Scope of the case

9. The complainant contacted the Commissioner on 2 June 2014 to complain about the way her request for information had been handled.
10. The Commissioner has considered whether the AGO applied section 35(1)(c) appropriately.

Reasons for decision

11. Section 35(1)(c) of FOIA provides that information held by a government department is exempt if it relates to the provision of advice by any of the Law Officers. As section 35 is a class-based qualified exemption, it is also subject to the public interest.
12. The Law Officers are the government's most senior legal advisers. '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.
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 one of the Law Officers, namely the Attorney General. He therefore considers that the exemption at section 35(1)(c) is engaged.

Public interest arguments in favour of maintaining the exemption

14. The AGO argued that there was a clear public interest in securing confidential space for government, within which it can evaluate matters internally, with candour and free from the pressures of public political debate. The AGO argued that this principle had been judicially recognised, for example in *Conway v Rimmer* [1968] AC 910 and *Burma Oil v The Bank of England* [1980] AC 1090.
15. The AGO also explained that the government is entitled to seek and receive frank and confidential advice from its legal advisers. It went on to say that there is a strong public interest in ensuring that a government department is able to decide, free from external pressure, what sort of legal advice it needs to obtain, at what stage, from whom and in particular, whether it should seek legal advice from the Law Officers.
16. Furthermore, the AGO argued that this strong public interest is reflected in the long-standing constitutional convention, observed by successive governments, that neither the advice of Law Officers, nor whether their advice has been sought, is generally disclosed outside government.
17. The AGO pointed to the decision of the High Court in *HM Treasury v ICO* [2009] EWHC 811. This decision recognised that Parliament intended that 'real weight' should be afforded to this aspect of the public interest in considering any relevant request under the FOIA and the considerations of good government underlying the history and nature of the convention on Law Officers' advice were capable of giving determinative weight to the balance of the public interest whether or not the likelihood of particular harm could be established in an individual case.
18. The AGO also explained that the government has made its legal position in relation to the NATO action in Kosovo and Serbia clear on numerous occasions, but not the process by which it was obtained.
19. Furthermore, the AGO argued that since the public interest in understanding the Government's legal position had been fully catered for and it was not in the public interest to disclose the advisory process for the reasons stated above, it considered that it was not in the public interest to disclose the requested information. The AGO pointed to three

statements¹ concerning the decision to commence aerial bombardment of Kosovo, including the following statements made by the UK Permanent Representative to the United Nations to the Security Council on 24 March 1999:

"It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions."

"Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe and is the minimum judged necessary for that purpose."

20. The AGO noted the complainant's comments regarding the disclosure of the Attorney General's legal advice on the war with Iraq. It argued that the position in relation to Iraq was of very limited assistance. It explained that the decision to participate in the NATO aerial bombardment of Kosovo had not generated the same level of public controversy as the intervention in Iraq had done. It was only because of the exceptional circumstances that the government of the day decided to disclose the Attorney General's advice on going to war with Iraq.

Public interest arguments in favour of disclosure

21. The Commissioner considers that disclosure of the requested information could promote transparency and help public understanding of why action was taken in Kosovo and Serbia.
22. The complainant acknowledged that it was important at the time the advice was sought for the government to have confidential space to evaluate matters internally and formulate policy, free from the pressures of public debate. However, she argued that with the passage of time,

¹ 1999 FCO Minister in HC debate (HC Debs., vol. 340, col. 164W: 30 November 1999: UKMIL 1999, p. 598); 2000 Foreign Secretary speech to American Bar Association (19 July 2000: UKMIL 2000, pp. 646-8).

exclusion on the basis of the need for confidential space could not now be argued.

23. The complainant also pointed out that the cases cited by the AGO predated the FOIA and were at a time when a statement by a Minister of the Crown was generally held to be final and conclusive. She also explained that the present government has made a commitment to transparency, quoting the Prime Minister's website:

"Greater transparency across government is at the heart of our commitment to let you hold politicians and public bodies to account".

24. Furthermore, the complainant pointed to *HM Treasury v ICO* [2009] EWHC 1811 paragraph 64 which states: "Nothing in this judgement is intended to undermine the important new principles of transparency and accountability that the FOIA has brought to government in many ways. The Law Officer's Convention will now operate subject to the principles of the FOIA which means that neither the government department that may have sought or received the advice or the Law Officers that gave it will any longer make final or binding decisions on what, whether and when information may be disclosed. I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was of such public importance that irrespective of the decision of government to make partial disclosure, the strength of public interest in disclosure of the advice as to the legality of the Iraq war might well have out-weighed the exemption in its general and particular aspects."
25. The complainant explained that she considered that the reasoning in the above case, equally applied to Serbia. She went on to argue that the context for the commencement of aerial bombardment of Serbia, a sovereign state that had posed no threat to the United Kingdom, was of such wider public importance that the strength of public interest in disclosure of the legal advice as to legality outweighs the maintenance of the section 35(1)(c) exemption.
26. The complainant also pointed out that, as was the case in relation to Iraq, the government of the day did not seek authority from the United Nations Security Council to commence aerial bombardment and in the case of Serbia, did not bring the matter before Parliament for debate and vote.
27. Furthermore, the complainant argued that, given the lack of transparency about the decision-making to attack Serbia, this was carried out at significant cost to the public purse and the controversy concerning 'humanitarian intervention', there is a significant public interest in knowing whether the government of the day received sound legal advice and whether it followed the legal advice given.

28. The complainant pointed out that the Attorney General's advice on Iraq of 12 February 2003 (draft advice) and 7 March 2003 (final version of the advice) has been disclosed in full and through that, there was partial disclosure of the Kosovo advice as paragraph 13 of the February advice said that, in relation to 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."* Furthermore, the complainant pointed out that paragraph 4 of the March advice stated: *"The use of force to avert overwhelming humanitarian catastrophe has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the UK in the Kosovo crisis"*
29. Furthermore, the complainant pointed out that paragraph 30 of the March 2003 advice stated that: *"In reaching my conclusions, I have taken account of the fact that any number of previous occasions ... and Kosovo in 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. But a 'reasonable case' does not mean that if the matter ever came before a court I would be confident that the court would agree with this view."*
30. The complainant argued that there was no rational basis for disclosing the advice on Iraq but not in relation to Kosovo, given the marked similarity in the underlying basis for military action. She explained that both courses of action were taken to to 'avert a humanitarian catastrophe' and to prevent the use of 'weapons of mass destruction' and when both actions were taken without prior approval or authority by the United Nations Security Council, the body responsible for international peace and security.
31. The complainant also argued that disclosure should happen in the interests of justice and to avoid prejudice. She explained that the stated aim of the military intervention was to protect ethnic Albanians from Serbian repression, but approximately 800,000 ethnic Albanians left their homes following the start of military action on 24 March 1999. After 78 days of aerial bombardment and following the entry of international forces on 12 June 1999, approximately 300,000 non-Albanians and Albanians who did not support the Kosovo Liberation Army fled their homes or were killed.

Balance of public interest

32. The Commissioner's approach to the public interest test under section 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.

33. The Commissioner also 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.
34. The Commissioner recognises that there is a public interest in knowing that the government of the day acted in accordance with the rule of law, sought the appropriate professional advice and did not act unlawfully or legally questionable manner.
35. 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. Furthermore, there is a clear public interest in government departments being free from external pressure in deciding what sort of legal advice to obtain, when and from whom.
36. 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, should be confirmed without their consent. This is set out on page 5 paragraph 2.13 of the Ministerial Code 2010: "*The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority.*"
37. The Commissioner notes the complainant's argument regarding references to the Kosovo advice contained in the Iraq advice. The complainant has argued that this amounted to a partial disclosure and therefore the advice should be published in its entirety.
38. At the time the Iraq advice was obtained, the draft legal advice and final advice documents were classified 'secret', but they were subsequently de-classified and released to the public.
39. The Commissioner's view is that, in general, where information is already officially 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.
40. The Commissioner accepts that there is a public interest in understanding the legal basis for the decision to commence aerial bombardment of Kosovo in 1999. The Commissioner notes the complainant's argument that there are similarities between the

circumstances under which the Kosovo advice and subsequent Iraq advice were sought.

41. However, the Commissioner also accepts that at the time the decision was taken by NATO in March 1999 to carry out military strikes, there was widespread public concern about the humanitarian situation in Kosovo. The intervention by way of military airstrikes was not met with widespread public disapproval in the UK.
42. Furthermore, the Commissioner notes that in the case of the Iraq legal advice, the government published the full advice in April 2005, following a partial leak. The Commissioner notes that although the Iraq advice does refer to the Kosovo advice, it does not give any detail about what was considered and how the Kosovo advice was arrived at.
43. This point was considered in relation to the application of section 42 (legal professional privilege) in *Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel* (EA/20087/0052, 15 February 2008). The public authority obtained legal advice on how to spend revenue and referred to it when dealing with the MTUA. The Tribunal found that the references made by the public authority to the legal advice did not "*reveal the full advice or anything approaching that, or quote directly from it ...*". Furthermore, the Tribunal found that it did not disclose "*... the reasoning behind the legal advice or the other options considered*".
44. The Commissioner considers that, although the case dealt with the application of section 42 to legal advice, it equally applies in the present case as they both concern references to legal advice. Furthermore, the Commissioner considers that even if the legal advice had not been provided by the Law Officers, section 42 would have been applicable.
45. The Commissioner issued an Enforcement Notice dated 22 May 2006, which dealt with requests for information relating to the Iraq advice, to the Legal Secretariat to the Law Officers. He considered that the public interest in maintaining legal professional privilege (section 42) generally and in particular exempting advice from the Law Officers (section 35(1)(c)) were of particular importance in that case. The Commissioner considers that this reasoning applies to the present case.
46. The Commissioner also noted that in relation to the Iraq advice, there was some confusion regarding consistency between the legal advice of 7 March 2003 and a statement made by the Attorney General on 17 March 2003, to the House of Lords. There was a view that the statement was a summary of the detailed advice. These circumstances generated a very strong public interest in clarifying the relationship between the two

documents and therefore in disclosing information about more detailed analysis and advice and the chain of events. There was no such confusion in relation to the legal position in relation to Kosovo.

47. Furthermore, the Commissioner also noted that in relation to the disclosure of the Iraq advice in full: *"This was a highly exceptional case from almost every perspective ... The Commissioner does not believe that wider precedent implications can, or should, be deduced from these conclusions."*
48. Taking all of the above into account, the Commissioner does not consider that the Kosovo advice qualifies as an exceptional case which would justify departure from the presumption of upholding legal professional privilege and the established convention of not disclosing Law Officers' advice.
49. Therefore the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the section 35(1)(c) exemption outweighs the public interest in disclosure.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF