

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2021

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

Decision (including any steps ordered)

1. The complainant made a three-part request for information relating to Dominic Cummings' *"lockdown travel to Durham"*. The Attorney General's Office (the 'AGO') provided the requested information for part 2 of the request and initially refused to confirm or deny whether the remainder was held, citing section 35(3) of FOIA (formulation of government policy, etc) by virtue of sections 35(1)(a), (c) and (d). During the course of the Commissioner's investigation, the AGO partly revised its position as set out in the 'Scope' section and, ultimately, the interpretation of part 2 of the request came under debate. Based on the broader interpretation of part 2 (as set out later in this notice), the AGO confirmed its position to be that it wished to rely on sections 35(1)(a)(c) and (d) for part 1 of the request, and it wished to cite section 35(3) and neither confirm or deny whether any further information (part 2) or information (part 3) was held in accordance with section 35(3) of FOIA.
2. In relation to the first part of the request, the Commissioner's decision is that the AGO was entitled to rely on section 35(1)(c) to withhold the requested 'Schedule of documents'. In respect of the second part of the request, the Commissioner finds that the AGO was entitled to neither confirm nor deny whether any further information was held in scope, beyond that already disclosed to the complainant, in accordance with section 35(3) of FOIA, by virtue of section 35(1)(c). With regard to the third part of the request, the Commissioner finds that the AGO was correct to neither confirm nor deny if this information was held, again under section 35(3) by virtue of section 35(1)(c). She also finds that the public interest in relation to all parts of the request supports the AGO's position. As the Commissioner has found section 35(3) to be engaged by virtue of section 35(1)(c) for both parts 2 and 3 of the request, she has

not found it necessary to consider the AGO's citing of sections 35(1)(a) and (d).

3. The Commissioner does not require the AGO to take any steps to ensure compliance with the legislation.

Request and response

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

"Please provide the following information. I make this request under the Freedom of Information Act.

1) A schedule of documents held by your office about Dominic Cummings's lockdown travel to County Durham, his stay there, any journeys while he was there and return from County Durham.

2) A copy of any correspondence sent or received by the Attorney General about the same issue.

3) A copy of any legal advice or guidance given by the Attorney General either to Mr Cummings, Downing Street or elsewhere about the same issue."

5. The AGO responded on 29 June 2020. It provided the information requested in part 2 of the request. It said it considered the information in parts 1 and 3 of the request, if held, would fall within the following exemptions:
 - Section 35(1)(a) - provides that information is exempt if it relates to the formulation or development of government policy.
 - Section 35(1)(c) - provides that information is exempt information if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice.
 - Section 35(1)(d) - provides that information is exempt if it relates to the administration of a ministerial private office.
6. The AGO refused to confirm or deny whether the requested information was held for parts 1 and 3 of the request, citing 35(3), the 'neither confirm nor deny provision' within the exemption. The AGO concluded that the associated public interest test favoured maintaining section 35(3) of FOIA for both parts 1 and 3 of the request.

7. Following an internal review the AGO wrote to the complainant on 27 July 2020. It confirmed that its response to part 2 had taken into account both paper and electronic information and maintained its original position in relation to parts 1 and 3 of the request.

Scope of the case

8. The complainant contacted the Commissioner on 9 August 2020 to complain about the way his request for information had been handled. He submitted the following grounds of complaint:

"These are my arguments as to why I believe the 'neither confirm nor deny' action fails and why this information should be released...

Section 35(1)(c) is not a blanket exemption. The [Commissioner's section 35] guidance¹ says: 'If the exemption is engaged, departments must go on to conduct a public interest test. They must consider how much public interest there is in maintaining this exemption in the circumstances of the particular case and balance this against the public interest in disclosure.'

I believe there is a strong public interest in this case because, although it does not relate directly to the formulation of Government policy, these very high profile events had an indirect impact on its ability to keep people safe during the Coronavirus pandemic. For example, a YouGov poll on 26 May found that 70 percent of the public felt it [sic] the issue would make it harder for the Government to get future lockdown messaging across to the public. A second poll on 3 June suggested one in five Britons (21 percent) had followed the rules less strictly in the previous week.²

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

² <https://yougov.co.uk/topics/politics/survey-results/daily/2020/05/26/e3651/2> and https://yougov.co.uk/topics/health/articles-reports/2020/06/03/one-five-have-started-breaking-lockdown-rules-more?utm_source=twitter&utm_medium=website_article&utm_campaign=cummings_impact

There is also a wider need for public confidence in the Government in this time of national crisis. In each of the exemptions deployed, including and particularly in Section 35(1)(c), disclosure would help to increase trust in the Government by increasing transparency and helping people in assessing the quality of any advice being given by the Attorney General..."

9. The complainant also submitted comments in relation to the AGO's citing of sections 35(1)(a) and 35(1)(d) which the Commissioner passed on to the AGO. She has not replicated them here as this notice does not consider either section 35(1)(a) or (d), given the Commissioner's conclusions set out in the 'Reasons for decision' section of this notice. However, at the start of her investigation, the Commissioner relayed all the complainant's grounds of complaint to the AGO for its consideration.
10. As part of its investigation response to the Commissioner, the AGO confirmed it had given "*close consideration to [the complainant's] grounds of complaint*".
11. The complainant also raised concerns about the Cabinet Office Clearing House which are not an FOIA section 50 matter. The Commissioner has commented on this aspect of his complaint in the 'Other matters' section of this notice.
12. During the course of the Commissioner's investigation, the AGO partly revised its position. It wrote to the complainant on 25 March 2021 and said it no longer wished to rely on section 35(3) for part 1 of his request.
13. The AGO instead confirmed it held information covered by part 1 of the request and also said it no longer wished to rely on section 35(1)(d), (administration of a ministerial private office), for the requested 'Schedule of documents'. However, the AGO maintained that the 'Schedule of documents' remained exempt under sections 35(1)(a), (relates to the formulation or development of government policy) and 35(1)(c) (the provision of advice by any of the Law Officers or any request for the provision of such advice).
14. The Commissioner wrote to the complainant on 30 March 2021 seeking his view on the AGO's partly revised position. On 6 April 2021, the complainant replied, submitting comments both about the AGO's revised position, but also the following in relation to its handling of part 2 of his request (where the AGO had previously disclosed the requested information):

"This part of the response should be considered to include not just letters but all forms of communication. In Section 35 of the Act, the concept of ministerial communications is broad and

includes letters, memos, emails and other documents written to convey information between ministers and also meetings and telephone conversations, including meetings of the Cabinet or Cabinet committees as defined in Section 35 regarding ministerial communications."

15. The Commissioner made further enquiries with the AGO to determine whether any further information was held in respect of part 2 of the request.

16. On 30 April 2021, the AGO advised the Commissioner as follows:

"While reviewing our handling of [the complainant's] request to respond to your questions, we became aware that our original searches in relation to Part 1 of the request may not have retrieved all relevant documents for inclusion in a schedule of documents. We are in the process of re-doing those searches. We will write to you with more detail on this and provide an updated schedule of documents in due course."

17. The AGO also confirmed its view that:

"The only reasonable objective interpretation of part 2 of [the complainant's] request is for copies of any letters sent or received by the Attorney about this issue. We do not consider that it is reasonable to read "correspondence" as including memos, emails or other documents that are not letters. There was no context or background to this request suggesting [the complainant] other types of documents."

18. There followed an exchange of correspondence and views between the AGO and the Commissioner as to the interpretation of "correspondence" used by the complainant in part 2 of his request. The AGO argued that a narrower definition of "correspondence" was applicable and cited the entry in the Cambridge dictionary³ which defines correspondence as being for:

"letters, especially business or official letters."

19. The Commissioner has noted the use of the term "any correspondence" by the complainant in this part of his request. Furthermore, the Commissioner had written to the AGO on 6 April 2021 to highlight the

³ CORRESPONDENCE | meaning in the Cambridge English Dictionary

complainant's view as to what he expected to be included in the AGO's response to part 2 of his request, as set out in paragraph 14 above. Whilst the Commissioner considers the complainant's interpretation far too broad, indeed it refers to "all forms of communication", she also considers that an objective interpretation of the word 'correspondence' would include more than just letters. In her view, at the very least, 'correspondence' would include emails (and potentially other documents). It is the Commissioner's view that this broader interpretation is more commonly applied and she has also found alternative dictionary definitions which support her broader view.⁴

20. On 10 May 2021, the Commissioner wrote to the AGO to confirm her preliminary view 'correspondence' could include letters, emails and (and potentially other documents) and asked it to confirm, whether, based on an acceptance of the broader definition, the AGO held more information in scope of the request and whether this was caught by any exemption.
21. The Commissioner accepts that the AGO has a different interpretation of what would fall under 'correspondence' but appreciates that it also provided its response to her in relation to both interpretations.
22. In the specific circumstances and context of this case, the Commissioner has concluded that the correct approach is to apply a broader definition of 'correspondence' in relation to part 2 of the request which covers both letters and emails.
23. Based on the broader interpretation of 'correspondence', on 19 May 2021, the AGO advised it considered the following position to apply to the request:
 - For part 1 of the request, the AGO and said it considered the requested 'Schedule of documents' to be exempt under sections 35(1)(a), (c) and (d) of FOIA.
 - For part 2 of the request, the AGO said it would neither confirm nor deny whether any further information was held, by virtue of section 35(1)(a), (c) and (d) of FOIA.

⁴ correspondence noun - Definition, pictures, pronunciation and usage notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com

CORRESPONDENCE | Definition of CORRESPONDENCE by Oxford Dictionary on Lexico.com also meaning of CORRESPONDENCE

- For part 3 of the request, the AGO would neither confirm nor deny whether the requested information was held, by virtue of section 35(1)(c) of FOIA.
24. The Commissioner set out to consider whether the information in part 1 of the request was exempt under sections 35(1)(a), (c) and (d). She has examined whether the AGO was entitled to rely on section 35(3) by virtue of sections 35(1)(a), (c) and (d) for part 2 of the request in relation to whether any further information is held beyond that previously disclosed. She has also considered whether the AGO was entitled to rely on section 35(3) by virtue of section 35(1)(c) for part 3 of the request.

Reasons for decision

Part 1 of the request - 'Schedule of documents'

25. The AGO has provided the Commissioner with a document referenced as the 'Schedule of documents' which constitutes the withheld information (as per part 1 of the complainant's request).
26. This document has been withheld from the complainant on the basis of sections 35(1)(a), (c) and (d).
27. The AGO has explained to the Commissioner that it did not hold a list or schedule of the requested documents at the time of the complainant's request, but that it had approached this part of the request in line with ICO decision notice *FS50070854*⁵.
28. That decision notice concerned a request for information about discussions between the United Kingdom and the United States on energy policy and oil production. The initial request was for the information on the discussions itself. This was followed up with a request for a schedule of documents falling within the scope of the original request. In respect of the schedule the Commissioner stated that:

"The information already exists: the public authority cannot be said to be creating it. And, while producing a list of the documents in which the relevant information is contained may be a new task, it is not creating new information; it is simply a re-presentation of existing information..."

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2006/382816/DECISION_NOTICE_FS50070854.pdf

29. Further details can be found in the Commissioner's guidance⁶ on determining whether information is held. The Commissioner agrees that the AGO has correctly interpreted her guidance and that it was right to produce a list/'Schedule' of the documents held in respect of part 1 of the request.
30. The Commissioner must next consider whether the AGO was entitled to withhold the 'Schedule of documents' from the complainant on the basis of section 35(1)(a) and/or sections 35(1)(c) and (d).

Section 35 – Formulation of government policy, etc.

31. Section 35 of FOIA states:

"(1) 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 for the provision of such advice, or*
- (d) the operation of any Ministerial private office."*

32. As outlined in the Commissioner's guidance, the purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
33. Having examined the withheld 'Schedule of documents' and noted the descriptions provided by the AGO, the Commissioner has first considered the AGO's reliance on section 35(1)(c) of FOIA in relation to part 1 of the request.

Section 35(1)(c) – Law Officer's advice (part 1 of the request)

34. 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

⁶ https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

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.

35. 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.
36. 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.
37. 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.
38. 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.
39. The exemption covers advice which 'relates to' the provision of Law Officers' advice (or requests for advice) which is interpreted broadly.
40. 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.
41. 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.

42. In refusing to provide the 'Schedule of Documents' to the complainant in response to part 1 of his request, the AGO told the Commissioner it had followed her guidance set out above.
43. Following the AGO's confirmation of its revised position in relation to part 1 of his request, the complainant submitted further comments. He argued that:

"Under section 35(1)(c), a distinction can be drawn between requesting the disclosure of actual legal advice provided by law officers to a government department and merely asking whether such advice was requested from law officers, and whether it was given and to whom it was given..."

There may be other information or documents in the schedule that do not relate directly to legal advice, such as statements, expenses receipts, communications, data, which may have been part of Government discussions about the issue but do not fall strictly within Section 35 (1) (c). This information should be released."

44. The Commissioner asked the AGO to consider the above comments.
45. In response, the AGO said it did not agree any such distinction can be drawn, and referenced that *"none of the section 35(1)(c) guidance, the Law Officers' Convention, the ICO or the Courts have drawn the distinction described by the complainant."* It said:

"Section 35(1)(c) states that information held by a government department is exempt information if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. As stated in the ICO'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 Law Officers' Convention has been observed by successive Governments and is recognised in paragraph 2.13 of the

Ministerial Code, as well as by the Court and the ICO. The underlying purpose of the Convention is to protect fully informed decision making by allowing government to decide to seek (or not seek) legal advice in private, without fear of any adverse inferences being drawn from the content of any advice or the fact that it was or was not sought in any particular case. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases. Such consequences would risk seriously undermining the processes by which the government obtains legal advice, and in particular the Law Officers' role as the government's chief legal advisers.

*Importantly, the exemption in section 35(1)(c) and the Convention applies as much in cases where there is no Law Officer advice as in cases where there is. If the government were required to confirm those cases where it had not sought legal advice, any instances where it did not so confirm would effectively amount to confirmation that advice had been sought. As recognised by the ICO's guidance, and the decision in *HM Treasury v Information Commissioner & Evan Owen [2009] EWHC 1811 (Admin) (HMT v ICO)*, there is a strong public interest in upholding the Law Officers' Convention, including where advice has not been given. This strong public interest may still be outweighed in some cases if there are particularly strong factors in favour of disclosure. The example given by the Tribunal in *HMT v ICO* of the type of case in which the Convention might be outweighed was advice concerning the legality of the war in Iraq..."*

46. Having considered the AGO's explanations and inspected the withheld information, the Commissioner has concluded that the information relates to the provision of advice by a Law Officer or any request for the provision of such advice. As such, the Commissioner finds that the exemption at section 35(1)(c) is engaged in respect of the withheld information requested at part 1 of the request.
47. Given this conclusion, the Commissioner has not found it necessary to consider the AGO's reliance on section 35(1)(a) or (d) in relation to part 1 of the complainant's request.

Public interest test – Part 1 of the request

48. The exemption at section 35 is a qualified exemption. Therefore, the Commissioner has to next consider whether in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(c) outweighs the public interest in disclosure.

49. Public interest arguments under section 35(1)(c) should focus on harm to government decision making processes. This reflects the underlying purpose of the exemption. Arguments about other issues will not be relevant.
50. The key public interest argument for this exemption will relate to protecting the Law Officers' convention of confidentiality.
51. The AGO had initially submitted public interest arguments in relation to section 35(3) only, given its initial position that this exemption applied to both parts 1 and 3. It submitted similar but briefer arguments in relation to its subsequent reliance on section 35(1)(c) for part 1 of the request.

Arguments in favour of disclosing the requested information

52. The AGO acknowledged that there is a public interest in understanding the working and decision making processes of government, and in particular where that relates to aspects of the Covid-19 pandemic response.
53. The complainant initially said:

"There is also a wider need for public confidence in the Government in this time of national crisis. In each of the exemptions deployed, including and particularly in Section 35(1)(c), disclosure would help to increase trust in the Government by increasing transparency and helping people in assessing the quality of any advice being given by the Attorney General..."

54. On 6 April 2021, the complainant also submitted additional comments regarding the public interest as follows:

"There is a strong public interest in releasing the information. While the request does not relate to Government policy within the ICO's guidance, the incident did have a bearing on public safety. These events were high profile and made national headlines at the height of the first wave of the pandemic. More than that, they forced the Government to divert its attention away from fighting the pandemic and caused the Prime Minister to have to focus his attention on firefighting the public relations disaster that ensued.

The incident also resulted in a shift in the public response to social distancing. A YouGov poll on 26 May 2020 found that 70 percent of the public felt the issue would make it harder for the Government to get future lockdown messaging to the public. A

second poll on 3 June suggested one in five Britons (21 percent) had followed the rules less strictly in the previous week.

In June last year, academics at London School of Economics said that 'a widespread response to Mr Cummings's actions (and government defence of his actions) was that the situation could anger people, undermine the sense that those in power abide by the same public health rules, and reduce compliance with travel and other restrictions'.

Some 96 percent of people in an LSE survey had heard of the incident and while only 16 percent felt it was okay to bend the rules, 84 percent agreed that 'people in power bend the rules when they need to'.

The academics said in conclusion: 'As the government pushes more and more to open up the economy and get people moving, the biggest risk is complacency—we need people to adhere to health guidelines and be willing to fully engage in track, trace and isolate. As we adjust to a greater degree of relaxation of restrictions, and as public health measures become increasingly targeted, voluntary compliance will be as important as ever. Yet, while adherence continues to be rooted in widespread social norms and a sense of collective responsibility, there are signs that cynicism about the binding nature of the rules (linked to the Dominic Cummings affair) is starting to become a factor. [sic]

'This finding suggests that restoring public trust lost in the last few weeks will be vital if the collective effort against COVID-19 is to be maintained and a second wave avoided. It seems unlikely that this will be easy—once lost, trust is hard to regain. Transparency, openness, and maintaining a sense of mutual responsibility will be central to such efforts, as will be clarity over rules (and the reasons for them) and consistency in their application. Whether the Government has the will or political capital to do this remains to be seen⁷.'

There is also a wider need for public confidence in the Government in this time of national crisis. In each of the exemptions deployed in the AGO's response, including and particularly in Section 35(1)(c), disclosure could help to increase

⁷ <https://blogs.lse.ac.uk/politicsandpolicy/public-compliance-covid19-june/>

trust in the Government by increasing transparency and promoting accountability and help people in assessing the quality of any advice being given by the Attorney General on this particular issue.

This was true when the request was made and remains particularly true at this moment in time (March 2021) as Government continues on the path of easing lockdown rules with the danger of the pandemic far from over. The Prime Minister has urged people to 'proceed with caution' as lockdown is eased and much reliance is being placed on the public's ability to stay within the guidelines in the expectation of a possible third coronavirus wave.

On 5 April 2021, the Prime Minister told the public: 'It is by being cautious, by monitoring the data at every stage, and by following the rules: remembering hands, face, space and fresh air – that we hope together to make this roadmap to freedom irreversible.'

ICO guidance on Section 35 says: 'Departments should always consider whether there are additional arguments in favour of disclosure, relating to the particular circumstances of the case. For example, these could include transparency in relation to the influence of lobbyists, accountability for spending a large amount of public money, the fact that a proposal has a significant impact on the public, a reasonable suspicion of wrongdoing or flaws in the decision-making process, or a potential conflict of interest.'

Ministry of Justice guidance (Freedom of Information Guidance: Exemption Guidance, 2008) adds: 'Considerations which may weigh in favour of a decision to disclose include: greater transparency makes government more accountable to the electorate and increases trust; as knowledge of the way government works increases, the public contribution to the policy making process could become more effective and broadly-based; the public interest in being able to assess the quality of advice being given to ministers and subsequent decision-making; the greater impact on the country or on public spending the greater the public interest may be in the decision-making process being transparent.'

55. The Commissioner notes the public interest in public authorities being transparent and accountable with regard to the way they make decisions.
56. The Commissioner accepts that there was a high level of interest and concern about Mr Cummings' actions during the 2020 lockdown, and

that, by association, there is likely to be some interest in knowing whether legal advice was provided in relation to this matter.

Arguments in favour of maintaining the exemption

57. Specifically in relation to part 1 and section 35(1)(c), the AGO told the Commissioner that there is 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".

Balance of the public interest

58. The Commissioner accepts that there is a public interest in disclosing the withheld information in view of the unprecedented nature of the Covid-19 pandemic and the associated steps to mitigate and manage the spread of the disease.

59. However, given that the withheld information consists of a list of documents held in scope of part 1 of the request, as opposed to the documents themselves, she does not consider that disclosure would add anything of particular significance to the issue. Furthermore, disclosure of the 'Schedule' would reveal whether or not Law Officer advice had been sought. This is particularly relevant given the AGO's refusal to confirm or deny whether any legal advice or guidance exists (as per part 3 of the complainant's request).

60. The exemption at section 35(1)(c) reflects the long-standing constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any 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. There is clearly a strong public interest therefore in maintaining the exemption and the Commissioner has given that inherent strong public interest in maintaining the exemption appropriate weight in the circumstances of this case.

61. The AGO argued:

“Importantly, the exemption in section 35(1)(c) and the Convention applies as much in cases where there is no Law Officer advice as in cases where there is. If the government were required to confirm those cases where it had not sought legal advice, any instances where it did not so confirm effectively amount to confirmation that advice had been sought. Disclosing the information requested would make it clear whether Law Officer advice was sought.

Whilst there is a public interest in understanding the working and decision making processes of government, and in particular where that relates to aspects of the pandemic response, that public interest has to be weighed against 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. Accordingly, it is in the balance of the public interest to withhold the information requested, as it would make it clear whether Law Officer advice had been sought.”

62. The Commissioner considers that the public interest in not revealing the withheld information is stronger than the public interest in disclosure in the circumstances of this case.

63. The Commissioner has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information in all the circumstances of this case.

Section 35 – formulation of government policy (neither confirm nor deny ‘NCND’) – Parts 2 and 3 of the request

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

65. The decision to use an 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.

66. 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.

67. For part 2 of the request, the AGO has refused to confirm or deny whether any further information is held beyond that previously disclosed to the complainant, citing section 35(3). The AGO has issued a NCND response regarding whether it holds the information requested by the complainant at part 3 of his request, 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 that it holds any information which would come within the scope of sections 35(1)(a),(c) and (d) in respect of both parts 2 and 3 of the complainant's request.
68. In reaching a decision, the Commissioner does not need to know whether the AGO does or does not hold the information requested in parts 2 and 3 of the request, as it is not necessary for her consideration of this exemption.
69. 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]".

Part 2 of the request – "any correspondence..."

70. The AGO provided information in response to part 2 of the complainant's request and clarified at internal review that this included both paper and electronic information.
71. As set out in the 'Scope' section, on 6 April 2021, the complainant submitted the following comment to the Commissioner:

"This part of the response should be considered to include not just letters but all forms of communication. In Section 35 of the Act, the concept of ministerial communications is broad and includes letters, memos, emails and other documents written to convey information between ministers and also meetings and telephone conversations, including meetings of the Cabinet or Cabinet committees as defined in Section 35 regarding ministerial communications."

72. Also as set out in the 'Scope' section, the Commissioner wrote again to the AGO to make further enquiries. On 30 April 2021, the AGO responded and disputed the complainant's view above. It was at this stage that the AGO argued that 'correspondence' applied only to letters (as set out in paragraphs 17 to 19 of this notice).

73. Given the Commissioner's broader interpretation, she asked the AGO whether it held any further information in scope ie that is not already in the public domain. Subsequently, on 19 May 2021, the AGO refused to confirm or deny whether any further information was held in relation to part 2 of the request. It cited section 35(3) and said:

"This is because disclosing such correspondence would reveal whether Law Officer advice had been requested or given. We therefore consider that s.35(1)(c) would be engaged and the public interest would be in favour of applying s.35(3) in this situation for the same reasons set out in our letter to you dated 30 April 2021."

74. Based on the foregoing and the type of information being requested, the Commissioner has concluded that the exemption at section 35(3) of the FOIA is engaged because further information within the scope of part 2 of the request, if held, could reasonably be expected to include advice provided by the Law Officers or requests for such advice.
75. As the Commissioner has found that any further information within the scope of part 2 of the request, if held, would fall within the definition of section 35(1)(c), she has not considered the AGO's citing of sections 35(1)(a) and (d) any further. The next step for the Commissioner is to consider the public interest test in relation to part 2 of the request; this consideration follows her examination of the AGO's handling of part 3 of the request.

Part 3 of the request – "any legal advice..."

76. Given the wording of part 3 of the request ("*A copy of any legal advice given by the Attorney General...*"), the Commissioner has first considered the AGO's citing of section 35(1)(c), (*the provision of advice by any of the Law Officers or any request for the provision of such advice*), in relation to its decision to NCND whether this information was held.
77. 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.
78. 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.

79. As the Commissioner has found that the information requested in part 3, if held, would fall within the definition of section 35(1)(c), she has not considered the AGO's citing of sections 35(1)(a) and (d) any further. The next step for the Commissioner is to consider the public interest test in relation to part 3 of the request.
80. Given that the AGO's final position is that it has cited section 35(3) of FOIA for both parts 2 and 3 of the request, which the Commissioner has found to be engaged by virtue of section 35(1)(c), she has considered the AGO's public interest submissions for both parts 2 and 3 jointly below. It is important to note that the only slight difference between these parts of the request is that some information was disclosed to the complainant in relation to part 2, but that the AGO refused to confirm or deny whether any *further* information was held on the basis of a broader interpretation of 'correspondence'. For part 3, the AGO has refused to confirm or deny whether or not it holds any information.

Public interest test – parts 2 and 3 of the request

81. 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 further information is held for part 2/whether information is held for part 3

82. The Commissioner has considered the points raised by the complainant in respect of part 1 of his request, in so far as they relate to parts 2 and 3 (see paragraphs 53 and 54 above).
83. 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.
84. 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 in favour of maintaining the exemption

85. In its response to the request, the AGO advised the complainant:

"We also take the view that the public interest is not in favour of confirming or denying whether any such documents are held... It would also 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."

86. The AGO told the Commissioner:

"Moreover, there does not appear to be a particularly strong public interest in the disclosure of this information given all the circumstances of this case, notwithstanding the general importance of the broader subject matter (the pandemic). The complainant has mentioned that these events were very high-profile and made national headlines at the height of the coronavirus pandemic. However, the Attorney's responses to Lord Falconer have already been made public, and the Attorney said other things publicly about this matter, including at Attorney General's Questions in June 2020."

87. The AGO argued that on the basis set out above, it is not clear how the disclosure of the conversations between the Attorney and her officials (if held) would materially add to the public's understanding of the issue. It argued that the recognised benefits to the effective functioning of government from withholding this type of information (if held) would be foregone *"with no positive impact on the public's understanding that we can see."*

Balance of the public interest

88. Again, the Commissioner accepts that there will always be a strong public interest in confirmation or denial as to whether the government has 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.
89. 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.
90. 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.
91. 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.

92. 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 further information falling within the scope of part 2 of the request, and whether the AGO holds information within the scope of part 3 of the request which would be exempt by virtue of section 35(1)(c).

Other matters

93. The complainant asked the Commissioner to consider his concerns that his request may have been handled differently because it was known by the public authority that he is a journalist. It is not disputed that the AGO knew that he is a journalist, however, the Commissioner's analysis in this decision notice found that the AGO handled his request in line with the requirements of FOIA.

Right of appeal

94. 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

95. 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.

96. 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

Gerrard Tracey
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Information Commissioner's Office
Wycliffe House
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SK9 5AF