

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 6 December 2010**

**Public Authority:** Office of the Solicitor to the Advocate General  
for Scotland  
**Address:** Victoria Quay  
Edinburgh  
EH6 6QQ

### Summary

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The complainant wrote to the public authority, the Office of the Solicitor to the Advocate General (OSAG), to request information regarding a number of aspects relating to the operation of OSAG. OSAG responded to the request and disclosed some of the information requested, applying various exemptions to the remaining withheld information. The complainant's internal review request and subsequent complaint to the Commissioner concerned only information withheld under section 35(1)(c). The Commissioner has found that OSAG correctly withheld information under section 35(1)(c) of the Act and requires no steps to be taken by OSAG.

### 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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2. Officer of the Solicitor to the Advocate General for Scotland (OSAG) is part of the Office of the Advocate General (OAG). OAG comprises three offices; OSAG, the Legal Secretariat to the Advocate General

(LSAG) and the Ministerial Private Office. The work of the OAG, OSAG and LSAG spans both Law Officer and non-Law Officer functions.

3. OSAG provides legal services in Scotland to most UK Government Departments and supports the Advocate General in the exercise of his functions under the Scotland Act and in relation to functions as a UK Law Officer. OSAG provides legal advice in relation to Scots law, instructs United Kingdom legislation applying to Scotland and represents UK Government Departments in litigation in the Scottish Courts. It has particular expertise in constitutional and public law matters and acts for UK Government Departments in a substantial proportion of the judicial reviews which come before the Court of Session.
4. OSAG also supports the Advocate General in respect of proceedings raised or defended in Scotland which are relevant to the exercise of his functions. This work includes consideration of devolution issues, within the meaning of Schedule 6 to the Scotland Act 1998, that arise in the Courts. OSAG also provides legal advice and services to UK Government Departments, including primary and subordinate legislation. On the instruction of the Scotland Office, OSAG also drafts Orders under the Scotland Act.

## The Request

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5. The complainant wrote to OSAG on 26 May 2009 and requested the following information:
  - Details of the November 2008 diary commitments of the Advocate General for Scotland.
  - The number of employees working for the Office of the Advocate General this year and for each year since 1999.
  - A list of Parliamentary Bills and other projects the Office of the Advocate General is working on and any planned projects up until 2011.
  - Whether the Office of the Advocate General is conducting work relating to an independence referendum or the National Conversation.
  - The number of letters sent and received in 2008 by the Office of the Advocate General.
6. OSAG responded to the request on 25 June 2009, and provided the complainant with some information relating to his request. OSAG also

advised the complainant that other information was being withheld by virtue of various exemptions.

7. Of particular significance to the complainant's complaint to the Commissioner, OSAG also advised the complainant that the Legal Secretariat and the Advocate General were currently working on the following projects:
- Legal services liberalisation and mutual assistance projects in relation to China, India and Vietnam (assisting Ministry of Justice).
  - Project for engagement with China for trade and investment (assisting UK Trade and Investment).
  - Programme of training for and co-ordination of government lawyers on devolution and related issues (organised through a working group of government lawyers from several departments).

OSAG informed the complainant that they held information relating to a number of other matters on which the Legal Secretariat and the Advocate General were currently working, but that they did not propose to release any of this information "*on the basis that the provision of advice by the Law Officers, or any request for the provision of such advice, is exempt information by virtue of section 35(1)(c) of FOIA*". Having considered the public interest test in relation to this information, OSAG stated that they were of the view that there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding whether or not to seek advice from the Law Officers on a particular issue, and therefore the public interest favoured maintaining the exemption.

8. Regarding the complainant's specific query concerning the independence referendum and the National Conversation, OSAG responded that, "*With reference to section 35(1)(c) (provision of advice by the Law Officers), and (3), we can neither confirm nor deny whether the Office of the Advocate General is conducting work relating to an independence referendum or the National Conversation. We have considered the application of the public interest test as regards disclosure of this information and, for the reasons cited above, have concluded that it is in the public interest to maintain the exemption*".
9. The complainant requested an internal review of his request on 14 July 2009. In his letter to OSAG, the complainant made clear that his request for an internal review was restricted to two particular responses provided by OSAG, stating that:

*"I wish to have an internal review conducted of the decision refusing to provide information on 'a number of other matters on which the Legal Secretariat and the Advocate General are currently working', and whether the Office of the Advocate General is conducting work relating to an independence referendum or the National Conversation. It is illogical to provide details of Parliamentary Bills and some other projects OSAG is working on, but to exempt other related matters, particularly concerning an issue of as great a public interest as proposed constitutional change".*

10. OSAG provided the complainant with their internal review decision on 14 August 2009, addressing the two parts of the original response specified. With regard to the work of the Legal Secretariat to the Advocate General (LSAG), OSAG confirmed that the information withheld in this area related to requests for Law Officer advice being undertaken by LSAG and the Advocate General himself. OSAG reiterated that this information was exempt from disclosure on account of section 35(1)(c), and proceeded to detail the public interest arguments which favoured the maintenance of this exemption. In terms of the public interest reasons favouring disclosure of this information, OSAG stated that, *"It is difficult to identify those public interest reasons where the request for information is in general terms. More particularly, it is difficult to give appropriate weight to those reasons. That release of the information allows the public to see what the Government considers are legally complex or controversial matters, which in turn informs public debate, is probably the main argument in favour of release"*.
11. Addressing the second of the two areas specified by the complainant, namely, whether OAG was conducting work relating to an independence referendum or the National Conversation, the OSAG advised the complainant that having reconsidered the issue, they were of the view that section 35(1)(c) and (3) had been applied incorrectly in their original response to the request. By way of explanation, OSAG advised that, *"Your initial request asked whether the OAG were conducting work relating to an independence referendum or the National Conversation and not whether the Advocate General had provided advice on the matter. The information you have requested is exempt information under section 35(1)(a) (formulation or development of government policy) and (3). The Office of the Advocate General can neither confirm nor deny whether the Office of the Advocate General is conducting work relating to an independence referendum or the National Conversation"*. OSAG recognised that whether the issue was being considered by the Government would be of interest to the public, but that this factor was outweighed by the

powerful public interest in safeguarding openness in all communications between the Government and its legal advisers in formulating and developing policy.

## The Investigation

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### Scope of the case

12. On 20 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Referring to the original response to his request, the complainant advised that, "*Some information was refused and I accept the basis for that refusal*". The complainant confirmed to the Commissioner that his complaint concerned two queries posed in his request, and that in neither instance had he requested copies of any advice being provided to Government Ministers. The outstanding queries were:
- Whether the Office of the Advocate General is conducting work relating to the independence referendum or the National Conversation?
  - What other matters the Legal Secretariat and the Advocate General are working on?

The complainant contended that, "*The provision of information in this respect would be no different to that already provided by OSAG on other matters. I do not agree that exemptions under either sections 35(1)(a) and (c) Freedom of Information Act 2000 are applicable in this situation. This is particularly the case concerning the proposed independence referendum and National Conversation. These issues are of major public discussion in Scotland and there is a strong public interest argument in knowing whether Her Majesty's Government is conducting work on a proposal of the Devolved Government in Scotland relating to constitutional change*".

13. In his complaint to the Commissioner, the complainant expressed the view that the case made by OSAG that disclosure of the occasions where legal advice has been sought from the Law Officers would therefore have the effect of disclosing those matters which, in the judgement of Government, have a particularly high political priority or are assessed to be of particular legal difficulty, "*would be more relevant if the 25<sup>th</sup> July 2009 OSAG letter had not already released information which has revealed the need for legal advice relating to other areas of what one must assume is 'high political priority'*". The

complainant added that the case made by OSAG was 'a fiction', since they had already provided him with information regarding China, India and Vietnam, and the names of six Bills of the Scottish Parliament whose legislative competence was being considered. On this basis, the complainant was of the view that the withheld information relating to the 'other matters' should be disclosed.

14. The Commissioner notes that the information previously withheld under section 35(1)(a) has now been provided to the complainant. Part 3 of the request originally included, *'a list of Parliamentary Bills and other projects the Office of the Advocate General is working on and any planned projects up until 2011'*. The Commissioner notes that some of this information was provided to the complainant, where the information was part of the Advocate General's non- Law Officer functions (whether done by the AG, OSAG or LSAG). Only some limited information specifically relating to other projects the LSAG and AG were working on was withheld under section 35(1)(c), because this information related to Law Officer advice. The only remaining issue for the Commissioner to decide upon is the application of section 35(1)(c) to this limited information falling within part 3 of the request.

## Chronology

15. The Commissioner wrote to OSAG with details of the complaint on 27 October 2009, and requested copies of the withheld information and details of the application of section 35(1)(c) to this information.
16. On 26 November 2009, OSAG provided the Commissioner with the withheld information. This comprised a briefing paper to the Advocate General as prepared by the Legal Secretariat and dated 21 May 2009. OSAG also provided the Commissioner with detailed submissions regarding the application of section 35(1)(c) to the withheld information.
17. On the separate question of whether OAG is working on an independence referendum or the National Conversation, OSAG advised the Commissioner that as the complainant had asked a yes/no question, this was not a request for information within the provisions of the Act, but essentially a question of fact. OSAG cited the Tribunal decision in *Day v ICO & DWP (EA/2006/0069)*, in which it was held that, *"The Act only extends to requests for recorded information. It does not require public authorities to answer questions generally; only if they already hold the answers in recorded form"*.
18. OSAG acknowledged that they had nevertheless treated the question as an FOI request and had applied section 35(1)(a) in their previous

- response. However, having reconsidered the public interest test, OSAG advised that although any such policy formulation advice would be covered by section 35(1)(a), they were content to deal with the request, *"since it only questions whether we are working on these matters and is not a request for the substance of our advice"*. On balance, and on the facts of this case, OSAG were satisfied that there is a public interest in knowing that the UK government was keeping the proposed Referendum Bill and the National Conversation under review. Consequently, OSAG advised that they had written to the complainant on 26 November and had informed him that they had been keeping the proposed Referendum Bill and the ongoing National Conversation under consideration as part of their ongoing responsibilities. The provision of this information to the complainant by OSAG satisfactorily resolved one of the two issues in the complainant's complaint to the Commissioner.
19. The Commissioner subsequently discussed the remaining issue of the complaint (what other matters the Legal Secretariat and the Advocate General were working on), with the complainant. The Commissioner explained that there would have to be strong public interest reasons to warrant disclosure of confidential legal advice provided by the Law Officers under section 35(1)(c). The Commissioner asked the complainant to provide him with specific and detailed representations as to the public interest factors favouring disclosure of the withheld information.

## Analysis

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### Scope of the request

20. The complainant responded to the Commissioner by email on 1 July 2010. The complainant informed the Commissioner that, *"The outstanding information I am looking for from OSAG on 'matters on which the Legal Secretariat to the Advocate General and the Advocate General are currently working', refers to individual issues such as:*
- *The Calman Commission on Scottish Devolution*
  - *Fiscal or financial independence, responsibility or autonomy for the Scottish Parliament*
  - *Transfer to the Scottish Parliament of any of the reserved matters listed in Schedule 5 of the Scotland Act 1998*

*The above matters could be described as being concomitant to the independence referendum or National Conversation".* The Commissioner considers that although the complainant did not refer to

any of the above three issues in his request to OSAG, they nevertheless fall within the scope of his original request, as they constitute 'projects' which the OSAG may or may not be working on.

21. The complainant advanced public interest arguments which he considered supported disclosure of the withheld information. In addition, the complainant contended that because OSAG had placed no legal restraint upon the provision of information regarding the independence referendum and the National Conversation, and because OSAG had previously provided him with information relating to China, India and Vietnam, *'I believe confirmation as to the other matters listed at the beginning of this email (as set out in the above bullet points) should be granted'*.
22. The Commissioner subsequently contacted OSAG to enquire whether they would be prepared to provide the complainant with confirmation information as to the three new topics, in order to informally resolve this matter.
23. OSAG replied to the Commissioner in a letter dated 12 August 2010. Having considered the Commissioner's suggestion concerning the three new topics, OSAG explained that:

*" We do not believe that these are within the scope of the complainant's original request or the internal review – they basically constitute a new FOI request. If these specific issues were what the complainant was seeking information on, he ought to have requested it at the time. In addition, this is again a question rather than a proper FOI request for information (see BERR case). The only document/information that we hold which would answer this question is the LSAG monthly briefing. If released, this document would constitute a complete answer to part 3 of [name redacted] original request. However, although we have provided this document to you, we have withheld it from the complainant on the basis of section 35(1)(c). We believe that the complainant is attempting to widen the scope of his original request (15 months later) via correspondence with the ICO and seek more information than originally requested".*

OSAG confirmed that they would be happy to deal with a new FOI request from the complainant as to the three specific issues raised, and advised the Commissioner that the only outstanding matter which required a decision was their withholding of the monthly briefing paper in accordance with section 35(1)(c).



24. As noted, the Commissioner does not agree with the view of OSAG that the three issues specified by the complainant are outside the scope of his original request and constitute a new request. However, as OSAG have confirmed that the only document/information which they hold which would answer the complainant's questions with regard to the three specified issues, is the LSAG monthly briefing to which they have applied the section 35(1)(c) exemption, OSAG have already answered these questions by providing the complainant with all information held which is not exempt under section 35(1)(c).
25. The Commissioner spoke with the complainant on 6 September 2010 and explained that having considered the withheld information, it was highly likely that a formal decision by the Commissioner would uphold the application of the section 35(1)(c) exemption by OSAG. The complainant told the Commissioner that at no point in his original request, or subsequently, had he been seeking any legal advice pertaining to the 'other matters' which the Legal Secretariat and the Advocate General were working on. The complainant confirmed that he was seeking to obtain a similar response to that which he had received from OSAG with regard to the independence referendum and the National Conversation, i.e. confirmation as to whether OSAG had been looking at the three specified issues.
26. The Commissioner explained to the complainant that the section 35(1)(c) exemption had been correctly applied to the remaining portion of withheld information falling within part 3 of his original request, since it had been drafted in such wide terms so as to encompass some Parliamentary Bills and planned projects in regard to which legal advice had been sought from the Advocate General in his capacity as one of the Law Officers. This was the case, notwithstanding the fact that the complainant had never actually wanted to see any such legal advice.
27. Due to the legally sensitive and confidential nature of the withheld information in this case, the Commissioner is not able to comment in detail about the information contained in the briefing paper of 21 May 2009 as prepared for the Advocate General by LSAG. However, having had sight of the withheld information, the Commissioner notes that it contains details and references to a number of Parliamentary Bills upon which the LSAG has provided legal advice and opinion. The Commissioner is therefore satisfied that the withheld information relates to advice provided by the Law Officers.

### **Section 35(1)(c) – Provision of Advice by the Law Officers**

28. Section 35(1)(c) provides that *"Information held by a government department or by the National Assembly for Wales 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".*

29. Section 35(5) confirms that, *'the Law Officers' means that Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland'*. As one of the functions of LSAG is to support the AG in his capacity as a UK Law Officer, the Commissioner is satisfied that the withheld information relates to work undertaken by LSAG and the AG in that capacity.

### **Public Interest**

30. Section 35(1)(c) is a qualified exemption and therefore subject to the public interest test under section 2(2)(b) of the Act. This states that Information is exempt information where the public interest, in all the circumstances, in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public Interest arguments in favour of disclosing the requested information**

31. In considering those public interest factors which are in favour of disclosing the requested information, it is important to note that the information provided to the complainant concerning the independence referendum and the National Conversation was whether OAG as a whole had been working on these topics, and would not reveal anything specifically about whether Law Officer advice was sought or given. The disputed information is more specific information on what LSAG and AG are working on, in addition to the information already released about work not relating to Law Officer functions. Consequently, the withheld information is information relating to Law Officer advice.
32. The Commissioner recognises that there is a public interest in disclosing both whether the Law Officers have provided advice to the Government (which is what the complainant is essentially seeking in this case), and where this is the case, the disclosure of that advice. Disclosure of the fact that Government has sought advice from the Law Officers could provide reassurance to the public that careful and fully informed decisions were being made on the basis of the best possible legal advice.
33. There is a general public interest in Government being open and transparent about its decisions and the rationale upon which they are made. This public interest is closely allied to the public interest in

Government being accountable for its actions and decisions and the disclosure of any legal advice requested or provided could certainly help ensure such accountability.

34. In their submissions to the Commissioner, OSAG have acknowledged that aside from a general public interest in the openness and accountability of government departments, there could also be an interest in the public knowing which issues the Government consider to be legally complex or controversial. The Commissioner would note that it could also be argued that there is an interest in the public having knowledge as whether or not advice received from the Law Officers is subsequently followed.
35. In his submissions to the Commissioner, the complainant has confirmed that, *"The basis on which I request the information regarding other matters is that it is in the public interest by way of great constitutional significance"*. The complainant sought to draw a distinction between the case of *HM Treasury v the Information Commissioner and Evan Owen [2009] EWHC 1811 (Admin)*, which concerned a request for Counsel's opinion as to whether the Financial Services and Markets Bill was compatible with the Human Rights Act 1998, and his own request. The complainant stated that, *"I believe this case (Owen) should be distinguished from my complaint regarding OSAG. Owen, although, recognisably of constitutional significance, relates to a substantive issue that could not be classified as being on a parallel with that information requested here. The issue at the crux of my complaint relates to devolution issues and goes to the very core of the fabric and structure of the State itself"*. Whilst the Commissioner would not disagree that some of the "other matters" within the scope of the complainant's original request would have significance in terms of constitutional issues, he does not consider that the present case carries a more forceful argument than Owen in terms of favouring disclosure.
36. The complainant has submitted that a more analogous case to his own complaint is the June 2009 decision of the Commissioner in FS50100665. The information in that case concerned the proceedings of a Cabinet Committee considering devolution in Scotland and Wales. In terms of the type of information in both cases, there are clearly similarities, given that both concern issues of Scottish devolution. The complainant has suggested that, *"Although the instance cited dealt with cabinet minutes rather than legal advice, the substantive matter is more closely related to my complaint than that of Owen and the public interest test should be similarly applied here"*. The exemption relied on in the Owen case was section 35(1)(a) and (b) (formulation or development of government policy) and not that pertaining to advice of

the Law Officers as stipulated by section 35(1)(c). Whilst the Commissioner would accept that the public interest in disclosure is similarly strong in this case, the public interest in the exemption may be different.

37. In submissions to the Commissioner, the complainant has cast doubt on the validity of some aspects of the public interest arguments put forward by OSAG in favour of maintaining the section 35(1)(c) exemption. The complainant has highlighted the fact that in their response to his request, OSAG provided him with certain information concerning matters which the Legal Secretariat and the Advocate General were currently working on, including the names of some Scottish Parliament Bills and project information pertaining to the liberalisation of legal services in China, India and Vietnam and trade and investment in China. On the basis that OSAG were content to provide him with this information, the complaint considers that there should be no impediment to his receiving information concerning the "other matters" referred to. The Commissioner considers this point further in paragraph 50 below.

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

38. In its request response to the complainant and subsequent submissions to the Commissioner, OSAG have advanced a number of arguments to support their decision to maintain the section 35(1)(c) exemption and withhold information concerning the "other matters" on which the Legal Secretariat and the Advocate General are currently working.
39. Firstly, OSAG have argued that there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular, whether it should seek advice from the Law Officers. OSAG have highlighted that this public interest is reflected in the long-standing convention, observed by successive governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. This convention is recognised in paragraph 2.13 of the Ministerial Code.
40. OSAG have stated that as the most senior legal advisers, the advice provided by the Law Officers has a particularly authoritative status within Government. However, the need for Government to obtain legal advice on a very wide range of matters is such that it would be impossible for such advice to be provided by the Law Officers in every case. OSAG have contended that, "*Disclosure of the occasions when legal advice has been sought from the Law Officers would therefore*

*have the effect of disclosing those matters which, in the judgement of the Government, have a particularly high political priority or are assessed to be of particular legal difficulty. This would be directly counter to the strong public interest which underlies the whole of section 35".*

41. Another negative two-fold effect which the disclosure of information as to whether the Law Officers have advised on a particular issue(s) could have in this case was enumerated by OSAG. *"On the one hand, to disclose that they have advised on an issue could be taken to indicate that particular importance was attached to it or even that the Government was in particular doubt about the strength of its legal position. Even if that impression were unfounded, the risk of creating it might deter the Government from consulting the Law Officers in appropriate cases. On the other hand, to disclose that the Law Officers have not advised on an issue might expose the Government to criticism for not having consulted them, and hence having failed to give sufficient weight to the issue or to obtain the 'best' advice. Again, even if unfounded, this could lead to pressure to consult the Law Officers in inappropriate cases or in an unmanageably large number of cases".*
42. In their submissions to the Commissioner, OSAG have highlighted the following public interest argument in favour of withholding the information. *"To avoid criticism for not seeking Law Officer advice on a particular issue, the Government may seek an opinion on all matters, even where this would ordinarily be unnecessary. This has obvious detrimental consequences in terms of inefficiency in government and the potential to create an unmanageable caseload for the Law Officers".*
43. Finally, OSAG referred to the recent High Court decision in BERR v O'Brien and the Information Commissioner [2009] EWHC 164 (QB). Although this case related to Legal Professional Privilege under section 42 of the Act, OSAG correctly stated that there is a close degree of linkage between section 35(1)(c) and section 42, since both exemptions relate to legal advice. In the case cited, the Court held, when considering the balancing of the public interest test, that in such cases involving requests for legal advice, there should be *"some clear, compelling and specific justification for disclosure"*. Applying the findings of the Court, OSAG advised the Commissioner that *there must be highly compelling reasons to release the information under either exemption"*, and that in the case of the present complainant's general request, *"there are no clear, compelling and specific justifications for disclosure"*.

## Balance of the public interest arguments

44. Having given careful consideration to the withheld information, and the public interest arguments set out above, the Commissioner has concluded that the public interest in this case, is weighed substantially in favour of not disclosing the monthly legal briefing. In reaching this conclusion, the Commissioner considers that whilst there are public interest arguments in favour of disclosing the information, these are considerably outweighed by the public interest factors in favour of maintaining the exemption.
45. Although not an absolute exemption, section 35(1)(c) contains a strong element of inbuilt public interest in terms of withholding from disclosure, advice obtained and provided by the Law Officers. In this respect, the exemption is closely related to the concept of legal professional privilege with which section 42 is imbued. As the Court noted in the Owen case, "*Parliament has precisely identified as exempt the issue as to whether or not the Law Officers have given their advice, this was statutory language intending to reflect the substance of the Law Officers Convention itself, a long-standing rule adopted by the executive for the promotion of good government*". Furthermore, as Mr Justice Blake made clear, the primacy of this principle of non-disclosure was not displaced by the provisions of the Act, and that, "*General considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining an exemption, even in the absence of evidence of particular damage*".
46. However, as Mr Justice Blake acknowledged, such general considerations and enshrined public interest importance still needed to be evaluated within the context of the Act, with its guiding principles of transparency and accountability. That is to say, no matter how much weight may be given to the public interests protected by the Law Officers' Convention, as concisely articulated by OSAG in the current complaint, these are not determinative of the outcome in any particular case, and where there are equal or weightier countervailing public interest factors favouring disclosure, then the public interest in maintaining the exemption will not outweigh the public interest in disclosing the information.
47. Guidance as to the weight and prominence of the public interest factors which would be required to equal or outweigh the strong and cogent public interest factors favouring maintaining the section 35(1)(c) exemption, can be obtained through a consideration of the handful of cases in which such legal advice has been previously disclosed. Such cases have included advice concerning the Scott Inquiry into the arms

sales to Iraq affair, the UK government's liability for breaching European Community law in the Factortame litigation, and most recently, the advice of the Attorney General on the legality of the use of force against Iraq in 2003. The Commissioner notes that in all these cases, the decision to disclose the due advice was taken at the highest level of government for exceptional and compelling reasons.

48. In the present case the complainant is interested in obtaining confirmatory (i.e. a yes/no response) information as to whether OSAG has been considering the matters specified. Whilst the Commissioner recognises that there may sometimes be a legitimate public interest in knowing the legal basis for key government decisions and actions, he does not consider that the public interest in disclosure of a yes/no answer would carry significant weight in this case.
49. The complainant has contended to the Commissioner that because OSAG latterly chose to provide him confirmatory information with regard to his question concerning the independence referendum and the National Conversation (in their letter of 26 November 2009), then he should also be provided with similar information as to the "other matters" and the three new topics specified in his email to the Commissioner of 1 July 2010. This contention is based on a mistaken premise as to the reasoning and actions of OSAG in this matter.
50. During the course of his investigation, the Commissioner contacted OSAG to query why information had been disclosed to the complainant concerning the Scottish Parliament Bills and the projects concerning China, India and Vietnam. OSAG confirmed that they were content to disclose this information because they did not consider it to be exempt. The Commissioner therefore does not consider, contrary to the arguments put forward by the complainant, that there has been any inconsistency in this respect on the part of OSAG. The Commissioner would in any event note that inconsistency is not in itself necessarily a relevant factor. It can be quite legitimate to weigh up the factors in applying an exemption and/or considering where the public interest lies and produce what appear to be different outcomes.
51. In conclusion, having had sight of the withheld information in this matter (the monthly briefing paper), the Commissioner is satisfied that its contents are such as to bring it within the section 35(1)(c) exemption. That is to say, the "other matters" of which OSAG averred to in its correspondence with the complainant, concern advice from the Law Officers and are thus consequently exempt from disclosure under the stated exemption.

52. Having balanced the respective public interest factors in this case, the Commissioner does not consider that a public interest in discovering whether the OSAG is considering a number of issues relating to matters of Scottish devolution, that is to say, simple confirmatory 'yes' or 'no' responses, constitutes a sufficiently weighty public interest in this case so as to draw equivalence with, or outweigh, the powerful and compelling public interest arguments in favour of maintaining the section 35(1)(c) exemption.

## **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.

## **Other matters**

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55. In his submissions to the Commissioner, the complainant raised concerns over the fact that when he received copies of the previous correspondence at the internal review stage of his request, the paragraph containing the information as regards the projects in China, India and Vietnam, was omitted from the copy of the OSAG letter to him of 25 June 2009. The complainant sought advice from the Commissioner as to whether "*it is normal for UK Government departments to alter correspondence in this way*".
56. The Commissioner duly raised this issue with OSAG, who explained that the copy of this letter as provided to the complainant at the internal review stage of his request, was an earlier draft copy of the final letter actually sent to the complainant on 25 June 2009, which had been provided to the complainant in error. The Commissioner therefore satisfied that this discrepancy was as a result of an oversight, and not an attempt to alter sent correspondence in any way.



## Right of Appeal

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57. 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 sent.

**Dated the 6<sup>th</sup> day of December 2010**

**Signed .....**

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

## **Legal Annex**

**Section 35(1)(c)** provides that:

“Information held by a government department or by the National Assembly for Wales 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(5)** provides that:

‘the Law Officers’ means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland’.