Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 December 2009

Public Authority: Electoral Commission
Address: Trevelyan House
Great Peter Street
London
SW1P 2HW

Summary

The complainant requested information related to proposals to modify the system of dual reporting requirements for MPs, which requires them to give details of certain financial support received by them and their constituency associations both to the House of Commons Registrar of Members' Interests and the Electoral Commission. The public authority provided much of the information but withheld other information, citing the exemptions contained in sections 36(2)(b)(i) and (ii) and 42 of the Act. The Commissioner, in the absence of evidence that the opinion of the qualified person was reasonably arrived at, has decided that they were sufficiently overridingly reasonable so as to engage the exemption provided by section 36 and that the public interest favoured the maintenance of the exemption . The Commissioner also found that the section 42 exemption was engaged and the public interest favoured the maintenance of the exemption.

The Commissioner's Role

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

2. The Electoral Commission is an independent body, established by the Political Parties, Elections and Referendums Act 2000; its primary functions are to regulate political parties and their funding arrangements.

3. Members of the House of Commons are expected to register their financial interests in The Register of Members' Interests which was set up following a Resolution of the House of Commons on 22 May 1974.

4. A consequence of the Political Parties, Elections and Referendums Act 2000 was to require Members of Parliament to register certain interests with the Electoral Commission that were already to be registered in the Register of Members' Interests. This dual reporting led to confusion and duplication, with some Members of Parliament facing criticism or sanctions for registering an interest with one body but not with the other.

5. This situation of "dual reporting" was to be addressed in the Electoral Administration Bill. As part of the legislative process there was an exchange of opinions between the bill's sponsoring department, the [former] Department for Constitutional Affairs (DCA), and the Electoral Commission.

6. On 11 July 2006 Royal Assent was given to the bill which became known as the Electoral Administration Act 2006 which removed the need for much, but not all, of the dual reporting. Section 59 of that Act dispensed with the requirement for MPs to personally report recordable donations to the Electoral Commission, with the Commission obtaining the information it required for its registers from information supplied to the Registrar of Members' Interests.

The Request

7. On 16 May 2006 the complainant, expressing the view that disclosure was in the public interest, requested from the Electoral Commission:

> 'Information concerning proposals to simplify the current system of dual reporting requirements for MPs, which requires them to give details of certain financial support received by them and their constituency associations both to the Registrar of Members' Interests and the Electoral Commission'.

8. The Electoral Commission replied on 14 June 2006 stating that it held briefing papers that fell within the ambit of the request and these were being posted to the complainant. There was however correspondence that also fell within the ambit of the request but was likely to be exempt by section 36 of the Act. However it further explained that section 36 could not actually be relied on until relevant certification had been received by the Electoral Commission from the DCA.

9. The Electoral Commission sent a further reply on 13 July 2006 saying that in addition to the information already released it held further information concerning policy and legislation in respect of dual reporting. It explained that this was contained in the following documents:

- Correspondence with MPs, peers and Government ministers.
- Correspondence with the DCA concerning policy.

- Internal correspondence, including advice from the Commission's legal advisors.
- Briefing notes and drafts.

10. The Electoral Commission explained that it was releasing further information in these categories to the complainant unless it believed the information was exempt .The Electoral Commission went on to say that:

> "In respect of the correspondence with MPs, Peers and Government Ministers described above, the Commission declines to release this information on the grounds that this information is exempt under section 36(2)(b)(i) and (ii)…[The qualified person has]...certified that the release of this information would, or would be likely to, inhibit the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation, on the grounds that if this information were to be released, those concerned would be inhibited from seeking advice from, or exchanging views with, the Commission. Any discussions would be unable to be free and frank, and this would adversely affect the quality of policy making and legislation. The public interest in maintaining the exemption under section 36 for this information outweighs the public interest in disclosing this information on the grounds that the free and frank provision of advice and the free and frank exchange of views are, in these circumstances, necessary for the effective delivery of policy and legislation."

11. The correspondence with the DCA, the Electoral Commission further said, contains advice from and to Parliamentary Counsel, whose client was, in this instance, the DCA. It stated that the above exemption under section 36 also applies to the advice from and to Parliamentary Counsel, which is held by the Commission. In respect of the internal correspondence from the Commission's legal advisors, this information is exempt under section 42 on the grounds that release of this information would breach legal professional privilege. In this part of the correspondence there was no mention of the briefing notes and drafts that had been referred to earlier.

12. On the same day, 13 July 2006, the complainant requested the Electoral Commission to review its decision regarding the withheld information. The Electoral Commission provided its internal review decision on 11 August 2006. It upheld the original decision, adding that section 42 applied to correspondence with the DCA which contained advice to and from Parliamentary Counsel.

The Investigation

Scope of the case

13. On 14 August 2006 the complainant contacted the Commissioner to complain about the Electoral Commission's decision to withhold the information, as outlined above.

Chronology

14. The Commissioner wrote to the Electoral Commission on 17 September 2007 asking it to provide a copy of the withheld information and its comments on various issues regarding its application of the exemptions.

15. The Electoral Commission replied on 16 October 2007, stating that there had previously been some inadequacies in its record keeping and (although these had now been corrected) it did not have any record of its decision in this case other than the letters sent to the complainant.

16. The Electoral Commission believed that, the first response to the request had been made on 14 June 2006, when some information was disclosed and the complainant was informed that section 36 might apply to the remainder of the information. It next explained that the official dealing with the original request was appointed as a 'qualified person' on "13 July 2006" (although she only received formal notification at a later date), which was why the application of the section 36 exemption had been delayed. (The Electoral Commission in a letter dated 16 September 2009 to the Commissioner explained that the "13 July 2006" date was an error and that the correct date was 13 June 2006.)

17. Under cover of their letter dated 16 October 2007 the Electoral Commission provided the Commissioner with copies of the information it had either communicated to the complainant or withheld. The withheld information related to proposals to simplify the then current system of dual reporting requirements for MP's and comprised the following:

- A bundle of emails, notes and memoranda.
- A draft of a letter to a MP.
- An internal item of correspondence said by the Electoral Commission to be legal advice.

18. The letter also indicated that the Electoral Commission was now considering releasing to the complainant the withheld information and to this end they were seeking the views of relevant government departments.

19. After a lengthy exchange of correspondence the Electoral Commission, in a letter dated the 2 June 2008, informed the Commissioner that it would not be releasing the withheld information to the complainant. The Commissioner therefore went on to complete the investigation process.

Findings of Fact

20. The Commissioner, after viewing confirming evidence, finds that on 13 June 2006 the Chief Executive and the Secretary of the Electoral Commission were authorised to act as the qualified persons for the purposes of section 36 of the Act by the requisite government Minister, (Baroness Ashton of Upholland). The qualified person was therefore in place before the statutory time period for compliance with the request ended.

Analysis

Substantive Procedural Matters

21. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

22. In this case, the complainant made his request on 16 May 2006. The Electoral Commission did not provide its refusal notice until 13 July 2006, 41 working days later. This delay is in breach of section 17 (1) of the Act. By providing some of the requested information on the 13 July 2006 the Electoral Commission breached section 10 (1) of the Act.

Exemptions

Section 36

23. The Electoral Commission relied on section 36(2)(b)(i) and (ii) of the Act in relation to some of the requested information:

- A bundle of emails, notes and memoranda.
- A draft of a letter to an MP.

24. Section 36(2)(b) provides that:

> 'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act - …
>
> … (b) would, or would be likely to, inhibit –
> (i) the free and frank provision of advice, or
> (ii) the free and frank exchange of views for the purposes of deliberation…'.

25. The Information Tribunal has decided (Guardian & Brooke v The Information Commissioner & the BBC, EA/2006/0011 and EA 2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both 'reasonable in substance and reasonably arrived at'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply 'an opinion within a range of reasonable opinions'. However, it also accepted that 'there may (depending on the facts) be room for conflicting opinions, both of which are reasonable'.

26. In considering whether an opinion was reasonably arrived at, the Information Tribunal in McIntyre v Ministry of Defence (EA/2007/0068) proposed that the qualified person should only take into account relevant matters and that the

process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

27. The Electoral Commission has said (in its letter to the Commissioner dated 16 October 2007) that the qualified person had subsequently left their employ and there was no record on file as to when or why the decision was taken. Accordingly there is no evidence before the Commissioner that the opinion of the qualified person was reasonably arrived at.

28. Notwithstanding the decision in Guardian & Brooke v The Information Commissioner & the BBC the differently constituted Information Tribunal in McIntyre v The Information Commissioner and the Ministry of Defence found that an opinion that was "overridingly reasonable in substance" might not be invalidated by a flawed process. It commented (at paragraph 31) that:

> "We are prepared to adopt the test in Guardian and Brooke but subject to two caveats. Firstly where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion. Secondly, we take a broad view of the way the opinion is reasonably arrived at, so that even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review."

29. Although the circumstances of this case are different to McIntyre, the Commissioner believes the same principles can apply. The Act does not contain a requirement for qualified person's opinion to be recorded and therefore he will not reject an opinion purely on the basis of the lack of evidence. The position does however add a level of doubt that the opinion was reasonably arrived at and the opinion must be overridingly reasonable to overcome this lack of evidence. The Commissioner is most likely to find an opinion to be overridingly reasonable in substance where there is a wide-ranging and severe prejudicial effect on the ability of a public authority to carry out a core (rather than a subsidiary or support) function and where this effect would (rather than would be likely to) occur were the information in question to be disclosed.

30. As a regulator the Electoral Commission will often provide input on proposed legislation affecting its regulatory area. Accordingly the Commissioner's view is that the information does closely relate to one of the Electoral Commission's core activities. Although the Commissioner will be most likely to accept that an opinion is overridingly reasonable when there would be prejudice to a core function of the public authority, it's just one factor and is not solely determinative. Additionally, the Commissioner accepts the Electoral Commission assertion that disclosure would also prejudice a core function of the DCA and other departments, in particular their ability to sponsor relevant legislation and be able to obtain free and frank advice from all relevant bodies. The Commissioner also taken into

account the timing of the request, at that time the process of deliberation and final amendments to the legislation was still ongoing.

31. In conclusion the Commissioner, having viewed the information withheld, taken into account the context of the information and having regard to the decision in McIntyre v The Information Commissioner finds that the opinion of the qualified person was (in the absence of evidence that the opinion was reasonably arrived at) a sufficiently overridingly reasonable one so as to engage the exemption. Notwithstanding this decision in this matter the Commissioner encourages all public authorities to keep records relating to the seeking and receiving of the qualified person's opinion. Records not being kept increases the risk to the public authority that the Commissioner may find that the opinion is not reasonable.

32. In this instance, under section 36, even though the qualified person has concluded that the exemption applies, the public interest test must be applied to determine whether to disclose the information. It is only where the public interest in non-disclosure outweighs the public interest in disclosure that the information should not be disclosed. The Commissioner has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.

33. The Commissioner will, when considering the application of the public interest test will do so in the context of the time the information request was made. This view reflects that taken by the Information Tribunal in DBERR v the Information Commissioner and the Friends of the Earth (EA/2007/0072, 29 April 2008).

34. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* [EA/2006/0011 and EA 2006/0013], where the Tribunal considered the law relating to the balance of public interest in cases where section 36 applied. The Commissioner has followed the interpretation of the law relating to the public interest test, as set out in this decision, and notes and adopts in particular the following conclusions:

- Unless there is any relevant exemption under the Act then the section 1 duties will operate. The "default setting" in the Act is in favour of compliance – requested information held by a public authority must be disclosed except where the Act provides otherwise.

- The public interest in maintaining the exemption must outweigh the public interest in disclosure as the 'presumption' of disclosure in the Act will operate where the respective public interests are equally balanced.

- There is an assumption built in to the Act that the disclosure of information by public authorities on request is in itself of value and in the public interest so as to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest, and the strength of the competing interest in maintaining any relevant exclusion or exemption, must be assessed on a case by case basis.

35. When it comes to weighing the balance of public interest, it is impossible for the Commissioner to make the required judgement without forming a view on the severity, frequency and extent of any prejudice and the Commissioner notes the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would have (or would be likely to have) the stated detrimental effect. That means that the qualified person has made a judgement about the degree of *likelihood* that the detrimental effect would occur and does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.

36. The right approach, consistent with the language of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which the detrimental effect will or may occur.

37. Whilst considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner recognises that there are competing public interest arguments. He has gone on to consider these arguments in turn.

Public interest arguments in favour of releasing the information

38. The Commissioner is aware that the release of the information in question would promote transparency, accountability and the ability of the public to participate in the political process. In particular it would aid the public's ability to participate and input in the discussion regarding the regulation of MP's interests outside parliament, a factor the Commissioner has given significant weight. Accordingly, disclosure might enhance the quality of discussions and the decision making process.. A further factor, in favour of releasing the information, is that it would contribute to the public's understanding of a working relationship between a government department and a regulatory independent body set up by the UK Parliament.

Public interest arguments in favour of maintaining the exemption

39. The Information Tribunal, in Department for Education and Skills v the information Commissioner and The Evening Standard (EA/2006/0006) recognised the importance of ensuring a safe place for the development of policy. It stated that "Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy" (paragraph 75, point iv). This argument recognises that the need for a safe space whilst formulating policy exists separately to, and regardless of any potential effect on the frankness and candour of policy debate that might result from disclosure of information under the Act (the "chilling effect", discussed below). Even if there was no suggestion that those

involved in policy formulation might be less frank and candid in putting forward their views, there would still be a need for a "safe space" for them to debate policy and reach decisions without being hindered by external comment.

40. An important determining factor in relation to the "safe space" argument will be whether a request for such information is received whilst a "safe space" in relation to that particular policy making process is still required. In DBERR v the Information Commissioner and Friends of the Earth (paragraph 114) the Tribunal commented in relation to the need for a private "thinking" space; "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public". In this regard the information sought to be released remained, with the proposed legislation still before parliament, a live issue.

41. The Scottish Information Tribunal in Scotland Office v the Information Commissioner (EA/2007/0070) noted that arguments about "the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause" had validity when considering the public interest test under section 35 of the Act. These "chilling effect" arguments basically deal with the overall concept that the disclosure of information will affect the frankness or candour with which issues are debated by relevant parties such as Ministers and Civil Servants. Public Authorities have maintained that such a loss of frankness or candour would not be in the public interest because it would ultimately result in poorer decision making and less robust, well considered or effective policies and decisions. The majority of Tribunal cases referred to this in the context of withheld information under section 35 of the Act. The Commissioner extrapolates this argument to apply to the section 36 matters here given the information is concerned with the formulation and consideration of policy.

42. The Commissioner acknowledges that there is an inherent public interest in disclosing information and a significant public interest in disclosing the information in question. However, in this matter, the Commissioner recognises that the information was the discussions between policy officers and civil servants regarding the formulation and refinement of government policy applying to a Bill that was currently then before Parliament. The subject matter of the request, i.e. the simplification of dual reporting obligations on MPs, at the time of the request was being debated in Parliament was a matter that fell within the Electoral Commission regulatory role and was one where there input would have been important. At that particular time, release of this information would, the Commissioner believes, have seriously undermined the Electoral Commission civil servants' freedom to give advice to Ministers, and to debate policy issues, in confidence, with a consequential detrimental effect on policy formulation. There was a public interest in protecting the ability of Government to consult with the Electoral Commission thoroughly on matters of electoral policy, and the release of the information would effectively inhibit such consultation. The disclosure of views whilst the Bill was being developed/amended by the DCA and considered by Parliament would have had an effect on the nature of and value of the views expressed. This chilling effect would cover civil servants (both at the DCA and the Electoral Commission) and Ministers, both groups would feel constrained if

their views were disclosed whilst the issues were "live". In the circumstances of this case the Commissioner finds it is reasonable to accept a "chilling effect" would occur. It is for these reasons given above that the Commissioner's decision is that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 42

43. The Electoral Commission relied on section 42 of the Act not to communicate to the complainant certain internal correspondence with the Electoral Commission's in house legal advisors and correspondence with the DCA that contained advice from Parliamentary Counsel.

44. Section 42(1) provides that:

'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'

45. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of Bellamy v the Information Commissioner and the DTI) as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph. 9)

46. There are two types of privilege: litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. The Information Tribunal in the case of Calland and the Financial Services Authority (EA/2007/0136) noted that in-house legal advice or communications between in-house lawyers and external solicitors or barristers also attracts legal professional privilege.

(A) Internal Legal Advice

47. The Electoral Commission maintains (in their letter to the Commissioner 16 October 2007, paragraph 17 above) that the relevant information is the "legal advice" obtained by one of its policy officers from a barrister employed by them.

Both working for the Electoral Commission at that time the correspondence took place. The advice was obtained and used for improving the drafting of the Commission's proposed amendments to the text of the Electoral Administration Bill, which was going through Parliament at that time. The Electoral Commission went on to say;

(a) The public was not aware that it had been sought or obtained.

(b) The legal advice was used to amend the drafting of the proposed amendments. The public was not made aware of the fact that such changes were the result of legal advice.

(c) The information has not been disclosed in any way.

(d) The information withheld under this exemption was, to the best of their understanding, one single advice note from the Legal Counsel. The note, by itself, makes little sense because it is a list of proposed amendments to a Bill clause, which it itself sought to amend an Act of Parliament.

(e) The information was created in the context of a legal adviser delivering professional legal advice to a colleague

(f) The information was created for the sole purpose of the provision of legal advice to the client. It is legal advice in its nature and attracts advice privilege. Whilst counsel does ask questions about the Commission's policy in certain areas, this was to better understand the legal effect of the proposed amendments, and it should not be considered as 'policy advice'.

48. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.

49. The Commissioner is of the view that legal departments and professional legal advisers are becoming increasingly involved in policy development. Advice from professional legal advisers in this context can still be regarded as privileged if the normal criteria are met.

50. The advice being generated by an in house lawyer at the Electoral Commission acknowledges that it was generated in response to a paper circulated by a colleague policy officer (to whom the advice was addressed). It provides legal advice as to the likely legal effect and consequences on proposed legislative changes that the Electoral Commission were considering recommending to the Bill's sponsoring department, the DCA. The Commissioner, having regard to the facts laid out above and noting the contents of the "advice" itself considers it to be legal advice to which advice privilege applies and the exemption provided by section 42 of the Act is engaged.

51. Section 42 is a qualified exemption it is therefore necessary to consider whether in all the circumstances of the case the public interest in maintaining the

exemption outweighs the public interest in disclosing the information. This is considered below

(B) Legal Advice from Parliamentary Counsel

52. The Commissioner notes the specific reference at paragraph 41 in Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48 that advice provided by Parliamentary Counsel to the Government can constitute legal advice attracting legal privilege.

53. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is capable of attracting legal professional privilege. This is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information (USP Strategies plc v London General Holdings Ltd [2004] EWHC 373 (Ch), [2004] All ER (D) 132 (Mar)).

54. The Commissioner has viewed the documents in which references are made to the advice given by parliamentary counsel. It is apparent that the references are legal advice given to the DCA and then relayed by them to the Electoral Commission where it is repeated internally. Accordingly the Commissioner's decision is that the advice was legal advice affixed with legal advice privilege and that this privilege extends to its repetition within the Electoral Commission. The exemption provided by section 42 is engaged.

Public Interest Test

55. As section 42 is a qualified exemption it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

56. The Information Tribunal, in James Kessler QC v Information Commissioner (EA/2007/0043), laid out with clarity (at paragraph 60) the following public interest factors in favour of maintaining the exemption at section 42:

"a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.

b. If legal advice were routinely disclosed, there would be disincentive to such advice being sought and/or as a disincentive to seeking advice based on full and frank instructions.

c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between government and its legal advisers.

d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.

e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.

f. There is a significant risk that the value placed on legal advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed."

57. The public interest test factors for maintaining of the section 42 exemption as laid out above (paragraph 56) can also apply to this case. The Commissioner also notes the "live" nature of the advice and has accorded this factor significant weight.

58. The Commissioner considers the countervailing factors, supporting the public interest in the disclosure of this information, to be as follows:

a. It would aid and add to the public's general knowledge of the legislative process by showing the role played by Parliamentary Counsel in that process,

b. It would assist the public in understanding the obtaining, purpose and use of legal advice in government and public affairs by exemplifying how legal advice by Parliamentary Counsel is considered by public bodies who seek to input into legislative change.

c. The promotion of transparency, accountability, public understanding and involvement in the democratic process by contributing to the public's knowledge of the democratic and legislative process.

59. The Commissioner notes that the role of Parliamentary Counsel is laid out in the Cabinet Office's website[1]. The relevant information in this complaint provides an example of this role being undertaken but aside from this its disclosure will not add greatly to the public's knowledge of the role. The Commissioner also believes that disclosing the advice will not overly add to the public's knowledge that legal advice is considered by corporate bodies. The Commissioner does consider, in the context of parliamentary counsel advice in the drafting of legislation, that disclosure of such advice may inhibit the giving of advice and it turn hamper the democratic processes of drafting legislation. It is not difficult for the Commissioner to envisage that disclosed advice of parliamentary counsel would inevitably become the focus of political debate. Parliamentary Counsel and their advice should not normally be placed in such a political arena. To do so brings about the possibility of Parliamentary Counsel curtailing their advice to government department to minimise the likelihood of being the object of criticism both political and professional in nature. The Commissioner believes that the releasing of advice from Parliamentary Counsel would negatively impact on their working relationship with the departments of government.

[1] (http://www.cabinetoffice.gov.uk/parliamentarycounsel.aspx).

60. The Commissioner has taken into account the factors referred to above but decides in this instance that the public interest favours the retention of legal professional privilege and maintenance of the exemption for the reasons given in paragraph 45 and 48 above. The Commissioner finds that the public authority correctly applied the exemption contained in section 42 of the Act. The public interest in maintaining the exemption outweighs the public interest in disclosure.

The Decision

61. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- In its application of section 42 not to disclose the information that consists of legal advice emanating from parliamentary counsel and from its own "in-house" lawyer.

- In its application of section 36(2)(b)(i) and (ii) to:

    - A bundle of emails, notes and memoranda.
    - A draft of a letter to an MP.

Steps Required

62. The Commissioner requires no steps to be taken.

Right of Appeal

63. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 1st day of December 2009

Signed ……

Steve Wood
Assistant Commissioner

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

Legal Annex

General Right of Access

Section 1(1) provides that –

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

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-
  (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  (iii) the work of the executive committee of the National Assembly for Wales,
(b) would, or would be likely to, inhibit-
  (i) the free and frank provision of advice, or
  (ii) the free and frank exchange of views for the purposes of deliberation, or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. "

Legal Professional Privilege

Section 42(1) provides that –
"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Section 42(2) provides that –
"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."