



# Scotland Office

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Mr Michael Bimmler

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Website: [www.gov.uk/scotland-office](http://www.gov.uk/scotland-office)

Our Ref: DB 1244 – internal review

17 July 2017

Dear Mr Bimmler,

## **Freedom of Information Act 2000 – Outcome of Internal Review**

Thank you for your email of 19 June in which requested an internal review of the Office's handling of your original FOI request of 15 March.

In your original request (SO reference DB 1221) you wrote:

I would like to ask for any internal note, paper, advice, memorandum, briefing or ministerial submission held in your records which discusses the Scottish Government's legal powers to hold a referendum on Scottish independence, whether binding or advisory, without asking the UK Government for permission to do so.

Please consider files from the last 5 years.

It may assist your understanding and interpretation of my request if I explain that it is made in the context of the following article on this question published today by two legal scholars:

<https://ukconstitutionallaw.org/2017/03/15/ewan-smith-and-alison-young-thats-how-it-worked-in-2014-and-how-it-would-have-to-work-again/>

I would be very surprised if you told me that no such files are held, as I consider it unlikely that the Scotland Office never considered the question of the Scottish Government's legal powers to hold a referendum. However, should this be the position of the Scotland Office, please indicate who would be likely to hold such files instead.

In case you intend to refuse access to part or all of the files concerned, I ask that you nonetheless provide me with a schedule which reasonably allows me to identify the files withheld (e.g. by date and title or description), in order to facilitate any later challenge to the refusal of access.

On 7 April the Office replied to your request saying that

- that the cost of the replying to your request would exceed the appropriate limit specified in regulations issued under section 12(4) of the Act;
- that if you were to narrow the scope of your request the Office might be able to process it within the appropriate limit;
- but that the likelihood was that the information you had requested would be exempt under section 42; and
- that in accordance with the Office's duty under the Act to give advice and assistance the Office was providing you with a reference to the Coalition Government's consultation on an independence referendum which covered issues relevant to your enquiry.

The same day you replied restricting your request to "the period of 1 January 2017 until now". You also wrote

I must admit that I am rather puzzled by your assertion that it would take "in excess of 24 hours" to retrieve these files. If I were a Minister or Senior Civil Servant, who would like to have sight of the files on this matter, I'd not be very happy to hear that due to "the way records are filed" it takes a very long time to retrieve them. May I suggest some internal thought is given as to how records are filed, e.g. by keywords in an information management database?

Nonetheless and in the wish of avoiding further back-and-forth, I would now restrict my request to the period of 1 January 2017 until now. I trust that at least these files will be readily retrievable.

Once you have located the relevant files, I trust you will be able to look closely into the extent to which they are covered by section 42 / legal professional privilege. As you will be no doubt aware, not every internal file which discusses a 'legal matter' or makes reference to legal analysis is covered by legal professional privilege. Section 42 is a quite well-defined exemption which may apply to some but not all of the records sought. My request was by no means only meant to cover advice received from a legal advisor, which is the most likely application of Section 42. Of course, even if Section 42 comes into play, you will also need to apply the 'public interest test' for every file where you consider Section 42 to be engaged.

The Scotland Office designated this as a new FOI request with the reference DB 1244, and undertook to respond by 11 May. On 11 May the Office wrote to say that under section 17(2) where a public authority is relying on a claim that any provision of Part II of the Act, which relates to the duty under the Act to confirm or deny whether the authority holds the requested information, is relevant to the request it must inform the requestor if no decision has been reached as to the application of those provisions. The provisions in Part II relevant to your request were identified as sections 28(1), 35(1)(a), 35(1)(c), and 42(1). The letter proceeded to say that the Office estimated that you would receive a substantive response by 16 June.

On 16 June the Office sent you a substantive response to your restricted request of 7 April. The Office reported that the information you had requested was exempt under section 35(1)(a), section 28(1) and section 42, and that in each of these cases the public interest in maintaining the exemption outweighed the public interest in disclosure.

In requesting an internal review of this decision you wrote on 19 June:

While the exemptions quoted may be applicable to my request, I am not convinced that the public interest favours, in all instances and for the entire document(s) concerned, the withholding of the information. I am afraid that it is difficult to be more specific in my review request as you have not even disclosed what (kind of) documents you hold.

A full history of my FOI request and all correspondence is available on the Internet at this address: [https://www.whatdotheyknow.com/request/referendums\\_in\\_scotland](https://www.whatdotheyknow.com/request/referendums_in_scotland)

The purpose of an Internal Review is to assess how your Freedom of Information request was handled in the first instance and to determine whether the original decision given to you was correct. It is an independent review of the request handling.

I note that your request for an internal review rests on whether or not “the public interest favours, in all instances and for the entire document(s) concerned, the withholding of the information” held by the Scotland Office. Before discussing the balance of the public interest under sections 35(1)(a), section 28(1) and section 42 I will review whether or not these particular exemptions were engaged and whether or not any other exemptions were engaged.

Firstly I note that in the letter of 11 May my colleague wrote that the Office was considering its duty under the Act to confirm or deny whether it holds the information, under the following sections 28(1), 35(1)(a), 35(1)(c), and 42(1). No reference was made to section 35(1)(c) in the Office’s letter of 16 June. This was a procedural error. Having raised the relevance of section 35(1)(c) in the letter of 11 May reference should have been made in the letter of 16 June.

Section 35(1)(c) says 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(3) and section 2(1)(b) together provide that the duty to confirm or deny does not arise in respect of information which is exempt (or would be exempt) under section 35(1) if the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not the Scotland Office holds the information.

Section 35 is statutory recognition of the public interest in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of public political debate. This principle has also been judicially recognised (see, for example, *Conway v Rimmer* [1968] AC 910, 952 (Lord Reith); *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, 1112 (Lord Wilberforce), 1121 (Lord Salmon), 1126-1127 (Lord Edmund-Davies) and 1143-1145 (Lord Scarman)). As part of this principle, there is a strong public interest in ensuring that a government department is able to act freely 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. This strong 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 ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579752/ministerial\\_code\\_december\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579752/ministerial_code_december_2016.pdf)). It is also an interest which is recognised by the particular form of words used in section 35(1)(c) which is different to the general provision in relation to legal professional privilege in section 42(1).

Since the Law Officers are the government's most senior legal advisers, their advice 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. 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 judgment 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. To disclose routinely whether the Law Officers have advised on particular issues would potentially create a two-fold detriment. 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. We recognize that there is a public interest in citizens knowing that decisions of this nature have been taken with the benefit of sound legal advice. However, I consider that, in the circumstances of this case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not this department holds the information.

Other than sections 28(1), 35(1)(a), 35(1)(c), and 42(1) I do not find that any other exemptions were relevant to the information within scope of your request. I have reviewed the information held within scope of your request and it is clear to me that the information is indeed variously exempt under sections 28(1), 35(1)(a) and 42(1). My colleague did not describe the exemptions at sections 28(1) and 35(1)(a) exactly and he failed to give a description of section 42(1). For the avoidance of doubt

- information is exempt information under section 28(1) if its disclosure under the Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.
- Under section 35(1)(a) information held by a government department is exempt if it relates to the formulation or development of government policy.
- Under section 42(1) 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.

Notwithstanding the failure to describe these exemptions exactly in the letter of 16 June I am confident that these three exemptions apply.

I have also reconsidered the public interest arguments in favour of maintaining the exemptions and in favour of release and looked at them with the information in scope. In my judgement the public interest factors were identified appropriately and the decision that the public interest in maintaining the exemptions outweighs the public interest in disclosure is correct and should be upheld.

I have given particular attention to your suggestion that even if some of the information held is exempt, and the public interest is in favour of maintaining the relevant exemptions, there may nevertheless be some information within scope of the request that could be released to you. I do not think that there is. The cited exemptions and the balance of the public interest attach to all of the information within scope.

I also note that in the Office's letter of 7 April my colleague provided advice and assistance by giving you a reference to the Coalition Government's consultation on an independence referendum which covered issues relevant to your enquiry. This was not procedurally necessary but seems to me an example of good practice in handling FOI requests. For convenience I have repeated that reference here:

<http://webarchive.nationalarchives.gov.uk/20130130150421/http://www.scotlandoffice.gov.uk/scotlandoffice/17088.523.html>

If you are unhappy with the outcome of this review you are entitled to write to the Information Commissioner at the following address:-

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK95AF

Yours sincerely

FOI Manager  
Scotland Office