



Ministry of
JUSTICE

Freedom of information guidance

Exemptions guidance

Section 35 – Formulation of
government policy

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Introduction

Section 35 is aimed at protecting the policy-making process in order to maintain the delivery of effective government. It only applies to government departments (including a Northern Ireland Government Department) and the Welsh Assembly Government.

Section 35 covers information that 'relates to':

- formulation or development of government policy
- ministerial communications
- provision of advice by any of the Law Officers
- the operation of ministerial private offices

The exemption under section 35 is closely related to the exemption under section 36. Section 36 relates to information that if disclosed would adversely affect the delivery of effective government. Section 36 applies only to information that is not exempt under section 35. They can be cited in the alternative, for example by citing section 35, and to the extent that it does not apply, section 36.

Sections 35 and 36 are both subject to the public interest test. When considering the public interest test, you will need to weigh up:

- the important public interest in disclosure of information about the process of government policy formulation
- versus
- the powerful public interest in ensuring that there is a space within which ministers and officials are able to discuss policy options and delivery, freely and frankly; as well as any arguments which relate specifically to the information caught by the request.

Relationship with section 36

Section 36 is potentially broader than section 35 in that it is not restricted to information of any particular description; instead, it focuses on the likely effects of disclosure of information on the conduct of public affairs, including in particular the ways of working necessary to the conduct of public affairs.

While section 36 applies to all public authorities, section 35 only applies to information held by a 'government department' as defined in section 84 of the Act (including a Northern Ireland Government Department) or the Welsh Assembly Government (see '**who does it apply to**' on the following page).

Section 36 applies only to information that is not exempt under section 35. If it is thought that information held by a government department might be exempt under section 36, a judgement should first be made as to whether or not the information is exempt under section 35. If it appears that it is, section 35, rather than section 36, should be used.

The protection of collective responsibility of Ministers of the Crown, and the free and frank provision of advice and exchange of views are not explicitly mentioned in section 35, unlike in section 36. Section 35 does however deal with the formulation of policy, ministerial communications and the need to protect Cabinet documents, all of which are likely to involve the provision of advice, exchange of views and collective decision-making. If section 35 appears to apply, it should usually be cited.

Section 35 and section 36 cannot both be cited together to explain a refusal to disclose the same information. They can, however, be cited in the alternative. That is, it is possible to claim that information falls within the scope of section 35, but that if the Information Commissioner concludes that this is wrong, nevertheless release of the information would have one of the effects set out in section 36 and it is therefore exempt under that section.

Both sections 35 and 36 are subject to the public interest test. The public interest arguments in relation to either exemption are likely to be similar because they are both closely related to ensuring good government. For more information on this, see the section on the public interest test.

Section 36 requires a determination by a 'qualified person'. The exemption only applies if the reasonable opinion of a qualified person is that certain forms of adverse effect would follow from disclosing the information.

Who does it apply to?

Section 35 relates only to information held by a government department (including a Northern Ireland Government Department) or by the Welsh Assembly Government.

'Government department' is defined in section 84 of the Act and includes:

- a Northern Ireland department
- the Northern Ireland court service
- any other body or authority that is 'governmental' and 'departmental' in nature and which exercises statutory functions on behalf of the Crown¹

It does not relate to information held by any other public authority, and cannot be used by any other public authority to withhold information.

Information contained in copies of documents held by other public authorities, which would fall within section 35 if held by a government department or the Welsh Assembly Government, cannot be exempt under section 35. It may however be exempt under other sections, particularly section 36. For instance information contained in a draft policy paper on local government finance held by a government department might be exempt under section 35. A copy of the same document held by a local authority cannot be exempt under section 35, though it may be exempt under section 36.

¹ Determining whether a body meets these tests requires a careful consideration of the facts, including the structure of the 'body', its constitutional position and its functions. For example, the Privy Counsel Office was a 'public authority' in its own right (before it became part of the Ministry of Justice in 2007) but the Privy Council itself is not. Independent statutory office holders may or may not exercise functions on behalf of the Crown, it depends on the nature of their functions. A body that does not exclusively exercise functions on behalf of the Crown (i.e. a 'hybrid' body) would fall outside the definition of 'government department'.

What information is covered?

Information is exempt under section 35 if it 'relates to':

- the formulation or development of government policy – section 35(1)(a)
- ministerial communications – section 35(1)(b)
- the provision of advice by any of the Law Officers – section 35(1)(c)
- the operation of ministerial private offices – section 35(1)(d)

Information 'relating to' one of the categories above will include the substantive information falling within the description, for example, information which describes a new government policy, or is contained in a ministerial communication. It will also include other information which is about that information. Consistent with the approach taken by the Information Tribunal in the Department for Education and Skills (DfES) case², the term 'relates to' should be interpreted broadly. In the Office of Government Commerce (OGC) case, the High Court agreed that section 35 'is in very wide terms' and should be interpreted in line with this Tribunal decision³.

For example, information contained in papers discussing whether or not to seek the Law Officers' advice may be 'related to' the provision of that advice (see '**Law officers' advice**' on page 11). Papers 'related to' ministerial communications would include the record of the communication itself, for example, a note of a meeting or a reference to a conversation in correspondence to a third party.

In the DfES case, the Tribunal said, at paragraph 58:

we are firmly of the view that, when asking the question, whether the minutes of a particular meeting or part of one, a memorandum to a superior or a minister or a note of advice fall within s.35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s.35(1)(a) activities, then everything that was said and done is covered.

² *Department for Education and Skills v Information Commissioner and the Evening Standard* (EA/2006/0006) (19 January 2007), at paragraph 53.

³ *Office of Government Commerce v Information Commissioner and HM Attorney General on behalf of the Speaker of the House of Commons* ([2008] EWHC 737 (Admin)) on 11th April 2008 at paragraph 79.

Information may fall within more than one category. For example, a document could relate to the formulation of government policy, and it could relate to ministerial communications at the same time.

There is a special provision regarding statistical information (section 35(2)) as it relates to formulation or development of government policy or ministerial communications. See '**what is statistical information**' on page 9.

There is also a special provision addressing how the public interest test applies to factual information that provides an informed background to the formulation or development of government policy (section 35(4) discussed below).

The formulation or development of government policy

The Tribunal, beginning in the DfES case, has interpreted this part of the exemption broadly. It is an approach that has been endorsed by the High Court (see OGC, above). Information falling within the scope of this part of the exemption will be found in a wide range of documents from officials' emails to Cabinet Committee papers. These will clearly include such documents as submissions to ministers, correspondence with other departments and public bodies in connection with policy development, minutes and proceedings of both ministerial and officials' committees and internal departmental correspondence. Drafts of such documents are also likely to be covered, as well as related documents such as emails discussing points arising on drafts. It is not the nature of the document itself that determines whether it is covered by the exemption, but the substance of the information contained within it.

'Government policy' is not defined (except that it expressly includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government (section 35(5)).

The exemption does not need to be confined to strategic policy, such as long-term reform. It could equally include decisions on responding to more immediate challenges - so long as it involves policy development or formulation. It is not necessary that the information relates to a policy that is ultimately agreed. The exemption would apply to early ideas that are discarded as policy is developed.⁴

The information may not be purely internal; a suggestion, or advice received from a third party in the course of policy development will be covered by the exemption.

⁴ *HM Treasury v Information Commissioner* (EA 2007/0001) (7 November 2007), at paragraph 60(3).

Sometimes policy development continues as a decided policy is implemented. Continued consideration of ways in which to refine policy will be covered. But the 'formulation or development' of policy is distinguishable from the implementation or operation of policy (information of the latter nature may need to be considered in the context of section 36). Particular care will be needed in deciding whether information is related to continuing policy development or is in fact related solely to the operation of the policy. Relevant Tribunal decisions on this point are DfES and the Department for Work and Pensions.⁵

Ministerial communications

The general definition of 'Ministerial communications'

Subsection (5) defines ministerial communications to mean any communications between:

- Ministers of the Crown
- Northern Ireland Ministers, including Northern Ireland junior Ministers
- members of the Welsh Assembly Government

The term 'any communication' shows that these communications are not confined to formal correspondence, but would, for instance, include records of telephone conversations, meetings and references to ministerial discussions.

But section 35(1)(b) does not cover information relating to all communications a minister may engage in, only those between one minister and another.

The communications in question must be between Ministers of the Crown **or** between ministers of the same administration. Information relating to communications between a Minister of the Crown and ministers of devolved administrations do not fall within section 35(1)(b) (though they may fall within other exemptions such as section 28).

⁵ *Department for Work and Pensions v Information Commissioner* (EA/2006/0040), (5 March 2007).

The information falling within the exemption includes not only the content of relevant communications but also information about the fact of such communications. Official correspondence setting up a ministerial meeting, or discussions at official level of the matters to be discussed by ministers, may relate to ministerial communications.

Internal correspondence such as a submission to a minister proposing that he or she writes in certain terms to a ministerial colleague would be covered, as would papers prepared for discussion at Cabinet. To fall within this exemption, communications between ministers must be communications in their position as ministers and would not include private discussion of party matters or personal correspondence not connected to their ministerial duties. Indeed such personal papers are unlikely to be 'held' by the department at all.⁶

Cabinet proceedings

Subsection (5) continues the definition of ministerial communications:

[they include], in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and the Cabinet or any committee of the Cabinet of the Welsh Assembly Government.

Cabinet government, and the confidential nature of Cabinet proceedings, are longstanding and fundamental conventions of the United Kingdom's constitution. These are key considerations when carrying out the public interest test. Through the section 35 exemption, Parliament has demonstrated the importance it places on the need to safeguard these decision-making processes. There is likely to be a strong public interest in maintaining the exemption in this respect when it comes to any balance of the public interest.

The reference to committees of Cabinet includes both standing committees and ad hoc committees. Proceedings of other meetings of ministers, such as, for instance, minutes of bilateral meetings, also fall within section 35(1)(b), although subsection (5) does not specify them. Details of their proceedings may also be covered by section 35(1)(a).

⁶ 'Held by' implies more than merely 'located in' and requires some degree of control. Where information is not held by a public authority, it does not come within the Act at all: see section 3(2).

Proceedings of Cabinet and other meetings covered by section 35(1)(b) are not confined to the formal minutes of the meetings, but include information relating to timing, attendance, agendas, memoranda and other tabled papers. Where a committee does much of its business by correspondence, the correspondence of the committee is covered by section 35(1)(b) and may also be covered by section 35(1)(a).

Statistical information

There is a special provision for how statistical information should be treated in section 35(2). Statistical information is a subset of factual information, which also has its own provision (section 35(4)) and is discussed further on.

What is statistical information?

The Act gives no definition of statistical information. Statistical information used to provide an informed background to government policy and decision making or in ministerial communications will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, and so on, to be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being (i) derived from some recorded or repeatable methodology, and (ii) qualified by some explicit or implied measures of quality, integrity, and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the limitations of the methodology, and the relevant measures of quality, and so on, allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy.

Departmental policy papers and ministerial communications may contain headline statistical information, but are less likely to contain all the available

methodology and qualifications that support the statistics, nor the underlying observations or facts from which the statistics are derived. Therefore it is good practice when producing such papers and communications to include a footnote or annex containing an outline of the statistical methodology, any available qualifications of quality, relevance and integrity, and the source of the underlying observations or facts. When the headline statistical information is disclosed to an applicant, the footnote or annex should be disclosed simultaneously.

Any statistical information used to provide background to decision taking, regardless of the content or quality of that information, or the methods used to collect it, is potentially covered by subsection (2).

'Official' and 'National' Statistics

The Statistics and Registration Service Act 2007 includes a definition of 'official statistics' which are subject to assessment by the Statistics Board with a view to their designation as 'National Statistics'. The Board will assess official statistics for their compliance with its Code of Practice for Statistics, which supersedes the previous National Statistics Code of Practice. The Information Tribunal endorsed the principle that information produced to the standards in that previous Code was statistical information for the purposes of section 35.⁷

Statistical information ceases to be exempt under section 35(1)(a) and (b) once a policy decision has been taken. It is, however, possible (though unusual) for such information to continue to be exempt under another provision of the Act.

Section 36(4) also refers to statistical information. That subsection is discussed in the chapter on section 36.

'Once a decision as to government policy has been taken'

The Act does not say exactly when a 'decision as to government policy' is taken and so when the statistical information ceases to be exempt under

⁷ *Department for Work and Pensions v Information Commissioner* (EA/2006/0040) (5 March 2007), at paragraph 20.

section 35. Where a public announcement of policy has been made, the conditions are likely to be fulfilled. However, there may be less clear-cut cases, such as, for example:

- interim or incremental decision-making
- conditional or contingent decisions, and decisions which are a small part of a wider policy issue
- unannounced or unrecorded decisions

If it is an interim decision necessary to proceed to the next stage of the formulation of policy, then the section 35 exemption is likely to continue to apply.

A positive decision not to proceed with a policy that has been under consideration is a decision as to government policy (for example, adopting a 'no change' option following consultation).

The general intention of this provision is that when the policy-making process has reached a point at which the statistical information essentially becomes a part of the historical explanation rather than a continuing and integral part of the policy-making itself, it should no longer be exempt. But if the statistical information has a continuing integral role, rather than being in the background, the exemption may continue to apply. Applying the provisions on background statistical information will be much easier where departments have clearly identified and recorded decisions at the time they were made.

Law Officers' advice

Section 35(1)(c) covers information relating to the provision of advice by any of the Law Officers or any request for such advice.

Section 42 exempts information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The section 42 exemption is also subject to the public interest test. Section 35(1)(c) however has a wider range than section 42. For more information see the guidance on section 42.

Subsection (5) defines Law Officers as: the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the

Solicitor General for Scotland, the Counsel General of the Welsh Assembly Government and the Attorney General for Northern Ireland.

Scope of 'advice'

Section 35(1)(c) refers to requests for, and the provision of, any advice, and not just that which comes under the narrower heading of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (exempt under section 42). It might therefore refer to advice on the provision of any aspect of government policy and operations, and not just legal advice. The policy and operational functions of the Law Officers are very broad. If in doubt, please consult the Attorney General's Office.

Note that section 35(1)(c) relates to the provision of 'advice'. It will be necessary to make a judgement as to whether or not the information requested relates to advice, rather than to a decision or communication that does not amount to advice. 'Advice' could relate to any of the Law Officers' functions, but is most likely to be given in their roles as legal advisers. In general:

- The exemption applies to both legal and non-legal advice given by the Law Officers to others, or requested from them.
- The exemption would not normally apply to decisions taken by the Law Officers exercising their own functions, or the reasons for such decisions. Examples of cases where the Law officers exercise their own functions rather than provide advice to others are decisions about whether to consent to a prosecution, commence contempt proceedings or refer a question on the competence of devolved legislation. But each case would need to be examined to determine whether advice formed part of the decision.
- Information relating to the functions of the Law Officers which is distinct from information relating to the provision of advice does not fall under section 35(1)(c), but may fall under one of the other parts of section 35, or one of the other exemptions under the Act.

Operation of any ministerial private office

Under section 35(1)(d) information relating to the operation of a ministerial private office falls within the terms of the section 35 exemption. Subsection (5) defines a ministerial private office as:

any part of a government department which provides personal administrative support to a Minister of the Crown, a Northern Ireland minister or junior minister, and any part of the administration of the National Assembly for Wales providing personal administrative support to the members of the Welsh Assembly Government.

When considering whether or not information requested falls under section 35(1)(d), you need to consider whether or not the information relates to the operation of the private office itself. Information in a document that has been sent to, or originated in, a private office does not fall under this exemption merely because it has passed through the office. Information relating to the operation of the office might include staffing, organisation, and procedures for handling the minister's papers. Management of ministerial diaries could be covered by the operation of the private office, but not all information about ministerial engagements will fall within these terms.

Information relating to the minister's private affairs is not exempt under 35(1)(d), but may be exempt as personal information under section 40 or may be outside of the scope of the Act altogether: see '**Ministerial communications**' on page 17.

The duty to confirm or deny

Section 35(3) states that departments do not have to confirm or deny whether they hold information exempt under section 35(1), but reliance on this exemption from the duty to confirm or deny is subject to the public interest test.

For example, if a department received a request for information about whether or not there had been deliberations about whether to seek advice from the Law Officers in a particular case, and it was considered that the public interest was in favour of not revealing whether there had been such deliberations, the department would be able to say that it could neither confirm nor deny whether it had such information. If the duty to confirm or deny is excluded, there is no need to go on to claim exemption from the

duty to communicate the information to the applicant under section 1(1)(b) of the Act.

Public interest test

Section 35 is not an absolute exemption; it is subject to the public interest test in section 2 of the Act.

If information falls within this exemption, it will be necessary to take a clear view of the public interest considerations that must be weighed in considering whether or not the information requested should be released. Decisions must be based on good evidence and be documented. To withhold information in reliance on this exemption it is necessary to consider whether or not the public interest in withholding the information requested outweighs the public interest in disclosing it.

Section 35 is concerned to ensure that there remains a safe space within which the formulation and development of government policy and government decision-making can proceed, balanced with proper public participation in policy debates.

The application of the public interest test in relation to this exemption is particularly complex. The public interest both in disclosure of some information and in the withholding of other information lies in what might be broadly described as good government.

General public interest considerations in favour of disclosure

Considerations which may weigh in favour of a decision to disclose and which will need to be assessed on a case by case basis include:

- the general public interest in disclosure if it is advanced by the specific information in question
- greater transparency makes government more accountable to the electorate and increases trust
- as knowledge of the way government works increases, the public contribution to the policy making process could become more effective and broadly-based

- the public interest in being able to assess the quality of advice being given to ministers and subsequent decision making
- the greater the impact on the country or on public spending the greater the public interest may be in the decision-making process being transparent

Disclosure of factual background information will assist in discharging the public interest in disclosure outlined above – it will allow more informed debate, give a wider number of people the opportunity to contribute to that debate and increase trust in the quality of the decision-making. The balance provided by this exemption is to provide greater transparency while at the same time allowing fully frank discussion of ideas to take place securely.

General public interest considerations in favour of non-disclosure

Considerations which may weigh against a decision to disclose information include:

- good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure
- advice should be broad based and there may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice because it might be disclosed
- the impartiality of the civil service might be undermined if advice was routinely made public as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision-making
- ministers and officials also need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of the pros and cons without there being premature disclosure which might close off better options⁸

⁸ An important part of the risk assessment of government programmes and projects is undertaken as part of the Gateway reviews conducted by (or in accordance with the guidelines of) the Office of Government Commerce. Specific guidance on this can be found in the working assumption on Gateway reviews.

- there needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule
- disclosure of interdepartmental consideration and communications between ministers may undermine the collective responsibility of the government

Unless these considerations are protected there is likely to be a negative effect on the conduct of good government. If the public interests outlined above cannot be protected, there is a risk that decision making will become poorer and will be recorded inadequately. Many of the public interest arguments outlined here were deemed by the High Court (in the Export Credits Guarantee Department decision) to be 'at the heart' of public interest considerations surrounding this class of information. It found that cases in which it will 'not be appropriate to give any weight to [such] considerations will, if they exist at all, be few and far between'⁹.

Specific public interest considerations in favour of non-disclosure

As well as the more general public interest arguments outlined, it is imperative that consideration is given to the specific harm that the disclosure of the requested information may cause. This might be, for example, the effect upon the course of a particular policy or on negotiations with a third party. This can only be done by detailed examination of all the information subject to the request, together with consultation with all interested parties.

Background factual information

The Act makes special reference to background factual information and the public interest test.¹⁰ It says that regard should be had to the particular public interest in the disclosure of factual information used, or intended to be used, to provide an informed background to decision-taking as far as the

⁹ *Export Credits Guarantee Department v Friends of the Earth* ([2008] EWHC 638 (Admin)), 17 March 2008, at paragraph 38.

¹⁰ This applies both to the duty to confirm or deny whether information is held and the duty to communicate information.

formulation and development of government policy is concerned (section 35(1)(a)). It **only** relates to that part of section 35.

There is no definition of factual information in the Act. Advice from officials to ministers is not covered by the term 'factual information', although that advice could, and normally should, be supported by evidence which may well fall within the scope of the term. For example, a report submitted by an external body or research commissioned by a government department may be factual information (although opinions or advice from third parties is not 'factual'). Poor quality or inaccurate factual information should be treated the same as any other factual information.

In contrast with the provision on statistical information, the provision on factual information refers to information 'which is intended to be used' in providing an informed background to decision making. It does not require that a decision must have been taken.

Assessing the public interest in withholding factual background information requires particularly clear evidence that disclosure would be contrary to the public interest. If it was not in the public interest to release such information, it is likely to be for one of two reasons:

- Because the information is exempt under one of the other sections of the Act, as well as under section 35(1)(a).
- Because the factual information is so intimately integrated in the advice that it forms part of the argument, rather than informed background to the decision-making. This may particularly be the case in relation to information created before the passage of the Freedom of Information Act, when the distinction was less relevant. Since 1 January 2005, advice to ministers should be constructed so that it is possible to identify clearly relevant background factual information.

Ministerial communications

The main consideration which may weigh in favour of a decision to disclose is the fact that ministers decisions have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent.

Considerations which may weigh against a decision to disclose information include:

- Collective responsibility is a constitutional convention which is described in the ministerial code as follows:

'Collective responsibility requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been made. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained'.

If ministers feel inhibited from being frank and candid with one another because of the risk of subsequent disclosure, the quality of debate lying behind the collective decision will be diminished.

- Ultimate responsibility for government decisions lies in the Cabinet. Collective responsibility seeks to ensure that decisions do not become personalised.

Law Officers' advice

Where the advice of the Law Officers is legal advice, the public interest considerations under section 35 will generally be the same as for section 42. You should consider the guidance on the section 42 exemption wherever disclosure of legal advice from the Law Officers is concerned. You should consult that guidance for the relevant public interest considerations.

You should consider the following factors:

- There is a longstanding convention, followed by successive governments, that the government does not disclose either the content of Law Officers' advice nor whether advice has been requested. Departments should not disclose any information about whether the Law Officers have advised, or about the advice itself, without consulting the Law Officers. The principal basis for the longstanding convention on disclosure of Law Officers' advice is that the government is entitled to receive frank and confidential advice from its principal legal adviser.

- The Law Officers' particular constitutional position raises special considerations. In particular, it might be detrimental to the effective conduct of its affairs if the government were routinely to confirm or deny that the Law Officers had advised in a particular case.
- It would be impossible for the Law Officers to advise on every aspect of government policy having legal implications, bearing in mind the enormous range of legal advice that government requires.
- At present, it is a matter for ministers, departments and the devolved administrations to decide whether to ask the Law Officers for advice. But if the government routinely disclosed the occasions on which the Law Officers had given advice, then that could give rise to questions about why they have not advised in other cases, and create political pressure for them to advise in cases where their involvement is not justified.
- That could in turn undermine their constitutional position as principal legal advisers, who advise only on matters that ministers, departments and the devolved administrations consider to be of particular significance.
- It would also undermine the position of departmental legal advisers. This would not be conducive to the effective conduct of public affairs and given the impracticality of the law officers advising on everything, could lead to poorer decision-making.

Operation of ministerial private offices

Considerations which may weigh in favour of a decision to disclose include:

- information caught by this exemption may demonstrate that ministers are complying with their duties under the ministerial code – there is a public interest in compliance with this code
- the public interest in ensuring that private offices operate efficiently
- the public interest in ensuring that ministers are provided with the policy and administrative support in order for them to do their jobs effectively

Considerations which may weigh against a decision to disclose information include:

- the fact that the private office is an important aspect of the space around ministers which needs to be protected so that good decision making is not threatened
- ministers expect to receive advice from their private office about a range of matters that other officials are not able to give – it sometimes needs to be especially frank

Consultation

Given the wide range of section 35, you should be particularly mindful of the need to consult interested departments or bodies – specifically:

Requests for information relating to the formulation and development of policy should be referred to the department with lead responsibility for the policy.

Requests for information which relates to communications between ministers should be referred to all the departments whose ministers were party to the communications.

If the request relates to sensitive or significant information, or its release might create a precedent for government, you may need to consult the Ministry of Justice Clearing House. See '**referring to the Clearing House**' in the Procedural Guidance.

If the request relates to Cabinet or Cabinet committee proceedings the Ministry of Justice Clearing House will consult the Cabinet Office so that there can be a consistent approach to such requests across government.

In the case of requests relating to the proceedings of the Executive Committee of the Northern Ireland Assembly, the Ministry of Justice Clearing House will consult the Office of the First Minister and Deputy First Minister.

Likewise, the Ministry of Justice Clearing House will consult the Office of the First Minister for Wales in relation to proceedings of the Welsh Assembly Government.

Requests relating to the provision of advice by the Law Officers should be referred to the office of the relevant Law Officer.

Where disclosure of the information would affect the interests of a third party, and it is possible to do so, the views of the third party should be sought to ensure that adequate consideration is given to those interests, and where relevant to avoid the effect disclosure may have on their future cooperation.

Duration of the exemption

The public interest in withholding information under this exemption may diminish with the passage of time. In any case, the section 35 exemption cannot be used if the information is in a document or file over 30 years old.

It is possible that information contained in the classes of records covered by section 35 will be exempt for longer than 30 years under a different exemption. Accordingly information in a Cabinet minute more than 30 years old cannot be exempt under section 35, but may, for instance, be exempt under section 27 if its disclosure would damage relations between the United Kingdom and another state.

Papers of previous administrations

There is an important interaction here with the long-standing convention that governments are not normally permitted to see ministers' papers of a previous administration of a different political persuasion. The purpose of this convention is the same as that on collective responsibility: to give ministers and their officials a secure space in which to develop and document their thinking on policy options. The convention guards against the risk of exposing ministers to improper political attacks by their opponents in the future.

Those cases requiring ministerial intervention will be handled by the Attorney General. The relevant former minister should be consulted before a decision is made.

Relationship with other exemptions

When considering withholding information under section 35, almost any of the other exemptions may be relevant. If there is uncertainty about how far the information requested relates to the areas specified in section 35(1), you should consider whether it falls under one of the other exemptions under the Act. As noted above there is a particularly close relationship between all of section 35 and section 36.

Like all information covered by the Act, information which falls within section 35 may fall within:

- the exemption in section 21, for information available elsewhere (for example in the annexes to a White Paper)
- the exemption in section 22, for information which it is planned to publish in the future (for example where a department has been working up a White Paper)

Regarding the content of the information, you should consider, in particular, whether it may be covered by the exemptions in:

- section 26 on defence
- section 27 on international relations
- section 28 on relations within the United Kingdom
- section 29 on the economy
- section 39 on environmental information
- section 40 on personal data

Section 35(1)(c) on information relating to the provision of advice by any of the Law Officers is also related closely to the following other exemptions:

- Section 30 on investigations and proceedings by public authorities
- Section 31 on law enforcement
- Section 42 on legal professional privilege

