

Category of information

1. Legal advice.

Working assumption

2. **Withhold** – citing exemptions 35(1)(a) (Formulation of Government policy) and 42(1) (Legal Professional Privilege).

Reason for the assumption

3. While it is conceivable that in a particular case there may be sufficient public interest arguments why legal advice should be released, in practice these cases are likely to be few and far between. In the majority of cases, the public interest factors in maintaining the exemption will outweigh any public interest in releasing the information.
4. It is important that Government is able to receive legal advice on an ad hoc basis as and when necessary wh
4. The public interest arguments in favour of applying the exemptions under s35(1)(a) and (c) (formulation or development of government policy and advice of the law officers respectively), and under s42(1) (legal professional privilege) are set out below.
5. It is in the public interest that the decisions taken by government are taken in a fully informed legal context. Government departments therefore need high-

quality, comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with a full appreciation of relevant facts.

7. The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes arguments in support of his or her final conclusions but relevant counter-arguments. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the Department's position.
8. Without such comprehensive advice the quality of the government's decision-making would be much reduced since it would not be fully informed and this would be contrary to the public interest.
9. Disclosure of legal advice has a significant potential to prejudice the government's ability to defend its legal interests – both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest.
10. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

11. There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record. This too would be contrary to the public interest. It is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision-making is described accurately and fully; the legal advice must be part of that record. At worst there may even be a reluctance to seek the advice at all.
12. This could lead to decisions being made that are legally unsound. In addition to undermining the quality of the government's decision-making, this is likely to attract successful legal challenges which could otherwise have been avoided. Even in areas where a legal challenge is unlikely, government's willingness to seek frank legal advice is essential in upholding the rule of the law.

Referral Points

13. Working assumptions do not fit all situations. The referral points set out below describe specific situations where the working assumption (either to release information or withhold information) should not be used. The fact that the assumption does not apply **does not mean you should automatically release the information**. In these circumstances, the information request should be **referred** to a more senior member of staff, or a dedicated FOI practitioner, for them to consider:
 - The request states that the applicant is asking for internal review of an earlier decision to refuse to release information – working assumptions are only

designed to be used on the first occasion that information is requested. Appeals against decisions to withhold information may need more careful consideration and should therefore be referred;

- The information relates to a matter covered by the Environmental Information Regulations (EIRs). The EIRs have been closely aligned with the FOI Act to ensure that there are as few operational differences as possible. However, there are some differences between the two regimes, particularly in that some of the exceptions in the EIRs are worded differently from the FOI Act exemptions, and all of the EIR exceptions are subject to the public interest test. If there is any doubt as to whether or not information is covered by the EIRs, the case should be referred. Further guidance on the EIRs can be found at:

<http://www.foi.gov.uk/guidance/exguide/sec39/chap02.htm> and

<http://www.defra.gov.uk/corporate/consult/envinfo/index.htm>

- The information relate to or contain personal data or are concerned with a personal matter; and
- You are not sure whether the material is legal advice or not.