

23.10.03

13 Deputy M.R. Scott of H.M. Attorney General regarding the disclosure to the public of legal advice given to States Members and Government Officers by the Law Officers' Department (OQ.183/2023)

Will His Majesty's Attorney General advise whether or not legal advice given to States Members and government officers by the Law Officers' Department on their interpretation of Jersey law and statute, and the legal reasoning for that interpretation, is disclosable to members of the public, and if not, why not; and will he advise whether there are any circumstances when disclosure could be made on the grounds of public interest?

Mr. M.H. Temple K.C., H.M. Attorney General:

The answer to the first question of whether legal advice given by law officers to States Members and government officers on the interpretation of Jersey law is disclosable to the public is no, it is not; so law officers' advice is confidential. The answer to the second question as to why it is not disclosable is because of legal privilege, and specifically law officer legal advice privilege, which is a particular type of legal privilege. In a recent decision of the Office of the Information Commissioner, law officer privilege was described as the long-standing constitutional convention that Government does not reveal whether law officers have or have not advised on a particular issue or the content of such advice without law officers' consent. The purpose of this confidentiality is to protect fully informed decision-making by allowing Government to seek legal advice in private without fear of adverse inferences being drawn from either the content of that advice or the fact that it was being sought. It ensures Government is neither discouraged from seeking legal advice in appropriate cases nor pressurised to seek advice in appropriate cases. So the privilege plays an important role in good governance because it enables law officers in complete confidence to give uninhibited and sometimes difficult advice to public law decision-makers about legal risk and legal difficulties. The third and final question about whether publication could be made on grounds of public interest, I cannot immediately, and I am thinking in a vacuum, think of a public interest which would be served by such publication. I can only think the publication would serve a third party's private interests because, for example, a person with a private cause considers that their private interests will be advanced by them being able to cite a law officer's legal opinion in support of their private cause.

3.13.1 Deputy M.R. Scott:

Given that States Members often witness great efforts being made by members of the public to understand how legal statutes might be interpreted and Jersey law might be interpreted, and as I understand from the Attorney General, that it is possible for legal privilege to be waived with consent of law officers, can the Attorney General accept that there could be grounds on public interest where it will not necessarily, in terms of just providing clarity on the situation, for the legal interpretation of statute as it is understood by law officers be disclosed?

The Attorney General:

Well I think the answer to that was probably largely covered by my second and third answers to the questions originally raised by the Deputy. But to expand on those, what is important about the interpretation of Jersey law and Jersey statutes is the decisions of the courts. Those are public, they are published on the website, and they are accessible by private individuals whether they choose to involve a lawyer in advising them on the particular question on which they are concerned or whether they seek legal aid to do so or they go to the Free Representation Unit or other organisations. But a law officer's role is not to provide a general free legal advice service to members of the public, its

role is to advise States Members, government decision-makers about matters of public concern. It is not to provide some sort of private legal advice service to members of the public. If we were to do so it would make our jobs very difficult indeed because it would create conflicts of interest with those third parties and we would always be concerned and the Government Members, government officials who we advise would always be concerned whether our advice is going to be published to the public. So, that relationship of confidentiality where a client comes to a lawyer in complete confidence and can disclose everything that they need to disclose in order to give advice and that the advice that is given confidentially in return would just be undermined if our advice becomes disclosable.

3.13.2 Deputy M. Tadier:

There is a precedent in the Commonwealth, and indeed in the British Isles, for legal advice to Ministers having been disclosed. Of course that example is perhaps most high “profilely” known, if you will excuse the clumsy English, in the Goldsmith’s advice to Tony Blair during the Iraq war. So, although the precedent is absolutely that in most cases legal advice remains privileged, if there is an overwhelming judgment that it is in the public interests to disclose, that can be published. So, my question to the Attorney General is under the Freedom of Information Law, I know that when it was originally drafted there were 2 categories of qualified exempt and absolute exempt, could he just remind us which category legal advice falls into, if it is the former or the latter?

The Attorney General:

It is generally the former.

3.13.3 Deputy M. Tadier:

So, given that, if it is qualified exempt, that if there is an overriding public interest, legal advice that is given to Ministers or to States Assembly Members could be released in certain circumstances?

The Attorney General:

Well that is correct but that would have to be assessed by the Information Commissioner in each case. But while I accept that war in Iraq is a matter of overriding public interest, I have not yet come across a situation that is comparable to war in Iraq, and that is why my overriding points about the importance of maintaining confidentiality of legal advice for those whom we serve with that advice is paramount.

[11:15]

3.13.4 Deputy M.R. Scott:

Given that recently the Guernsey Government disclosed information from its law officers regarding the interpretation of the Proceeds of Crime Law in the context of international treaties and whether there is a conflict or not, would the Attorney General perhaps come back to the point of whether there could be any circumstance which is mentioned in the third part of the question? Whether that is in terms of a period of time, in terms of an interval, any circumstance in which he could contemplate that, notwithstanding some of the concerns and risks about disclosing information a certain way, whether these opinions might be, and accepting that they are opinions, disclosed and whether, in the absence of doing so, there could be a concern that Government might be perceived as avoiding challenge.

The Attorney General:

In relation to the disclosure by Guernsey law officers, I have to say I am not familiar with that particular disclosure. I do not know its details but it may have been that that disclosure was made with the consent of the Guernsey law officers; it is quite possible. In relation to the Deputy's more general question, I would concede there are possible circumstances where with our consent, yes, our advice may be disclosed. But so far I have not come across one of those with the exception of course of what I am just doing now, the advice in the Assembly, that I do give in public. But I am not aware of one circumstance in 8 years of being a law officer which has justified private advice given outside the floor of the Assembly being published.