

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 26 November 2007**

**Public Authority:** Home Office  
**Address:** Seacole Building  
2 Marsham Street  
London  
SW1 4DF

### Summary

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The complainant requested information from the public authority regarding a staff transfer which occurred in December 2004. The public authority provided some information, but withheld some of the information on the grounds that it was covered by the section 42 legal professional privilege exemption. Some information within the scope of the request was initially withheld but was released when the public authority conducted its internal review.

The complainant alleged that the public authority had misapplied the section 42 exemption and that the public authority held more information relevant to his request than had been disclosed or deemed exempt.

The Commissioner's decision is that in failing to supply some information within the scope of the request within the original response the public authority breached section 10 of the Act. However, he is satisfied that no further information was held that was within the scope of the request at that time. It has been subsequently clarified that the Home Office now holds additional information which was only created after the request was received. The complainant has been advised that if wishes to access that information he would need to make a further request.

The Commissioner has also concluded that the public authority misapplied the exemption in section 42 to a limited amount of the withheld information. This is on the basis that the information did not constitute a communication between a client and a legal advisor for the dominant purpose of seeking or providing legal advice. However, in relation to the remainder of the withheld information he has decided that the public authority appropriately cited section 42 and that the public authority was not obliged to comply with section 1(1)(b) in relation to that information.

## The Commissioner's Role

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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.

## The Request

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2. The complainant made a request for information from the Home Office on 31 March 2006. His request was for:

“ copies of all records pertaining to the pension arrangements made for the employees transferred from IND<sup>1</sup> to Atos Origin as part of the IPIDS contract on the two transfer dates of 20 December 2004 and 1 March 2005, to include:

- a. copies of any agreements, discussions, clarifications made between IND and Atos Origin about the pension arrangements for the affected staff at any time since the award of contract in August 2004 to date ( i.e. pre, during and post transfer);
- b. copies of any legal advice (together with an indication if any of it was ignored) provided by the Treasury Solicitors (or other relevant to the pension arrangements);
- c. copies of all correspondence between IND and the PCS Union, pre, during and post transfer;
- d. A Copy of the GAD<sup>2</sup> certificate comparing the 'Principal Civil Service Pension Scheme (PCSPS) to the 'Atos Origin Civil Service Pension Scheme';
- e. Dates when the GAD certificate was shown to the Home Office/IND;
- f. Details about who within the Home Office/IND the certificate was shown to;
- g. Details of any pension terms and conditions insisted upon by the outsourcing department (the Home Office/IND in this case) for all or any of the IND staff transferred;
- h. Any correspondence or documentation relating to my particular pension arrangements (such as transfer values) “

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<sup>1</sup> Immigration and Nationality Directorate

<sup>2</sup> Government Actuary's Department

3. The Home Office wrote to the complainant on 27 April 2006 providing some of the information requested, indicating which aspects of the request were not held and advising that parts of his request would be refused. Public interest arguments and a full response were sent on 24 May 2006. The section 42, legal professional privilege exemption, was invoked regarding some of the information. Detailed public interest arguments were provided regarding the use of this section.
4. Regarding point A of the request, information from February 2005 to the date of the request was provided in response to the request. Individuals' names were redacted out of the information.
5. Regarding Point C, a compilation of extracts was provided.
6. Regarding Point D, a copy of the certificate valid from 31 March 2006 to 31 March 2007 was provided. The Home Office stated that it believed the complainant had been given the March 2005 certificate through the complainant's current employer, and that it did not hold a copy of it.
7. Regarding Points E and F the complainant was told that the certificate dated 31 March 2006 was received in mid April 2006, and that this certificate was delivered to a named Home Office employee from the IND Home Office IT.
8. Regarding Point G and H, the Home Office stated that it held no information.
9. The complainant asked for an internal review on 1 June 2006. In his request, the complainant disagreed with the public authority's application of section 42. He felt that the reasoning as to why one factor outweighed another was not clear; and that the reasons for maintaining the exemption were general and unspecific. He felt that underlying the Freedom of Information Act was an assumption that openness is in the public interest and further contended that disclosure would give greater understanding to, and demonstrate accountability and transparency of decisions made by the Department. As someone affected by those decisions, he felt that he would better understand the basis of the decisions if the information request was disclosed.
10. The complainant also queried why there was no information provided pre January 2005 as the transfer had occurred in December 2004 and he expected that there should have been information available from this time; and he complained that the redaction applied by the public authority was too excessive.
11. The Home Office's response to the internal review was sent on 6 September 2006. That review upheld the use of the section 42 and more public interest arguments were provided. The redacted information was revised and more information provided to the complainant.

## The Investigation

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### Scope of the case

12. On 27 December 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- The public authority's application of the section 42. The complainant felt that the Home Office had failed to follow Government policy issued in 1999 and 2004 regarding the 'Fair Deal for Staff Pensions (Procurement of Bulk Transfer Agreements and Related Issues)'. This document stated that a bulk transfer agreement should be finalised before staff transferred from the public sector to a private sector partner. The complainant states that this did not occur and this should be taken into account when considering the public interest arguments in this matter.
  - Whether the information provided constituted a complete record of the information held as he felt that the public authority held additional information.
  - Whether the public authority correctly redacted certain information.
13. In the course of the investigation the Commissioner has considered the following issues:
- Whether legal professional privilege can be claimed in respect of all of the withheld information?
  - In particular, whether legal advice privilege or litigation privilege can be claimed in respect of the withheld information?
  - Whether the public authority has waived legal professional privilege in this matter?
  - The public interest considerations cited by both the complainant and the public authority.
  - Whether some of the information would be more suitably dealt with as a subject access request under the Data Protection Act 1998?

### Chronology

14. The complainant is a former employee of the Home Office. A contract was entered into regarding the transfer of some staff from the Home Office to a public private partnership in August 2004. The complainant and other staff were transferred to this private partner in December 2004. The information that he is

- seeking relates to the pension arrangements and communications that occurred at the time of the transfer.
15. The complainant was particularly interested in information about whether there was a Government Actuarial Department (GAD) Certificate in place at the time of transfer. The complainant's position is that Government policy precluded a transfer taking place in the absence of a valid certificate, and he believed the Home Office had been careful to neither confirm nor deny whether such a certificate had been in place at the time of transfer.
  16. On 20 November 2006 the Commissioner wrote to the complainant. In that letter the Commissioner advised that he would investigate whether there was information withheld which predated February 2005; whether section 42 was correctly applied and whether other pieces of information were available, which could be disclosed. Point H was identified as being more suitable for a subject access request under the Data Protection Act 1998 (DPA) as it related to the complainant directly.
  17. The Home Office was written to on 21 November 2006, with a request for the withheld information to be provided to the Commissioner for consideration and a clarification about whether any additional information had been withheld. The Home Office was asked whether Point H had been treated as a subject access request.
  18. The Home Office initially indicated that it would provide the information to the Commissioner by the 19 January 2007 and then having not provided it by that date indicated that it would provide the information to the Commissioner by 26 January 2007.
  19. On 2 February 2007 the Commissioner wrote to the Home Office and advised that if the material was not provided within 10 working days he would consider issuing an Information Notice.
  20. The information was received by the Commissioner on 22 February 2007. Copies of the unredacted information and copies of the first and second versions of the redactions were provided. The information withheld under section 42 was provided.
  21. Regarding Point C, the Home Office explained that it did not hold any additional information. In relation to this point, its position is that there was a meeting held on 28 September 2005 and that information about this meeting had been provided to the complainant.
  22. Regarding requests D, E and F: the Home Office provided a copy of the certificate it holds. According to the Home Office, information about the exact date it was received was not held as it was sent with an undated compliment slip and the envelope it arrived in had been destroyed. An email was held indicating it was received in mid April. The only information held about who had seen the certificate was that it had been seen by a named Home Office employee and this had been communicated to the complainant.

23. Regarding Point G, the Home Office advised that it had provided all the information held relating to the request to the complainant. It clarified that there was a misunderstanding about the required process regarding the transfer of pension rights but a draft agreement had now been prepared, subsequent to the request having been made.
24. In relation to request H the Home Office agreed that information was held regarding this point which would be exempt from disclosure under section 40(1) of the Act but which was accessible under the DPA. As the Home Office was satisfied as to the complainant's identity and did not charge for personnel related issues in this case it agreed to send the information it held to the complainant.
25. The Commissioner wrote to the Home Office on 12 March 2007 seeking further clarification about the information requested. The Commissioner asked why there was no information about pensions pre-dating January 2005, given that the transfer occurred in December 2004; other information which the complainant expected the Home Office to hold was also queried.
26. The Commissioner also wrote to the complainant on 12 March 2007, inviting him to make any additional arguments regarding the public interest considerations in releasing the information to which the Home Office had applied section 42.
27. The complainant wrote to the Commissioner on 14 March 2007. In his letter he made additional public interest arguments. These are contained in Paragraph 67 of this Decision Notice.
28. The Home Office wrote to the Commissioner on 10 April 2007. In that letter the Home Office confirmed that:
  - Despite the contract being awarded in August 2004 there was no recorded information about the pension issues predating 25 January 2005.
  - Additional information the complainant believed was held by the Home Office had been searched for and no record found of it.
  - It did not hold a GAD certificate for the period March 2004 to March 2005, and that only a draft certificate was held, which was finalised in March 2005. The Cabinet Office had been content to allow the staff transfer on the basis of the draft certificate. The Home Office advised it would give information about this issue to the complainant even though the information post dated his request for information.
  - No other information about the GAD certificates was held at the time of the complainant's request. Although there is information held which post dates the request, if the complainant seeks access to this information he should submit another FOI request for this updated information.
  - Other information was provided about the material for which the section 42 exemption was claimed.

29. The Commissioner approached the Home Office to see if it would consent to a redacted copy of this letter being provided to the complainant in an attempt to informally resolve these aspects of the complaint. The Home Office agreed however it did not agree that the parts of the letter which referred to section 42 could be released.
30. The ICO agreed to forward this information to the complainant to expedite resolution of these points.
31. A copy of this letter was sent to the complainant on 19 April 2007, with the section 42 related information redacted. As the information contained in this letter appeared to answer most of the complainant's requests, the Commissioner considered the outstanding issue for consideration to be access to the material for which legal professional privilege had been claimed. The complainant was invited to clarify if he believed that other issues were outstanding.
32. The complainant wrote to the Commissioner on 8 May 2007 confirming that he wanted to continue with his complaint about the use of the exemption and reiterated his public interest arguments made on 14 March 2007. He also made these further arguments:
  - That the Home Office should have been aware of the Government's pension policies when transferring staff as it had previously done so for other staff and it is an important issue.
  - That the Fair Deals Policy said that no TUPE<sup>3</sup> transfer could take place if the pension arrangements had not been addressed.
  - That there is widespread public concern about the issues of pensions and it is an emotive subject.
  - That the Home Office position that there was no information which pre dated 25 January 2005 indicates that the transfer was not undertaken as it should have been and Government policy was contradicted.
  - That this position is inconsistent because an impact analysis for the proposed contract was done in November 2003 and the function of the complainant's team was listed as being wholly transferred to the new supplier and the Union had been told in May 2004 there was a contingency for up to 10 staff to be TUPE transferred.
  - That he was unclear when the Cabinet Office agreed that the transfer arrangements could go ahead.
33. The Commissioner therefore proceeded to investigate the complaint on the basis of whether section 42 was correctly applied by the public authority. The complainant was told on 12 March 2007 that it was not the role of the Commissioner to adjudicate in relation to alleged discrepancies in the statements

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<sup>3</sup> Transfer of Undertakings ( Protection of Employment) Regulations

provided to him by the Home Office about the pension arrangements and that the Commissioner's role in this case is solely to investigate whether the public authority has complied with its obligations under FOIA. No decision can therefore be made about the discrepancies raised by the complainant and further considerations would therefore be confined to the public authority's application of section 42.

### **Findings of Fact:**

34. During the investigation the Commissioner found that:

- Some of the information withheld has the complainant as the focus of that information.
- There is no evidence before the Commissioner to indicate that the Home Office has previously placed the legal advice into the public domain.
- The Home Office has not waived privilege over the disputed information.
- Legal proceedings were not and are not anticipated.

### **Analysis**

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#### **Procedural matters**

35. The initial request for information was made on 31 March 2006 and a response was sent on the 27 April 2006. This response provided some of the information sought and refused other aspects. It referred to the need to give further consideration to the public interest test. The conclusions in relation to the public interest were communicated to the complainant in the letter dated 24 May 2006. Section 10(3) of the Act states that a,

“public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this does not affect the time by which any notice under section 17(1) must be given”.

36. The Commissioner is satisfied that, in responding to the complainant on 27 April 2006 and advising the applicant that it needed further time to consider the public interest test the public authority satisfied the requirement of section 17(2) of the Act. Further, he is also satisfied that in explaining its conclusions in relation to the public interest in the letter dated 24 May 2006 the public authority also complied with section 10 (3) of the Act.

37. The Commissioner notes that some information within the scope of the complainant's request was withheld when the initial response was provided. However, at the internal review stage, further information was disclosed to the complainant. In failing to supply this information to the complainant within 20 working days the public authority breached section 10 of the Act. However, as

this information has now been supplied to the complainant the Commissioner has not ordered any remedial steps in this regard.

38. Some of the information withheld had the complainant as the focus of that information and was later deemed to be exempt under to Section 40(1).

**Does legal advice privilege or litigation privilege apply to the information requested?**

39. The information in question comprises emails that sought and provided legal advice and which were exchanged between Home Office officials (clients) and their legal advisors about the issue of the transfer of staff to a public/private partnership. No litigation was contemplated nor is any pending. The matter is therefore one for which legal advice privilege can be considered.
40. For legal advice privilege to be successfully claimed the information in question must be communicated in a professional capacity; and it needs to be for the dominant purpose of seeking or giving legal advice.

**Has the public authority waived legal professional privilege in relation to this information?**

41. There is no evidence before the Commissioner to indicate that the public authority has waived privilege regarding this information. He is not aware that the content has been deliberately placed in the public domain, nor is he aware of any evidence to suggest that the actions of the public authority may have resulted in privilege being waived. For example, he is not aware of any evidence that the public authority has discussed the content of the legal advice at public meetings.

**Is the information no longer privileged because of wrong doing?**

42. The complainant has argued that if a legal advisor becomes aware of wrong doing, the information ceases to become privileged, and that this was the case here as the Department failed to follow Government policy. Privilege cannot extend to material that was given in relation to any criminal activity or to advice concerning the commission of any crime in the future, nor can it extend to communications made in order to get advice for the purposes of carrying out a fraudulent activity. However, the activities the complainant takes issue with do not come within this description. Therefore the Commissioner has not given this issue further consideration.

**Exemption**

43. **Section 42(1) of the Freedom of Information Act 2000** 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.”

44. The Freedom of Information Act Awareness Guide Number 4 on Legal Professional Privilege states that 'information does not attract privilege simply by being handed to a professional legal advisor amongst other communications'.

45. With this in mind, the Commissioner has therefore gone through each piece of information individually with a view to establishing whether privilege can be claimed over the entirety of each document for which the section 42 exemption has been claimed.

46. *First piece of information:*

The first piece of information is from a Home Office employee to a professional legal advisor. The dominant purpose of this document is for a client to seek advice from a professional legal advisor. Legal Advice privilege can therefore be claimed over this first document.

47. *Second piece of information:*

The second piece of information is from a Home Office employee to a professional legal advisor. The document contains a request for legal advice, in the form of a list of issues that the Home Office are seeking advice from the professional legal advisor about in an upcoming meeting. The dominant purpose is the seeking of legal advice and therefore legal advice privilege covers this document.

48. *Third piece of information:*

The third piece of information is an email from a professional legal advisor to a Home Office employee client. It is seeking information about a contact at GAD. As such it is not giving or receiving advice, and the dominant purpose of this document is to seek information about a contact. Privilege cannot be attached to this document.

49. *Fourth piece of information:*

The fourth piece of information is an email from a Home Office employee to a professional legal advisor seeking a meeting time. The dominant purpose of this email is to seek a meeting and not to seek advice. Advice privilege cannot be attached to this document.

50. *Fifth piece of information:*

This piece of information is from a Home Office employee client to a professional legal advisor. It refers to previous advice given and seeks further advice. The dominant purpose of this email is the seeking of legal advice and privilege can therefore be attached to this document.

51. *Sixth piece of information:*

This piece of information is from a professional legal advisor to his client, a Home Office employee. The first part of the email provides legal advice; the second half provides procedural advice about a meeting. However the dominant purpose of the email is the provision of legal advice, therefore privilege can be attached to the whole document.

52. *Seventh piece of information:*

This piece of information consists of notes from a meeting between a professional legal advisor and his client. The dominant purpose of this document is the recording of legal advice given and is therefore covered by the privilege.

53. The Commissioner agrees that advice privilege was correctly claimed over the majority of the material by the Home Office Advice as privilege can be attached to all documents, reports, information, and evidence obtained for the dominant purpose of obtaining legal advice. The exemption has been correctly claimed over material which comes into this category. However the Commissioner is not satisfied that all of the information for which the exemption has been claimed can be covered by the exemption as he does not agree that all of the material was obtained for the dominant purpose of obtaining legal advice.

54. The exemption contained in Section 42 is a qualified exemption and is therefore subject to the imposition of a public interest test.

55. Having established that legal advice privilege could be claimed over some of the withheld information but not other parts of it, the Commissioner then moved on to consider the public interest arguments including those submitted by the complainant and the Home Office.

**Public Interest Arguments:**

56. In reaching a view about the public interest, the Commissioner has taken into account cases that have already been heard by the Information Tribunal (IT) in which the issue of legal professional privilege and the public interest have been considered.

57. In the case EA/2005/2003 *Bellamy v the Information Commissioner and the DTI* (the Bellamy Case) the IT decided that 'with regard to legal professional privilege, there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right insofar as the administration of justice is concerned' (paragraph 8).

58. Paragraph 10 of the Bellamy decision cites the case of *In Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16 at page 32E, where Lord Nicholls of Birkenhead stated that, 'the public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases'.

59. The Tribunal found at Paragraph 35 that 'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'.
60. The Commissioner also considered the Information Tribunal's decision EA/2006/0044 of *Kitchener v the Information Commissioner and Derby City Council* ('the Kitchener decision') and in particular their findings regarding public interest and legal professional privilege.
61. Paragraph 16 of the Kitchener decision states, regarding legal professional privilege, 'if either the lawyer or the client could be forced to disclose what either said to the other (whether orally or in writing) as part of that process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there was a possibility that disclosure might later be ordered'.
62. Paragraph 12 of the Kitchener decision states, 'It is clear that, in law, each request for disclosure of information must be considered by the Commissioner on its merits, against the framework. '
63. Whilst those cases are not binding upon the Commissioner's decision, they provide the Commissioner with guidance in determining what weight should be given to the public interest arguments in this matter.
64. A public authority such as the Home Office must be able to seek legal guidance when making decisions. This advice should be free from the threat of interference except in exceptional circumstances, where the arguments in favour of disclosure override the arguments in favour of maintaining the exemption.
65. The Commissioner has given consideration to the public interest arguments put forward by the complainant and the Home Office to see whether exceptional circumstances exist in this case.

Home Office's public interest arguments:

66. In summary, the Home Office's public interest arguments are that whilst there is a public interest in the complainant being able to progress his pension issues, it was felt that the legal advice would continue to bear relevance to future programmes and that disclosure may affect future relationships with their professional legal advisors. Overall, the Home Office believed that the public interest in encouraging full and frank exchanges between clients and their advisors outweighed the public interest in disclosure. Ensuring that the decisions taken by Government are undertaken in a fully informed legal context is in the public interest. This advice needs to be given in context and with a full appreciation of the facts. The position provided in their response to the request for internal review is that:

*'Without such comprehensive advice the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest. Disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests by*

*diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. This could easily result in poorer decision making, as the decisions themselves may not be taken on a fully informed basis. Alternatively there may be 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. As policy develops or litigation decisions are made it will be important to be able to refer back to advice given along the way. At worst there may even be a reluctance to seek the advice at all. This could lead to decisions being made that are legally flawed. Therefore in this case the decision to withhold this information has been seen to be correct'.*

67. The complainant's public interest arguments:

A summary of the complainant's arguments, which the Commissioner took into account are:

- a. The FOI promotes a culture of openness and accountability and this is in the public interest.
- b. The Home Office could elect to disclose if it wished. The Home Office did not adequately argue why the public interest favoured the maintenance of the exemption.
- c. That the advice should not be considered privileged if it was to inform its policy and decisions, and that if the advice was covered by advice privilege not all the information/communication would attract the privilege.
- d. That once a professional legal advisor becomes aware of wrong doing the information ceases to be privileged and that this was the case in this matter as the Department had failed to follow Government policy.
- e. That as the request was a year after the legal advice was given there was no reason for the exemption to remain in perpetuity, and that no litigation had occurred as a result of the advice.
- f. That there is a private interest in withholding the information as it will disclose incompetence. The Home Office has said it received high quality legal advice but later acknowledged to his Member of Parliament that the transfer had been badly managed and this was due to a misunderstanding between their responsibilities and the process. The public interest in disclosing information in a situation such as this therefore outweighs the private interest in maintaining the exemption.
- g. That two years after transferring, the issue of pensions remained unresolved.

68. To assess whether there are strong countervailing public interest considerations in this matter, the Commissioner has approached his analysis of the public interest in this case by considering a number of questions. These are addressed in turn below.

*What is the age of the information in question?*

69. The complainant has argued that there is no reason for the privilege to remain in perpetuity and that his request for the advice was a year after the advice was given. In the Bellamy Case the Information Tribunal states at Paragraph 35 that 'where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight'. The Commissioner therefore considered whether the legal advice in this matter could be considered to be stale.
70. The information in question relates to a transfer of staff in 2004. Pension issues relating to these staff remain outstanding. The issue is therefore still a live one and whilst no litigation is intended, the Commissioner is not satisfied that in this matter the information in question can be seen to stale, or of such an age that the public interest arguments connected to the maintenance of the exemption should be diluted for this reason.

71. Little weight can therefore be put on this public interest argument for disclosure.

*Would the information help the public to understand the decisions made by the public authority?*

72. The Commissioner agrees that as a general principle there is a public interest in ensuring that the Home Office is accountable for its decisions and accepts that if the legal advice was released it would increase transparency about the decisions made by that public authority. This in turn is likely to contribute to a greater public confidence in the decisions that have been made.

*Is there a suggestion or any evidence that the public authority has not followed its own procedures?*

73. Where information reflects that a public authority has not followed its own practices or procedures the public interest in disclosure is likely to be stronger. In addition where there is a widespread concern that a public authority may or may not have sought advice where appropriate or that it may not have provided the legal advisor with all the relevant facts, it is arguable that the public interest in disclosing the instructions and legal advice will be greater.
74. The fact that the complainant is a former staff member affected by the decision to withhold the information is not a factor which has great weight regarding whether the information should be released to the public in general. However the effect of such a policy on members of the public including the complainant is a relevant factor.

75. In this matter the Home Office, as part of the process of transferring staff to a public-private partnership obtained legal advice about this issue. The complainant argues that this transfer was poorly dealt with and points to Government policy which he believes was broken when the transfer occurred. The complainant points to a letter sent by a Home Office Minister to his Member of Parliament on 11 January 2007 which states that the transfer of staff under TUPE Regulations (1981) had been badly administered by the Home Office and that the failure was due to misunderstanding the process and their responsibilities.
76. The complainant also stated that as at 14 March 2007 his pension and those of the other staff members transferred remains unresolved. He points to the June 2004 document issued by the Treasury and Cabinet Office entitled 'Fair Deal for staff pensions: procurement of bulk transfer agreements and related issues' which suggests there is no reason for it to take longer than six months following staff transfer for the bulk transfer process to be completed.
77. The Commissioner is mindful of the concerns about the way in which the Home Office has handled the transfer of staff and of its own acknowledgement that this was badly managed. Having considered the withheld information, he is satisfied that if it were disclosed the public would gain a better understanding of the nature of the advice sought and provided. This in turn would allow people to determine the degree to which the advice may or may not have been taken on board by the public authority, which may increase confidence in the decisions that have been made. Whilst the Commissioner considers this argument to have some significance because the poor handling has been acknowledged by the public authority, he does not consider that it is sufficient to outweigh the arguments in favour of maintaining privilege.
78. The Commissioner also notes that during the course of the investigation the Home Office have released certain pieces of information about the issue of the pension transfer which have clarified some issues for the complainant. In particular their letter of 10 April 2007 and the clarification that letter provides about the GAD certificate addresses some of the concerns about the previous lack of clarity about this issue. The information contained in their 22 February 2007 letter about the likelihood of the pension issue being resolved in the near future also counter balances some (but not all) of the public interest concerns relating to the public authorities handling of the pensions issue.
79. The complainant has said that releasing the legal advice would promote a culture of openness and accountability and this is in the public interest. The Commissioner agrees that this is a public interest argument with some weight and that ensuring that public authorities are accountable and transparent is an important public interest argument.
80. The Commissioner notes the comments made in Paragraph 14 of the Information Tribunal's decision EA/2006/0044 of *Kitchener v the Information Commissioner and Derby City Council* which stated 'there is a public interest in ensuring that the activities of public authorities are known and can be called to account if appropriate'.

81. Despite there being some important public interest arguments in favour of disclosure in this matter, the Commissioner considers that the arguments in favour of maintaining the exemption are compelling. Therefore, where the Commissioner is satisfied that information is subject to the exemption in section 42, in other words that it does attract legal professional privilege; he has concluded in the circumstances of the case that the public authority appropriately concluded that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

## The Decision

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82. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
83. In failing to provide certain information within the scope of the request to the complainant until the internal review was completed, the public authority breached section 10 of the Act. However, the Commissioner has not ordered any remedial steps in this regard. He is further satisfied that, with the exception of the material to which section 42 has been applied, the public authority does not hold any additional information which falls within the scope of the complainant's request which has not been disclosed to him.
84. The public authority incorrectly applied the exemption in section 42 of the Act to the third and fourth pieces of information that have been withheld. The title of these documents is listed in Annex B to this notice which will only be provided to the public authority as it forms part of the exempt information. In failing to supply this information to the complainant the public authority breached sections 10 and 1 of the Act.
85. The Commissioner has concluded that section 42 was appropriately cited in relation to the remainder of the withheld information. He is also satisfied that the public interest favoured maintaining the exemption and that therefore the public authority was not obliged to provide this information to the complainant under section 1(1)(b) of the Act.

## Steps Required

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86. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose the information listed in Annex B to this notice to the complainant.
87. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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88. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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93. 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](mailto:informationtribunal@tribunals.gsi.gov.uk)

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 26<sup>th</sup> day of November 2007**

**Signed .....**

**Jane Durkin  
Assistant Commissioner**

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

## Legal Annex

### Section 1 – Right of access

- “(1) 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 10 – Time for compliance

“(1) -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.

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

### Section 17 - Refusal of request

“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

## **Section 42 – Legal Professional Privilege**

“(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.

(2) 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”.

## **Annex B – Information to be released by the public authority**

### **Third piece of information**

Email from Camilla Barry to Margo Cartwright/Ricky Vassell etc dated 10 February 2005 (Time 16.44)

### **Fourth piece of information**

Email from Margo Cartwright to Ricky dated 2 February 2005 (Time 9.28 am)