

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 28 September 2009

**Public Authority:** Attorney General's Office  
**Address:** 20 Victoria Street  
London  
SW1H 0NF

#### Summary

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The complainant made a request for information related to a meeting between the Attorney General and the strategy adviser to the then Prime Minister Tony Blair, Lord Birt. The public authority refused the request under section 35(1)(a) (formulation and development of government policy) and sections 36(2)(b)(i) and (ii) (free and frank provision of advice or free and frank exchange of views). The Commissioner has investigated the complaint and has found that for most of the withheld information the section 35(1)(a) exemption applied and the public interest in maintaining the exemption outweighed the public interest in disclosure. However the Commissioner also decided that for some information the public interest favoured disclosure and that some information was neither exempt under section 35(1)(a), nor sections 36(2)(b)(i) and (ii). The Commissioner requires the public authority to disclose that information to the complainant within 35 calendar days. Finally, the Commissioner found that the public authority breached section 17(1) (refusal of a request) in its handling of the complainant's request.

**NB.** The complainant originally submitted his request to the Legal Secretariat to the Law Officers. At the time of the request this was a distinct government department providing support to the Attorney General and Solicitor General in their responsibilities as UK Law Officers. The Commissioner understands that the work of that department has now been absorbed by the Attorney General's Office. References in this decision notice to "the public authority" should be read as references to the Attorney General's Office.

#### 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. On 11 May 2005 the complainant emailed the public authority to request information relating to two parliamentary answers of April 25 2001 which referred to meetings with, the then Prime Minister Tony Blair's adviser on crime, Lord (John) Birt. The request read as follows:

"In two parliamentary answers on April 25 2001 (Hansard Column 273 W), the government stated that the Solicitor-General and the Attorney-General had held one substantive meeting with Lord Birt, the government adviser on crime, and had received a briefing from Lord Birt setting out his emerging findings prior to the meeting with him.

Under the act, I would like to request complete copies of the background briefing papers/notes which were prepared by your department for both of these parliamentary questions on April 25 2001 by Ann Widdicombe MP.

Under the Act, I would also like to request complete copies of the minutes and agendas of the meetings between Lord Birt and the Attorney-General and Solicitor-General which is referred to in the parliamentary answer. The date of the meeting is not specified, but I assume that your department will be able to trace the meeting from the reference given. I would also like to request complete copies of all and any documents (such as briefing material, letters, memos, emails, memorandums of conversations) which were prepared for or connected with the meetings, either before or after the event);

Under the act, I would also like to request a copy of the briefing referred to in the parliamentary answers which was received by the Attorney-General and Solicitor-General prior to the meeting with him.

I would also like to ask your department, on answering the above request, to comply with a further request under the Freedom of Information act. This request is to provide a schedule of documents within this file which may be refused. I believe that there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld. This is a specific request for information to which I believe I am entitled under the Freedom of Information act, and would also represent best practice in open government."

3. The public authority responded to the request on 13 June 2005, acknowledging it had missed its target of responding within 20 working days. At this point it said that a number of qualified exemptions applied to the request and it needed additional time to consider the public interest test. The exemptions which it said applied were section 35(1)(a) (formulation and development of government policy), and 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs). It informed the complainant that it aimed to provide him with a substantive response by 1 July 2005.

4. The public authority wrote back to the complainant on 11 July 2005 with its substantive response. For convenience it separated his request into the following parts:
  - a) complete copies of the background briefing papers/notes which were prepared by your department for parliamentary questions on 25 April 2001 by Ann Widdecombe MP,
  - b) complete copies of the minutes and agendas of the meeting between Lord Birt and the then Attorney-General and Solicitor-General, Lord Williams of Mostyn and Ross Cranston MP, which is referred to in the parliamentary answer.
  - c) complete copies of all and any documents (such as briefing material, letters, memos, emails, memorandums of conversations) which were prepared for or connected with the meeting either before or after the event;
  - d) a copy of the briefing referred to in the parliamentary answers which was received by the then Attorney-General and Solicitor General, Lord Williams of Mostyn and Ross Cranston MP, from Lord Birt prior to the meeting with him; and
  - e) to provide a schedule of documents within this file including the nature of the document, the date of the document, and whether the document is being released or not.
5. In respect of part d) of the request the public authority informed the complainant that the briefing from Lord Birt was now, with the exception of one slide, accessible by other means as it had been published on the Cabinet Office's website. A copy was also provided for ease of reference. It explained that it did not hold an agenda for this meeting and did not hold a schedule of documents (part e) of the request).
6. As regards the remaining parts of the request the public authority said that the information was exempt from disclosure under section 35(1)(a) (formulation and development of government policy) and, in the alternative, section 36(2)(b)(i) and (ii) and it concluded that the public interest favoured maintaining the exemptions. The public authority set out its reasons why the exemptions applied and its reasons for concluding that the public interest in maintaining the exemptions outweighed the public interest in disclosure.
7. On 13 July 2005 the complainant contacted the public authority to ask that it carry out an internal review of its handling of his request. In particular the complainant argued that there was a public interest in the information being released because it appeared that Lord Birt was playing a significant role in government but very little information had been released about what he does.
8. The complainant also said that he was not requesting a review of the decision not to release the one slide within the briefing which had been published. However,

the complainant repeated his request for a schedule of any documents that have been refused and said that he saw no reason why this could not be disclosed.

9. The public authority presented the findings of its internal review on 21 July 2005 at which point it upheld its earlier response to the request. As regards the schedule of documents the public authority referred the complainant to section 84 of the Act which defines “information” to mean “information recorded in any form”. It argued that where a public authority does not hold information in a recorded form it is not obliged to create it. In this case it explained that it did not hold recorded “information” in the form of a schedule of documents and it was not required to create one. It did however confirm that the information that was being withheld comprised: (a) the briefing sent to the Law Officers by Lord Birt; (b) advice from officials to the Law Officers; (c) advice from officials to the Law Officers in connection with the Parliamentary Questions in April 2001.

## The Investigation

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### Scope of the case

10. On 12 September 2005 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 public authority’s decision to refuse to disclose the withheld information. He explained that his grounds for appeal were the same as in his request for internal review.

### Chronology

11. The Commissioner first wrote to the public authority with details of the complaint on 9 February 2006. The Commissioner raised a number of procedural issues regarding its handling of the complainant’s request. The Commissioner also asked the public authority for further comments as to why the exemptions applied to the withheld information and why it had concluded that the public interest favoured maintaining the exemptions.
12. The public authority responded to the Commissioner on 8 March 2006 and provided the Commissioner with further details surrounding its handling of the complainant’s request. The public authority referred to its letter to the complainant of 11 July 2005 which it said set out the considerations which it took into account when making a decision on withholding the information.
13. Regrettably there was then a considerable delay due to the high volume of complaints at the Commissioner’s office requiring investigation. The Commissioner contacted the public authority again on 29 October 2008 and apologised for the delay in re-commencing the investigation into the complaint. The Commissioner now asked for copies of all of the information that had been withheld from the complainant, clearly marked to show where each exemption applied.

14. Assuming that the public authority was relying on section 35(1)(a) in the first instance, the Commissioner asked the public authority to explain why the exemption applied to the withheld information. Noting that the public authority was, in the alternative, seeking to rely on section 36(2)(b), the Commissioner also asked the public authority to respond to the following:
  - The Commissioner asked the public authority to confirm that when applying this exemption it had obtained the opinion of the qualified person.
  - The Commissioner asked the public authority to confirm when the qualified person's opinion was given.
  - The Commissioner asked the public authority to confirm whether the opinion was given verbally or in writing.
15. The public authority responded to the Commissioner on 20 March 2009 providing 'flagged' copies of all the withheld information. The Commissioner had asked for a further explanation of why the withheld information was exempt under section 35(1)(a) and the public authority now went on to say why it believed this information related to the formulation and development of government policy. It again referred the Commissioner to its letter of 11 July 2005 for its public interest arguments.
16. On 30 April 2009 the Commissioner wrote back to the public authority to ask for further details regarding the work undertaken by Lord Birt in his capacity as the Prime Minister's advisor on crime. In particular the Commissioner sought clarification on how the report/briefing produced by Lord Birt contributed to government policy, when this work was completed and what the outcome of this work was.
17. As regards the public authority's application of section 36, the Commissioner noted that it had obtained the written opinion of the qualified person on 8 July 2005. He now asked to see a copy of this opinion, if available, and enquired as to the material which was placed before the qualified person to allow him to form an opinion on the application of the exemption. Finally, the Commissioner asked the public authority to clarify the origin of some of the information contained within Lord Birt's briefing and invited the public authority to provide him with any other information which would aid his understanding of the context in which the information was held.
18. The public authority responded to the Commissioner on 19 June 2009. It explained that a submission was sent to the qualified person on 6 July 2005 consisting of a copy of the complainant's request and the information falling within the scope of the request. The public authority explained how the qualified person had communicated his opinion to officials.

### **Findings of fact**

19. It is well-known that, for some six years starting with an initial project in 2000 and until December 2005, Lord Birt had served as the then Prime Minister's

personally chosen Strategy Adviser. He was unpaid. Lord Birt estimated for the Public Administration Select Committee in April 2006 that he had seen the Prime Minister “probably....once a fortnight”.

20. Various statements about Lord Birt's activities have been made, both by way of Parliamentary Answers and otherwise. In June 2005, the Cabinet Office website recorded that:

“Lord Birt, the Prime Minister's Strategy Adviser, provides confidential advice to the Prime Minister and other Cabinet Ministers on a range of issues. His work has included reports on London, Drugs, Health, Education, Transport and Crime. The project teams for these reports included departmental officials and external advisers. All but the Crime report was produced in conjunction with the Prime Minister's Strategy Unit. Each report was produced in two phases. Phase One set out the evidence and analysis of the issues. Phase Two set out policy advice and recommendations. We are publishing the evidence and analytical phases of each of the reports (in the case of the London report, the analytical and final reports have already been published). These reports were intended to provoke discussion and contribute to debate across Government. They are not statements of Government policy.”

21. There has been debate and some controversy about Lord Birt's role, contribution and influence. This mirrored commentary on the relationships between previous Prime Ministers and their close advisers. In this case, apart from the substance of his advice, discussion focused on the circumstances of Lord Birt's appointment, his background as former Director General of the BBC, his association with a firm of consultants, his status as neither civil servant, nor conventional special adviser and his subsequent activities in the private sector.
22. There have been Questions and Answers in Parliament about Lord Birt's role and contribution. The Public Administration Select Committee published a special Report in November 2005 expressing dissatisfaction at the non-attendance of Lord Birt as a witness before the Committee.<sup>1</sup>
23. However, in April 2006, after he had stood down, Lord Birt did give oral evidence to the Committee and answered a range of questions exploring his role and the nature of the strategic contribution.<sup>2</sup>
24. The work carried out by Lord Birt in his capacity as an adviser on Crime was fed into the government Strategy document “Criminal Justice: the way ahead” which was published in January 2001.

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<sup>1</sup><http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubadm/690/search=%22birt%20strategy%20prime%22>

<sup>2</sup><http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubadm/c756-iii/c75602.htm>

## Analysis

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25. A full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

## Exemptions

### Section 35(1)(a) – (formulation and development of government policy)

26. The public authority maintains that the exemption in section 35(1)(a) applies to all of the withheld information in parts a) to c) of the request. This includes background papers produced in response to the parliamentary questions; minutes of the meeting between the Attorney General and Solicitor General, and Lord Birt; and letters and other papers connected to the meeting. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
27. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
28. Having reviewed the withheld information the Commissioner is satisfied that, with the exception of one piece of information, this relates to policy formulation and development. Whilst the information is not itself government policy it does 'relate' to the formulation and development of government policy as it was created in the context of informing government policies on reducing crime culminating in the publication of the white paper, "Criminal Justice: the way ahead". Moreover, the Commissioner considers that section 35(1)(a) can safely be given a broad interpretation given that the exemption only requires that information 'relates to' policy formulation or development.
29. The one piece of information which the Commissioner has decided is not exempt under section 35(1)(a) falls within part a) of the request. This provides a background to the parliamentary answer referred to in the complainant's request. The information is more presentational in nature. It does not discuss or refer to the work undertaken by Lord Birt but instead discusses how the parliamentary answer should be drafted. The public authority has sought to rely on the section 36 exemption in the alternative and the Commissioner will return to this point when considering the application of that exemption.

### Public interest test

30. Section 35(1)(a) is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act. This provides that information to which an exemption applies may only be withheld where, in all the circumstances

of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

31. The complainant has argued that the public interest in disclosure of the information is twofold insofar as it would lead to greater transparency and accountability into the work undertaken by Lord Birt in his capacity as an adviser to Tony Blair, and would also help to shed light on how decisions are reached in an important policy area such as crime. The complainant has suggested that this would in turn encourage public participation in debates on this issue.
32. The Commissioner agrees with the arguments put forward by the complainant and would add that having reviewed the withheld information he believes that disclosure would be likely to lead to greater transparency in crime policy and also wider issues surrounding the criminal justice system.
33. The Commissioner has also taken into account the effect the timing of the request would have on the public interest test. In general the Commissioner believes that the public interest in protecting information relating to policy formulation and development is likely to diminish over time. In this case the Commissioner considers that the publication of "Criminal Justice: the way ahead" in January 2001 marked the end of the policy process. The complainant did not make his request until May 2005 and therefore the public interest in maintaining the exemption is to some extent reduced.

### **Public interest arguments in favour of maintaining the exemption**

34. The public authority has advanced the following reasons why the public interest in maintaining the exemption outweighs the public interest in disclosure:
35. In respect of the information in part a) the public authority has argued that the public interest is served by Ministers being able to properly answer parliamentary questions and provide sound information to Parliament. In order to do this it argues that Ministers must have free and frank advice about the context and background of the question.
36. In relation to the minutes of the meeting with Lord Birt and the related papers (parts b) and c) of the request) the public authority has said that there is a strong public interest in Ministers being able to receive free and frank advice to inform their policy decisions. They need to be able to discuss and debate the pros and cons of particular policy options in private before their final decisions come under public scrutiny.
37. The public authority has also added that there is a public interest in allowing government a clear space immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of public debate. Disclosure of such material would undermine the policy making process in the future.



38. Finally, the public authority suggested that where experts have been consulted and provided their views on a private basis, if that information is disclosed they would be reluctant to be so frank and candid in providing their views. The Commissioner would also highlight the potential danger that disclosure would discourage Ministers from commissioning work of the kind undertaken by Lord Birt in the future or would discourage external experts from accepting such commissions in future.
39. The Commissioner has also taken into account the importance of protecting the role of an external adviser such as Lord Birt who is outside the established Whitehall culture. Clearly Tony Blair as Prime Minister felt it was useful to have an adviser of this kind who could report to his private office outside of the normal channels.

### **Balance of the public interest arguments**

#### Information in respect of which the public interest favours maintaining the exemption

40. The Commissioner has first considered the information falling within part b) and c) of the request as he considers that a separate balancing exercise is required for this information compared to the information within part a) of the request.
41. The Commissioner has given a certain amount of weight to the arguments in favour of shedding greater light on the role of Lord Birt as an adviser to the Prime Minister and government and acknowledges that at the time of the request there was little information in the public domain about the nature of the work undertaken by Lord Birt. The Commissioner also believes that the fact that Lord Birt was not known to be an expert on crime or to have had any significant prior experience in this field is also a factor in favour of greater transparency.
42. The Commissioner has also given some weight to the timing of the request and in normal circumstances the public interest in favour of maintaining an exemption would be significantly reduced where the information is almost five years old and government policy on the subject had been completed four years previously. However, whilst the policy process had been completed the information was still 'live' in the sense that both the Prime Minister and Lord Birt were still in their posts at the time of the request and the issues being discussed were still topical.
43. The Commissioner accepts that there is a public interest in allowing the Prime Minister and the government the opportunity to obtain imaginative and radical policy options; "to think the unthinkable".
44. The Commissioner has also considered the nature of the information itself and has given particular weight to the fact that the minutes of the meeting, the briefing pack provided by Lord Birt, and the associated papers include or comment upon a number of contentious and radical proposals and recommendations put forward by Lord Birt. This is a reflection of Lord Birt's brief to introduce radical "blue-sky thinking" to policy development. The information is written in an informal style, being both frank and candid and including more direct language than the

Commissioner would normally expect to find in information connected with more traditional policy processes.

45. Given the nature of the information in this case the Commissioner has attributed limited weight to the public authority's argument that disclosure of the information in this case would undermine the policy making process by reducing the frankness and candour of civil servants in future. This is the 'chilling effect' argument which has featured in several Tribunal cases concerning information relating to the formation and development of government policy. In general the Commissioner is sceptical of arguments that suggest that disclosure would lead to a wider impact on the frankness and candour of debate. However the Commissioner considers that in this case, given the nature of the information and in light of the fact that Lord Birt was not a traditional civil servant, this argument is relevant.
46. The Commissioner is also mindful of the fact that the work undertaken by Lord Birt does not appear to have had a significant impact on the government policy on crime but was instead just one element of a wider policy formulation and development process that led to the publication of the white paper. Had the work undertaken by Lord Birt had a more significant or disproportionate affect on government policy there may have been a greater public interest in that information being disclosed. As it is, the Commissioner has decided that the public interest in maintaining the exemption in section 35(1)(a) of the Act in respect of the information in parts b) – c) of the request outweighs the public interest in disclosure.

#### Information in respect of which the public interest favours disclosure

47. The Commissioner has already decided that one piece of information falling within the scope of part a) of the request is not covered by the section 35(1)(a) exemption. As regards the one remaining piece of information falling within this part of the request, the Commissioner has decided that the prospect of disclosure does not raise the concerns outlined above. This is because the information, whilst briefly referring to the meeting between the Attorney General and Lord Birt, does not discuss the work carried out by Lord Birt in any level of detail as to risk prejudicing the policy process.
48. The Commissioner has considered the public authority's argument that the public interest is served by Ministers being able to obtain free and frank advice in order to properly answer parliamentary questions. Whilst the Commissioner recognises the importance of this principle he does not agree with the suggestion that disclosure in this case would discourage officials from providing Ministers with proper advice in relation to parliamentary questions. The Commissioner is mindful of the comments made by the Information Tribunal when considering the affect of freedom of information on the robustness of officials. For example:

*"...In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that...[is]...the hallmark of our civil service." It went on to describe civil servants as "...highly educated and politically sophisticated public servants who well understand the*

*importance of their impartial role as counsellors to Ministers of conflicting convictions.”<sup>3</sup>*

49. The Commissioner would stress that this analysis is based on the particular information and in light of the fact that the information constitutes advice from traditional civil servants as opposed to the information in parts b) and c) of the request which relate to information from an external adviser.
50. Finally the Commissioner would also add that in this particular case the information is fairly innocuous and merely reflects, albeit in slightly more detail, the information that was revealed as a result of the parliamentary answer. On the other hand, the public interest in disclosure is not particularly strong as the information does not shed much light on the work carried out by Lord Birt or his wider role as an adviser to government. However, bearing in mind the presumption in favour of disclosure running through the Act, the Commissioner has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosure in respect of this one piece of information.

**Section 36(2)(b) – Free and frank provision of advice or free and frank exchange of view for the purposes of deliberation.**

51. Section 36(2)(b) of the Act provides that information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –
- (b) would, or would be likely to, inhibit
    - (i) the free and frank provision of advice, or
    - (ii) the free and frank exchange of views for the purposes of deliberation
52. However, section 36(1)(a) makes it clear that this exemption only applies to information which is not exempt by virtue of section 35. The Commissioner has decided that one piece of information falling within the scope of part a) of the request is exempt under section 35 but that the public interest favours disclosure (the information engages the exemption regardless of whether the balance of the public interest favours its maintenance). Therefore section 36 cannot apply. However the Commissioner will consider whether this exemption applies to the piece of information in part a) of the request which he decided did not relate to formulation or development of government policy and therefore was not exempt under section 35. The Commissioner has attached an annex to allow the public authority to identify what information in part a) of the request was considered under each exemption. The annex is being kept confidential so as not to risk revealing the content of the information in advance of any appeal by either party.

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<sup>3</sup> Department for Education and Skills v Information Commissioner and The Evening Standard [EA/2006/0006], para. 75.

53. In investigating whether the section 36 exemption is engaged the Commissioner will undertake the following:
- Ascertain who is the qualified person for the public authority
  - Establish that an opinion was given
  - Ascertain when the opinion was given
  - Consider whether the opinion was reasonable in substance and reasonably arrived at.
54. The public authority has confirmed that the qualified person, the Attorney General, gave his opinion on the application of the exemption on 6 July 2005. However the public authority had initially responded to the request on 13 June 2005 and had stated that section 36(2)(b)(i) and (ii) applied to the request but it needed further time to consider the public interest test. At this point the exemption should not have been applied as the exemption is only engaged once the qualified person has given his/her opinion. Nevertheless, by the time the public authority issued its substantive response on 11 July 2005 the qualified person's opinion had been obtained. The fact that the opinion was obtained outside of 20 working days does not necessarily undermine the public authority's application of the exemption although it does merit criticism.
55. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal considered the sense in which the reasonable person's opinion under s.36 is required to be reasonable. It concluded that:
- "...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at".<sup>4</sup>*
56. The Commissioner has first considered whether or not the qualified person's opinion was reasonable in substance and notes that the public authority has not explicitly said whether disclosure would OR would be likely to cause the prejudice outlined in section 36(2)(b)(i) and (ii). In light of this the Commissioner thinks it is appropriate to apply the lesser test, that is to say the exemption will apply if disclosure would be likely to cause the prejudice in section 36(2) of the Act. This approach has found support in the Information Tribunal when it stated:
- "We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."<sup>5</sup>*
57. The Information Tribunal has also considered the meaning of 'would be likely to prejudice' and found that for this to apply:
- "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."<sup>6</sup>*

<sup>4</sup> *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0013], para. 64.

<sup>5</sup> *McIntyre v Information Commissioner & the Ministry of Defence* [EA/2007/0068], para. 45.

<sup>6</sup> *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005], para. 15.

58. This in turn follows the judgement of Mr Justice Munby in the High Court in which the view was expressed that:

*“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”<sup>7</sup>*

59. The public authority has not offered any separate arguments in respect of the application of section 35 and section 36. The Commissioner considers that the only relevant argument advanced by the public authority that could apply to this particular piece of information is that disclosure would be likely to discourage officials from providing proper advice in relation to parliamentary questions. As he has made clear at paragraph 48 the Commissioner does not accept that disclosure of this particular information would have this effect. Therefore, even when the lesser test of “would be likely to prejudice” is applied the Commissioner is not satisfied that the likelihood of prejudice occurring is sufficient to engage the exemption. For this reason the Commissioner has concluded in respect of this piece of information that the qualified person’s opinion, viewed objectively, was not reasonable in substance and that the section 36(2)(b) exemption is not engaged.

### **The requested schedule**

60. The public authority has argued that it was not obliged to comply with the complainant’s request for a schedule of the documents falling within the scope of the request as no such schedule was held and under the Act it was not obliged to create one. The Commissioner accepts that the actual requested schedule did not exist at the time the request was received. However, the documents that would comprise the requested schedule, in terms of their titles and dates, are held and would simply require extracting from the body of other material in order to fulfil the request. As such, this specific information requested by the complainant in respect of the schedule was in fact held, even though it may not have existed in the form of a schedule.
61. Given the limited information that would need to be disclosed in order to fulfil the complainant’s request for a schedule, (a brief description of each document including the date of the document) the Commissioner is of the opinion that none of the concerns regarding the application of section 35 and section 36 apply.

### **Procedural Requirements**

62. The complainant’s request was sent to the public authority via email on 11 May 2005. The public authority responded to the request on 13 June 2005 and apologised to the complainant for failing to respond within 20 working days. Later, in correspondence with the Commissioner, the public authority appeared to suggest that it had in fact responded to the request within the statutory timescale.

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<sup>7</sup> R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

However, the request was acknowledged, and thus received, by the public authority on the same day as it was sent. Therefore by failing to issue a refusal notice until 13 June 2005 the public authority exceeded the twenty working day deadline which constitutes a breach of section 17(1) (refusal of a request).

## The Decision

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63. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld the information falling within the scope of parts b) and c) of the request under section 35(1)(a) of the request.
64. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 1(1)(b) of the Act by refusing to disclose the information in part a) of the request, incorrectly relying on sections 35(1)(a), 36(2)(b)(i) and 36(2)(b)(ii) of the Act.
  - The public authority breached section 1(1)(b) of the Act by failing to provide the complainant with a schedule of documents falling within the scope of the request.
  - The public authority breached section 10(1) of the request by failing to disclose the information in part a) of the request and the schedule within 20 working days.
  - The public authority breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days of receiving the request.

## Steps Required

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65. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the information falling within the scope of part a) of the request.
  - Provide the complainant with a schedule of the information falling within the scope of the request.
66. 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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67. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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68. 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).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 28th day of September 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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



## Legal Annex

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**Section 1(1)** provides that -

“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 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

**Section 10(1)** provides that –

“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.”

**Section 17(1)** provides that –

“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

**Section 35(1)** provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.