

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 8 October 2009**

**Public Authority:** Department for the Environment, Food and Rural Affairs  
**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### Summary

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The complainant requested from the Department for the Environment, Food and Rural Affairs (Defra) various pieces of information relating to the declarations of interests made under the Ministerial Code by Ministers within Defra. Defra supplied the complainant with some of the information it held in relation to the request but withheld the remainder under section 41 of the Act (information provided in confidence).

Following the Commissioner's intervention, Defra released some of the withheld information to the complainant. The Commissioner is satisfied that the remaining withheld information is exempt under section 41. The Commissioner also found that Defra failed to respond within the statutory time limit, thus breaching sections 10(1) and 17(1) of the Act (time for compliance with a request and refusal of a request).

### 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 28 June 2005 the complainant requested the following information from Defra:
  1. How many times have ministers in your department consulted the permanent secretary under section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public

duties and their private interests (financial or otherwise) since November 26 2004;

2. Which ministers in your department have consulted the permanent secretary in relation to section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since November 26 2004;
  3. On what dates have ministers in your department consulted the permanent secretary in relation to section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since November 26 2004;
  4. For what reasons did each minister consult the permanent secretary in relation to section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since November 26 2004;
  5. What action was taken in each case since November 26 2004 and in which was it necessary to consult the Prime Minister.
  6. Complete copies of the lists of interests provided by each minister to their Permanent Secretary on entering office in your department since November 26 2004 which might be thought to give rise to a conflict.
  7. Complete copies of the documents written by each minister on entering office in your department since November 26 2004 which records what action has been considered and taken, following their meeting with the Permanent Secretary.
  8. A schedule of documents which are relevant to this request...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... such a schedule would clarify what documents are being released and what is being withheld.
3. Defra responded to the complainant on 3 August 2005, in which it supplied a table containing information requested in relation to the relevant ministers: Margaret Beckett, Elliot Morley, Ben Bradshaw, Jim Knight and Lord Bach. Details were provided alongside each name under the following headings:
- How many times consultation took place between the minister and permanent secretary under Section 9 of the 2001 Ministerial Code for the period 26 November 2004 to 28 June 2005.
  - On what dates consultation took place
  - For what reason consultation took place
  - Details of declaration

- What action was taken in each case and in which was it necessary to consult the Prime Minister
4. Defra also sent the complainant a letter in which it made the following points (which are directly reproduced here):
5. **Information held**
- i. To the extent that the department is required by the FOI Act to provide disclosure in relation to the relevant period, the recorded information that it holds is set out in the attached table.
  - ii. There may have been informal consultations, for example, in the margins of meetings, which will not have been recorded: any information so disclosed would fall outside the scope of the FOI Act.
6. **Section 41 – Information provided in confidence**
- i. Some of the information requested is exempt from disclosure by virtue of section 41 of the FOI Act because it was provided to the department in confidence. Under section 41, information is exempt if (a) it was obtained by a public authority from any other person and (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
  - ii. Section 41 applies to some of the information provided to this department in respect of the interests of ministers. There is a strong public interest in protecting the confidentiality of such communications. First, the information is inherently private. It may include information which is not in the public domain, such as mortgage details. Second, it is disclosed as a result of the obligations imposed by the Ministerial Code. Third, that Code expressly states that the information is provided in “complete confidence”.
  - iii. We recognise that a duty of confidence can be overridden by a higher public interest, and we accept that there is a public interest in ensuring that there is an appropriate regime for eliminating any risk of a conflict between a minister’s private interests and his or her official duties. However, in the circumstances of this case, we consider that the public interest does not demand any greater disclosure than that set out in the attached table.
7. The complainant wrote to Defra on 7 March 2006 to request an internal review of its decision. In his letter he also made the following points:
- i. Disclosure of all the requested information is clearly in the public interest...public confidence can only be ensured if the public can see for themselves that the system for avoiding these conflicts is being applied.
  - ii. The Parliamentary Ombudsman decided that the withheld information should be released in response to a previous request made by this complainant for the same information under the Code of Practice on

Access to Government Information. Paragraph 41 of the Ombudsman's decision stated "That public interest in such matters has intensified in recent years in a climate where greater openness about conflicts between the public and private interests of ministers is increasingly seen as a desirable end in itself. This is not only for general reasons of good governance but to avoid any suspicion of improper ministerial influence".

- iii. Defra's response of August 3 is illogical. I fail to see why some of the declarations are disclosed, but not others... this merely gives credence to the view that ministers have disclosed interests which they believe are not controversial, while keeping secret those which they believe are or might be.
  - iv. I believe the public interest in disclosing this information outweighs that of protecting the confidentiality of communications between ministers and their officials.....in a democratic system, politicians are required to make public information which they may see as private. Members of Parliament are for instance required to declare their financial interests. Those interests may be private, but the public expects it to be in the public domain, not least to judge whether such interests are influencing the public behaviour of those MPs.
  - v. I believe that the government needs only to make public a level of information which would allow the public to see what has been going on, but can keep private other sensitive details. For instance, the minister could declare that he or she has a bank account, but not with a particular bank or how much is in the account.
8. Defra responded to the complainant on 2 May 2006. It refused to conduct an internal review into its handling of the complainant's request and advised him of his right to appeal to the Commissioner. It stated the following reasons for this decision:
- i. It had been eight months from the time the decision was communicated until the request for a review. Defra was of the view that in this case there had been undue delay in seeking a review of that decision.
  - ii. Defra had reasonably concluded that this case was closed, it would not now be appropriate to re-open it. Defra noted that in respect of making a complaint to the Information Commissioner, such a complaint ought to be brought before him as soon as possible and in any event within two months of the date of the public authority's decision.

## The Investigation

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### Scope of the case

9. On 15 May 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:
  - i. Defra's decision not to conduct an internal review.
  - ii. Defra's refusal to release all the information requested.
10. Section 50(2)(b) of the Act allows the Commissioner to reject a complaint to him if it appears that there has been undue delay in making the application. The Commissioner considers that normally a delay of more than two months between the outcome of the internal review and the submission of a complaint to him amounts to "undue delay". However, although Defra refused to carry out an internal review, less than two months elapsed between its decision as such and the complainant referring the matter to the Commissioner. The Commissioner therefore accepted the complaint.

### Chronology

11. The Commissioner did not commence his investigation into this complaint for over twelve months. However, during that period he was actively investigating complaints about similar requests which the government had made to other government departments which gave rise to the same issues. The Commissioner contacted Defra on 16 September 2007 to advise it of the complaint. The Commissioner requested full copies of the withheld information, and asked a number of questions regarding Defra's reliance on the exemption under section 41 of the Act.
12. The Commissioner also advised Defra of his view that the authority did not appear to have complied with the time limit for responding to a request. Section 10(1) provides that an authority must respond to a request promptly, and in any event within twenty working days of the day after the request is received.
13. In relation to the internal review the Commissioner asked Defra whether it had sought to establish whether there was any reason why the complainant did not request a review sooner.
14. Defra responded to the Commissioner on 25 October 2007. In relation to the internal review, Defra advised that the complainant contacted it on 7 March to advise that he had not received a response to his request of 28 June 2005. Defra therefore reissued its response of 3 August 2005, and the complainant requested a review the same day. Defra also provided the Commissioner with detailed arguments in relation to the withheld information.

## 15. Section 41 exemption

- i. Defra confirmed to the Commissioner that the information was provided to it by the respective ministers. In addition, the information was disclosed by the ministers as a result of the obligations imposed by the Ministerial Code which expressly states that the information is provided in confidence.
  - ii. Defra confirmed to the Commissioner that the withheld information was not already in the public domain, for example in the Register of Members' interests. Defra drew the Commissioner's attention to the confidential and personal nature of the withheld information, and the fact that it was supplied under the expectation of confidence set out in the Ministerial Code. Given the confidential and personal nature of declarations made under the Ministerial Code Defra held the view that it would be inappropriate to disclose those declarations to any third party. In accordance with the Ministerial Code, where it was proposed to release any detail from a minister's declaration the minister concerned was consulted to ensure that they were content with the release. To release any additional information would be contrary to the Ministerial Code. Defra concluded that disclosure of the withheld information would give rise to an actionable breach of confidence.
  - iii. Defra recognised that a duty of confidence and a likely prejudice to commercial interest can be overridden by a higher public interest, and accepted that there is a public interest in ensuring that there is an appropriate regime for eliminating any risk of a conflict arising between a minister's private interests and his or her official duties. However, Defra expressed the view that there is also a strong public interest in protecting the confidentiality of the information provided by ministers. Defra concluded that in the circumstances of this case, the public interest did not demand any greater disclosure than was provided to the complainant, where the only information that was withheld was personal information relating to the ministers, their spouses and their families.
  - iv. Defra advised the Commissioner of its concern that disclosing the personal details provided in confidence could lead ministers to disclose less information to their permanent secretaries and as a result reduce the effectiveness of and therefore public confidence in the regime for protecting conflicts of interest.
16. Defra did not provide the Commissioner with a copy of the withheld information. Rather, it advised the Commissioner of its concerns that the information, which is considered highly sensitive, should not be copied widely. Defra suggested that the Commissioner inspect the information at Defra's offices, subject to the prior consultation and agreement of the ministers concerned.
17. The Commissioner wrote to Defra on 14 November 2007, clarifying that inspection of the withheld information was not conditional on the agreement of the ministers. The Commissioner referred Defra to section 51 of the Act, which

provides that the Commissioner may serve a notice requiring an authority to provide information required as part of an investigation under section 50.

18. On 21 December 2007 the Commissioner visited Defra's offices to inspect the withheld information.
19. This case was put on hold because the Commissioner was considering a similar case in relation to another public authority, the Department for Culture, Media and Sports (DCMS, see Decision Notice FS50111328, issued 23 June 2008). When that case had been resolved, the Commissioner recommenced his investigation into the case involving Defra. The Commissioner wrote to Defra on 18 September 2008 to advise that in the DCMS case, more information had been disclosed than had been disclosed by Defra. Following the principles set out in the DCMS case, the Commissioner was of the view that Defra could release further information to the complainant. The Commissioner provided Defra with a schedule of the information he considered ought to be released.
20. On 18 December 2008 Defra released to the complainant all of the information recommended by the Commissioner. Therefore the disclosure aspect of the Commissioner's decision in this case relates solely to the remaining withheld information, although the procedural aspects relate to the handling of the request as a whole.

### Findings of fact

21. The Commissioner has analysed the Ministerial Code and considered the following provisions (listed under 'Ministers' Private Interests') relevant to his investigation:

"5.3 On appointment to each new office, ministers are advised to provide their permanent secretary with a full list in writing of all interests which might be thought to give rise to a conflict. The list should cover not only the minister's personal interests but those of a spouse or partner, of children who are minors, of trusts of which the minister or a spouse or partner is a trustee or beneficiary, or of closely associated persons. The list should cover all kinds of interest including financial instruments and partnerships, financial interests such as unincorporated businesses and real estate, as well as relevant non-financial private interests such as links with outside organisations, and previous relevant employment."

"5.4 On receipt of the written list the permanent secretary will arrange a meeting with the minister to discuss it and to consider what advice is necessary and from what source, and what further written information is needed. The permanent secretary will stand ready either to give a considered view on the issues which the minister raises, drawing on precedent and the help of the Cabinet Office as necessary, or to arrange for expert or professional advice also to be made available to the minister from inside or outside government. At the end of the exercise ministers are advised to record in writing what action has been considered and taken, and to provide the permanent secretary with a copy of that record."



“5.6 The personal information which Ministers disclose to those who advise them is treated in confidence. Should the department receive a request for this information it will take account of a range of factors including the confidentiality of the information. The relevant minister will also be consulted and his or her views taken into account before a decision would be made on disclosure. If an allegation is made that a particular minister has a conflict of interest it must be for that minister to explain their position and justify what has been done. In doing so, they may wish to make public the list of their private interests (required under paragraph 5.3) and the steps taken to avoid an actual or perceived conflict. It is open to them if they wish to confirm (if it is the case) that they have consulted their permanent secretary in accordance with the Code. The minister should however consult the permanent secretary about the content of any such statement before making it to ensure that there is agreement about the content, and any disagreement should be referred to the Prime Minister.”

## Analysis

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### Procedural matters

#### Section 10 – time for compliance with request

22. Section 10(1) of the Act states that a public authority must comply with a request made under the Act not later than the twentieth working day following the date of receipt.
23. The Commissioner notes that the complainant made his request on 28 June 2005. However, Defra did not provide the complainant with the information it did not withhold until 3 August 2005. The Commissioner notes the complainant's claim that he did not receive this response, however the Commissioner has seen no evidence to suggest that it was not in fact sent. In any event, a response dated 3 August would have been outside the twenty day deadline, and this constitutes a breach of section 10.

#### Section 17 – refusal of request

24. Section 17(1) of the Act states that if a public authority is relying on any exemption, it must, within twenty working days following the date of receipt of the request:
  - i. State that fact,
  - ii. Specify the exemption(s) in question, and
  - iii. State why the exemption applies.
25. As Defra did not issue such a refusal notice to the complainant in respect of the information to which exemptions were applied until 3 August 2005, the Commissioner is satisfied that Defra also breached section 17 of the Act.



## Exemptions

### Section 41 – information provided in confidence

26. Information is exempt by virtue of section 41 if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under the Act) by the authority holding it would constitute a breach of confidence actionable by that or any other person.
27. In relation to the application of the section 41 exemption, the Commissioner must first consider whether or not the requested information was in fact obtained from another person. This is to satisfy the requirements of section 41(1)(a). In this case, the information was provided by Defra's own ministers to their own permanent secretary. However, regardless of whether it has any bearing on the conduct of the ministers in their official capacity, the information itself relates to those ministers' private lives and, therefore, their private capacity. In drawing a distinction between information obtained about a minister's dealings or interests in their public capacity (which would generally fall within the scope of information obtained from within the department) and private capacity (which falls within the scope of information obtained from outside the department), the nature of this information is such that the Commissioner is satisfied that it constitutes information which was obtained by Defra from "another person".
28. Having established that the redacted information was in fact obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the Act), would constitute a breach of confidence 'actionable' by that or any other person.
29. The requirements for a claim for breach of confidence are set out in the case of *Coco v Clark*.<sup>1</sup> A claim for breach of confidence can be established where:
- (1) the information has the necessary 'quality of confidence',
  - (2) was imparted in circumstances giving rise to an obligation of confidence, and
  - (3) there has been (or would be) an unauthorised disclosure of the information.

All three elements must be present for a claim to be made out. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the Act requires a further consideration in any case, namely, whether or not there would be a defence to such a claim.

### Information provided to the Department from Ministers

30. Of the information withheld which constitutes declarations made to Defra by ministers, the Commissioner considers these to consist of either financial details, confidential information relating to third parties or declarations which are not

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<sup>1</sup> *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41

required to be made under the Ministerial Code. The Commissioner is satisfied that such information is not already in the public domain, and as such has the necessary quality of confidence.

31. As the Ministerial Code explicitly assures ministers that any information provided under it will be provided in confidence, the Commissioner believes that the circumstances under which the information was provided means that its release without the consent of the relevant minister would constitute an actionable breach of confidence. The Commissioner is also of the view that disclosure of the withheld information in this particular case would subject ministers to an unwarranted intrusion into their private lives. This would be of detriment to those ministers.
32. The Commissioner considers it important that ministers are encouraged, willing and able to provide as much information as possible about their private interests to their permanent secretary under the Code, even if it goes beyond the requirements of the Code. The Commissioner considers that this will assist in ensuring that the Ministerial Code is effectively applied in order to provide for departments to identify any possible conflicts of interest. This will then enable permanent secretaries to provide ministers with appropriate advice. The Commissioner is satisfied with the assurance of Defra that disclosure of such information would restrict the information declared by ministers which, in the absence of a statutory requirement to provide such details, would result in less accountability.
33. The Commissioner considers the nature of the information withheld from the complainant to differ to that disclosed, the latter of which the Commissioner considers to consist of summaries of the interests declared which:
  - fall within the scope of the Ministerial Code,
  - are presented in such a way as to ensure that confidence would not be breached by its disclosure, and
  - were disclosed with the consent of the relevant ministers.
34. In contrast, the Commissioner is satisfied that there is no remaining withheld information the content of which both fall within the requirements of the Ministerial Code and could be presented to the complainant in such a way as to ensure that confidence would not be breached by its disclosure.
35. The Commissioner notes that in response to part five of the complainant's request ('What action was taken in each case since November 26 2004 and in which was it necessary to consult the Prime Minister') Defra informed the complainant, alongside each submission of interests, "Noted. PM not consulted". In one case the permanent secretary did provide advice to a minister, namely Lord Bach, on the possibility of a conflict of interest in relation to the Agricultural Wages Board. Following the Commissioner's intervention, this information was disclosed to the complainant, and the Commissioner is therefore satisfied that Defra did comply with this part of the request.

## Public interest defence to breach of confidence

36. As the exemption under section 41 is absolute there is no public interest test to be applied under the Act. However, case law on the common law concept of confidence suggests that a duty of confidence can be overridden if there is an overriding public interest in the disclosure of the information. In this respect, the Commissioner took note of the decision in *Derry City Council v The Information Commissioner* [EA/2006/0014], in which the Information Tribunal interpreted a Court of Appeal decision (*London Regional Transport v The Mayor of London*, 2001).
37. The cases referred to above were considered in the context of commercial contractual confidentiality. Nevertheless, the Commissioner does consider the decisions to be of relevance to cases where an individual person has supplied information in confidence.
38. In the *London Regional Transport* case the judge at first instance said an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. In the subsequent Court of Appeal hearing, this view was not expressly overturned but left the question open. Its final decision was to allow the disclosure in that case.
39. In the *Derry* case, the Information Tribunal interpreted the Court of Appeal decision as meaning that:
- No exceptional case has to be made to override the duty of confidence that would otherwise exist.
  - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
40. In this case, the Commissioner therefore assessed whether this public interest override is relevant in respect of the information withheld from the complainant.
41. The Commissioner interprets the public interest test in deciding if a duty of confidence can be overridden to differ from the public interest test normally applied under the Act, in that the burden of proof is reversed:
- The public interest test for qualified exemptions (as set out in section 2(2)(b) of the Act) assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.
  - The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
42. In light of this interpretation, the Commissioner believes that it is important to fully appreciate the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. In particular, his view is that a duty of confidence should

not be overridden lightly, particularly in a case such as this, where a duty of confidence is owed to an individual.

43. In considering the wider public interest in preserving the principle of confidentiality, the Commissioner is of the view that the relationship of trust, protected by the duty of confidence, operates to serve the public interest. In this particular case, the Commissioner considers that the relationship of trust between a minister and their permanent secretary in respect of declarations made under the Ministerial Code serves the public interest as it encourages the minister to be as open as possible about their interests which results in transparency with their departments and allows the permanent secretary to provide the minister with appropriate advice on the basis of those declarations in order. This ensures that any possible conflicts of interests are both declared and acted upon.
44. The Commissioner has also considered the interests of the confider, particularly within the context of Article 8 of the European Convention on Human Rights which states that: "Everyone has a right to respect for his private and family life, his home and his correspondence." In light of this, the Commissioner considers the real consequence of disclosing private personal information is an infringement of the confider's privacy and there is a public interest in protecting the privacy of individuals.
45. Having identified the public interest in withholding this information, the Commissioner proceeded to reach a view as to whether Defra would have a public interest defence were it to disclose the withheld information. The Commissioner concluded that it could not. He based this on his assessment of the information itself, upon which he formed the following opinions, and related these to the factors set out above which support the withholding of the information:
  - i. The quality of confidence of the withheld information is of a higher degree to that which was disclosed to the complainant.
  - ii. The nature of the declarations are not of sufficient significance to merit disclosure to the public such as a conflict(s) of interest which, even following departmental advice, is likely to affect a minister's legitimate conduct in their role. Nor has the Commissioner noticed any declaration made or action taken which could be considered improper.
  - iii. In respect of accountability and transparency, the public interest in disclosing the interests declared is, to a large extent, served by the information which had been disclosed to the complainant. This is because the nature of the information being withheld (especially when compared to that which has been released) is such that accountability and transparency would not be furthered by its disclosure to any notable extent.
46. The Commissioner also draws support on the issue of the application of section 41 to ministerial interests from the Information Tribunal's decision in the case of *Ennis McBride v Information Commissioner and Ministry of Justice (Formerly the Privy Council Office)* [EA/2007/0105]. In this case the Tribunal found that the

exemption under section 41 could be applied to information relating to ministerial interests, especially with regard to private financial information.

## The Decision

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47. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:
- i. Application of section 41 (Information provided in confidence).
48. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Section 10 (time for compliance with request) in relation to the time taken to supply information to the complainant.
  - ii. Section 17 (refusal of request) in relation to the time taken to issue a refusal notice to the complainant.

## Steps Required

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49. The Commissioner requires no steps to be taken.

## Right of Appeal

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50. 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 8th day of October 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex: Relevant statutory obligations

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1. **Section 1(1)** provides that:

(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.

2. **Section 10** provides that:

(1) ... 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. **Section 17(1)** provides that -

A public authority which ... 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.

4. **Section 41(1)** provides that –  
Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.