

Freedom of Information Act 2000 (Section 50)

Decision Notice

23 June 2009

Public Authority: Crown Prosecution Service
Address: Headquarters
50 Ludgate Hill
London
EC4M 7EX

Summary

The complainant made a three part request; for information about cases pre August 2004 where the defence of 'reasonable chastisement' was used against a charge of assault by a parent or guardian on a child, for similar cases post August 2004 and for details of what the complainant perceived to be a change in the policy of the public authority towards the reasonable chastisement defence. The Commissioner finds that the public authority failed to comply with the first part of the request in that it did not accurately confirm what information it held at the time of the refusal, but has since remedied this and disclosed all information it holds falling within the scope of the request. In regard to the second part of the request, the Commissioner finds that the public authority incorrectly cited section 22(1) (information intended for future publication) and requires it to disclose the information falling within the scope of this part of the request. In connection with the third part of the request, the Commissioner finds that the exemption provided by section 35(1)(a) is engaged in relation to all but one document which was already in the public domain at the time of the request, but that the public interest in maintenance of this exemption does not outweigh the public interest in disclosure. The public authority is also required to disclose the information falling within the scope of this part of the request. The Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(a), 1(1)(b), 10(1), 17(1)(b), 17(1)(c) and 17(3)(b) through its handling of the request.

The Commissioner's Role

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

2. On 14 July 2005, the complainant made the following information request:

*"i) Mr Horne attached a schedule to his letter of 13 August 2004 listing 11 **[reasonable chastisement]** cases. Please could you provide details of these cases.*

ii) Details of any cases in which the defence of reasonable chastisement has been used since August 2004.

iii) The basis on which the CPS changed its position in relation to limiting the defence of reasonable chastisement to charges of common assault between 2000 and 2004. (In 2000, the CPS response to Protecting Children, Supporting Parents, stated that it would be 'wrong' and 'unnecessary' to so limit the defence, while in the summer of 2004, it advised government ministers that it was 'comfortable' with such a change in the law.) Please would you confirm the level within the CPS at which this policy decision was made and supply any correspondence and notes of meetings at which the issues were discussed."

3. The public authority responded to this on 11 August 2005. The response to each part of the request was as follows:

i) Refused under sections 40(3) (personal information) (as covered below at paragraph 46, the correct subsection was 40(2)) and 44(1)(a) (statutory prohibition). These exemptions were cited as the information requested included personal data relating to third parties and as it was believed that the Human Rights Act 1998 provided a statutory bar to disclosure.

ii) Refused under section 22(1) (information intended for future publication). The public authority stated that it had set up an "ongoing monitoring system to capture cases in which the reasonable chastisement defence has been, and is being, used since August 2004" and that the results of this would be sent to another public authority for publication. It did not specify when this information would be published, or by whom. Neither did this response address why the public interest favoured the maintenance of this exemption.

iii) Refused under section 35 (formulation of government policy). This exemption was cited as it was believed that internal policy making discussions should be protected. The public interest was not addressed.

4. The complainant responded on 17 August 2005 and requested that the public authority carry out an internal review of its handling of his request. The public authority responded with the outcome to its internal review on 26 October 2005. In relation to each part of the request, the outcome of the review was as follows:

i) In his request for internal review, the complainant had specified that he did not wish to receive any information constituting personal data and the public authority should consider if the information withheld under section 40(2) could be

anonymised. The public authority agreed to consider this and responded that only 4 of the 11 files referred to in the request could be located. The complainant was asked to respond clarifying what details of these cases he wished to receive.

ii) The refusal under section 22(1) was upheld. It was clarified that the information was expected to be published by the Department for Education and Schools (the "DfES"). The public authority referred to a review of reasonable chastisement cases that was to be carried out by the DfES but provided no more detail about the specific information that was intended for future publication. The public authority was unable to provide a date for the publication and the complainant was advised to contact the DfES for further information about this.

iii) The refusal under section 35 was upheld.

5. As noted above, the complainant was asked to respond clarifying what details about the cases identified in part i of his request he wished to receive. The complainant did so on 16 March 2006 and specified the following:

- The nature and context of the assault
- Its duration
- Its physical and mental effects
- The sex, age and state of health of the child
- The relationship between the defendant and the child
- What the defendant was charged with
- The outcome, including the sentence where applicable, and the comments of the judge.

6. In this letter, the complainant also questioned the citing of section 22(1) in response to the second part of his request as he had contacted the DfES in connection with this, as advised by the public authority, and had been advised by the DfES that it had no plans to publish any information relevant to the second part of his request.

7. The public authority responded to this on 27 April 2006. This response stated that there was nothing further to provide to the complainant.

8. In response to the complainant's comments concerning the second part of his request, the public authority maintained that the DfES would be the appropriate source for this information and stated "*...we are unable to provide you with any guarantees as to whether this information will be published or who will be publishing it.*"

9. The complainant contacted the public authority again on 7 June 2006 and stated that his letter of 27 April 2006 had not been intended to make a further information request, rather that this was the more detailed version of part i of his request of 14 July 2005 that he had been asked to provide in the internal review response of 26 October 2005.

10. The response from the public authority stated that, of the 11 cases referred to in part i of his request, information had been retained in relation to 3 of these cases. The information requested by the complainant for these 3 cases was disclosed.

The public authority also commented further on part ii of the request, stating that the information requested was not held in a 'recordable' form.

The Investigation

Scope of the case

11. The complainant contacted the Commissioner initially on 16 May 2006 and specified that he was dissatisfied with the response to each of the three parts of his request.
12. In connection with parts i and iii of the request, the stance of the public authority has altered during its correspondence with the complainant and also since the involvement of the Commissioner. The public authority has maintained that section 22(1) was cited correctly in response to part ii of the request. This notice covers both the initial handling of the request by the public authority and its current stance in relation to each part of the request, including whether all information retained that falls within the scope of part i of the request has been disclosed.
13. The public authority has repeatedly stated that the complainant has been provided with information within the scope of the request in question here at other times during his long running correspondence with the public authority. The complainant has stated that he does not consider any aspect of his requests to have been resolved through his wider correspondence with the public authority and the public authority has not clearly described or evidenced the disclosures it states have taken place.
14. In reaching a decision in this case, the Commissioner has taken into account only the specific request that was the source of this complaint and the correspondence that stemmed immediately from this. The wider correspondence between the public authority and the complainant and any disclosure of information that may or may not have taken place through this correspondence has not been taken into account.

Chronology

15. The Commissioner contacted the public authority initially on 14 August 2007. In relation to each part of the request, the public authority was asked to respond to the following:

i) Does the CPS hold information that falls within the scope of this part of the request according to the wording provided by the complainant in his letter of 16 March 2006?

Has this information been disclosed to the complainant and in relation to any information that has been withheld, under what provision of the Act has this information been withheld?

Does the CPS maintain that the initial refusal under sections 40(2) and 44(1)(a) was correct and, if yes, why are these exemptions considered engaged?

The complainant requested information in relation to 11 cases. The CPS has now indicated that information relating to all but 3 of these cases has been destroyed. Was this information destroyed in line with the CPS retention policy?

ii) Does the CPS hold information that falls within the scope of this part of the request?

Does the CPS maintain that the initial refusal under section 22(1) was correct?

If yes, when is the information to be published, by whom and why does the public interest favour the maintenance of this exemption?

iii) Does the CPS hold information that falls within the scope of this part of the request?

If yes, and assuming the CPS maintains that this information is exempt under section 35(1)(a), why is the information requested here considered exempt under section 35(1)(a) and why is the public interest considered to favour the maintenance of this exemption?

16. The public authority responded to this on 13 September 2007. In respect to part i of the request, the public authority stated that the complainant was informed at the time of his initial request that some information falling within the scope of this part of the request was held. It further stated that the complainant was informed that the information requested in his refined request of 16 March 2006 could not be disclosed as 'a number' of the files had been destroyed. The public authority maintained that its initial refusal under sections 40(2) and 44(1)(a) was correct.
17. In relation to the second part of the request, the public authority stated that it did not hold the information requested at the time of the request, rather this was requested by the DfES at a later stage. The public authority also stated that the situation regarding the DfES changed and, as a result, information was not passed from the DfES to the public authority. The public authority further stated that it believed that section 22(1) had been cited correctly and also that it did not believe it was necessary to respond clarifying when the publication would take place, by whom and where the balance of the public interest lay.
18. In relation to the third part of the request, the public authority referred the Commissioner to the internal review outcome, stating that this made it clear that information falling within the scope of the request was not held and that section 35(1)(a) was cited incorrectly. The public authority confirmed that its position remained that section 35(1)(a) had been cited incorrectly as it held no information falling within the scope of this part of the request.
19. The Commissioner noted the following inconsistencies and contradictions in the response of the public authority:

i) The public authority stated that the complainant had been informed in the refusal notice that *some* information falling within the scope of his request was held. In fact, the refusal notice had not referred to any information having been destroyed and simply cited sections 40(2) and 44(1)(a). The refusal notice implied that information in relation to all 11 cases was held at that time.

The public authority stated that the complainant had been informed in response to his refined request of 16 March 2006 that the information could not be disclosed as a 'number' of files had been destroyed. However, whilst the public authority did state that all but 3 files had been destroyed, the information requested was disclosed in respect to those 3 files. Also, the public authority maintained that sections 40(2) and 44(1)(a) had been cited correctly when the disclosure of information to the complainant would suggest that it had altered its stance in this respect.

ii) The public authority stated both that it did not hold the information requested and that it considered that section 22(1) had been cited correctly. It also declined to respond to the question of who was to publish the information in question and when and why it considered that the public interest favoured the maintenance of the exemption.

iii) The public authority stated that the internal review response had made it clear that no information falling within the scope of this part of the request was held and that section 35(1)(a) had been cited in error. It did not; the internal review response in fact referred to information that was held by the public authority and stated that section 35(1)(a) had been cited correctly.

20. The Commissioner contacted the public authority again on 18 September 2007, stating the following.

i) Confirm whether the information disclosed to the complainant in response to his letter of 7 June 2006 constituted all information held by the public authority at that time that fell within the scope of the request. For those files that had been destroyed, confirm whether this destruction had been carried out in accordance with the retention policy of the public authority.

ii) The public authority was informed that if it did not hold information falling within the scope of this part of the request at the time that the request was made, the correct response would have been to confirm this, rather than citing section 22(1). The Commissioner also noted that the refusal notice referred to an *"ongoing monitoring system to capture cases in which the reasonable chastisement defence has been, and is being, used since August 2004"* that was to be set up. It would appear likely that, if this system was established, the information held for the purposes of this system would fall within the scope of this part of the request. The public authority was asked to respond to the following:

- Confirm either whether information falling within the scope of this part of the request was not held at the time of the request, or whether it was held but was considered to be exempt by virtue of section 22(1). The public authority

was also advised that, if it maintained that section 22(1) did apply, it would be necessary to respond stating by whom and when the information was to be published and why the public interest favoured the maintenance of the exemption.

- Confirm whether the *“ongoing monitoring system to capture cases in which the reasonable chastisement defence has been, and is being, used since August 2004”* referred to in the refusal notice of 11 August 2005 was set up.
21. The public authority responded to this on 26 October 2007, confirming firstly that the response to the applicant's correspondence of 7 June 2006 did state that information about 3 cases within the scope of the first part of the complainant's request had been retained. A copy of the criminal case retention schedule was also provided.
 22. Secondly, the public authority confirmed that it did hold information falling within the scope of part ii of the request at the time of the request, in the form of 'raw data' that was provided to the DfES. The intention of the DfES was to publish a report into the issue of reasonable chastisement.
 23. The Commissioner contacted the public authority on 29 October 2007 asking again that it respond to the question of whether the information provided in response to the complainant's correspondence of 7 June 2006 constituted all information held at that time relevant to the first part of the request. The public authority responded to this on 13 November 2007 and confirmed that the information about 3 of the 11 cases referred to in the original request that was disclosed to the complainant did constitute all the relevant information held at that time.
 24. The Commissioner contacted the public authority further on 15 November 2007. The public authority was advised that it did not appear that section 22(1) had been cited correctly. The public authority was advised that it was unlikely that the Commissioner would be satisfied that the public authority was clear what information was to be published and when this publication was to take place. Neither did it appear that there was ever an intention to publish the actual information requested by the complainant; rather, the DfES intended to publish a report on the issue of reasonable chastisement incorporating information supplied to it by the public authority that may have fallen within the scope of the complainant's request. The complainant did not request a copy of the DfES report; his request was for the details of cases in which the reasonable chastisement defence had been used post August 2004.
 25. The public authority was also advised that it appeared questionable whether appropriate steps had been taken to verify what information was held that fell within the scope of the third part of the request. It was noted that the response of the public authority dated 13 September 2007 had erroneously suggested that the internal review response stated that no information was held that fell within the scope of this part of the complainant's request and that there appeared to be some uncertainty about what information was held that fell within the scope of this part of the request.
 26. In connection with the second part of the request, it was suggested to the public

authority that it should disclose to the complainant the information held falling within the scope of this part of the request given that it appeared clear that section 22(1) had been applied incorrectly. In connection with the third part of the request, the public authority was advised to look afresh at this. This process should involve establishing definitively what information was held that fell within the scope of the request.

27. The public authority responded to this on 3 December 2007. The public authority stated firstly that it maintained that it had cited section 22(1) correctly in connection with the second part of the request. The public authority agreed to consider the third part of the request afresh. The public authority later copied to this office its response of 4 January 2008 to the complainant. This response stated that it had established that it did hold information falling within the scope of the request, but that it considered the majority of this information to be exempt by virtue of section 35(1)(a).
28. In connection with the first part of the request, whilst the complainant was prepared to accept that the main case files held by the public authority relating to all but 3 of the cases identified in his initial request was no longer retained, he suggested that information falling within the scope of this part of the request may be held elsewhere. The complainant specified correspondence that the public authority has entered into with the DfES and the Legal Secretariat to the Law Officers (the "LSLO").
29. The Commissioner contacted the public authority on 4 December 2007 and raised the issue of whether information falling within the scope of the first part of the request in the form of correspondence with the DfES and the LSLO had been retained. The public authority responded to this on 4 January 2008, stating that it had located further information relevant to the first part of the request in the form of an 'overview' of the 9 reasonable chastisement cases. This was disclosed to the complainant.
30. The Commissioner contacted the public authority again on 14 January 2008 and requested that the public authority supply the information withheld from the complainant under section 35(1)(a). The public authority responded to this on 13 February 2008, providing copies of the information it stated was that which it held that fell within the scope of the third part of the request.
31. The Commissioner contacted the public authority again on 13 March 2008 in order to verify that it had undertaken appropriate searches for information falling within the scope of the first part of the request. The public authority was asked to specify all areas where information falling within the scope of the first part of the request could be held and to confirm that these areas had been searched for relevant information.
32. The public authority responded to this on 27 March 2008. The public authority stated firstly that initial searches were conducted within the Policy Directorate at its headquarters. This produced the list of 11 cases disclosed to the complainant and referred to above. The public authority went on to describe the steps that it had undertaken to ensure that all information of relevance to the request had

been located, stating that searches had been conducted of the central policy unit and each regional office that had handled cases of relevance. The public authority listed the following as areas that had been searched for information of relevance:

CPS Avon & Somerset
CPS Greater Manchester
CPS Humberside
CPS Kent
CPS Merseyside
CPS Surrey
CPS Sussex
CPS Thames Valley
CPS West Mercia

33. The Commissioner responded to this on 9 April 2008. In this letter it was noted that the previous response from the public authority appeared to cover only those steps that were taken to locate relevant information at the time of receipt of the request. The public authority was asked to clarify if further searches had been carried out following the Commissioner's letter of 4 December 2007.
34. The public authority responded on 30 May 2008. In this response the public authority covered firstly the searches that had been carried out to locate information falling within the scope of the first part of the complainant's request, confirming that no further searches had been carried out following the letter of 4 December 2007. This was because the public authority believed that it had located all relevant information previously and that further searches at that stage were not necessary. Whilst the public authority had located *'detail of the remaining cases'* as it had stated in the letter of 4 January 2008, it had not conducted any further searches for the cases themselves as these had been disposed of in line with its retention policy. The public authority reiterated that its stance was that it had located all information held that fell within the scope of the first part of the complainant's request.
35. An exchange of correspondence between the Commissioner and the complainant followed in which the complainant confirmed that the scope of the third part of the request extended to discussions between the public authority and central government departments. Following this clarification from the complainant and in order to firmly establish what information was to be regarded as falling within the scope of the third part of the complainant's request, the Commissioner reviewed the information supplied to his office by the public authority. This included numerous duplicates, which it was necessary to exclude from the remainder of the information.
36. Having completed this review and established what information appeared to fall within the scope of the request, the Commissioner sent a copy of this information to the public authority on 27 February 2009. The public authority was asked to respond confirming it if agreed that the information identified by the Commissioner was that held by it that fell within the scope of the request. The public authority responded to this by letter dated 11 March 2009 and confirmed

that the information identified by the Commissioner was that held by it that fell within the scope of the third part of the complainant's request. The section 35(1)(a) analysis below relates to the information sent by the Commissioner to the public authority on 27 February 2009.

Analysis

Procedural matters

Section 1

37. The response to part i of the request cited sections 40(2) and 44(1)(a) and, in so doing, suggested that information falling within the scope of this part of the request was held. At the internal review stage, the public authority stated that information relating to only 4 of the 11 cases referred to in the request had been retained. In failing to confirm what information was held that fell within the scope of the request at the time of the initial refusal, the public authority failed to comply with the requirement of section 1(1)(a).
38. The position of the public authority is now that it holds the case files for only 3 of the 11 cases referred to in the complainant's information request. It also states that the information requested by the complainant relating to these three cases has been disclosed to him. The public authority has also disclosed to the complainant additional information relevant to the first part of the request in the form of an 'overview' of 9 of the cases falling within the scope of part i of the request.
39. The Commissioner has considered whether the public authority has now disclosed to the complainant all information held that falls within the scope of the first part of the complainant's request. In connection specifically with criminal case files held by the public authority that fall within the scope of part i of the request, the Commissioner notes that the retention policy provided by the public authority shows that the majority of these files are retained for a maximum of 3 years.
40. However, this retention policy states that 'Long Term Interest case files' are to be sent to the 'Records Management Unit' within 3 months of the conclusion of the case. Whilst it is not specified how long such files are retained, the Commissioner assumes that this is longer than the 3 year maximum for other types of files. Also, files connected to cases which resulted in a prison sentence should be retained for the length of the sentence. The Commissioner notes that the request was for cases that took place prior to August 2004 and so accepts that the majority of these case files are not likely to still be retained.
41. The public authority has now stated that it has located all information held that falls within the scope of this part of the request. As noted above, it has listed all the possible locations for information falling within the scope of this part of the request and has stated that searches have been conducted of each of these areas. The public authority also conducted a search for and located information

after specific prompting by the Commissioner on a point raised by the complainant.

42. When investigating cases where it is disputed whether information is held by a public authority, the Commissioner has been guided by the approach the Information Tribunal adopted in the case *Linda Bromley and others v Information Commissioner and the Environment Agency (EA/2006/0072)*. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on the balance of probabilities the information is held. The conclusion of the Commissioner is that on a balance of probabilities the public authority does not hold further information to that identified previously that falls within the scope of this part of the request. In reaching this conclusion, the Commissioner has given weight to the explanation provided by the public authority about the searches it has carried out.
43. As noted above at paragraph 29, the public authority disclosed to the complainant additional information falling within the scope of the first part of his request following the intervention of the Commissioner. In failing to disclose this information within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 1(1)(b). Further in failing to disclose the information contained within the 3 files following receipt of the clarification provided by the complainant the public authority was in breach of section 1(1)(b).

Section 10

44. The clarified version of the first part of the request was dated 16 March 2006 and, in accordance with section 1(3), the public authority was not obliged to comply with section 1(1) in connection with the first part of the request prior to this clarification having been received. However, the public authority did not respond to this clarified request until 27 April 2006. In failing to respond to this request within 20 working days of receipt, the public authority breached section 10(1).
45. Further to the section 1(1)(b) breach recorded at paragraph 43, in failing to disclose the information in respect of the overview of 9 cases within 20 working days of receipt of the request the public authority also did not comply with the requirement of section 10(1).

Section 17

46. When initially refusing part i of the request, the public authority cited subsection 40(3). The correct subsection is 40(2). In not citing the correct subsection in its initial refusal of part i of the request, the public authority failed to comply with the requirement of section 17(1)(b). When citing section 44(1)(a) in connection with part i of the request, the public authority cited the Human Rights Act as providing a statutory prohibition to disclosure. The Human Rights Act provides no such prohibition and in failing to provide a valid explanation as to why section 44(1)(a) was believed to be engaged the public authority did not comply with the requirement of section 17(1)(c).

47. Neither the initial refusal notice nor the internal review response provided an adequate explanation for the refusal of the second part of the request under section 22(1), or for why the public interest was believed to favour the maintenance of this exemption. In so doing, the public authority failed to comply with the requirements of sections 17(1)(c) and 17(3)(b).
48. When initially refusing part iii of the request, the public authority failed to identify the relevant subsection of section 35 (35(1)(a)) and also did not set out why it believed that the public interest favoured the maintenance of this exemption. In not citing the relevant subsection of section 35, the public authority failed to comply with the requirement of section 17(1)(b). In failing to refer to the public interest, the public authority failed to comply with the requirement of section 17(3)(b).

Exemption

Section 22

49. As noted at paragraph 26, the Commissioner advised the public authority that it appeared that section 22(1) had been cited incorrectly and that it would be appropriate for it to look again at this part of the request. The public authority declined to do so and maintained that it considered that section 22(1) had been applied correctly.
50. As with many of the issues in this case, the public authority failed to communicate its stance here with clarity. Despite this, the Commissioner considers the central issue to be clear; this being that the information which the public authority believed was intended for publication is not the information requested by the complainant.
51. Section 22(1) will apply where the information requested is to be published. Where requested information is to contribute to a future publication, 22(1) will be engaged only where that publication closely and manifestly relates to the information requested. The public authority has described the publication planned by the DfES as “...a report on the issue of reasonable chastisement”. The complainant did not request a copy of this report; the complainant requested information about post August 2004 reasonable chastisement cases. It appears that the publication planned by the DfES at the time of the request was about the issue of reasonable chastisement and that the public authority had provided to the DfES background information which contributed to this publication. It is not the case, however, that the publication planned by the DfES would have constituted, or closely resembled the information requested by the complainant in part ii of his request.
52. The Commissioner concludes that section 22(1) is not engaged as the information requested was not intended for future publication. The public authority has, therefore, breached section 1(1)(b) in refusing to disclose the requested information on the grounds that section 22(1) was engaged. As the Commissioner has reached his conclusion at this stage, it has not been necessary to go on to consider the balance of the public interest.

Section 35

53. The public authority has cited section 35(1)(a) in connection with the third part of the request. This provides that information that relates to the formulation or development of government policy is exempt. The task in considering whether this exemption is engaged is to consider whether the information in question can be accurately characterised as relating to the formulation or development of government policy. This exemption is qualified by the public interest. This means that, however clear it is that the exemption is engaged, the information should be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Formulation or development of government policy?

54. Turning to whether the information can be accurately characterised as relating to the formulation or development of government policy, the Commissioner's view is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. At paragraph 58 of *DfES vs the Commissioner & Evening Standard* (EA/2006/0006), the Information Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of that information, rather than on a line by line dissection. The Commissioner's decision here is based on whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a minute dissection of the content of this information.
55. The information in question here primarily concerns the passage of the Children Bill through Parliament and primarily consists of e mail exchanges between the public authority and others about the various proposed amendments to the Bill, background information about the Bill and how it deals with the issue of reasonable chastisement. The bulk of this information relates to the House of Lords stage, with a smaller portion relating to the House of Commons stage. The remainder of the information appears less closely related to the policy formulation and development process in that its focus is on the charging standards of the public authority, rather than the Children Bill specifically.
56. The Commissioner would accept that the process of the Children Bill passing through Parliament clearly constitutes the formulation and development of government policy. The question is, therefore, whether the information relates to this process sufficiently closely for the exemption to be engaged.
57. In relation to that information that relates most closely to the development of the Bill, e mail exchanges concerning various proposed amendments to this Bill and attachments to these e mails providing background about the Bill, background about the issue of reasonable chastisement and the wording of the proposed amendments, the Commissioner considers that it is clear that this information does relate sufficiently closely to the formulation and development of government policy for this exemption to be engaged. The passage through Parliament of

legislation is a key stage in the formulation and development of government policy and information relating to this process does, therefore, relate to the formulation and development of government policy.

58. In relation to the remainder of the information, that which appears to relate less closely to passage of the legislation through Parliament and some of which post dates the Children Act 2004, which is dated 16 November 2004, the Commissioner believes that this can be accurately characterised as relating to the development of government policy. This information appears to relate more closely to the internal policies of the public authority, but the Commissioner does accept that this is related to the process of development of government policy in that it records the process of the Children Act 2004 being enacted through the charging standards of the public authority.
59. The conclusion of the Commissioner is that the exemption provided by section 35(1)(a) is engaged in relation to the entirety of the information in question here. This is on the basis that the creation and finalising of the Children Act 2004 constitutes the formulation and development of government policy and that the information in question can be accurately characterised as relating to this process.
60. Within the information falling within the scope of the third part of the request is a document titled "*Offences Against The Person, Incorporating Charging Standard*", which appears to be a finalised version of the charging standards, rather than an earlier draft version, examples of which are also included within the information in question. A search of the website of the public authority shows that Charging Standards documents are freely available. The Commissioner concludes that this information is not subject to the exemption provided by section 35(1)(a). A more appropriate response from the public authority in connection with this information may have been to cite the exemption provided by section 21(1) and to advise the complainant where this information was available.

The public interest

61. Having concluded that the exemption is engaged, it is necessary to go on to consider whether the public interest favours the maintenance of the exemption. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner's considerations of those of the 11 principles that are relevant in this case are set out here.

The information itself

62. *"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case"* (paragraph 75)

This comment from the DfES case was commended as a statement of principle by Mr Justice Mitting in the High Court decision *Export Credits Guarantee Department v Friends of the Earth*.

63. The information in this case relates to the reasonable chastisement defence. The volume of debate on this issue, both within government and elsewhere, suggests that there is a public interest in full disclosure of information relating to this subject in order to inform this debate. To the extent that disclosure would inform this debate, the public interest would favour disclosure.
64. However, the nature of this information can also be employed as an argument in favour of maintenance of the exemption. Given the sensitive and controversial nature of the subject discussed within the withheld information, this may suggest that in order for all policy options in this area to be discussed thoroughly and robustly, it is necessary for this to take place in a private space away from the possibility of disclosure. If the government is unable to carry out effective policy formulation and development as a result of the possibility of disclosure, this would be counter to the public interest.

'Status' of information not relevant

65. *"No information within Section 35(1)(a) is exempt from the duty of disclosure simply on account of its status or its classification as minutes or advice to a minister, nor because of the seniority of those whose actions are recorded. To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1)(a) class of absolutely exempt information"* (paragraph 69)

The Information Tribunal commented further on the suggestion that there is a particular importance attached to exempting from disclosure information that falls within the class specified in section 35(1)(a) in the case *DWP v the Information Commissioner* (EA/2006/0040). In that case the DWP argued that:

"[section 35(1)(a)] was an exemption of particular importance...[and that] greater weight should be attached to the public interests in favour of maintaining the exemption in order to protect Government space for deliberation on policy". (paragraph 60)

The Tribunal rejected this argument.

66. The High Court has also considered this issue and endorsed the above approach in the case *OGC v The Information Commissioner*. It commented at paragraph 79 that:

"I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to 'the public interest in maintaining the exemption', which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms, and interpreted literally it covers information that cannot possibly be confidential. For

example, a report of the Law Commission being considered by the Government with a view to deciding whether to implement its proposals would be or include information relating to 'the formulation or development of government policy', yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to Parliament an intention to create a presumption of a public interest against disclosure. I therefore agree with the view expressed by the Information Tribunal in The Department for Education and Skills v the Information Commissioner and the Evening Standard ”

67. The information in question here records discussions concerning the fine detail of legislation and records the views of individuals at senior levels within the public authority and within other public authorities. That this information records the views of individuals at senior levels within the public authority and elsewhere does not, however, indicate that the public interest in favour of maintenance of the exemption is stronger than in comparison to a record of exchanges at less senior levels or that focussed less on the fine detail of legislation. To the extent that the senior levels of the views recorded and level of detail within some of the information may indicate that this information is of a sensitive nature, this would be a factor covered under the previous heading as these factors would relate to the nature of the information rather than the status of the information. Neither does the conclusion above, that the information falls within the class described in section 35(1)(a) suggest that the starting point when considering the balance of the public interest is that the public interest favours maintenance of the exemption.

Protection for civil servants not politicians

68. That disclosure may expose the decision making of politicians to criticism, fair or otherwise, is not a valid argument in favour of maintenance of the exemption. The public authority has advanced no argument that the public interest favours maintenance of the exemption on the basis that politicians should be protected from the results of disclosure.
69. However, whilst it is not unfair to politicians to release information that allows their policy decisions to be challenged after the event, there is a public interest in preserving the convention of collective Cabinet responsibility. This would be in order to allow the Cabinet to discuss issues in a free and frank manner in order to improve the decision making process. Disclosure of information showing that ministers had voiced individual disagreement for policies at the discussion stage may discourage thorough Cabinet discussion and may lead to time being spent justifying individual ministerial views that were never government policy.
70. Having reviewed the information in question here, the Commissioner does not believe that this includes any content the disclosure of which would be likely to threaten the preservation of the convention of collective Cabinet responsibility. Neither has the public authority advanced any arguments connected to this point and this is not, therefore, a factor that carries weight in this case.

Timing

71. Whilst policy is in the process of formulation or development at the time of the request it is less likely that the public interest would favour disclosure unless the arguments in favour of this were particularly compelling such as, for example, if disclosure would expose wrongdoing in government. The timing of a request is of importance. Whilst the Commissioner has accepted that the process of policy development did continue immediately following the passing of the Children Act 2004 on 16 November 2004 in relation to the development of the public authority's charging standards, the Commissioner is aware of no evidence to suggest that this process remained ongoing at the time of the complainant's request. The formulation and development of the policy in question here would not, therefore, have been impacted upon through disclosure and so no argument can be made that on this basis the public interest favours maintenance of the exemption.

Completion of policy formulation or development

72. As noted above, the policy formulation and development process was complete by the time of the request. That this process was complete by the time of the request does not, however, indicate that the information would no longer be sensitive. The issue of reasonable chastisement remains of considerable sensitivity. If disclosure would disrupt the ability of the public authority to apply the law in this area, this would be counter to the public interest. The Commissioner accepts that this factor carries some weight in favour of maintenance of the exemption, but considers that the weight of this factor is reduced as a result of the specific policy formulation and development process to which the information relates being complete by the time of the request.

Information in the public domain

73. The issue of the reasonable chastisement defence was the subject of a considerable volume of media coverage. Although there is no suggestion that the information in question here has been disclosed into the public domain through this coverage, this coverage can be relevant to the balance of the public interest in other ways.
74. Firstly, if the media coverage had been sufficiently informative that disclosure of the information in question would provide little further illumination about the issues at stake, it could be argued that the public interest in disclosure would be reduced. However, the Commissioner does not believe that is the case here for two reasons. The first of these being that, regardless of how voluminous and informative the media coverage, there will always be an argument in favour of disclosure in order to provide the full picture of the background to an issue. The second of these is that, having reviewed the contents of the information in question here, the Commissioner believes that disclosure would add somewhat to the public knowledge and understanding already provided through the media coverage.
75. Secondly, the impact of information already in the public domain in terms of the

harm or benefits produced through the availability of this information can be taken as an indication of what impact disclosure of the information in question would have. The media coverage of the issue of the reasonable chastisement defence is likely to have resulted in wider public knowledge of the law in this area. Improving public knowledge of the law is in the public interest, and that disclosure of the information in question here would improve that knowledge is a valid argument in favour of disclosure.

The robustness of officials

76. The suggestion here is that officials may be tempted to shy away from providing honest, frank and candid advice if they are concerned that the record of their contribution may later be subject to disclosure. Whilst this may be the case, dependant on the circumstances and sensitivity of the subject of the advice, the Information Tribunal in the DfES case mentioned above stated:

“...we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service” (paragraph 75)

77. The Tribunal 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.” (paragraph 75)

In short they should not easily be discouraged from doing their job properly.

78. However, in the case *Export Credits Guarantee Department v Friends of the Earth*, the High Court made clear that arguments about loss of frankness and candour are central to the considerations of the public interest in section 35(1)(a). If the frankness and candour of officials when making policy in sensitive and controversial areas would in future be compromised as a result of disclosure here, this would be a valid public interest factor in favour of maintenance of the exemption.
79. The argument of the public authority as to why the public interest favoured the maintenance of the exemption focussed on this issue. It has suggested that disclosure in this case would lead to reticence in official's contributions in future. The bulk of the information in this case does record exchanges between officials within the public authority and with officials in other public authorities and the Commissioner accepts that the issue of the use of the reasonable chastisement defence is of some controversy and sensitivity.
80. Within the withheld information there are records of exchanges where officials do express their views on this sensitive subject with frankness and candour. However, much of the information records exchanges that are primarily administrative in purpose and which do not include any content that records the views of officials about any aspect of the policy in question. The Commissioner gives some weight to the argument that disclosure in this case may impact negatively upon the frankness and candour of official's contributions in future, but

considers the weight of this argument reduced as much of the content of the exchanges recorded within the information does not include views expressed by officials.

Conclusion

81. Whilst the Commissioner has recognised that there are significant arguments in favour of maintenance of the exemption, when weighing factors on both sides of the balancing exercise the argument that carries most weight is that relating to the nature of the information. In particular the Commissioner has noted that disclosure would be in the public interest in order to inform the debate on the issue of reasonable chastisement. The conclusion of the Commissioner is, therefore, that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.
82. Whilst it appears that some of the information in question may be factual, as the Commissioner has reached the conclusion above in relation to the entirety of the information falling within the scope of this part of the request it has not been necessary to go on to consider the public interest in the factual information separately in accordance with section 35(4).

The Decision

83. The Commissioner's decision is as follows:
 - In connection with part i of the request the public authority failed to comply with the requirement of section 1(1)(a) in that it did not accurately confirm what information was held that fell within the scope of this part of the request at the time of the initial refusal and sections 1(1)(b) and 10(1) through the late disclosure of information. The Commissioner also finds that the public authority is now correct in stating that it has located all the information it holds falling within the scope of part i of the request.
 - In connection with part ii of the request, the public authority breached section 1(1)(b) in refusing to disclose the information requested on the basis that the exemption provided by section 22(1) was engaged.
 - In connection with part iii of the request, the Commissioner finds that the exemption provided by section 35(1)(a) is engaged in respect of all the information held by the public authority falling within the scope of the request with the exception of the information cited at paragraph 60 of this notice which is already available in the public domain. In respect of the information to which section 35(1)(a) is engaged, the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
 - The refusal notice also failed to comply with the requirements of sections 17(1)(b) and (c) and 17(3)(b).

Steps Required

84. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

In connection with part ii of the request, the public authority should identify all information held that falls within the scope of this part of the request. In doing so, the public authority should give specific regard to the wording of the request and ensure that all information relevant to this request is identified, not only the 'raw data' that the public authority has stated it provided to the DfES. This information should then be disclosed to the complainant.

85. In connection with part iii of the request, disclose to the complainant all information falling within the scope of this part of the request.
86. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

87. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

As alluded to previously within this notice, the handling of this case was complicated through the failure of the public authority to communicate its stance clearly or accurately. At various stages in the case handling process it was necessary for the Commissioner to revert to the public authority for clarification on issues either not addressed thoroughly by the public authority or where the public authority had contradicted a position it had taken previously. When communicating with the Commissioner in connection with any future cases the public authority should ensure that its responses are appropriately thorough and accurate.

88. As covered above the public authority reconsidered the third part of the request following the Commissioner's suggestion that it do so. The Commissioner takes the inconsistency of the statements from the public authority about this part of the request and its willingness to reconsider its handling of this part of the request as an indication that it did not take appropriate steps to establish what information it held that fell within the scope of this part of the request at the time of the initial refusal. The Commissioner would stress to the public authority that its first step in response to the receipt of an information request should be to ascertain what information it holds that falls within the scope of the request.

Failure to comply

89. 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

90. 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.
Website: 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.

91. 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 23rd day of June 2009

Signed

**Nicole Duncan
Head of FOI Complaints**

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

Legal Annex

Section 1

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 1(3) provides that -

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 10

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

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 applies.”

Section 17(3) provides that -

“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 22

Section 22(1) provides that -

“Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

Section 35

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 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”