

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 5 February 2009

**Public Authority:** Department for Culture, Media and Sport  
**Address:** 2 – 4 Cockspur Street  
London  
SW1Y 5DH

### Summary

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The complainant requested six pieces of information from the Department of Culture, Media and Sport (DCMS) relating to the business activities of David Mills, the husband of the Rt. Hon. Tessa Jowell MP (the Secretary of State for Culture, Media and Sport at the time of the request). DCMS informed the complainant that it did not hold any information in relation to five parts of his request. However, it supplied information relating to the sixth part, which was for information on Mr Mills' business dealings and Miss Jowell's declaration of these interests; though further relevant information was withheld under two of the FOI Act's exemptions: Section 41 (Information provided in confidence) and section 42 (Legal professional privilege). The complainant contacted the Commissioner about the withholding of this information.

The Commissioner agreed with DCMS that the information relating to the complainant's request which was withheld is exempt from disclosure under sections 41 and 42 of the Act. However, he found that several procedural provisions of the Act were breached by DCMS in its handling of the 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 13 March 2006, the complainant wrote to DCMS to request the following information, and stated that it “relates to the business activities of Mr David Mills, the husband of Tessa Jowell MP”:
  1. What representations did DCMS (or its predecessor) receive from the Old Monk Company between 1997 and 2000? Could you please supply full details of these representations and all supporting documentation including emails, telephone transcripts, minutes and memos etc?
  2. Could you please supply all correspondence with the Old Monk Company or any of its representatives between 1997 and 2000?
  3. Did officials from DCMS (or its predecessor) ever meet with representatives from the Old Monk Company between 1997 and 2000?
  4. Did any member of the ministerial team ever meet with a representative of the Old Monk Company between 1997 and 2000?
  5. Has Mr David Mills, the husband of Tessa Jowell MP, ever approached DCMS or any member of its ministerial team with regards to the following two policy areas:
    - a. Liberation of the licensing laws regarding public houses
    - b. The expansion of casinos
  6. Could you please provide all internal documentation which touches upon Mr Mills’ business dealings and/or Miss Jowell’s declaration of these interests? These documents should of course include all communications between the press office and other employees of DCMS, which touch upon the controversy of the last few weeks.
3. On 11 May 2006, the complainant wrote to DCMS to complain that he had not yet received a formal response to his request of 13 March 2006. He requested that an internal review be carried out into the way this request had been handled.
4. On 25 May 2006, DCMS provided a substantive response to the request of 13 March 2006. It apologised for the delay in responding and explained that this was because “consultation was necessary with other government departments as well as others with an interest in the information held, and this process has taken longer than we anticipated to complete”. It informed him that “for the purposes of the Act, we do not hold any information relating to requests 1-5”. In relation to part 6 of the request, DCMS stated the following:

“We have interpreted this as a request for information relating to the disclosure of the Secretary of State’s interests under the Ministerial Code from the time she joined this department to date. The recorded information that the Department holds as regards declarations of interests relating to the Secretary of State is set

out in summary form in the enclosed table. A copy of this table has been sent to a number of media correspondents who have made similar requests, and it is also available on the departmental website. The exemptions cited in the table are explained in Annex A to this letter. To the extent that you require information not covered by the enclosed, please clarify your request as to the particular information sought.”

5. The information supplied to the complainant consisted of a schedule containing the dates “When consultation took place” (which referred to disclosure made in relation to the Secretary of State under the Ministerial Code) and, for each date, a “Summary of disclosure made in relation to the Secretary of State”. In the schedule, 12 dates were provided. In total, 18 summaries of disclosure were provided and, in relation to seven dates, the complainant was informed that all or further information was being withheld. At the end of the schedule, the following statement was provided:

“In addition there may have been informal discussions, for example in the margins of meetings, which have not been recorded: any information so disclosed would fall outside the scope of the Freedom of Information Act 2000. In each case, the disclosures recorded above were considered, noted and advised on as appropriate. Further information is withheld pursuant to the exemptions in section 41 (information provided in confidence) and 42 (legal professional privilege) of the Freedom of Information Act 2000.”

6. Annex A to the DCMS letter provided further details of its application of exemptions, which are reproduced as follows as direct quotations:

Section 41 – Information provided in confidence

- Disclosure of some of the information relevant to the request would constitute an actionable breach of confidence.
- There is a strong public interest in protecting communications in relation to Ministers’ interests. Such information is inherently private, and may include information which is not already in the public domain.
- Disclosures are made pursuant to obligations under the Ministerial Code. The Code recognises that such information is private and will be treated in confidence.
- The Department acknowledges that a duty of confidence may be overridden by a higher public interest, and that there is a public interest in ensuring that a regime is in place for eliminating any risk of a conflict between a Minister’s private interests and his or her official duties. We have taken this into account in considering what information can be disclosed in the enclosed schedule.
- However, in relation to some of the information held the Department is of the view that the public interest lies in favour of withholding the information.

Section 42 – Legal professional privilege

- Some of the information relevant to the request is exempt from disclosure pursuant to section 42 of the Act as it is information to which a claim for legal professional privilege could be maintained.

- This exemption is a qualified exemption and the Department has considered whether the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information.
  - There is a very strong public interest, as recognised by the courts, in ensuring that issues can be discussed freely with legal advisers without fear that this information would be disclosed to the public without their consent. If such advice were to be disclosed, it would be likely to inhibit future candid discussions with legal advisers, which may lead to advice being provided on a basis which does not consider all appropriate issues.
  - In these circumstances the public interest favours withholding the information.
7. In respect of the complainant's letter of 11 May 2006, DCMS stated that "that letter will be considered and responded to separately from this letter".
8. On 19 June 2006, the complainant contacted DCMS to seek an update on his request for an internal review of 11 May 2006 regarding the length of time taken to respond to his request. DCMS provided the outcome of this internal review in a letter to the complainant dated 3 July 2006. It stated that "the review does not consider the response of 25 May 2006 as such, but examines its timeliness". It then provided the following explanation (which is reproduced here as direct quotations):
- i. The information relevant to the request not only relates to the Secretary of State but also to close family members. The information that is disclosed as a result of the duty under the Ministerial Code is inherently private in nature, and therefore striking the balance between what is in the public interest to disclose and what is in the public interest to withhold under the Act requires careful consideration.
  - ii. Naturally there are third parties who, in relation to this subject matter, have an interest in the decision made by this department under the Act. There is a Code of Practice, pursuant to section 45 of the Act, which provides guidance in consultation with persons whose interest are likely to be affected by the disclosure of the information. This sets out whose views ought to be sought and considered before disclosures are made.
  - iii. Throughout the period between 13 March and 25 May, the Department was working in good faith to pursue this matter, ensuring that relevant third parties were part of that process as necessary.
  - iv. The Department apologises, however, that the [the complainant] was not kept adequately informed about the time needed to consider the request. The request for information was one of quite a number received within a short space of time on this and related matters. All of these requests had to be considered together for reasons of consistency, and to ensure that the views of third parties on all requests were sought and considered before responses were provided.
9. On 22 July 2006, the complainant contacted DCMS to request an internal review into its response of 25 May 2006. Specifically, he stated that he is "unhappy with

the amount of information provided and find it hard to believe DCMS does not hold further material on this issue which it could make available”.

10. On 11 October 2006, DCMS responded to the request for internal review of 22 July 2006. It stated that the complainant’s request was “considered afresh, and considered carefully the information held”. The Department confirmed that it does not hold information relevant to parts 1-5 of the request. With regard to part 6 of the request, the following explanation was provided:

“I am satisfied that the information disclosed to you in the table represents the information that can be disclosed under the Act and it was reasonable to provide that information to you in such a format. I am satisfied that section 41 (breach of confidence) and section 42 (legal professional privilege) of the Act apply to the information that has been withheld and that the public interest remains in favour of withholding that information for the reasons set out in our letter of 25 May 2006.”

## The Investigation

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### Scope of the case

11. On 12 October 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. The timing of the Department’s response; and
  - ii. “The Department’s failure to provide any of the requested information.”
12. In his complaint to the Commissioner the complainant stated that “the original request sought information about the business affairs of David Mills” and he asked the Commissioner to “examine DCMS’s refusal to provide to any information in connection with this matter”. The complainant did not comment on the DCMS assertion that it held no information in connection with parts 1-5 of the request.
13. Therefore the Commissioner has taken the scope of the complaint to be focused on the timing of the DCMS’s responses to the entire request and the nature and scope of the information provided or withheld in relation to part 6 of his request. This is because DCMS confirmed that the information supplied to the complainant fell within this part of the request, as did the information which it confirmed that it was refusing to disclose. In addition to the timing issue, these two responses regarding part 6 of the request were therefore the subject of the complaint.
14. The Commissioner therefore undertook to investigate the following matters:
- i. The timing to the Department’s response to the initial request;
  - ii. Whether the information supplied to the complainant falls within the scope of his request;

- iii. Whether the information withheld from the complainant under sections 41 and 42 of the Act properly falls within those exemptions; and
  - iv. Whether the public interest in maintaining the exemption under section 42 outweighs the public interest in the disclosure of the information withheld under this section.
15. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## Chronology

16. On 27 February 2007, the Commissioner contacted DCMS to request a copy of the information withheld from the complainant under sections 41 and 42 of the Act.
17. DCMS responded to the Commissioner on 28 March 2007. In its reply, it suggested that the Commissioner visit DCMS and view the withheld information in situ. It also provided the following representations regarding “the basis on which Ministers make declarations under the Ministerial Code”:
- i. The assessment in this case was that Sections 41 and 42 of the Act applied to some of the detail of declarations made in consequence of the Secretary of State’s duties....The information is inherently private or is covered by legal professional privilege. In addition, the information was disclosed [by the Ministers to the Department] as a result of the obligations imposed by the Ministerial Code which expressly states that the information is provided in confidence.
  - ii. It is recognised that a duty of confidence 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, there is also a strong public interest in protecting the confidentiality of the information provided by Ministers or where disclosure would be likely to render the conduct of commercial transactions problematic for individuals.
  - iii. In the circumstances of this case, the assessment was that the public interest did not demand any greater disclosure than was provided to the complainant, where the only information that was withheld was sensitive information relating to the Secretary of State or Mr Mills. Disclosing the personal, financial or commercially sensitive information provided in confidence by Ministers 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 preventing conflicts of interest.
  - iv. Given the confidential and personal nature of declarations made under the Ministerial Code it is 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.

- v. Some Ministers err on the side of caution and provide more information to their Permanent Secretaries than is required under the Ministerial Code. For example, some provide copies of bank and mortgage statements or spreadsheets from their financial advisers detailing transactions. Ministers provide this information to their Permanent Secretaries in confidence on the understanding that it will not be shared otherwise than in accordance with the Ministerial Code.
18. On 31 August 2007 the Commissioner visited DCMS to view the information withheld from the complainant.

### Findings of fact

19. The Commissioner has analysed the Ministerial Code and considered the following provisions (listed under 'Minister's 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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20. The provisions of sections 1, 10, 17, 41 and 42 of the Act can be found in the legal annex.

## Procedural matters

### Section 1 – General right of access to information held by public authorities

21. The Commissioner is satisfied that the information he viewed in situ contained both information which fell within the scope of part 6 of the request and was supplied to the complainant, and information which fell within the scope of part 6 of the request but was withheld. Therefore the Commissioner does not accept the complainant’s assertion to him regarding DCMS’s “failure to provide *any* of the requested information”.
22. Both categories of information viewed by the Commissioner also contain information which falls outside the scope of the request, that being the information relating solely to the Secretary of State (and not Mr Mills). However, no breach of the Act was committed by DCMS in also supplying some of this information to the complainant and the Commissioner did not consider whether the items of information falling outside the scope of the request but determined by DCMS to be exempt were appropriately withheld.
23. The Act provides a right of access to ‘information’ held by public authorities. As such, the complainant’s rights under the Act extend to access to the contents of documents but not for copies of the documents themselves. Therefore, although part 6 of the complainant’s request refers to ‘documents’ held, it was appropriate for DCMS to provide the content of the requested information within a schedule created in response to the request
24. However, the Commissioner considered whether the schedule provided to the complainant constituted all the information falling within the scope of part 6 of the request which was not considered by DCMS to be exempt from disclosure. This is because it was not clear whether the content of the schedule (which was created *in response* to the request rather than being a copy of the documents held) included all the information that would have been supplied had the complainant instead been issued with *copies* of the actual documents held (but with the exempt information redacted). Having analysed all the information held by DCMS falling within the scope of part 6 of the request, the Commissioner is



satisfied that the information provided to the complainant comprehensively covers the contents of the information not considered to be exempt.

25. The information disclosed to the complainant only relate to disclosures (declarations) made to the Department and the refusal notice only relates to the remaining declarations made in this respect. However, the withheld information also contains documents produced by the Department in response to the declarations, containing advice and discussion on the basis of those declarations. The Commissioner considers this material to fall within the scope of the complainant's request for "*all internal documentation* which touches upon Mr Mills' business dealings and/or Miss Jowell's declaration of these interests." Therefore, even if these documents are also exempt from disclosure under section 41 because disclosure of their contents would have the effect of revealing those declarations, DCMS breached section 1(1)(a) of the Act. This is because it did not inform the complainant that these other pieces of information are also held and the Commissioner believes that DCMS should reasonably have interpreted the complainant's request to have included this information. He does not consider it appropriate for the complainant to have been asked instead, in the Department's response of 25 May 2006, "To the extent that you require information not covered by the enclosed, please clarify your request as to the particular information sought."

#### **Section 10 – Time for compliance with request**

#### **Section 17 – Refusal of request**

26. The Commissioner notes that, although the complainant submitted his request on 13 March 2008, DCMS did not provide any of the information to him until 25 May 2006. This constitutes a breach of section 10(1) of the Act. In addition, in not issuing a refusal notice to the complainant until that date, DCMS also breached section 17(1) of the Act.

#### **Exemptions**

#### **Section 42 – Legal professional privilege**

27. When the Commissioner viewed the information falling within the scope of the complainant's request, he was satisfied that one document ("the document"), which constituted legal advice, was exempt from disclosure under section 42 of the Act.
28. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI: EA/2005/0023*) as "a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph 9)

29. There are two types of privilege – legal advice privilege and litigation privilege. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
30. On the basis of the above, and having reviewed the document, the Commissioner reached the conclusion that it constitutes legal advice privilege, and that section 42 is engaged in respect of this information. In addition, the Commissioner has no reason to believe that privilege has been waived in relation to its contents.
31. However, section 42 is subject to the public interest test. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: “There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest.” In summary, legal professional privilege was referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.
32. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information “*where the privilege holder no longer has a recognised interest to protect*”. The Tribunal also said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect “*a significant group of people*”. In the case of *Shipton v Information Commissioner and the National Assembly for Wales* [EA/2006/0028], a differently constituted Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information “*when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming*” (para 14b).
33. As a result of these Information Tribunal decisions on section 42, the Commissioner considers the following factors to favour the maintenance of the exemption:
- The inbuilt weight of the LPP concept;
  - The likelihood and severity of harm to be suffered by disclosure, which is affected by whether the advice is:
    - Recent
    - Live
    - Protecting advice relating to the rights of individuals
    - Other circumstances of the particular case

34. Against the arguments for maintaining the exemption in this case, and in line with the decisions of the Information Tribunal, the Commissioner considered the following public interest arguments in favour of disclosure to be of relevance:
- The assumption in favour of disclosure under the Act;
  - Amount of money involved;
  - Number of people affected;
  - Transparency of the public authority's action; and
  - Other circumstances of the particular case, which here include informing debate on key issues and the time elapsed since the advice was provided.
35. The Commissioner considers some of the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. This is particularly the case in terms of informing the debate on the key issues surrounding the business interests of Mr Mills and understanding the evidence supplied to the public authority upon which it provided advice in relation to declarations made under the Ministerial Code.
36. However, in the circumstances of this particular piece of information, the Commissioner considers that the arguments for disclosure are outweighed by the arguments in favour of maintaining the exemption under section 42. This is based on the Commissioner's analysis of the content and context of the information to which section 42 applies, from which he reached the following conclusions:
- i. The sensitivity and significance of the advice provided is such that the inbuilt weight of LPP in relation to this information is very strong.
  - ii. At the time of the complainant's request, the advice which was provided remained 'live' in terms of the issues and interests to which it related, and there are clear recognised interests which the advice continued to protect.
  - iii. The harm likely to be suffered by the party entitled to LPP, as a result of disclosure, would not be slight.
  - iv. It is important that individuals subject to the Ministerial Code feel able to provide this kind of information to public authorities as part of the disclosure of their interests. Disclosure of this information into the public domain would be likely to harm the future provision of such information.
  - v. The subject matter does not affect a significant group of people.
  - vi. The disclosure of this information would not promote probity or accountability in respect of Miss Jowell's own interests, or the decisions of the DCMS, to a notable extent.
37. The Commissioner has therefore concluded that in this case the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.

#### **Section 41 – Information provided in confidence**

38. The Commissioner proceeded to analyse the remaining information withheld from the complainant which he considered to fall within the scope of part 6 of the complainant's request. He identified this information to constitute the following:

- Declaration of interests provided to DCMS by Miss Jowell;
  - Declaration of interests (and related material) provided to DCMS by Mr Mills;
  - Departmental communications;
  - Departmental records of conversations; and
  - Correspondence from Permanent Secretary to Miss Jowell and Mr Mills.
39. The Commissioner compared the nature of this information to that which had been disclosed to the complainant and assessed its content and context in relation to section 41.
40. In order for section 41(1)(a) to apply, the information must have been obtained from a source outside the public authority. In this case, much of the information consists of those declarations of interests or business dealings which were provided by Miss Jowell or Mr Mills to the Permanent Secretary at DCMS. The remaining information relates to those declarations and the disclosure of any of these remaining contents would have the effect of identifying several key aspects of the information provided to the Permanent Secretary.
41. Regardless of whether the withheld information has any bearing on the conduct of either the Government or Miss Jowell in her official capacity, the information itself relates to Miss Jowell's (or her husband's) private interests 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 the public authority from "another person". As a result of the Commissioner's analysis of the withheld material, he extends this observation to the information generated from within the department (such as the Permanent Secretary's correspondence and internal correspondence) as disclosure of any of this information would have the effect of disclosing the content of the declarations to which section 41(1)(a) apply.
42. However, in order to determine whether disclosure of the withheld information would constitute an actionable breach of confidence (which would allow for section 41(1)(b) to apply) the Commissioner took the following considerations into account:
- Whether the information has the necessary quality of confidence about it;
  - Whether the information was communicated in circumstances importing an obligation of confidence;
  - Whether disclosure of the information would be to the detriment of the party to whom the duty of confidence is owed; and
  - Is there a public interest defence in the disclosure of the information?

### **i. Information provided to the Department by Miss Jowell and Mr Mills**

43. Of the withheld information which constitutes declarations made to the Department (and related material supplied) by Miss Jowell and Mr Mills, the Commissioner considers these to consist of the following information:
- Financial details
  - Business and commercial interests
  - Information relating to conduct
  - Information relating to third parties
  - Declarations which are not required to be made under the Ministerial Code
  - Requests for advice
44. Having analysed the all the information, and having compared it to that which was disclosed to the complainant, the Commissioner is satisfied that its contents are private and sensitive in nature, and such that it has the necessary quality of confidence.
45. The Ministerial Code explicitly assures Ministers that any information provided under it will be provided in confidence. In addition, the Commissioner understands that the information provided by Mr Mills about his own interests was supplied by him in order to fulfil his wife's obligations under the Code because, it was felt that as a Minister's spouse, that his interests were of relevance. Therefore, the Commissioner concludes it to have been reasonable for Mr Mills to consider that the information he provided would also be treated with the same level of confidence as that supplied by a Minister under the Code and that he would expect DCMS to owe him an obligation of confidence in respect of this information.
46. The Commissioner is therefore of the view that disclosure of the withheld information in *this* case would subject Miss Jowell and Mr Mills to an unwarranted intrusion into their private lives. This would be of detriment to those individuals. The Commissioner also believes that the circumstances under which the information was provided means that its release without the consent of Miss Jowell or Mr Mills would constitute an actionable breach of confidence.
47. The Commissioner considers that nature of the information withheld from the complainant to differ to that supplied, 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 Minister.
48. In contrast, the Commissioner is satisfied that there is no remaining withheld information the content of which both falls 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.

## **ii. Departmental communications and records, and correspondence from Permanent Secretary**

49. The Commissioner studied the remaining documents and contents of documents, those being the information generated by the Department in response to Miss Jowell's and Mr Mills' declarations. This information contains details of declarations provided to the Permanent Secretary in confidence or advice and discussion provided in relation to, and on the basis of, those confidential declarations. Furthermore, the Commissioner does not consider the contents of this information to have been derived on the basis of information supplied from any other source than that which was provided in confidence.
50. Therefore, the Commissioner believes that disclosure of any of this information would have the consequence of certain withheld details of interests contained within declarations made to the Department being disclosed. As such, the Commissioner is satisfied that section 41 is engaged in relation to this information as disclosure would result in an actionable breach of confidence on the part of the Miss Jowell or Mr Mills. The Commissioner's reasoning for the engagement of the exemption therefore matches that set out in his analysis of the declarations themselves to which he accepts that section 41 is engaged.

## **iii. Public interest override**

51. As the exemption for information provided in confidence is an absolute exemption 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).
52. 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.
53. 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 the Court left the question open. Its final decision was to allow the disclosure in that case. 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.



54. In this case, the Commissioner therefore assessed whether this public interest override is relevant in respect of the information withheld from the complainant. However, 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 the following respects:
- The FoI public interest test for qualified exemptions 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.
55. 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.
56. The Commissioner also considers it important that Ministers (and, in this case, their spouse) 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 the DCMS 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. The Commissioner therefore undertook his analysis of whether there is a public interest override in the disclosure of the withheld information in line with his considerations in this respect.
57. The wider public interest in preserving the principle of confidentiality  
The Commissioner considers the relationship of trust, protected by the duty of confidence, operates to serve the public interest. In this 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. The same analysis can be applied to relevant information disclosed to a Department in these circumstances by a Minister's spouse or other close family member.

58. The interests of the confider

The importance of the right to privacy is recognised by the Article 8 of the Human Rights Act 1998 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.

59. Having identified the public interest in withholding this information, the Commissioner proceeded to reach a view as to whether the Department 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 and related these to the factors set out above which support the withholding of the information.

60. The Commissioner considered the following public interest arguments in favour of the disclosure of the information to be of relevance in this case, but did not consider them to be sufficient to result in a there being a public interest override in respect of the disclosure of this information:

- i. Public transparency and accountability in respect of commercial and financial interests of Ministers and their spouses, particularly where there is public controversy about potential conflicts of interests.
- ii. Enabling greater public understanding and transparency in respect of the advice provided by officials, in specific cases, in response to declared interests which may have a bearing on a Minister's conduct.
- iii. Promoting public Ministerial accountability in respect of conduct in their role through the disclosure of all interests declared under the Ministerial Code.

61. In contrast, the Commissioner concluded that the following factors in respect of this specific information are such that, when taken together, the public interest defence in the disclosure of any of this information cannot be met:

- i. The nature of the declarations and the related information are not of sufficient significance to merit disclosure to the public. This is because the Commissioner does not consider that the disclosure of the information would reveal any evidence to suggest that a Minister's legitimate conduct in their public role has been compromised by a conflict of interest or any other impropriety.
- ii. The withheld information demonstrates that the operation of the Ministerial Code in the circumstances of this case is such that the purpose of the Code (see 'Findings of Fact', above) was fulfilled. As such, the public interest defence in bringing this information to light is considerably weakened.

- iii. The Commissioner considered whether disclosure of the information would bring to light any evidence of wrong doing or inappropriate behaviour in public life. He concluded that it would not.
  - iv. In respect of public accountability and transparency, the public interest in disclosing the interests of Miss Jowell and Mr Mills is, to a large extent, served by the information which has been disclosed to the complainant. The Commissioner considered the information disclosed to be wide-ranging and to constitute an appropriate account and overview of the content of the declarations made by Miss Jowell and Mr Mills, given the public interest in maintaining confidence.
62. In conclusion, the Commissioner firstly noted the application of section 41 to declarations of ministerial interests which was confirmed by the Information Tribunal in the case of *Ennis McBride v Information Commissioner and Ministry of Justice (Formerly the Privy Council Office)* [EA/2007/0105]; this decision was promulgated on 27 May 2008. The Commissioner then related that decision to the circumstances of this case for which, in contrast, he acknowledged that there is a degree of public interest in the disclosure of *some* of the withheld information. However, the Commissioner does not believe that the public interest which he identified as favouring disclosure in relation to this particular information is sufficient to override the public interest in confidentiality maintained by section 41. He therefore accepts the application of section 41 to withhold the information falling within part 6 of the complainant's request which was not disclosed.

## The Decision

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63. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- i. Conformity of the DCMS response in relation to section 1(1)(b) (General right of access to information held by public authorities) regarding the scope of the information provided to the complainant and the manner in which this information was supplied.
  - ii. Application of section 42 (Legal professional privilege) to legal advice withheld from the complainant.
  - iii. Application of section 41 (Information provided in confidence) to the remaining information withheld from the complainant.
64. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Breach of section 1(1)(a) as a result of not informing the complainant of the categories of information held in relation to his request.

- ii. Breach of section 10(1) (Time for compliance with request) in relation to the time taken to supply information in response to the complainant's request.
- iii. Breach of section 17(1) (Refusal of request) in relation to the time taken to issue a refusal notice.

## Steps Required

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- 65. The Commissioner requires no steps to be taken.

## Right of Appeal

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66. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 5th day of February 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## **Legal Annex**

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### **General Right of Access**

**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(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**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 1(4)** provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”



## **Time for Compliance**

**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 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

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

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

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

## **Refusal of Request**

**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(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

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

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

**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 17(4)** provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

**Section 17(6)** provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

**Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

### **Information provided in confidence**

**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.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

## **Legal Professional Privilege**

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

**Section 42(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”