

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date:** 14 December 2009

**Public Authority:** Department for Environment, Food and Rural Affairs ('DEFRA')  
**Address:** 3 – 8 Whitehall Place  
London  
SW1A 2HH Nobel House

### Summary

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The complainant requested information concerning meetings between DEFRA and the Environment Agency and British Waterways. The complainant subsequently submitted a meta-request, ie a further request for information about the handling of his first request. DEFRA refused to disclose the requested information in both instances, citing the exemption in section 36 of the Act. Following the internal review DEFRA changed its stance slightly, claiming that should section 36 not be engaged in relation to the information, then section 35 should apply in the alternative. The Commissioner found that the requested information was exempt by virtue of section 35 of the Act. In relation to the second request the Commissioner found that the exemption at section 36 was engaged. With respect to both requests the Commissioner found that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner therefore found that DEFRA had acted correctly in withholding the information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

## Background

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### Strategy 'Refresh'

2. In 2006 the Department for Environment, Food and Rural Affairs (DEFRA) underwent a widespread strategy 'refresh,' revisiting its priorities, organisational structures and ways of working. Strategy Refresh was a high level policy issue that led to a refocusing of DEFRA's mission and its outcomes were formalised in the Comprehensive Spending Review 2007 (CSR07) announced by Government on 9 October 2007. All of DEFRA's activity was captured through a new set of Departmental Strategic Objectives which in turn framed the business planning process including people and financial resources.

### Comprehensive Spending Review 2007 (CSR07)

3. The Comprehensive Spending Review is a governmental process in the United Kingdom carried out by HM Treasury to set firm and fixed three-year departmental expenditure limits and, through public service agreements, define the key improvements that the public can expect from these resources.
4. Comprehensive Spending Reviews focus upon each government department's spending requirements from a zero base (i.e. without reference to past plans or, initially, current expenditure) and are named after the year in which they are announced - thus CSR07 (completed in October 2007) applies to financial years 2008-2011.
5. The UK's 2007 Comprehensive Spending Review represented a new development in that it was the first real test of the capacity of the review process to plan and deliver a discretionary fiscal consolidation in the UK in order to halve the real rate of growth in public spending from 4% per annum to 2% per annum over the next three years 2008 - 2011. CSR07 also marked an extension in the length, breadth and depth of certainty that the UK system now provides to managers about their future budgets. Finally, CSR07 saw a major streamlining of the UK's public service performance management regime from 110 largely departmental-based Public Service Agreements (PSAs) into 30 explicitly inter-departmental PSAs articulating the government's top priorities for the coming period.

### Environment Agency

6. The Environment Agency (EA) was established under the Environment Act 1995 to protect and improve the environment of England and Wales and promote sustainable development. Although independent from government, the EA plays a central role in delivering central government's environmental priorities.

7. The EA is an executive non departmental public body of DEFRA and an Assembly sponsored public body of the National Assembly for Wales. In 2006/07 the EA had a budget of around of £1bn, of which £603m was grant funding from its sponsor departments.
8. The Secretary of State for Environment, Food and Rural Affairs has the lead sponsorship responsibility for the EA as a whole and is accountable for its day to day operations in England, in particular the approval of its budget and payment of government grant.

### **British Waterways**

9. British Waterways (BW) is a public body corporate set up under the Transport Act 1968 to maintain and manage the waterways (canals and other navigations) so that they fulfil their full economic, social and environmental heritage potential.
10. In order to assist BW with its statutory obligations it receives financial support from the government. In England and Wales BW's sponsor department is DEFRA and in 2007 approximately £68m of grant funding was provided from DEFRA and the Scottish Government. The balance of income needed to fund BW's total operating costs comes from a wide range of commercial activities including utilities and property development.
11. The provision of public funding is regularly reviewed and priorities are established by balancing the aims of BW with the wider interests of the national economy and government policy. BW maintains detailed short and long term budgets for the execution of its responsibilities consistent with its allocations of grant funds.

### **The Request**

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#### **The original request**

12. On 13 January 2007 the complainant contacted DEFRA via its website to request the following:  
  
‘notes/minutes of all meetings/discussions regarding the setting of future budgets for both the Environment Agency and British Waterways covering 2007 and onwards. I would like the information for the following two quarters, July – September 2006 and October – December 2006’.
13. The complainant requested the above information to be provided to him in hard copy format to be sent to his home address. For clarity this request is referred to as the original request throughout this Notice.

14. On 8 February 2007 DEFRA responded to the complainant advising that it was considering the application of the exemption under section 35 of the Act (formulation of government policy) and needed to extend the time limit by 20 working days to consider the public interest in disclosure of the information.

### **The meta-request**

15. On 9 February 2007 the complainant contacted DEFRA to make a further request for information, namely:

'hard copies of all emails, meeting notes, meeting minutes and notes of phone calls relating to your inter-department and intra-department discussions as to the validity of my original FOI request which you received on 13 January.'

16. The complainant stressed that this was not a vexatious request but rather he was genuinely interested in how DEFRA believed that the section 35 exemption applied to his request. For clarity this further request is referred to throughout this Notice as the 'meta-request'.
17. On 19 February 2007 DEFRA provided a response to the complainant that dealt with both the original request and the meta-request. The response explained that some of the information requested, namely the budget information for the year 2006 in relation to EA and BW, was not held by DEFRA as those bodies set their own internal budgets. In view of this the complainant was advised to seek this information from the bodies in question. In relation to the information that it did hold DEFRA refused to disclose this applying the exemption at section 36(2)(b) (prejudice to the effective conduct of public affairs).
18. In relying upon section 36 DEFRA argued that in setting budgets for future years both ministers and officials needed private space to discuss policy options and delivery consequences in a free and frank manner. The disclosure of such information would be likely to hinder the provision of free and frank advice to ministers by compromising the ability of officials to provide such advice for the purposes of deliberation.
19. With respect to the meta-request, DEFRA also refused to provide this information, again citing the exemption in section 36, arguing that it was important for government to be able to maintain a private space to discuss candidly how departments should respond to FOI requests.
20. Furthermore in relation to both requests, DEFRA asserted that the public interest favoured maintaining the exemption.

21. On 26 February 2007 the complainant requested an internal review of DEFRA's decision not to disclose the requested information on the grounds that embarrassment was not a valid reason for rejecting his requests.
22. DEFRA relayed the outcome of the internal review to the complainant on 24 April 2007. The internal review upheld DEFRA's original decision not to disclose but also provided some additional information by way of assistance to the complainant that outlined the budget setting process and considerations supporting the 2007/08 budget allocations for the EA and BW.

## The Investigation

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### Scope of the case

23. On 26 April 2007 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - he did not believe that releasing information on how DEFRA came to its budget decisions for BW and the EA would hinder future budget decisions
  - no attempt had been made by DEFRA to provide any information – even in redacted form
  - he believed it to be extremely questionable that DEFRA did not hold any information on how the budgets were set for BW and the EA
  - with respect to his second request – the meta-request - regarding how his first request had been handled, he stated that he could not understand how this request had been contentious.
24. Finally the complainant highlighted the fact that DEFRA had originally sought to refuse his request citing section 35 of the Act but subsequently withheld the information citing section 36. In any event the complainant regarded both exemptions to have been deployed on a 'blanket' basis to withhold all of the requested information.
25. Although the complainant did not believe DEFRA's assertion that budget information for the year 2006 in relation to EA and BW was not held, the Commissioner's view is that this information was not part of his original request, which sought information held in relation to budgets for 2007 onwards that was created during the last two quarters

of 2006. In view of this, this information fell outside the scope of the original request.

## Chronology

26. Regrettably, due to the heavy workload at the Commissioner's office, the investigation into the complaint did not get under way until January 2009. On 6 January 2009 the Commissioner contacted DEFRA and asked for its representations regarding the handling of both requests. In particular clarification was sought regarding the exemption used to withhold the requested information at the time of the request, given that section 35 was cited as an alternative to section 36 to the extent that section 36 might not be engaged. Full details of the designated qualified person (QP) were also sought together with details of how the QP reached an opinion that section 36 was engaged.
27. DEFRA was also asked to provide to the Commissioner a copy of the withheld information in order to assist in the considerations of whether the exemptions cited had been applied correctly.
28. On 5 February 2009 DEFRA provided the Commissioner with a copy of the withheld information in relation to the original request. On 16 February 2009 DEFRA provided its detailed response to the Commissioner's initial queries.
29. In relation to the meta-request, this was received within three weeks of the original request when DEFRA was still formulating its response. Given the timing of this request and the fact that the complainant was seeking information about how his original request was being handled, the Commissioner did not seek further clarification regarding DEFRA's rationale for withholding this information.
30. DEFRA argued that it had initially considered section 35(1)(a) to be engaged on receipt of the request but had subsequently relied upon section 36(2)(b) at the time of refusal to disclose. Section 36(2)(b) was believed to be more applicable as release of the requested information in DEFRA's view would be likely to inhibit the free and frank provision of advice to ministers by officials.
31. DEFRA also argued that both ministers and officials needed 'private space' to discuss policy options and delivery consequences in a free and frank manner and that disclosure of such information would compromise the ability to provide that advice.
32. In view of this DEFRA sought to apply section 36(2)(b) and obtained approval of this stance via a submission to the designated qualified person (QP), in this instance the Secretary of State for Environment, Food and Rural Affairs, the Rt. Hon David Miliband MP.

33. However, at internal review stage DEFRA was cognisant of the decision of the Information Tribunal on 19 February 2007 (EA/2006/0006), which ruled that minutes of senior management meetings at the Department for Education and Skills (DfES) regarding the setting of school budgets was exempt from disclosure under section 35 because this information related to a policy objective of exerting greater control over public expenditure.
34. Given the need to withhold what it considered to be sensitive discussions about departmental budgets and being mindful of what they perceived as developing case law at that time, DEFRA put a revised submission to the QP on 24 April 2007.
35. This revised submission recommended upholding the original decision not to disclose the information requested under section 36(2)(b) but cited section 35(1)(a) in the alternative in an effort to apply the correct exemption.
36. On considering the copy of the withheld information, it appeared to the Commissioner that this was a compilation of several extracts from minutes of meetings rather than copies of the actual minutes themselves. On 12 March 2009 clarification was sought from DEFRA as to whether this constituted all of the information held that was pertinent to the request.
37. DEFRA confirmed that although the withheld information had been provided in summarised form, it had been extracted from the minutes of meetings at which a number of other issues not pertinent to the request had been discussed. DEFRA undertook to provide copies of such minutes in their entirety to demonstrate this fact and these were subsequently provided to the Commissioner on 28 April 2009.

## Analysis

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### Exemptions

38. The Commissioner notes that initially DEFRA indicated to the complainant that the information in the original request might be refused under section 35(1)(a) of the Act. However, DEFRA argued that whilst it believed section 36 to be properly engaged, following the *DfES* ruling of the Information Tribunal it could not rule out the possibility that section 35(1)(a) might be engaged. For this reason, with respect to the original request, at internal review DEFRA cited section 35(1)(a) in the alternative to the extent that section 36 might not be engaged, contending that issues of good government applied to both exemptions.

39. The complainant's view was that with respect to the original request DEFRA had first sought to apply section 35(1)(a) and then section 36 as blanket exemptions. The same reasoning also applied to the refusal of his meta-request. Furthermore he did not believe that the release of information on how DEFRA came to its budget decisions for the EA and BW for 2007 onwards would hinder future budget decisions.
40. The Commissioner notes that under section 35(1)(a), information cannot be exempt under both section 35 and section 36, in other words if section 35 is engaged in relation to a piece of information then section 36 can not be engaged. In this case therefore there was a need to determine in relation to the original request whether or not section 35(1)(a) was engaged. Therefore the Commissioner has first considered whether DEFRA was correct to apply the section 35(1)(a) exemption to the original request.

### **Section 35(1)(a): formulation or development of government policy**

41. Section 35(1)(a) provides that information that relates to the formulation or development of government policy is exempt. The task in determining 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.
42. 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 as per the Information Tribunal's comments at paragraph 58 of *DfES vs the Commissioner & Evening Standard (EA/2006/0006; 19/02/07)*. Although in that instance the Information Tribunal ruled that the requested information should be disclosed, for the purposes of this decision its suggestion 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, is a useful one.
43. In this case the Commissioner's decision is based on whether the overall purpose and nature of the minutes of meetings requested in the original request dated 13 January 2007 supports the characterisation of relating to formulation or development of government policy, rather than on a detailed consideration of the minutes themselves.
44. The information in question can be separated into two broad categories; (i) exchanges within the public authority and (ii) discussions between the public authority and third parties.
45. In relation to the information falling within the former category, that is exchanges within the public authority, the content of the requested information consists of exchanges between officials and Ministers on the provision of funding for BW and the EA. This includes discussion of



funding options and those policy factors influencing the determination of budgets.

46. The Commissioner notes that whilst the terms formulation and development of policy may be used interchangeably, development may go beyond formulation to involve a process of improving existing policy. In this sense section 35(1)(a) applies to information whether it relates to the formulation/development of one policy or its successor.
47. In the *DfES* case referred to above, the Tribunal commented on the distinction between formulation/development and implementation (para 56) stating that in some cases it could prove to be a very fine one since implementation of a current policy could also relate to development of that policy or even the development of future policies. The Tribunal also noted that such cases would be more readily recognised when confronted than defined in advance.
48. In this case the requested information concerned the setting of future budgets from 2007 onwards. Although funding decisions for 2007/08 had been announced in December 2006 some of the issues considered in discussions of those decisions were still under consideration in the context of the high level Strategy Refresh policy. The outcomes of the latter were formalised/announced in the CSR07.
49. The Commissioner is of the view that the allocation of funds at this level is an expression of the prioritisation of policy objectives. Furthermore at a higher level, the control of public expenditure as determined in Comprehensive Spending Reviews is part of economic policy. The Commissioner therefore accepts that the process recorded in this information constitutes the formulation and development of government policy and, therefore, falls within the class of information specified in the exemption.
50. In relation to information falling within the second category, relating to discussions between the public authority and third party organisations, the Commissioner also finds that this information falls within the class of information specified in section 35(1)(a).
51. As section 35(1)(a) provides a qualified exemption, the Commissioner has therefore gone on to consider the public interest test.

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

52. DEFRA acknowledged that there is a strong public interest in understanding generally how Government works and how public money is allocated and spent. In this instance DEFRA recognise that in making decisions regarding budget allocation for the EA and BW there is a need for transparency to allow proper scrutiny of the effective utilisation of public funding.

53. The complainant contended that DEFRA had refused to disclose information not because it was sensitive but to conceal embarrassment about DEFRA's handling of BW/EA funding issues.
54. The Commissioner's view is that the public interest in disclosure must be considered with reference to the actual information requested. He has carefully considered the information in question and the context and notes that the general public interest in efficacy of decision making in relation to budget setting is the main factor in favour of disclosure. It would also enable the public to better understand how significant amounts public money was allocated. Disclosure of the information would also enable public debate about funding levels for British Waterways.

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

55. In particular DEFRA highlighted the need to be able to discuss budget issues and funding options freely and frankly and to offer free and frank advice. Had the requested information been disclosed DEFRA contended that the ability of both the Department and its stakeholders ie the EA and BW, to enter into meaningful and safe discussion about possible scenarios would be affected with the risk of distorting or restraining those discussions in future.
56. DEFRA argued that this would not be in the public interest as it would not be conducive to setting a responsible and balanced budget for DEFRA and its delivery bodies, and would be to the detriment of public service provision.
57. The Commissioner's view is that there is no inherent public interest in withholding information that is covered by a class based qualified exemption. Thus consideration of maintaining section 35(1)(a) must take into account the potential harm any disclosure would have on the process of policy formulation or development. Such harm is likely to decrease once the process has been completed but this does not mean that the public interest in maintaining the exemption disappears completely.
58. In this instance DEFRA's arguments centred around the importance of preserving 'private space' to discuss policy options in the interests of good government. DEFRA also highlighted the potential for the frankness and candour of such discussions to be hindered through disclosure. These arguments are often referred to as 'safe space' and 'chilling effect' arguments respectively. The Commissioner's view is that it is important to differentiate between these arguments and looks to the Tribunal's comments in *DfES* for guiding principles in this respect.

## Safe Space

59. In relation to the need for 'safe space' the Tribunal stated that consideration needs to be given to the timing of the request and the stage of policy formulation/development ie whether it is ongoing or complete.
60. The complainant had asserted that, irrespective of the exemption used, DEFRA had done so on a 'blanket basis' to withhold all of the requested information. The Commissioner notes the comments of the Tribunal in *Scotland Office v the Information Commissioner (EA/2007/0128)* with respect to not regarding information falling under section 35 as being per se exempt from disclosure, otherwise such information would have been protected in the Act under an absolute exemption rather than a qualified one.
61. However the Commissioner also recognises the importance of the need for safe space to debate policy and reach decisions without being hindered by external comment. He also considers that an important determining factor in relation to the 'safe space' argument will be whether the request for information is received whilst a safe space is still needed in relation to that particular policy making process.
62. In this instance the information regarding budget setting was requested whilst Ministers and officials were debating the impact of various budgeting scenarios and thus there was a requirement for safe space to be maintained until this process was complete.

## Chilling Effect

63. In relation to any 'chilling effect' on the free and frank advice provided by officials that might result in poorer decision making, the Commissioner agrees with one of the guiding principles from the *DfES* Information Tribunal decision; the robustness of officials, ie they should not be easily discouraged from doing their job properly.
64. However, the Tribunal's view is that such arguments should not be dismissed out of hand as there is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. What is important is that the weight to be given to those considerations will vary from case to case depending again on the information requested and the timing of the request.
65. The EA and BW are major sponsored bodies funded by grant aid from DEFRA. As this funding accounted for almost a third of DEFRA's overall expenditure the process of setting or reviewing budgets involved looking at the full spectrum of DEFRA's expenditure and consideration of a range of pressures that may or may not materialise.

66. In DEFRA's view it was important that officials could engage with Ministers in a free and frank debate about such pressures and that all possible budgetary options were explored. These options were likely to inform subsequent budget setting and the Department's options in the next spending review. Consequently the release of information revealing the detail of such debate would be detrimental to the policy process around budget setting.

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

67. The Commissioner recognises the public interest in ensuring frank honest debate and advice in the interests of robust and well-considered policy making. He is also cognisant that the disclosure of information that relates to on-going policy development in advance of such policy being formalised and publicised may have a significant impact on the particular policy making process.
68. In this instance although the budgets for 2007/08 had been published in December 2006, a determination regarding budgets for future years had not yet been made. Indeed the outcomes of the budget setting exercise would not be formalised until October 2007 when the CSR07 would be announced by Government.
69. The Commissioner is therefore of the view that disclosure of the requested information, at the time of the request, would be likely to have significant impact on the formulation or development of policy. In this case he has therefore accorded significant weight to maintaining the exemption.
70. In relation to the public interest in disclosure, the Commissioner is of the view that the information in question throws up no particular issues that warrant a particularly high level of public interest in disclosure above the general factors already outlined such as the general efficacy and scrutiny of the policy making process related to budget setting. He has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner finds that DEFRA correctly applied the exemption at section 35(1)(a) in relation to the original request.

### **Section 36(2)(b)**

71. As the Commissioner is satisfied that section 35(1)(a) is engaged in relation to the original request he must find that the exemption under section 36 is not engaged. Therefore the Commissioner has not considered DEFRA's arguments in relation to section 36 with respect to the original request, he has considered these arguments with respect to the meta-request only.

72. Section 36(2)(b) provides that information is exempt if, in the opinion of the “qualified person” as set out at section 36(5), its disclosure would or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
73. In considering whether or not this exemption was engaged, the Commissioner was mindful of the Information Tribunal’s view as set out in the case of *Guardian & Brooke v The ICO & The BBC*<sup>1</sup>. In particular, the Tribunal commented at paragraph 64 that, in relation to section 36:
- “... in order to satisfy the sub-section the opinion must both be reasonable in substance and reasonably arrived at”.*
74. With this in mind the Commissioner has considered who acted as the qualified person in this particular case, details of the communication with the qualified person in relation to the request, and the application of the exemption, and details of the qualified person’s opinion and how it was reached.
75. The designated qualified person (QP) in this instance was the Secretary of State for Environment, Food and Rural Affairs, the Rt. Hon David Miliband MP.
76. DEFRA’s submission to the QP argued that the information requested in the meta-request was exempt by virtue of section 36(2)(b). The Commissioner notes that DEFRA did not distinguish between section 36(2)(b)(i) and section 36(2)(b)(ii) and stated that disclosure of this information would be likely to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation.
77. In its submission to the QP, DEFRA officials argued that the exemption was engaged in relation to the requested information because it was important for to maintain a private space within which officials and ministers could discuss candidly how to respond to FOI requests. It was put to the QP that had the requested information been disclosed this would be likely to inhibit the effectiveness of discussions regarding the handling of requests in future, resulting in poorer decision making.
78. The QP confirmed that he was content that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
79. The Commissioner’s view is that the prejudice test is not a weak test and a public authority must be able to point to prejudice which is “real, actual or of substance” and to show some causal link between the potential disclosure and the prejudice. Accordingly the Commissioner’s approach to assessing prejudice is as set out by the

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<sup>1</sup> Appeal references EA/2006/0011 and EA/2006/0013

Tribunal in *Hogan v the ICO and Oxford City Council (EA/2005/0026 and EA/2005/0030)*.

80. Whilst DEFRA did not distinguish between subsections (i) and (ii) of section 36(2)(b) the Commissioner recognises that there is a distinction and has therefore considered the link between disclosure and prejudice in relation to both the free and frank provision of advice and the provision of advice and exchange of views for the purposes of deliberation.
81. Given that the meta-request was for information relating to DEFRA's ongoing deliberations regarding a response to the complainant's original request, the Commissioner's view is that disclosure of this information would have been likely to have inhibited both the provision of free and frank advice and any deliberations at that point in time. The Commissioner is therefore content that section 36(2)(b)(i) and (ii) are engaged, the opinion was both reasonably arrived at and objectively reasonable.

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

82. In relation to the meta-request DEFRA did not submit any arguments for disclosure of information regarding the handling of the complainant's original request. However the Commissioner's view is that there is an important public interest in disclosing information in relation to FOI processes as such information shows the processes are working well or otherwise.
83. DEFRA had contended that there was little public interest in revealing the processing of information requests since the Act provides a statutory framework for request handling which requires an explanation to be given when information is withheld.
84. However the Commissioner's view is that the public interest in disclosure is not diminished by this argument. This is in keeping with the High Court decision in the Home Office, the Ministry of Justice and the Information Commissioner [2009] EWHC 1611 (*Admin*), paragraph 32:

*"...In relation to the Commissioner's acknowledgment that the enforcement mechanisms constituted the appropriate forum for investigations about how requests for information had been handled, the Tribunal presumably thought – in my view rightly – that there was a difference between a request intended to find out how a previous request for information had been handled, and a complaint that it had not been handled properly. The fact of the matter is that the enforcement mechanisms provided for by the Act are in addition to the core right in section 1(1), and should not be used in substitution for it."*

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

85. DEFRA had argued that it was important for government to be able to maintain a private space within which officials and ministers could candidly discuss how departments should respond to information requests. The Commissioner accepts this is a relevant argument in favour of maintaining the exemption.

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

86. The Commissioner's view is that meta-requests do not differ in status or importance from any other type of request. There is no legal basis for concluding that public authorities can refuse a meta-request under FOIA simply because it is a meta-request; there is no provision in FOIA which permits requests to be refused on the basis they constitute requests for the disclosure of information as to how a public authority internally handles a particular information request. They should therefore be considered in the same way as any other request and there is no exemption for circumvention of FOI processes in the Act.
87. What is therefore important is the extent to which the disclosure of information relating to the handling of the complainant's original request would have been likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberating a response to that request.
88. The Commissioner considers that in this instance the nature of the information requested ie it concerned deliberations on the original request and the timing of the meta-request ie whilst the original request was ongoing, are the determining factors. He is cognisant of the fact that the information requested throws up no particular issues that warrant a high level of public interest in disclosure above the general public interest factors of transparency, understanding the process of handling FOI requests and enabling the public to understand how a particular request was handled.
89. The Commissioner is of the view that disclosure of information in relation to the meta-request whilst discussions regarding a response to the original request were ongoing would, to a significant extent, have prejudiced those discussions. The Commissioner recognises that there is a considerable public interest in officials being able to discuss 'live' issues without external scrutiny.
90. In view of the above, the Commissioner finds that the public interest in maintaining the section 36(2)(b) exemption outweighs disclosure of the information.

## Procedural Issues

### Sections 10 and 17

91. Section 10 of the Act provides that a public authority must provide the information requested within 20 working days. However section 10(3)(b) provides that the period may be extended where a public authority requires additional time to consider the public interest in maintaining one of the qualified exemptions. Where such an extension is required a public authority is obliged to explain the situation to the applicant.
92. Under section 17(1) the public authority must state which exemption has been engaged and, if it is not obvious, why that exemption applies. This must be done within 20 working days. Under section 17(2) the public authority also has to inform the applicant if additional time is required to consider the public interest test within the 20 working days. In other words the public authority must have already decided that the exemption is engaged within the 20 working days; the extension is only available for consideration of the public interest test. The public authority must also provide an estimate of how long it will take to conduct the public interest test under section 17(2).
93. In this instance DEFRA did advise the complainant that additional time was required to consider the public interest and gave an estimate of 9 March 2007 as the date such considerations would be completed. The letter was sent on 8 February 2007 which was within 20 working day time limit.
94. However DEFRA had indicated that this extension was to consider the public interest in relation to the exemption at section 35 – formulation of government policy, as opposed to section 36(2)(b), which was the exemption cited in its substantive refusal notice.
95. Subsequently, at internal review stage, DEFRA upheld its original decision not to disclose citing section 36(2)(b) but cited section 35(1)(a) in the alternative should section 36 not be engaged.
96. Based on the information contained in the refusal notice and internal review letter and DEFRA's confirmation that it had initially considered section 35(1)(a) to be engaged on receipt of the request but had subsequently relied upon section 36(2)(b) at the time of refusal to disclose, it appears that the exemption at section 36 was cited late.
97. The Act requires a public authority to determine whether any information is covered by an exemption within 20 working days. The Commissioner will find a public authority in breach of section 17(1) if any element of the refusal notice relating to the application of exemptions, which is being relied upon at the completion of the internal review or the time for statutory compliance, is introduced outside of the



20 working day period. As DEFRA cited section 36(2)(b) late, this is therefore a breach of section 17(1).

### **The Decision**

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98. The Commissioner's decision is that the public authority had acted correctly in withholding the information.
99. However, the Commissioner has also decided that the request was not handled in accordance with the Act because in citing s36 late it breached section 17(1).

### **Steps Required**

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100. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

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

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

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

**Dated the 14<sup>th</sup> day of December 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## **Legal Annex**

### **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.”

### **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.”

### **Exemptions**

#### **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 36

Section 36(2) provides that –

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

(a) would, or would be likely to, prejudice –

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”