

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 December 2009

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall, London
SW1A 2WH

Summary

The complainant requested from the Cabinet Office the information contained in four files relating to the 1984/5 miners' strike. After a significant delay to consider the public interest test, the Cabinet Office provided some of the requested information, but withheld the remainder by reference to sections 23, 35(1)(a) and 42(1) of the Freedom of Information Act 2000 ('the Act'). During the course of the Commissioner's investigation the Cabinet Office released further information, and added section 35(1)(b) as the principal exemption, as well as applying a 'neither confirm nor deny' response under section 35(3). The Commissioner upheld the application of the exemptions to some information, but decided that the Cabinet Office had incorrectly withheld a large proportion of it which he required to be disclosed. He also decided that the Cabinet Office breached sections 1(1)(a) and 1(1)(b), 10(1) and 17(3) of the Act.

The Commissioner's Role

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

The Request

2. On 11 April 2005 the complainant requested from the Cabinet Office the information contained in four files relating to the 1984/5 miners' strike:

'1) 492/25 Pt2 -The Miners Strike-6/1/85-20/11/85

2) Coal Dispute 1984 -21/3/84-30/7/84

Coal Dispute 1984 -1/8/84- 28/11/84
Coal Dispute 1984 -3/12/84-26/6/91'.

3. The Cabinet Office replied on 11 May 2005 that it held the requested information but a number of exemptions applied. Information falling under section 23 of the Act was being withheld. The exemptions in sections 24, 29, 31, 35 and 42 applied to the rest of the information, and the Cabinet Office was extending the time limit for responding to the request in order to consider the public interest test in respect of these exemptions. It indicated that it would probably not be able to respond before the end of June 2005.
4. On 28 June 2005 the Cabinet Office wrote again to the complainant, stating that it required further time to consider the public interest test, possibly until 29 July.
5. There were subsequently 'many communications' between the Cabinet Office and the complainant providing updates on the progress of the case, including communications on 24 August 2005, 1 and 24 March 2006, and 28 April 2006.
6. The Cabinet Office wrote to the complainant on 19 May 2006, apologising for the delay. It provided some of the requested information. In relation to the remainder it indicated that, in addition to the information exempted by reference to section 23, it was now relying only on sections 35(1)(a) and 42(1). It advised the complainant that he could request an internal review, and complain to the Commissioner.
7. On 12 September 2006 the complainant requested an internal review. He argued that while the section 23 exemption applied to '*raw reports from the intelligence and security agencies*', it should not be applied to information which '*discusses the political and policy implications of such reports*'. In relation to the public interest test, he expressed his view that the age of the information, the significance of the events, and the fact that some of the politicians involved had put their version of events into the public domain, meant that the balance of the public interest favoured disclosure.
8. The Cabinet Office acknowledged the internal review request on 12 September 2006. On 5 March 2007 it apologised for the delay and provided the complainant with its decision. In a brief statement it upheld the original decision by reference to the exemptions in sections 23, 35 and 42. It reminded the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

9. On 8 May 2007 the complainant made a complaint to the Commissioner. He indicated that the information should be disclosed for the reasons given in his letter requesting internal review:

- information should not be exempt by virtue of section 23 if it comprises *'material discussing the political implications of such allegations [of intelligence agency involvement in the miners' strike]'*;
- in relation to the other exemptions, the public interest *'clearly'* favoured disclosure, particularly in light of the age of the information and the accompanying diminishment of the need to preserve the candour and confidentiality of discussions, and the fact that a number of the Ministers involved had published their memoirs of the events.

10. The Commissioner has investigated the application of sections 23, 35 and 42 to the information which the Cabinet Office continues to withhold.

Chronology

11. The Commissioner wrote to the complainant and the Cabinet Office on 24 April 2008. He asked the Cabinet Office to comment on various issues and to provide him with the withheld information.

12. He sent a reminder to the Cabinet Office on 27 May 2008.

13. On 28 May he agreed an extension until 13 June, in light of the volume of information, amongst other factors.

14. He subsequently agreed a further extension until 27 June 2008.

15. He sent a further reminder on 2 July 2008

16. On 7 July 2008 the Commissioner received a letter dated 18 June from the Cabinet Office's Director of Security and Intelligence in relation to the section 23 information. He asked the Cabinet Office to provide further details of the information to which section 23 had been applied.

17. The Commissioner sent a further letter to the Cabinet Office on 9 July 2008 reminding that its response was outstanding.

18. The Cabinet Office replied with its comments on 10 July 2008. It stated that it was prepared to disclose a small number of documents, which it now considered not to be exempt. It also provided some of the withheld information for the Commissioner's inspection, but required that a representative of the Commissioner view the remainder at its offices. In addition, it stated that, following a reconsideration of the request and the information that it might cover, it was now applying a 'neither confirm nor deny' response under section 35(3).

19. The Commissioner informed the Cabinet Office on 22 September 2008 that it should disclose to the complainant the information which it had now accepted was not exempt. He also asked for further comments.

20. The Cabinet Office confirmed on 10 October 2008 that it had sent to the complainant the documents which it considered to be no longer exempt.

21. On 2 September 2008 the Commissioner viewed information at the offices of the Cabinet Office.

22. He viewed further information at its offices on 27 October 2008.

Findings of fact

23. The UK miners' strike was part of a major industrial dispute between the National Coal Board and trade unions, principally the National Union of Mineworkers, affecting the British coal industry. It lasted for almost a year, ending on 3 March 1985.

Analysis

24. During the course of the Commissioner's investigation the Cabinet Office raised issues the analysis of which would disclose information which has been withheld. These matters are therefore addressed in a Confidential Annex to this Decision Notice which has been provided to the Cabinet Office only.

25. The Cabinet Office also decided to release a number of documents during the Commissioner's investigation. Of those that it continued to withhold, it altered the way in which it was applying the exemptions: a number of documents were withheld by reference to section 23(1) alone; one document was withheld by reference to section 42(1) alone; a few documents were withheld by reference to section 35(1)(a) alone; section 35(1)(a) was applied to a few documents in conjunction with section 35(1)(b); and the remaining documents were withheld by reference to section 35(1)(b). In addition, following a reconsideration of the request and the information that it might cover, a 'neither confirm nor deny' response was applied under section 35(3).

Exemption – section 23 – security bodies

26. Section 23(1) states:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

27. The complainant has argued that information should not be exempt by virtue of section 23 if it comprises *'material discussing the political implications of such allegations [of intelligence agency involvement in the miners' strike]'*.

28. The Commissioner takes the view that, as the section 23 exemption is an absolute one that is not subject to the public interest test, the relevant issue is simply whether the information at issue was directly or indirectly supplied by, or relates to, a relevant security body. The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information

withheld under section 23(1) has indeed been supplied by or is related to security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests. The Commissioner is satisfied that the Director of Security and Intelligence in the Cabinet Office occupied such a position in this case.

29. On 7 July 2008 the Commissioner received a letter dated 18 June from the Director of Security and Intelligence that he had examined the information and was able to assure the Commissioner that it was supplied by or related to one or more security bodies specified in section 23(3). On 2 September the Cabinet Office provided the Commissioner with details of the information withheld by reference to section 23(1). Having considered this explanation and the letter from the Director of Security and Intelligence, the Commissioner has concluded that the information that was withheld by the Cabinet Office by reference to section 23(1) did indeed engage that exemption. Since section 23 is not subject to a public interest test, the information is not required to be disclosed.

Exemption – section 35(3)

30. Following a reconsideration of the request and the information that it might cover, the Cabinet Office applied a 'neither confirm nor deny' response under section 35(3). This issue is addressed in the Confidential Annex which has been provided to the Cabinet Office. The Commissioner has concluded that section 35(3) is not engaged.

Exemption – section 35(1)

31. The Cabinet Office applied paragraphs of section 35(1) to most of the withheld information. Section 35(1) of the Act 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 for the provision of such advice, or

(d) the operation of any Ministerial private office.'

32. The Commissioner accepts that the term 'relates to' in section 35(1) can be interpreted broadly, following the case of *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006). In that case, discussing the minute of a meeting, the Tribunal decided that:

'If the meeting or discussion of a particular topic within it, was, as a

whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable' (paragraph 58).

33. The Tribunal clarified at paragraph 55 that the *'immediate background to policy discussions is itself information caught by s35(1)(a), an inference which we believe, is readily drawn from the wording of s.35(4) [regarding the particular public interest in disclosing factual information once a policy decision has been taken]'*. It also concluded that, because section 35(1) was a qualified exemption, public authorities would be required to adopt a commonsense approach to disclosure of any information which caused *'...no, or no significant damage to the public interest'* (paragraph 53).

Exemption – section 35(1)(b) – Ministerial communications

34. The Cabinet Office claimed that the majority of the information fell within section 35(1)(b) of the Act:

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

(b) Ministerial communications...'

35. Such communications are written correspondence in any form between Ministers of the Crown, between Northern Ireland Ministers, or between Assembly Secretaries. Ministerial communications include the proceedings of Cabinet or its Committees. Communications between civil servants on behalf of their Minister are also likely to be included.

36. The Commissioner has considered the withheld information to which the Cabinet Office applied section 35(1)(b). He has identified the information as falling within the following categories:

- (i) internal departmental material (including briefings for the Prime Minister by Cabinet Office officials regarding possible agenda items for upcoming Cabinet Committees, and briefings for other meetings, including those with Ministers outside of Cabinet Committees; briefing notes on options; and internal departmental notes between officials, including covering notes as well as substantive advice);
- (ii) interdepartmental material (including Ministerial correspondence, either between Ministers, or between officials on behalf of Ministers; and interdepartmental correspondence between officials not on behalf of Ministers);
- (iii) policy and background material (including policy reports; and officials' briefings on technical issues);

- (iv) miscellaneous material, comprising extracts from publicly available documents.

37. Having considered this information, the Commissioner takes the view that (i), (iii) and (iv) do not engage section 35(1)(b); and neither does that part of category (ii) that comprises interdepartmental correspondence between officials that was not on behalf of Ministers. In taking this view, the Commissioner has had regard to the fact that the exemption in section 35(1)(b) only applies to information which has the following characteristics: it comprises communications; the communications are *between* relevant parties; and the relevant parties are either Ministers, or officials communicating on their behalf. For category (i), the Commissioner does not consider the internal departmental material in this case to comprise communications *between Ministers*, as is also the case for the interdepartmental correspondence between officials in category (ii) which is not on behalf of Ministers. For category (iii), the information is not between Ministers and not, in some cases, communications. For category (iv), the information is not comprised of communications; there is no evidence that the information was communicated between or on behalf of Ministers; and the Commissioner does not consider in any event that publicly available information can be exempt in the circumstances of this case. The Commissioner therefore requires that the information that does not engage section 35(1)(b) should be disclosed, unless it is exempt by virtue of section 35(1)(a) (as considered below).

Public interest test

38. Section 35 is a qualified exemption and therefore subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*.

39. In its refusal notice of 19 May 2006 the Cabinet Office provided its assessment of the public interest. It identified the following factors as favouring disclosure of the information:

- the general public interest in greater transparency in how government operates;
- the general public interest in members of the public being able to assess the quality of debate between Ministers, the quality of advice they receive, and the quality of subsequent decision-making;
- enabling the public to contribute more knowledgeably to debate;
- the time which had passed since the events in question;
- the great deal of press and public interest in the events.

40. The Commissioner takes the view that there is a further public interest factor in the public being able to understand decisions which have been taken. He considers that the great deal of interest on the part of press and public in the

events surrounding the miners' strike, in combination with the desirability of transparency in the functioning of government at the time, are particularly significant public interest factors. The Commissioner also notes that the value of information in enhancing contemporary historical research is high and the level of public interest within communities particularly affected by the miners' strike. He also considers that it is very significant that the relevant events were, at the time of the freedom of information request, twenty years old. As a general rule, the sensitivity of information is likely to reduce over time. The impact of the passage of time on the operation of the public interest is recognised within the Act in the 'historical records' provisions, which stipulate that section 35 cannot be applied at all to information that is more than thirty years old. In this case the Commissioner believes that the events covered by the requested information could not be described as contemporary or having clear links to contemporary events, and the public interest in maintaining the exemption is accordingly weakened.

41. In favour of maintaining the exemption the Cabinet Office notified the complainant of the following public interest factors:

- the general public interest in full and frank discussion within government, and particularly within the Cabinet, to produce better quality decision-making, the candour of which might be negatively affected by considerations of whether the discussions might be disclosed (the 'safe space' and 'chilling effect' arguments);
- the public interest in upholding the convention of collective Cabinet responsibility, which allows for in-depth consideration of policies and actions;
- the public interest in protecting the confidentiality of communications between lawyers and their clients.

It concluded that *'It is important for the process of government that Ministers can discuss, consult and debate widely without their arguments entering the public domain'*.

42. The Cabinet Office provided further arguments to the Cabinet Office during the course of his investigation. In relation to section 35(1)(b), it again referred to the doctrine of collective Cabinet responsibility and the 'safe space' arguments, and added that:

'Inappropriate disclosure has the potential not only to limit discussion of policy between Ministers, but may also distort public perceptions of the advice provided by officials. The prospect of early disclosure could affect the impartiality of advice provided. The fact that the information concerns a particularly high-profile event, the Miners Strike, makes it even more sensitive'.

43. The Commissioner has considered in turn the arguments related to the 'chilling effect', 'safe space', and 'collective Cabinet responsibility'. He notes that there have been a number of Information Tribunal cases related to both the 'safe

space' and 'chilling effect' arguments, mostly arising out of cases involving section 35(1)(a). However, he considers that the principles developed by the Tribunal also apply to section 35(1)(b), so that Tribunal references to policy and officials' advice are also generally applicable to Ministerial communications and to debate between Ministers and within Cabinet. The Commissioner has taken this into account in the analysis that follows.

- *Chilling effect*

44. The Commissioner draws a distinction between arguments relating to the need for a 'safe space' (ie the public interest in civil servants and Ministers being able to formulate policy and debate live issues without being hindered by external scrutiny) and those regarding the potential 'chilling effect' on the frankness and candour of debate that might flow from disclosure of information. The Commissioner's view is that the 'chilling effect' of potential disclosure involves the risk of a loss of frankness and candour in advice or debate. On the other hand, the need for a 'safe space' exists regardless of any impact of disclosure on the candour of debate.
45. In this case, the chilling effect argument is that disclosing information falling under section 35(1)(b) that relates to an issue which is no longer 'live' will affect the frankness and candour with which Ministers debate other, different 'live issues' in the future. This is a fairly weak version of the chilling effect argument.
46. The Commissioner takes the view that 'chilling effect' arguments should be given appropriate weight in the public interest test, by reference to the requested information in question. In this regard he notes the Information Tribunal case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) (paragraph 75, principle i), commended as a statement of principle by the High Court in the case of *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department* ([2008] EWHC 638 (Admin)):

'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. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

47. Accordingly, the Commissioner accepts that in principle the possibility of disclosure of information may have a 'chilling effect' on discussions. Having considered the requested information, the Commissioner accepts that the 'chilling effect' of disclosure is likely to have some weight in this case.
48. However, he also notes that the Information Tribunal has generally not given significant weight to 'chilling effect' arguments. For example, in the case of *Scotland Office v the Information Commissioner* (EA/2007/0128) the Tribunal stated:

'We share the scepticism expressed by other Panels of this Tribunal as to the extent of the "chilling" effects predicted in relation to the impact of disclosure in relation to internal government deliberations.'

49. And in relation to section 35(1)(b), the Information Tribunal stated in the case of *Scotland Office v the Information Commissioner* (EA/2007/0070) that:

'No evidence has been put before us to show that because of the potential for disclosure under FOIA, Ministers have changed the way in which they communicate, to have taken less robust positions in debate or have been less candid in expressing their views in writing. In other words, there is no evidence that the "chilling effect" feared has actually materialised. This is of course as it should be. In line with the views expressed by the Tribunal in DFES, we consider that we are entitled to expect of our Ministers, as elected politicians, a degree of robustness and for them not to shy away, in cabinet discussion, from taking positions and expressing those positions candidly, for fear that their views may, in certain circumstances, become public.'

50. The Commissioner would therefore expect public authorities to provide convincing arguments for each kind of impact, with reference to the particular disclosure being considered. He does not believe that the Cabinet Office has done so in this case.
51. Furthermore, the Commissioner considers that the timing of the request is crucial. The Information Tribunal acknowledged this in the Environmental Information Regulations (regulation 12(4)(e)) case of *Friends of the Earth v The information Commissioner and Export Credits Guarantee Department*, which related to government departmental comments on an application to the ECGD to finance the Sakhalin II oil pipeline project:

'The Tribunal is simply not willing to accept...that disclosure of the 2003 inter-departmental responses in March 2005 was likely to pose a threat to the candour of further deliberations' (paragraph 74).

52. In this case, the request was made some twenty years after the information was generated, which the Commissioner considers has greatly reduced the impact of any chilling effect.

53. Similarly, as the impact of the particular 'chilling effect' gets progressively wider, the Commissioner considers that it will be more difficult for convincing arguments of this nature to be sustained. This is particularly the case for information where the process of policy formulation or development is complete but it is claimed that historic issues would affect the frankness and candour of contributions to future policy debate.

54. On the other hand, the Commissioner considers that in some cases disclosure may actually lead to better quality advice and improved decision making. This argument was put forward by counsel for the Commissioner in *The Secretary of State for Work and Pensions v The Information Commissioner* (EA/2006/0040), recorded in paragraph 90 of the decision:

'He suggested that the new law would have concentrated the mind of civil servants in a beneficial way to ensure a more rigorous approach to any analysis or predictions...the safest thing for the prudent civil servant, faced with the prospect of disclosure, is to make sure that he/she does the best job and puts forward figures that can be defended, not just to the Home Office, but, if necessary, in the course of public debate...the prospect of public disclosure is actually capable of importing a greater degree of rigour into the process.'

55. While the Tribunal did not indicate what weight it had given to this argument, its decision was that the information in question should be released.

56. In the Environmental Information Regulations (regulation 12(4)(e)) case of *Friends of the Earth v The information Commissioner and Export Credits Guarantee Department* (EA/2006/0073), the Tribunal stated that it *'feels most strongly that disclosure of the type of information in question...is, if anything, likely to improve the quality of the deliberative process'* (paragraph 76).

57. The Commissioner's view is that arguments about the prospect of disclosure leading to improved advice or debate should be considered in light of the nature of the information in question and the overall circumstances of the case. In this case, he considers that the Cabinet Office has failed to provide a convincing explanation as to why there would be a chilling effect. The Commissioner is therefore satisfied that the weight that can properly be given to the 'chilling effect' of disclosure is slight.

- *Safe space*

58. The 'safe space' was identified in the Information Tribunal case of *Scotland Office v the Information Commissioner* (EA/ 2007/0070) as *'the importance of preserving confidentiality of policy discussion in the interest of good government'*; in other words, the idea that the policy and decision making processes should be protected while ongoing in order to prevent them from being hindered by lobbying and media involvement. In *Department for Education and Skills v the Information Commissioner and The Evening Standard* (EA/2006/0006) the Tribunal recognised the importance of this safe space:

'Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.'

59. However, the 'safe space' argument is not definitive. In the case of *Scotland Office v the Information Commissioner* (EA/2007/0128) the Tribunal warned that:

'information created during this process cannot be regarded per se as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption'.

60. The Commissioner agrees with this view and comments that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration. Therefore, an important determining factor in relation to the 'safe space' argument is whether a request for such information is received while a 'safe space' in relation to that particular policy-making process is still required.

61. In the High Court case *Office of Government Commerce v the Information Commissioner* (High Court, [2008] EWHC 638 (Admin)) the information in question related to the Government's gateway zero review into the introduction of an identity cards Bill. The High Court accepted that:

'the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished'.

62. And in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) the Information Tribunal commented on the need for a private thinking space:

'This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.'

63. The Commissioner has therefore assessed:

- to which policy the requested information relates;
- whether the formulation and development of that policy is still ongoing; and
- whether the weight of the public interest has diminished due to the policy becoming 'more certain'.

64. The 'safe space' was identified in the Information Tribunal case of *Scotland Office v the Information Commissioner* (EA/ 2007/0070) as *'the importance of preserving confidentiality of policy discussion in the interest of good government'*; in other

words, the idea that the policy making process should be protected while it is ongoing in order to prevent it being hindered by lobbying and media involvement.

65. However, in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) the Tribunal commented that:

'This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.'

66. The Commissioner notes that in this case the issues which were before Ministers at the time when the information was generated had long before ceased to be current at the time of the request. The Commissioner is satisfied that, at the time of the request, the public interest in maintaining a 'safe space' attracted no or very little weight in the assessment of the public interest.

- *Collective Cabinet responsibility*

67. Separately to the 'safe space' argument, the Commissioner has considered whether there may be remaining public interest considerations related to the undermining of collective Cabinet responsibility, which is a separate public interest in allowing the Cabinet to promote and defend an agreed position without revealing divergent individual views. Not allowing this would potentially result in valuable government time being spent publicly debating views that have only ever been individual views, rather than government positions, and in commenting on the meaning and implications of a divided Cabinet. Whilst it is acknowledged that increased accountability and transparency count in the public interest, the Commissioner's view is that there is some public interest in not allowing freedom of information disclosures to result in a 'paralysed' Government.

68. The Commissioner has considered whether the content of the requested information is such that it is covered by the convention of collective Cabinet responsibility. This convention was described by the Information Tribunal in the case of *Scotland Office v The Information Commissioner* (EA/2007/0070) as being:

'the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed' (paragraph 82).

69. Although not all Ministers are Cabinet members, all Ministers are bound by the Ministerial Code to promote the positions taken by the Cabinet, and the convention of collective responsibility can therefore extend to all Ministers. The Commissioner notes that Section 1.2 of the Ministerial Code puts a Minister's

duty to uphold the principle of collective responsibility first in the list of principles of ministerial conduct.

70. Having considered the information in this case, the Commissioner has concluded that some of it is covered by collective Cabinet responsibility.

71. In considering the relevance of the convention, the Commissioner notes that, in the *Scotland Office* case (EA/2007/0070) above, the Tribunal was clear that the convention did not elevate section 35(1)(b) to the equivalent of an absolute exemption, since *'the convention of collective Cabinet responsibility is a public interest like any other, in the sense that the weight to be accorded to it must depend on the particular circumstances of the case'* (paragraph 86). However, it accepted the importance of the convention, in that *'detriment can arise to the public interest from disclosure of information concerning the formulation of Government policy at Cabinet level'* (paragraph 83); and that, *'where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption'*. This latter point was confirmed in a further case, *Scotland Office v The Information Commissioner* (EA/2007/0128):

'We do see some force however in the argument advanced by the Scotland Office that the factors in favour of maintaining the exemption for some types of information in this category will, almost always, be strong and that "very cogent and compelling" reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations.'

72. The Commissioner recognises that the Freedom of Information Act does not allow for Ministerial correspondence to be withheld automatically as a class of information, but he does accept that collective Cabinet responsibility may well be a significant factor in the public interest test, if a specific harm can be identified which would be caused by disclosure.

73. In the *Scotland Office* case (EA/2007/0070) the Tribunal also provided a (non-exhaustive) list of relevant factors for consideration when assessing the impact of the convention in a particular case:

'the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest'.

74. In relation to timing, the Tribunal also commented that this was:

'likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was "live" when the request was made, the public interest in preserving a "safe space" for Ministers to have a full and open debate, and the public interest in the Government being able to come together successfully to determine what may, in reality,

have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption.'

75. In the Commissioner's view, 'live' issues may go beyond ongoing policy-making to include scenarios such as a Government response to an unforeseen world event, or critical press coverage. He accepts that prolonged industrial action is one such scenario.

76. In this case, the Commissioner has identified the following factors as being of particular relevance to the impact of the convention on the public interest test. Factors that support the need to maintain the convention in this case are:

- the context of the information, ie the fact that some of it reveals the innermost workings of the Cabinet at this historical moment, when the government was one of the parties in a socially highly divisive historical event;
- the specific views of different Ministers which some of the information reveals, and the fact that particular Ministers are identified.

On the other hand, factors that compensate, or reduce the potential, for damage to the convention of disclosure, are:

- the fact that the relevant issues were not 'live' at the time of the request;
- the fact that none of the Ministers, or the governing party of the time, were still in office at the time of the request. The Commissioner has not been presented with any evidence that any of Ministers involved were still involved in front line politics.

77. Having weighed up these factors, the Commissioner is satisfied that disclosure of the requested information would be unlikely to significantly damage the convention of collective Cabinet responsibility, and that any erosion of the convention would in any event be outweighed by the public interest in transparency, accountability, informed public debate and understanding of the decisions which were taken at that particular historical conjuncture.

Summary

78. In addition to the arguments considered above, the Commissioner has also had regard to two points which were made by the Information Tribunal in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006). First, the Tribunal took the view that *'No information within s35(1) [the FOIA exemption which has some equivalence with regulation 12(4)(e)] is exempt from...disclosure simply on account of its status'*. The fact that the information relates to the deliberations of very senior officials or government Ministers does not of itself dictate that the information is sensitive, and *'To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1) a class of absolutely exempt information'*.

79. The Commissioner does not consider that there is not a conclusive interest in withholding evidence that Ministers might have had a difference of opinion, since he believes that an informed public will realise that such differences are a normal part of the policy-making process. (That said, he acknowledges that there is a public interest in maintaining the convention of collective Cabinet responsibility.)
80. Having weighed up the relevant public interest factors in favour of disclosure (including the public interest in transparency and accountability, the contribution to public debate and understanding of the events, the time which has elapsed, and the significant press and public interest in the events) and in favour of maintaining the exemption (the 'chilling effect', 'safe space', and 'collective Cabinet responsibility' arguments), the Commissioner has concluded that the balance of the public interest lies in disclosure of the requested information. He therefore requires the Cabinet Office to disclose this information (except insofar as disclosure is affected by another exemption assessed in this Notice).

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

81. The Cabinet Office applied section 35(1)(a) to a number of the documents. That section of the Act 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...'

82. As already noted, the Commissioner accepts that the term 'relates to' in section 35(1) can be interpreted broadly. He takes the view that the 'formulation' and 'development' of government policy encompasses the policy process from the earliest stages, where options are generated and sorted, through to piloting, monitoring, and reviewing existing policy. Policy is 'government' policy when it involves the development of options and priorities for Ministers to select from, and is likely to be a political process which requires Cabinet input, or applies across government, or represents the collective view of Ministers. Accordingly, the formulation or development of government policy is unlikely to include purely operational or administrative matters.
83. The Commissioner has considered the information to which section 35(1)(a) was applied in this case. There is a note of, and press releases from, a meeting between an outside group and Ministers/officials, a note from one official briefing another about the situation regarding a separate industrial dispute, a letter to a Minister from a Member of the European Parliament covering a number of documents relating to a resolution made to the European Parliament to set up a Committee of Enquiry, a note of an informal meeting between the National Union of Mineworkers and the British Coal Board, and a one-page note from an unidentified individual to another commenting on jury intimidation.
84. The Commissioner has decided that this information did not relate to the formulation or development of government policy, so that section 35(1)(a) is not engaged. Regarding the meeting with the outside group, that appears to have

related to discussions about how the miners' dispute might be ended; the Commissioner does not consider that an 'operational' meeting like this can be said to 'relate to' policy development or formulation. There is no evidence that the briefing note for the separate industrial dispute was produced in the course of the formulation or development of policy, let alone government policy, and so the Commissioner is unable to accept that section 35(1)(a) applies. Similar considerations apply to the covering letter from the Member of the European Parliament and attachments, at least some of which would be likely to have been publicly available documents. In relation to the note of the informal meeting between the National Union of Mineworkers and the National Coal Board, and the one-page note, the contents do not on the face of it relate to government policy formulation or development; in the case of the latter, the anonymity and lack of any context means that the Commissioner is unable to conclude that the document was created as part of, and therefore 'relates to', a policy-making process.

85. The remaining information comprises formal policy reports from technical experts, and related briefings and inter-departmental correspondence of officials. The Commissioner accepts that this information does relate to the formulation or development of government policy.

Public interest test

86. Section 35(1)(a) also attracts a public interest test. Much of the analysis of the public interest test provided in relation to section 35(1)(b) is also relevant to this, although the Commissioner has applied the test separately for the application of paragraphs (a) and (b) of section 35(1).
87. The Cabinet Office applied the same public interest arguments to both paragraphs (a) and (b), and these are recorded above. In its comments to the Commissioner, it provided some brief specific arguments related to section 35(1)(a), raising the 'safe space' and 'collective Cabinet responsibility' factors.
88. The Commissioner's considers that, as with section 35(1)(b), the relevant public interest factors in favour of disclosing the information are transparency and accountability, the contribution to public debate and understanding of events surrounding the miners' strike, the time which has elapsed, and the significant press and public interest in the events. In favour of maintaining the exemption are the 'safe space' and 'collective Cabinet responsibility' arguments. The Commissioner believes that the fact that the policies under consideration were over twenty years old at the time of the request, and therefore almost wholly historical, gives the factors in favour of maintaining the exemption little weight. He accepts that continued interest in the miners' strike and associated issues means that the public interest factors in favour of disclosure has not reduced in the same way.
89. Furthermore, he notes that some of the information is statistical. The Act specifies that once a decision about government policy has been taken, statistical information used to provide a background to that decision taking will no longer be regarded as related to either the formulation or development of government

policy, or to Ministerial communications, so that these exemptions are inapplicable. The rationale behind this is that delaying disclosure of statistical information means that it cannot be used by those who might wish to participate in an informed way on possible policy choices.

90. Having considered the information to which section 35(1)(a) was applied, and the comments of the Cabinet Office, the Commissioner has concluded that the balance of the public interest lies in disclosure of the requested information.

Exemption – section 42(1) – legal professional privilege

91. The Cabinet Office applied section 42(1) to one document. 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.'

92. The Commissioner has decided that the document in question does not attract legal professional privilege. His reasoning for taking this view is recorded in the Confidential Annex, since the explanation would itself disclose information that is currently withheld.

93. Since the Commissioner has concluded that the exemption is not engaged, he requires that it now be disclosed.

Procedural matters

Considering the public interest following an extension of time

94. Section 10(1) of the Act 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.'

95. However, section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. The refusal notice:

'must indicate that no decision...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'.

96. As he has explained in his 'Good Practice Guidance 4', the Commissioner takes the view that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken to deal with an internal review should in no case exceed 40 working days. Where any additional time beyond the initial 20

working days is required, the public authority must give an estimate of the time by which the final decision will be reached.

97. In this case, the complainant made his request on 11 April 2005. The Cabinet Office confirmed on 11 May 2005 that it held the requested information, but stated that it required an extension, probably until the end of June (2005), in order to consider the public interest test. In the event it did not provide a substantive decision until 19 May 2006, over 13 months later, although it did provide updates in the interim. The Cabinet Office therefore exceeded its own extended timescale by 11 months. Accordingly, the Commissioner finds that the Cabinet Office failed to provide its assessment of the public interest test within a reasonable timescale, which constitutes a breach of section 17(3) of the Act.

Failure to disclose information

98. The Commissioner has concluded that some of the withheld information was not exempt, and the Cabinet Office therefore breached section 1(1)(b) in failing to disclose this information, and section 10(1) by failing to provide it within the statutory time limit.

Incorrect application of 'neither confirm nor deny' response

99. The Cabinet Office incorrectly failed to confirm or deny whether it held information to which it had applied a 'neither confirm nor deny' response under section 35(3). This constituted a breach of section 1(1)(a) and section 10(1).

The Decision

100. The Commissioner's decision is that the Cabinet Office did not deal with the request for information in accordance with the Act. It failed to confirm or deny whether it held information to which it had applied a 'neither confirm nor deny' response under section 35(3), a breach of both section 1(1)(a) and section 10(1). It did not comply with its obligations under section 1(1)(b) by failing to communicate to the complainant information to which he was entitled, and section 10(1) by failing to do so within the statutory time limit. It also committed procedural breaches of section 17(3) by failing to provide its assessment of the public interest test within a reasonable timescale.

Steps Required

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

- disclose to the complainant the information identified in the Confidential Schedule supplied to it by the Commissioner;

- in relation to the 'neither confirm nor deny' response, confirm or deny whether it holds relevant information and, if it is held, either disclose the information or else issue a formal refusal notice citing a relevant exemption in the Act.
102. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.
103. In light of the circumstances, should there be a further complaint arising from these Steps, the Commissioner undertakes to expedite any further investigation which may be necessary on his part.

Failure to comply

104. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

Internal review delay

105. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his 'Good Practice Guidance No 5', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review.
106. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a public authority to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.
107. The complainant's internal review request was made on 12 September 2006. The Cabinet Office sent its internal review decision to him on 5 March 2007. The Cabinet Office therefore took almost six months to complete the review. The Commissioner does not believe that any exceptional circumstances existed in this case to justify that delay. Indeed, he notes that the brief statement contained in

the Cabinet Office's letter of 5 March 2007 added nothing to what had been contained in the original refusal notice, and failed to address any of the complainant's specific points. While the Commissioner recognises that the Cabinet Office's internal review in this case was started prior to the issuing of the 'Good Practice Guidance No 5' in February 2007, he considers that six months represents a wholly unreasonable timescale (particularly in light of the 13 months that it had taken the Cabinet Office to produce its original refusal notice) and he would like to take this opportunity to remind the authority of the expected standards in this regard.

Inadequate internal review

108. Paragraph 39 of the section 45 Code of Practice encourages authorities to provide a fair and thorough review of matters, including a fresh look at the application of exemptions:

'The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.'

109. In this case the internal review simply stated that the exemptions in sections 23, 35 and 42 had been properly applied and that, for the latter two, the public interest remained in favour of withholding the information, concluding that the original decision was therefore upheld. The Commissioner takes the view that this internal review was wholly inadequate, since there is no evidence that it genuinely engaged with the complainant's points or undertook a proper reconsideration of the issues.

Right of Appeal

110. 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.

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 21st day of December 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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’.’

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.’

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 23(1) provides that -

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

Section 23(2) provides that -

'A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.'

Section 23(3) provides that –

‘The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.’

Section 23(4) provides that –

‘In subsection (3)(c) ‘the Government Communications Headquarters’ includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.’

Section 23(5) 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) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).’

Section 35(1) provides that –

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

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

Section 35(2) provides that –

‘Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.’

Section 35(3) provides that –

‘The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).’

Section 35(4) provides that –

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

Section 35(5) provides that –

‘In this section-

‘government policy’ includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

‘the Law Officers’ means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

‘Ministerial communications’ means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

‘Ministerial private office’ means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the

administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

'Northern Ireland junior Minister' means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.'

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.'