

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 December 2009

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant asked the public authority for 'all data pertaining to' a freedom of information request which he had made previously. The public authority withheld some information under section 42 of the Freedom of Information Act 2000 ('the Act') and the rest under section 36. The Commissioner decided that information had been correctly withheld under section 42. Of the remaining information, he decided that it was exempt under section 36(2) but the public interest favoured disclosure, although part of the information relating to the identity of officials dealing with the complainant's request together with references to other individuals' freedom of information requests was exempt under section 40. The Commissioner also decided that the public authority did not comply with its obligations under section 17(1) in that it had failed to provide an adequate explanation of the public interest factors applicable to the exemption in section 36(2).

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 2 December 2005 the complainant requested that the Cabinet Office provide *'all records relating to the processing of my previous FOIA request'*, including but not limited to:

'all data pertaining to this request and its internal review held within your FOI case management system; and any intradepartmental or interdepartmental correspondence, email or memoranda relating to your response to this request and the internal review'.

(The previous request is the subject of another Decision Notice issued by the Commissioner under reference FS50087614.)

3. The Cabinet Office replied on 4 January 2006. It confirmed that it held information relevant to the request, including the correspondence to which the complainant had been party, which it offered to provide again if the complainant wished. The Cabinet Office stated that the rest of the information was being withheld as exempt under section 36(2)(b) and (c). Considering the public interest, the Cabinet Office expressed its view that disclosure of information relating to the way in which freedom of information requests were addressed would inhibit government departments' ability to analyse such requests, and by seeking to circumvent the enforcement mechanisms in the Act would also impose additional burdens on them. The Cabinet Office notified the complainant of his right to ask for an internal review.
4. The complainant asked the Cabinet Office on 4 January 2006 to review its decision. He confirmed that he did not require copies of correspondence sent by or to himself. He objected that the Cabinet Office had again *'failed completely to contemplate the redaction of sensitive material and the release of non-sensitive components of documents covered by this request'*.
5. The Cabinet Office replied on 26 June 2006. It apologised for the delay in responding, which it explained had been the result of a *'combination of factors that include the importance of the issues under consideration'*. It continued to claim the exemption under section 36 of the Act, and added that it had now concluded that some of the information was also covered by the exemption in section 42, relating to legal professional privilege. The Cabinet Office informed the complainant of his right to apply to the Information Commissioner.

The Investigation

Scope of the case

6. The complainant sent an email to the Information Commissioner on 25 February 2006 complaining that the Cabinet Office had failed to meet its own internal review deadline of 17 February 2006. Once he had received the review decision dated 26 June 2006, the complainant informed the Commissioner on the same day that the Cabinet Office had *'entirely neglected the central point of my initial complaint: they have entirely failed to undertake a proper redaction of non-sensitive information'*.

Chronology

7. On 18 October 2006 the Commissioner wrote to the Cabinet Office and asked for the withheld information to be forwarded to him.
8. The Commissioner sent a reminder to the Cabinet Office on 21 November 2006, and issued several further reminders.
9. On 1 February 2007 the Cabinet Office provided its substantive response to the Commissioner's request for clarification. The Cabinet Office did not provide the Commissioner with the information to which section 42 had been applied, on the grounds that:

'some, indeed most, of the information relates to exchanges involving the Cabinet Office and its legal advisers and therefore we believe is covered under the terms of s.51.(5)(a) of the Act'.

10. On 21 February 2007 the Commissioner asked the Cabinet Office to provide further clarification of this response. He subsequently sent reminders.
11. The Cabinet Office eventually provided its comments on 7 August 2007. It stated that it had reconsidered its response and now believed that section 51(5)(a) was not in fact applicable to most of the information to which it had been applied.
12. The Commissioner wrote to the Cabinet Office on 2 October 2007 asking for further clarification about the qualified person's opinion, querying when the opinion had been given.
13. The Cabinet Office replied on 19 October 2007 providing further information about the circumstances of the opinion.

Analysis

14. The Cabinet Office originally claimed that the requested information was exempt by virtue of section 36(2)(b) and (c) of the Act. It subsequently stated that some of it was also covered by section 42.

Exemption – section 42

15. In its comments to the Commissioner the Cabinet Office confirmed that the information covered by section 42 was *'exchanges between the Cabinet Office and its legal advisers on [the complainant's] request'*. In its letter of 1 February 2007 it declined to provide this information to the Commissioner on the grounds that *'some, indeed most, of the information relates to exchanges involving the Cabinet Office and its legal advisers and therefore we believe is covered under the terms of s.51.(5)(a) of the Act'*. After the Commissioner queried this, the Cabinet Office accepted in its letter of 7 August 2007 that the 'majority' of the information did not fall within section 51(5)(a), and provided a copy of this part of

the information. It also stated that it was only applying section 42 to the information to which it was still applying section 51(5)(a).

16. The Commissioner considers that it was extremely unsatisfactory that the Cabinet Office should have declined to give him sight of the information at issue in this case by citing section 51(5)(a), when that provision did not in fact apply to most of it, and it appears that the Cabinet Office was aware that it certainly did not apply to everything (hence its reference to *'some, indeed most, of the information'*).

17. Section 51(5) states:

'An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of-

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act.'

Since the Cabinet Office is claiming that section 51(5)(a) applies to the information which is exempt by virtue of section 42, the Commissioner has not had an opportunity to consider this part of the withheld information. However, he asked the Cabinet Office to confirm that all of the information was confidential; that it was created in the course of a relationship between a client and a professional legal adviser acting in their professional capacity; that it was created for the sole or dominant purpose of obtaining legal advice; and that all of it comprised legal advice to the Cabinet Office about its obligations, liabilities or rights under the Act. While the Cabinet Office did not provide any detail, it did affirm that this was the case. In fact, section 51(5)(a) only applies if an Information Notice is served, and in this case that did not happen. However, the Commissioner accepts that the Cabinet Office would have been justified in applying section 51(5)(a) to this information if an Information Notice had actually been served.

18. In relation to the application of the section 42 exemption to this information, 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.'

Information which falls within section 51(5)(a) will also fall within section 42. Therefore, insofar as he can make an assessment without having seen the information, the Commissioner considers that this information engages the exemption in section 42.

19. Since section 42 is a qualified exemption it is 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'*.

20. In relation to the public interest test, the Cabinet Office stated:

'We recognise that there is a general public interest in access to information about the government, how it reaches decisions and how it discharges its public functions.'

On the other hand it claimed that there was also a strong public interest in those obtaining legal advice:

'being able to communicate freely with their legal advisors in confidence and in being able to receive advice from them in confidence. The importance of this public interest had been reaffirmed by the House of Lords in Three Rivers DC v. Bank of England (No 6) [2004] UKHL 48. The underlying rationale for having a strong rule against disclosure is that it encourages full and frank exchanges between clients and their legal advisers, which is judicially recognised as being strongly in the public interest.'

21. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately, and also where disclosure would help further the understanding of issues of the day. In this case, disclosing legal advice could allow the public a greater comprehension of the legal issues which can arise out of freedom of information requests, and may assist in helping establish whether public authorities are adequately prepared to address the issues to which such requests give rise.

22. However, the Commissioner also acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) the Tribunal stated that:

'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.'

There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be. The Tribunal in the *Bellamy* case made it clear that disclosure was unlikely to be justified in most cases:

'it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...'

23. Furthermore, as legal advice has to be fair, frank and reasoned, it is inevitable that it will highlight the strengths and weaknesses of any course of action. Therefore, if advice obtained for the purposes of litigation were to be routinely

disclosed, public authorities would potentially be in a weakened position in litigation compared with other persons not bound by the Act. Therefore, there is a strong public interest in ensuring that legal professional privilege applies equally to all parties before, during and after litigation.

24. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure of the information.
25. In relation to the possibility of redaction of some of the requested information, the Cabinet Office stated that *'we did not consider that it would be possible to provide any meaningful data to [the complainant] without risk of...prejudice occurring'*. Although he has not seen the information, the Commissioner is mindful of the form that information constituting legal advice typically takes, and he has therefore concluded that it was reasonable for the Cabinet Office to have decided that redaction was not a realistic possibility.

Exemption – section 36(2)(b) and (c)

26. The Cabinet Office applied section 36(2) to the remainder of the requested information. Paragraphs (b) and (c) of section 36(2) state:

'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...

...(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.'

27. The Cabinet Office stated in its letter of 1 February 2007 that the agreement of the qualified person that the requested information fell within section 36(2)(c) *'was sought on 7 November 2005'*. Since the request was not made until 2 December 2005 the Commissioner asked the Cabinet Office to clarify the point. The Cabinet Office had also indicated that the opinion had been that the requested information fell within section 36(2)(c), whereas the Cabinet Office was claiming that both paragraphs (b) and (c) applied. The Cabinet Office's response was that the qualified person's opinion had in fact been sought on 15 December and given on 21 December 2005, and the submission had contained a typographical error in referring to the use of the exemption in section 36(3) rather than 36(2). However, it pointed out that the submission had referred to the use of section 36 in an earlier request by the same complainant, which had specified section 36(2)(c).

28. The Commissioner is satisfied that the person making the decision was the appropriate 'qualified person'. However, he notes that the Cabinet Office has failed to demonstrate that the qualified person agreed to the application of paragraph (b) as well as (c), although it had asserted both paragraphs in its refusal notice. In its letter of 7 August 2007 it claimed that, owing to the large amount of information, it was impractical to specify which information was covered by each of the paragraphs. In the circumstances, the Commissioner has decided that that the qualified person gave an opinion that it was section 36(2)(c) that was applicable, and that the Cabinet Office is therefore not able to apply section 36(2)(b) in this case.

Prejudice

29. The Cabinet Office indicated that disclosure of drafts of documents would be '*harmful to the processes and deliberations of Government*' since it was '*essential that officials are able to make suggestions and produce drafts for discussion and comment...without that process being subject to scrutiny*'. It also claimed that disclosure might prejudice the effective conduct of public affairs '*by encroaching on the space necessary for the development and evolution of FOI policy*'.

30. In respect of the first point, the Commissioner accepts that the prospect of disclosure might have a potentially chilling effect on the willingness of officials in the Cabinet Office to contribute to the decision-making process, or to keep records of earlier drafts. Regarding the second point about the space necessary for the development and evolution of freedom of information policy, the Commissioner does not accept that decisions about how to deal with specific freedom of information requests involve changes to freedom of information 'policy'; rather, these are decisions about how to apply or operate the policy already inscribed in the Freedom of Information Act. However, he accepts that disclosure might have an effect on the decisions which are necessary to apply or operate the policy. It might also reveal public authorities' views about the strengths and weaknesses of their positions and thereby prejudice their ability to defend their decisions.

31. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*) (EA/2006/0011 and EA 2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable', and based on good faith and the proper exercise of judgement. Having considered the arguments, the Commissioner is not satisfied that the opinion given by the qualified person was entirely reasonable from a procedural perspective. The submission put to the Parliamentary Under Secretary of State was, as already noted, defective in that there was a typographical error, so that it referred to section 36(3) rather than 36(2). This defect gave rise to confusion as to which paragraph or paragraphs of section 36(2) the Cabinet Office was actually applying in the case.

32. However, the Commissioner does not believe that this defect was sufficient to render the qualified person's opinion unreasonable, taken as a whole. In

particular, he accepts that it was reasonable for the qualified person to have concluded that disclosure under section 36(2)(b) would, or would be likely, to lead to some potentially adverse consequences in terms of inhibiting the free and frank exchange of views. The Commissioner has accordingly decided that it was objectively reasonable for the qualified person to have reached the opinion that disclosure of these elements of the information would be likely to prejudice the effective conduct of public affairs, and that the section 36 exemption therefore applies to the withheld information.

Public interest test

33. Since section 36 is a qualified exemption it is 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'*.

34. The Cabinet Office cited a number of factors in favour of maintaining the exemption. First, it claimed that:

'Parliament has provided robust enforcement mechanisms for the Act; the Information Commissioner, the Information Tribunal and ultimately the courts. The Act sets out the information an applicant is entitled to receive and a procedure for appealing refusals. The disclosure of the information requested risks undermining these mechanisms by allowing individual attempts to investigate the reasons for refusal of requests, a function clearly intended for the Information Commissioner and the Information Tribunal. It is not considered that there is any public interest in this "self enforcement" where enforcement and oversight procedures already exist under the Act.'

The Commissioner rejects this *'self enforcement'* argument in its entirety. In the first place, it appears to make an assumption about the purpose of the complainant's information request – that he requires the information in order to consider a possible challenge to the Cabinet Office's decision in relation to his original request., In the Commissioner's view this would not be an improper motive but there are other possible reasons why the complainant might want the information (to write an article about the experience of making a freedom of information request, perhaps) in respect of which the fact that a statutory enforcement mechanism exists is irrelevant. Secondly, the principle could be extended to any request for information which has an alternative *'enforcement mechanism'* or which is obtainable by another route, for example by application to a court. The Commissioner takes the view that, if Parliament had intended that requests for information relating to information requests should not be disclosable as a matter of principle, then it would be likely to have devised a specific exemption for that category of information. In the circumstances the Commissioner has decided that this so-called *'self enforcement'* factor should have no weight in the public interest test.

35. Secondly, the Cabinet Office pointed to the public interest in reducing the burden of freedom of information requests.

'It is also in the public interest that additional burdens are not imposed on public authorities in responding to requests which seek to circumvent the enforcement mechanisms in the Act.'

For reasons which are similar to those outlined in relation to the preceding factor, the Commissioner considers that this argument has no justification. The degree of 'burden' which public authorities are expected to shoulder is laid down in the Act, for example in the provisions relating to costs. Responding to a request for information about an information request is not, in the Commissioner's view, 'additional' to the general 'burden' which the Act imposes on public authorities to deal properly with freedom of information requests.

36. Thirdly, the Cabinet Office argued that there was a public interest in maintaining private space for refining policy and taking decisions in individual cases.

'The case file will, for example, contain several drafts of documents produced in reply to [the complainant's] request. Releasing drafts of documents, regardless of what the drafting changes may have been, is harmful to the processes and deliberations of Government. It is essential that officials are able to make suggestions and produce drafts for discussion and comment, so that policy positions and thoughts can be refined and developed, without that process being subject to scrutiny. To reveal the internal and inter-departmental discussions around particular FOI requests would expose the detailed deliberations about FOI policy. We believe the public interest in transparency of process is outweighed by the public interest in maintaining effective policy development and advice...releasing this information might also prejudice the effective conduct of public affairs by encroaching on the space necessary for the development and evolution of FOI policy, so that section 36 (2) (c) is engaged.'

37. The Cabinet Office applied this argument to both policy and decision-making in general and to freedom of information policy and decisions in particular. The Commissioner accepts that there is a strong public interest in maintaining such 'private space' while decisions – concerning either policy choices or the determination of individual freedom of information requests – are being taken. In relation to freedom of information policy in general, however, what the Cabinet Office refers to as a process of '*policy development and advice*' and '*development and evolution of FOI policy*' is in fact the application and refinement of existing policy. Indeed, the Cabinet Office apparently recognised this, since it did not seek to apply the section 35 exemption (which relates to policy formulation and development) to the information. In the circumstances, the Commissioner does not accept the suggestion that there was an ongoing process of formulation and development of policy which needed to be shielded from scrutiny. Furthermore, the Commissioner notes that paragraph (c) of section 36(2) takes a general form, referring to prejudice to '*the effective conduct of public affairs*'. As explained in the Commissioner's '*Awareness Guidance No 25*', paragraph (c) is not intended to be a 'catch-all', but instead to cover rare situations which could not be foreseen and which cannot be covered by another exemption, where it would be necessary to

withhold information in the interests of good government. Section 36(2)(c) places the harm outside of the individual public authority and in the realm of 'public affairs'. The Commissioner considers that section 36(2)(c) is only available in cases where the disclosure would prejudice the public authority's ability to offer an effective public service, or to meet its wider objectives or purpose (rather than simply to function) due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure. In this case, the Commissioner does not consider that divulging the requested information would have an impact so wide-ranging as to prejudice the public authority's ability to deliver an effective public service or meet its wider purpose.

38. In relation to the individual case, ie the original freedom of information request to which the information related, the Commissioner notes that at the time of the complainant's request this had already been determined by the Cabinet Office, so there was no question of prejudicing its investigation. What was still capable of being affected by disclosure of the requested information was any subsequent investigation – by either the Information Commissioner or the Information Tribunal – of the Cabinet Office's decision in the case. Disclosure could reveal officials' views about the strengths and weaknesses of their positions, and thereby prejudice their ability to defend their decisions. The Commissioner therefore accepts that, were such information to be disclosed in this case before all possible avenues for challenging the public authority's decision (eg the Commissioner or Tribunal) were exhausted that could have a 'chilling effect' in the future on officials who deal with individual freedom of information requests. The Commissioner considers that there is a strong public interest in preventing that by protecting private decision-making space. However, he considers that there are also significant counterbalancing factors relevant to the public interest test.
39. For instance, the Commissioner notes the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), in which the Information Tribunal laid down a number of principles guiding how to assess the public interest in cases involving the section 35 exemption. The Commissioner considers that these are also directly relevant to the section 36 exemption, which creates similar public interest issues. The Tribunal stated that '*The timing of a request is of paramount importance*' – while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the '*threat of lurid headlines depicting that which has been merely broached as agreed policy*'. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a '*parliamentary statement announcing the policy...will normally mark the end of the process of formulation*'.
40. The Tribunal also indicated that it was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that '*we are entitled to expect of [civil servants] the courage and independence that...[is]...the hallmark of our civil service*', since civil servants are '*highly educated and politically sophisticated*

public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions' and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make the officials exchanging advice and recording information less likely to perform their duties properly, since they would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the Cabinet Office to ensure that its officials continue to perform their duties according to the required standards.

41. There is a further public interest factor in favour of maintaining the exemption in order to reduce the temptation of officials in the Cabinet Office to keep inaccurate or incomplete records. The Commissioner recognises that it is important for the conduct of public affairs that appropriate records are kept of discussions and the advice given by public officials. He therefore accepts that where disclosure of information might legitimately inhibit the making and keeping of records then that would create a public interest in withholding the information. However, he believes that it is only in limited circumstances that officials performing their role with due diligence could legitimately be so inhibited. As the Tribunal indicated in the *Evening Standard* case, it did not consider that it:

'should be deflected from ordering disclosure by the possibility that minutes will become still less informative... Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency'.

Furthermore, the Commissioner notes the Tribunal's conclusions in the case of *Lord Baker v the Commissioner and the Dept for Communities and Local Government* (EA/2006/0043), in which the Information Tribunal reached a number of conclusions about Regulation 12(4)(e) of the Environmental Information Regulations 2004. He takes the view that the Tribunal decision in that case has a bearing on the application of the public interest test for the exemption under section 36 of the Freedom of Information Act. The Tribunal indicated that arguments that disclosure will lead to poorer record keeping should be given little weight, since that potential mischief is capable of being addressed by staff management. In this case, the Commissioner does not believe that the officials involved in determining the complainant's original freedom of information request (thereby generating the information which is the subject of this case) would have been justified in refusing to keep proper records of their decision. Accordingly, he does not consider that the potential damage to record-keeping carries much weight in the public interest test.

42. In favour of disclosing the requested information the Cabinet Office identified a general public interest *'in openness and in the transparency of the operation of new legislation, such as the Freedom of Information Act'*. The Commissioner believes that the public interest factors in favour of disclosure are a little more significant than the Cabinet Office's assessment suggests. Indeed, having regard to the contents of the Cabinet Office's refusal notice and internal review letter, he would go so far as to say that the Cabinet Office has failed to demonstrate that it

adequately considered the public interest in favour of disclosing the information, and that it therefore failed to conduct the public interest test properly.

43. The Commissioner has identified the following public interest factors in favour of disclosure of information about public authorities' administration of freedom of information requests. First, it may assist requesters in understanding the decisions which have been made in specific cases, and sometimes aid them in challenging those decisions. In the *Baker* case cited above the Tribunal found that there was a public interest in the transparent provision of the full information behind a decision because that removes any suspicion of 'spin' and therefore promotes confidence in public authorities: *'by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point'*.
44. Secondly, disclosure promotes accountability and transparency of public authorities in respect of their decisions and procedures, thereby encouraging improvement in the quality of decisions and administration. It may also increase public confidence that decisions are being made on the basis of the best available information, and improve public understanding of how government refines policy.
45. Thirdly, there is a strong public interest in understanding how public authorities are applying freedom of information legislation in general. In this case the public interest is even more significant because of the central role of the Clearing House in administering freedom of information requests made to government departments. Disclosure also facilitates the participation of the public at large and interested parties, such as the complainant in this case, in debate about the policy.
46. The information withheld by the Cabinet Office in this case comprises deliberations between officials about the application of the Act in the context of the complainant's (original) request, communications to and from the complainant, draft letter(s), a submission to the qualified person and draft(s) of it, and some material related to a request from another individual.
47. The complainant informed the Cabinet Office on 4 January 2006 that he did not require copies of correspondence sent by or to himself (although the Commissioner assumes that the complainant will wish to be provided with copies of draft communications). The material related to another individual is addressed below in relation to the exemption under section 40 of the Act.
48. The Commissioner has considered the remaining information – relating to officials' deliberations, the qualified person's submission, and drafts of letters to the complainant – in light of the public interest factors identified above. Since the Commissioner considers that the freedom of information policy process and the administration of the complainant's original request had both already concluded by the time of the request in this case, he does not consider that there was any public interest in protecting a 'private space' for deliberation. He accepts that some weight should be accorded to the public interest in giving officials confidence that their advice about individual freedom of information requests will not be disclosed while there is still the possibility of the case being considered by

the Commissioner or the Information Tribunal, but he agrees with the Tribunal's point that the threat of disclosure of officials' advice should not as a general rule inhibit their candidness. He also agrees with the Tribunal that, while there is a possibility that disclosure of information might sometimes inhibit record-keeping, it is only in limited circumstances that officials could legitimately refuse to keep proper records. Since the Commissioner does not believe that such circumstances apply in this case, he has decided that the factor carries little weight in the public interest test.

49. On the other hand, the Commissioner believes that there are strong public interest factors favouring disclosure of the information comprised of officials' deliberations, the qualified person's submission, and drafts of letters to the complainant: promoting accountability and transparency of public authorities' decisions and procedures, increasing public confidence and understanding of government policy and administration, assisting requesters in understanding decisions and how public authorities are applying freedom of information legislation in general, and facilitating participation in debate about policy. The Commissioner has also noted that categories of information 'analogous' to those requested in this case but relating to an earlier time period have previously been released in response to separate freedom of information requests by the same complainant and by another. The Commissioner is also mindful – as explained in his *'Awareness Guidance No. 25'* – that paragraph (c) was not intended by Parliament to be a 'catch-all' and is only available in cases where disclosure would genuinely prejudice the public authority's ability to offer an effective public service, or to meet its wider objectives or purpose. In this case, the Commissioner does not consider that divulging the requested information would have an impact so wide-ranging as to prejudice the public authority's ability to determine freedom of information requests or meet its wider purpose. Accordingly, taking all these factors into account, he has concluded that the public interest in maintaining the section 36(2)(c) exemption does not outweigh the public interest in disclosure.

Exemption – section 40

50. Although the Cabinet Office did not refer to section 40 of the Act, the Commissioner considers that the section is relevant to some of the withheld information. Section 40(2) of the Act allows public authorities to exempt information that constitutes the personal data of third parties. The Commissioner has concluded that information relating to the names and contact details of the officials dealing with the complainant's request, together with references to information relating to freedom of information requests by individuals other than the complainant in this case, constitute information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998.

51. Section 40(2) provides that:

'Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.'

Such information is exempt if either of the conditions set out in subsections (3) and (4) are met. The relevant condition in this case is at subsection (3)(a)(i), where disclosure would breach any of the Data Protection Principles. The Data Protection Principles are set out in schedule 1 of the Data Protection Act 1998, and in this case the Commissioner believes that disclosure of the information identified above would breach the First Data Protection Principle. That Principle states:

'Personal data shall be processed fairly and lawfully...'

52. Regarding individuals whose names appear in the address lines of emails and in correspondence, the Commissioner believes that section 40 of the Act (relating to personal data) may provide grounds for withholding the names of those who are relatively junior officials and who would therefore never expect their roles to be exposed to public gaze. In the *Evening Standard* case mentioned above the Tribunal stated that there should be *'a specific reason for omitting the name of an official where the document is otherwise disclosable'*. The Commissioner has concluded that those identified in the communications in this case are not senior officials and that they would not have expected that their personal role would be put under public scrutiny. Accordingly, he has decided that their names and contact details should be redacted from the information when it is disclosed. However, that redaction should not include the information identifying the public authorities or divisions, units and sections within which those individuals are employed, where that information is included in the address line of emails or elsewhere.
53. In relation to the withheld information which relates to a freedom of information request by individuals other than the complainant in this case, the Commissioner has decided that it would be unfair to disclose this information. These were members of the public and not employees of the Cabinet Office and had provided the information for their own purposes. The Commissioner considers that it would therefore be reasonable to assume that they did not intend for those details to be disclosed to a wider audience.
54. Having considered the information involved and the purposes for which it was generated, the Commissioner has concluded that it would be unfair and therefore a breach of the First Data Protection Principle to disclose the information relating to the names and contact details of the officials dealing with the complainant's request, together with references to information relating to freedom of information requests by other individuals. Accordingly, he has decided that this information should not be disclosed by virtue of section 40.

The Decision

55. The Commissioner's decision is that the Cabinet Office did not deal with the request for information in accordance with the Act. It did not comply with its

obligations under section 1(1) in that it failed to communicate to the complainant information to which he was entitled, on the mistaken basis that it was exempt from disclosure under sections 36(2) and 42. Furthermore, the Commissioner takes the view that the Cabinet Office did not comply with its obligations under section 17(1) of the Act, in that it did not provide an adequate explanation of the exemption under section 36(2) through its failure to give a proper assessment of the public interest factors in favour of disclosure.

Steps Required

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

- The Cabinet Office should provide the complainant with the information identified in the separate Schedule which has been provided to it.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

57. 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

58. The complainant made a complaint about the delay in dealing with his internal review. The complainant requested a review on 4 January 2006, and the Cabinet Office indicated that it would be concluded by 17 February 2006. In fact the Cabinet Office did not provide its review decision until 26 June 2006, when it apologised and explained that the delay had been the result of a *'combination of factors that include the importance of the issues under consideration'*. The Cabinet Office therefore took nearly six months to complete its internal review in this case.

59. 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. 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. In this case the Commissioner does not believe that the Cabinet Office's six month delay was justified by any exceptional circumstances, notwithstanding the Cabinet Office's reference to the 'importance of the issues under consideration'.

60. The Commissioner is also aware of the inordinate length of time it has taken to conclude his consideration of this complaint and to issue this Decision Notice. This has been due to a backlog of work at his office and he extends his apologies to the parties for the long delay.

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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

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 22nd day of December 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

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.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

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.”

Section 51(5) provides that –

“An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

- (a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or
- (b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.”