

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 November 2009

Public Authority: The Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested a number of pieces of information regarding the consultation document, *'Arrangements under Part IX of the Drug Tariff for the Provision of stoma and incontinence appliances – and related services – to Primary Care. Revised Proposals. Clarifications.'* The Department of Health (the "DoH") provided some information, but withheld the rest, citing sections 21, 41 and 43(2). The complainant complained to the Commissioner in regard to the DoH's use of sections 41 and 43(2), and also queried whether it held further information. During the investigation of the case the DoH disclosed some of the previously withheld information. However, it continued to withhold some information under sections 41 and 43(2). It also informed the Commissioner that it was seeking to rely upon sections 40(2) and 40(3)(a)(i) to withhold some of the information. After investigating the case the Commissioner decided that the information was exempt from disclosure under sections 41, 40(2) and 40(3)(a)(i). However, the Commissioner also found that the DoH had not met the requirements of sections 10 and 17.

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.
2. The complainant wrote to the DoH on 7 November 2007 and made a request under the Act for the following information in relation to the DoH consultation document, *'Consultation on Arrangements under Part IX of the Drug Tariff for the Provision of stoma and incontinence appliances – and related services – to Primary Care: Revised Proposals. Clarifications.'* Specifically the complainant requested the following:

- (a) All data held by the DoH and referred to in response to clarification question 5.
- (b) All information held by the DoH regarding the costs incurred by companies in providing appliances to customers.
- (c) The number of companies that have provided such data.
- (d) The identities of the companies that have provided such data.
- (e) The dates on which such data were provided.
- (f) Any correspondence, internal notes, emails or other documents relating to any information referred to in (a) or (b) above.

For ease of reference these requests will be referred to as requests (a) to (f).

3. By way of background, this consultation document was originally launched in September 2007. This consultation was part of the DoH's review of the arrangements under Part IX of the Drug Tariff for the provision of stoma and incontinence appliances (and related services) to Primary Care. 'Question 5' referred to in request (a) above, refers to a question listed in the consultation document which states,

"5. What evidence does the Department have in claiming that manufacturing costs have decreased over time?"

The DH has received data from some companies about their end-to-end costs of providing appliances to patients. These data are commercial-in-confidence and have been influential in shaping our thinking around the proposals. We welcome such data from other companies to help support or dispute our proposals."

Further information on this consultation can be found on the DoH website.¹

4. The DoH contacted the complainant by email on 30 November 2007. It confirmed that it held information that fell within the scope of the complainant's requests, but informed him that it was still considering the public interest test, in relation to section 43(2). It estimated that it would need an additional 20 working days, and stated that it planned to be able to respond by 2 January 2008.
5. The DoH responded to the complainant on 22 January 2008. In relation to request (a) the DoH confirmed that it held information relating to this request, and provided the complainant with a description of this information, stating that it held the following information:
- (i) product price/cost data submitted in support of a response to the DoH's 2005 Consultation, *'Arrangements for the Provision of*

¹ http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_078135

Dressings, Incontinence Appliances, Stoma Appliances, Chemical Reagents and other appliances to Primary and Secondary Care'
(Company A);

- (ii) information provided by Company A in the course of a meeting held at the commercial directorate at the DoH on 13 March 2006;
- (iii) information provided by Company B in the course of a meeting held at the commercial directorate at the DoH on 24 March 2006;
- (iv) email from Company C dated 22 June 2006 attaching sales breakdown;
- (v) information provided by Company D in the course of a meeting held at the commercial directorate at the DoH on 18 June 2006; and
- (vi) email from Company D dated 13 July 2006 attaching PowerPoint presentation.

This information was withheld under section 41. Additionally all the information except for that at (v) above was also withheld under section 43(2). In relation to request (b) the DoH stated that other than the information which fell under the scope of request (a), all the other information which fell under the scope of this request had been derived from publicly available sources. As such it believed that this information was exempt from disclosure under section 21, as it was readily accessible by other means. The DoH provided the complainant with a list of the sources of this publicly available information. In relation to request (c) the DoH disclosed this information. In relation to request (d) this information was withheld under section 41. In relation to request (e) the DoH disclosed this information. Finally, in relation to request (f) the DoH disclosed some information relating to this request, which had been derived from publicly available sources. In addition to this, it stated that it held two emails which amounted to a summary of information provided by Companies B and D following meetings with the DoH. It stated that, "...these emails, following the redaction of information provided in confidence by the companies concerned would be meaningless."

6. The complainant requested an internal review in a letter dated 1 February 2008, challenging the use of section 41 and section 43(2). The complainant also stated that he believed that the DoH must hold further information. In particular he made the following points:

- In respect of the qualified exemptions cited, the DoH had not adequately demonstrated why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.
- The DoH's response did not seek to, "aggregate or anonymise data in such a way as to meet any concerns about confidentiality or commercial prejudice..."
- It was not credible that the DoH did not hold any information about how it had analysed the information provided to it and referred to in response to clarification question 5.

[NB: The Commissioner believes that any such information would fall under the scope of request (f). The issue of whether the DoH holds any further information that would fall under request (f) is explored further at paragraphs 21 to 33 below.]

- The DoH was not entitled to rely upon section 41 to withhold the names of the companies who had provided the information in question.
7. The DoH carried out an internal review, and provided a response in an email dated 10 March 2008. It upheld its use of sections 41 and 43(2), and provided further submissions to support its use of these exemptions. In relation to the complainant's comments about potentially anonymising the information, it stated that because of the specialised nature of the sector, and the extent to which relatively few entities were involved in manufacturing and distributing a limited number of products, it did not consider this could be effectively done. It also confirmed that it did not hold any further information that fell under the scope of requests (a) to (f), and that the complainant had been notified of all of the information it held that fell under the scope of his request.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 25 March 2008 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the DoH's use of sections 41 and 43(2), and also whether it held any further information that fell under the scope of request (f). He also complained about the length of time it had taken the DoH to issue a refusal notice.
9. In particular the complainant argued that the DoH had not considered the public interest test correctly in relation to section 43(2). He also questioned the DoH's use of section 41 to withhold internal emails which summarised information provided by third parties. He also queried the DoH's refusal to provide the names of the companies who had provided the information in question.
10. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
- The DoH disclosed some of the previously withheld information that fell under the scope of request (a), and two emails that fell under request (f).
 - The DoH also disclosed the names of the companies who had provided the information in question. These names had been requested at request (d).
 - The names of individuals listed in the withheld information that were of Senior Civil Service grade.
11. Therefore the Commissioner has focused his investigation on the following:

- Whether the DoH was correct to withhold the outstanding information that falls under requests (a) and (f) under sections 41 and 43(2).
- Whether the DoH was correct to rely upon sections 40(2) and 40(3)(a)(i) to withhold the names of individuals referred to in the information that falls under the scope of the request (apart from the names of individuals that were of Senior Civil Service grade).
- Whether the DoH holds any further information in relation to how it had analysed the information provided to it. As noted above, the Commissioner believes that this information would fall under the scope of request (f).
- Whether the DoH had complied with the requirements of section 10.

Chronology

12. The Commissioner wrote to the DoH on 19 March 2009 and requested a copy of the withheld information. He also asked it for further submissions to support its use of sections 41 and 43(2). Finally he asked the DoH to confirm whether it held any further information in relation to request (f).
13. The DoH responded in a letter dated 1 May 2009 and provided a copy of the withheld information, together with its submissions to support its use of sections 41 and 43(2). It also applied section 40(2) to some of the requested information. The DoH also informed the Commissioner that after reconsidering the case it now believed that some of the information previously withheld under sections 41 and 43(2) could be disclosed. It also informed him that it had located two additional emails that fell under request (f), and was prepared to disclose these to the complainant. Finally it informed the Commissioner that it held no further information that fell under the scope of request (f).
14. Following a telephone conversation, the DoH confirmed to the Commissioner on 27 May 2009 that it had provided the complainant with the information it was now content to disclose on 15 May 2009.
15. The Commissioner contacted the DoH on 15 June 2009. He noted that it was now relying upon section 40(2) and asked it for more detailed submissions to support its use of this exemption. In relation to the complainant's assertion that it was 'simply not credible' that it did not hold any further information that would fall under request (f) he asked for further clarification of its position.
16. The DoH responded in a letter dated 29 June 2009 and provided detailed submissions to support its use of section 40. It also confirmed that it did not hold any further information that would fall under request (f), and provided a further explanation to support its position. This is discussed in detail at paragraph 29 below.
17. Following a telephone call on the same day, the Commissioner emailed the DoH on 29 July 2009, in order to seek further clarification regarding its position in relation to information falling under the scope of request (f).
18. The DoH provided a response in a letter dated 14 August 2009. It again confirmed that it held no further information that would fall within the scope of

request (f). It also provided further arguments to support its position, which are discussed in detail at paragraphs 31 and 32 below.

19. The Commissioner emailed the DoH on 28 September 2009 asking for additional clarification as to its use of sections 40(2) and 40(3)(a)(i). The DoH provided this clarification in an email dated 8 October 2009.

Analysis

Substantive Procedural Matters

20. The Commissioner has initially considered whether the DoH holds any further information in relation to request (f).

Section 1

21. Section 1(1) of the Act states 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.

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

22. One of the grounds of complaint in this case is whether the DoH holds any additional information that would fall within the scope of request (f). The complainant has argued that it is 'simply not credible' that the DoH does not hold any additional information. Therefore the Commissioner has initially considered whether the DoH complied with section 1(1)(a) in relation to request (f).
23. In its refusal notice the DoH set out what information it held that fell under the scope of request (f) – providing some information, and acknowledging that it held two other emails (which it was withholding).
24. As noted at paragraph 13 above, during the course of the investigation the DoH informed the Commissioner that it had located two additional emails that fell under request (f) (which have now been disclosed to the complainant). Therefore the Commissioner has focused on whether it holds any further information that would fall under the scope of this request.
25. As noted above, the complainant has argued, that it is 'simply not credible' that the DoH does not hold any additional information. During the course of the investigation the Commissioner asked the complainant to provide any further evidence he had to support this element of his complaint. The complainant replied in a letter dated 6 March 2009 and stated again that it was 'simply not credible'

that the DoH only held the information it had identified to him. However, he did not provide any further evidence to support this statement.

26. In considering this aspect of the complaint the Commissioner has been mindful of the approach of the Tribunal in *Bromley v ICO and Environment Agency* [EA/2006/0072]. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on the balance of probabilities the information is held:

“...we must consider whether the IC’s decision that the EA did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities...”²

“...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority’s records...”³

27. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. The Commissioner will also consider any other reasons given by the public authority for why it does not hold information falling within the scope of the request. This is in line with the approach of the Tribunal in *Fowler v ICO and Brighton & Hove City Council* [EA/2006/0071], where it referred to the following as factors to take into account when considering whether information is held:

“...evidence of a search for the information which had proved unsuccessful: or some other explanation for why the information is not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place...”⁴

28. In order to reach a view on this aspect of the case the Commissioner wrote to the DoH on 15 June 2009 and asked for a more detailed explanation in relation to the complainant’s assertion that it was ‘simply not credible’ that it did not hold any further information that would fall under request (f). He noted that the information the DoH had confirmed that it did hold seemed somewhat limited in nature, and asked it to check again whether it held any further relevant information. If it was the case that it did not hold any further information, he also asked it to clarify whether its position was that (a) there was never any other information created, or (b) that there might have been other information, but that for whatever reason it had not been kept. He also asked the DoH to provide further details of what steps it had taken to establish whether it held any further information.
29. The DoH provided a response to the Commissioner’s questions in a letter dated 29 June 2009, and confirmed that it held no further information that fell under the scope of request (f). It stated that it was not the case that relevant information had

² EA/2006/0072, para 10.

³ EA/2006/0072, para 13.

⁴ EA/2006/0071, para 24.

been lost or destroyed – no other relevant information had been recorded in the first place. It explained that,

“There was...no process of ongoing communication or negotiation between the [DoH] and manufacturers as it was entirely a matter for the manufacturers whether to submit data to us in relation to manufacturing costs. Indeed the [DoH] was careful to avoid entering into any ongoing detailed discussions with any particular manufacturer in order to protect the integrity and neutrality of the consultation process itself.

[...]

It is acknowledged that the [DoH's] recorded communications relating to the manufacturers' data are not extensive. There was however no reason why receipt of the manufacturer data should have generated any volume of internal records. While key decisions in the process of policy development were documented, the receipt of information that did not have significant implications for the consultation process would not ordinarily have resulted in further discussion or correspondence.”

30. The Commissioner asked further questions in an email dated 29 July 2009. He asked the DoH to confirm whether any information had been generated as a result of the receipt of the manufacturers' information. Specifically, he stated, he was seeking to clarify whether the DoH had undertaken any analysis of this data which had then fed into the 'key decisions in the process of policy development' that it had referred to in its letter.
31. The DoH provided further submissions in a letter dated 14 August 2009. It again stated that it did not hold any further information that fell under the scope of request (f). It stated that it had spoken to the relevant personnel who had been involved in the review under Part IX of the Drug Tariff for the provision of stoma and incontinence appliances (and related services) to Primary Care. They had confirmed that the manufacturing data had not generated any further documentation or correspondence, and that the data had not merited any further analysis as it was judged to be complete in and of itself.
32. In order to support its position further the DoH provided a further explanation as to how the process of the Part IX review of the Drug Tariff had been carried out. It stated that its initial position, that there was scope for potential costs savings, was informed by general data obtained from public domain sources (this information was disclosed to the complainant in its initial response). Following the taking of this initial view,

“All parties were encouraged to provide detailed information, including relevant data, to demonstrate any possible adverse impact of the [DoH's] proposals. Had any party, including manufacturers, been in a position to provide the [DoH] with comprehensive and representative data that called into question our general assumptions in relation to the underlying manufacturing cost base, such data would have been given very careful

consideration and would undoubtedly have generated additional internal correspondence and analysis.

In fact, only very limited data was provided by a small number of manufacturers. This was not judged to be either comprehensive or representative. Consequently, there was no reason for the review team to subject the data to further analysis or reconsider its working assumptions in relation to the potential savings that could be made in the level of reimbursement.

We recognise that [the complainant's] expectation that such a body of data would exist may have been prompted by the [DoH's] response to clarification question 5...The response to question 5 was that manufacturers' data had been influential in shaping the [DoH's] thinking around the consultation proposals. This was not intended to suggest that the data supplied by the companies had been a decisive factor in developing or changing the consultation proposals. The data received from the companies had been "influential" in that it had not called into question the [DoH's] basic assumptions in relation to the proposals upon which it was consulting."

33. After considering the DoH's explanations as to why it does not hold any further information that would fall under the scope of request (f), and taking account of the views of the Tribunal as referred to at paragraphs 26 and 27 above, the Commissioner is satisfied that it does not hold any further information that would fall under the scope of request (f).

Exemptions

34. The DoH has withheld all of the outstanding information (with the exception of the names of individuals shown on the documents) under section 41. It has also withheld most of this information under section 43(2). Finally, it has relied upon sections 40(2) and 40(3)(a)(i) to withhold the names of individuals shown on the documents. The Commissioner has first considered the application of section 41 to the information in this case.

Section 41

35. Section 41(1) provides that information is exempt from disclosure if:
- (a) it was obtained by the public authority from any other person; and
 - (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

The full text of section 41 can be found in the Legal Annex at the end of this Notice.

36. The Commissioner has adopted the approach to confidentiality taken by the court in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*. In that case Megarry J decided that disclosure would constitute an actionable breach of confidence if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- disclosure would be an unauthorised use of the information and to the detriment of the confider.

If these parts of the test are satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

37. The Commissioner has first considered whether the information was obtained from a third party.

38. The information in question consists of information in various formats (emails, spreadsheets and slides) provided by four companies to the DoH as part of the consultation process. Some of the withheld information is contained in meeting notes (in email format) written by DoH representatives recording information provided by some of these companies. Despite these emails being written by DoH representatives, the Commissioner believes that they still record information provided by these companies, and as such he is satisfied that the information in these emails was provided to the DoH by a third party.

39. Therefore the Commissioner is satisfied that the first element of the section 41 exemption has been met as all the information withheld by the DoH under this exemption was obtained from a third party.

40. The Commissioner has gone on to consider whether the disclosure of this information would constitute an actionable breach of confidence. In order to reach a view on this he has first considered whether the information has the necessary quality of confidence.

41. In considering whether the withheld information has the necessary quality of confidence the Commissioner has considered whether it is otherwise accessible, and whether it is more than trivial.

42. The DoH has argued that the withheld information is not otherwise accessible to the applicant. In reaching a view on this the Commissioner has considered the nature of the withheld information. It consists of information relating to:

- the price/cost build up of certain medical equipment,
- pricing margins and commercial strategy,
- confidential views on third parties,
- sales, revenue and pricing data for products sold by one of the companies,
- views on the proposed changes and the likely impact on the business of one of the companies, and
- financial information relating to some of the companies.

Bearing in mind the nature of this information the Commissioner is persuaded that it is commercially sensitive.

43. After considering the withheld information the Commissioner is satisfied that it was not likely to be widely accessible at the time of the request. Nor has he been presented with evidence to suggest that this is the case. Furthermore he is satisfied that this information is not in itself trivial.
44. The Commissioner has gone onto consider whether the information was imparted in circumstances giving rise to an obligation of confidence.
45. The DoH has stated that when some of the companies provided the information in question they were provided with a confidentiality notice on the consultation proforma, and has provided the Commissioner with a copy of this notice. The DoH has also informed the Commissioner that one of the companies was given verbal assurances of confidentiality before a meeting with DoH representatives. Further to this the Commissioner also notes that most of the withheld information is marked as confidential.
46. After taking into account these points and given the nature of the withheld information (see paragraph 42 above), the Commissioner believes that as this information was provided to the DoH as part of a consultation (rather than, say, a tender, where the successful bidder might expect greater transparency in relation to their bid), it would be reasonable for the companies concerned to expect that this information would be treated as confidential. In reaching this view the Commissioner has taken into account the fact that when initially dealing with this request, and during the investigation of the complaint, the DoH contacted the companies concerned about the potential disclosure of the withheld information. At both stages, the DoH's responses to the complainant / the Commissioner reflected concerns raised by these companies about the potential disclosure of their information.
47. After considering the above arguments, the nature of the information in question and the circumstances in which it was provided to the DoH, the Commissioner is satisfied that it was provided to the DoH in circumstances that imported an obligation of confidence.
48. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. Indeed the Tribunal has taken the view that the loss of privacy is a sufficient detriment in itself.⁵
49. However in this case the withheld information is not personal information. In such cases the Commissioner considers that there would have to be a detrimental impact to the interests of the confider for the breach of confidence to be actionable, and therefore for section 41 to be engaged.

⁵ See *Bluck v ICO and Epsom & St Hellier University NHS Trust* [EA/2006/0090].

50. The DoH has argued that all four companies who provided the withheld information would be likely to suffer detriment, were it to be disclosed. It has pointed out that much of this information relates to pricing and financial information, as well as information relating to commercial strategies and business forecasts, which would be of use to the competitors of the confiders. It has also argued that the disclosure of the withheld information which contains confidential views on third parties would be likely to undermine the confider's relationship with those third parties.
51. The Commissioner notes that the DoH has also consulted with all four companies as a result of this request and the possible disclosure of the information they had provided. In each case the DoH has confirmed that its views regarding potential detriment to the confider reflect the concerns raised by each of these companies.
52. In considering the DoH's arguments regarding potential prejudice the Commissioner has also considered the nature of the withheld information. He notes that much of the information relates to commercially sensitive information, which has been provided by private companies obviously engaged in a competitive market. He also notes the DoH's argument that although much of this information was provided some time before the request was made (the withheld information mainly relates to 2006 – roughly 18 months before the request was made), it would be relatively easy for competitors to 'uplift' the figures to allow for inflation. Given the circumstances of the case the Commissioner finds this argument persuasive.
53. The complainant has argued that it would potentially be possible for the DoH to anonymise the withheld information in such a way as to meet any concerns about confidentiality. The Commissioner believes that if this were true this could potentially lessen the likelihood of the confiders suffering detriment were the withheld information to be disclosed. In reaching a view on this aspect of the complaint the Commissioner has been mindful of the DoH's statement at internal review that,

“Because of the specialised nature of the sector, the extent to which relatively few entities are involved in manufacturing and distributing a limited number of products, we do not consider the information that has been provided to us by the companies concerned to be capable of presentation on a non attributable basis.”
54. Bearing in mind the small number of companies who provided the withheld information to the DoH, and the specialised nature of the industry sector, the Commissioner is persuaded that the DoH could not effectively anonymise the withheld information in such a way as to lessen the likelihood of detriment being suffered by the confiders.
55. Having considered the DoH's arguments in relation to detriment, the fact that its arguments reflect the concerns raised by the confiders, and the nature of the withheld information, the Commissioner is persuaded that the disclosure of the

- withheld information would have a detrimental impact on the interests of the confiders.
56. As noted above at paragraph 36, an actionable breach of confidence will not have occurred where there is a public interest defence to that breach. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. That test is whether the public interest in maintenance of the exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of confidence.
 57. The view of the Commissioner is that an express obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.
 58. In reaching a view on this issue the Commissioner has been mindful of the nature of the withheld information in this case. As discussed at paragraph 42 above, he believes that it is commercially sensitive. This information was provided to the DoH with the expectation of confidence, as part of a consultation exercise. Given the nature of the withheld information, and bearing in mind the DoH's arguments as to the potential prejudice to the confiders if the information were to be disclosed, the Commissioner believes that it is in the public interest to avoid unwarranted potential prejudice to the commercial interests of private companies simply because they have provided sensitive commercial information as part of a public authority's consultation.
 59. The complainant has questioned the validity of the DoH's conclusions in the Part IX review. He has referred to question 5 of the consultation document (see paragraph 3 above) and in particular the DoH's statement there that information received from some companies about their end-to-end costs for providing appliances "has been influential in shaping [the DoH's] thinking." Therefore the complainant believes that it is in the public interest for the withheld information to be disclosed, as this would ensure that the DoH's proposals were based on accurate information. It would also allow for more fully informed and comprehensive feedback from other interested parties.
 60. Whilst the Commissioner believes that there is a public interest in transparency and accountability, especially in decision making which affects the spending of public money, this must be weighed against the harm to the confider that would result through the breach of confidence, which in this case is the likely harm to the commercial interests of the four companies referred to, by the DoH, as companies (a) to (d). In reaching a view on this, the Commissioner has again been mindful of the DoH's comments (as quoted at paragraph 32 above) about the limited role that the withheld information played in the consultation process.
 61. Bearing these points in mind the Commissioner has concluded that a valid defence could not be made in this case that the breach of confidence was in the public interest. The breach of confidence would, therefore, be actionable.

62. Therefore the Commissioner believes that all of the outstanding information (with the exception of the names of individuals shown on the documents) is exempt from disclosure under section 41.

Section 43

63. As the Commissioner has formed the view that all of the information that the DoH has withheld under section 43(2) is exempt under section 41(1), he has not gone on to consider the application of this exemption in this case.

Section 40

64. The DoH has relied upon section 40(2) and section 40(3)(a)(i) in order to withhold the names of individuals recorded in the withheld information, stating that it believes that disclosure would be in breach of the 1st principle of the Data Protection Act 1998 (the "DPA").
65. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
66. In this case the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. As stated above, in this case the DoH has stated that it believes that the disclosure of the information would be in breach of the 1st principle of the DPA.
67. During the course of the investigation the DoH informed the Commissioner that it was not relying upon this exemption to withhold the names of individuals who were Senior Civil Servants (SCS) grade. Furthermore it also confirmed to him that it had now disclosed these names to the complainant. Therefore the Commissioner has not gone on to consider the application of this exemption in relation to these names.
68. In order to establish whether this exemption has been applied correctly to the outstanding names the Commissioner has first looked at whether the withheld information constitutes the personal data of third parties.
69. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
- from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
70. In this case the information the DoH has applied this exemption to lists of the names of both civil servants, and employees of third party organisations – as well as showing some job titles and contact details. This information clearly relates to

living individuals, who are identifiable from it. As such, the Commissioner is satisfied that this information constitutes the personal data of third parties.

71. The Commissioner has gone on to consider whether the release of this information would be in breach of the data protection principles. He has first considered whether the disclosure of the withheld information – which the Commissioner believes is personal data – would be in breach of the 1st principle of the DPA.
72. The 1st principle of the DPA requires that personal data is processed fairly and lawfully and must not be processed unless at least one of the conditions for processing in Schedule 2 of the DPA is satisfied. The Commissioner has initially considered whether the disclosure of this information would be unfair.
73. In considering whether the disclosure would be unfair the Commissioner has first considered the nature of the withheld information. This information records the identities (and at times contact details) of civil servants / representatives of the DoH, and employees of the four companies submitting information to the DoH as part of the consultation process.
74. In relation to the personal data of civil servants and representatives of the DoH the Commissioner notes that this information relates to more junior staff who do not appear to have had a major role in the decision making process. Nor do these individuals appear to have a public facing role. Bearing these points in mind, he believes that the disclosure of the information relating to these individuals would be unfair.
75. In relation to the personal data of the employees of the companies who submitted information to the DoH, the Commissioner has first considered the reasonable expectations of those individuals in regard to the potential disclosure of their names. The interaction between these individuals and the DoH was part of the process by which the commercial information was provided to the DoH. As noted at paragraphs 45 to 47 above, the Commissioner believes that this process was covered by an expectation of confidentiality. Whilst the Commissioner acknowledges that this expectation would potentially relate more to the commercial information, he also accepts that some expectation of confidentiality in relation to the individual's names would be likely.
76. In reaching a view on whether the disclosure of these names would be fair the Commissioner has in particular noted the nature of these individual's engagement with the DoH. These individuals provided detailed commercial information about manufacturing costs, price margins, etc (see paragraph 42 above) in response to a DoH consultation – on behalf of private companies. Whilst the Commissioner accepts that these individuals appear to have been acting as spokespeople on behalf of their companies, this appears to only be in the limited role of presenting this technical and/or corporate information to the DoH – rather than in influencing the development of government policy by attending meetings and directly engaging in the debate on the future of a policy. Bearing these factors in mind, the Commissioner is of the view that the disclosure of these names would be unfair and therefore in breach of the 1st data protection principle.

77. As such the Commissioner believes that this information is exempt from disclosure under section 40(2) and section 40(3)(a)(i).
78. The exemption listed at section 40(2) and section 40(3)(a)(i) is an absolute exemption, and therefore is not subject to a public interest test.
79. The full text of section 40 of the Act can be found in the Legal Annex at the end of this Notice.

Procedural Requirements

80. In this case one of the grounds of complaint was in regard to the length of time it took the DoH to refuse access to the information requested by the complainant.
81. Section 1(1) of the Act states 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.
82. Section 10(1) requires a public authority to comply with section 1(1)(a) and (b) promptly and in any event not later than the twentieth working day following the date of receipt of the request. Section 10(3)(b) states that if a public authority is considering the public interest test in relation to a qualified exemption (in this case section 43) it is not required to comply with section 1(1)(b) until such time as is reasonable in the circumstances – however, it is still required to issue a notice under section 17(1) within 20 working days.
83. Therefore under section 10(3) a public authority may extend the time for compliance where it is necessary to do so in order to properly consider the public interest in maintaining an exemption. In such cases the public authority is still required to cite and explain the exemption claimed within the 20 working days. The extension can only be for as long as is reasonable in all the circumstances. The Commissioner's Good Practice Guidance 4 indicates that in no case should this be more than an additional 20 working days, i.e. 40 working days in total.⁶ Therefore where a public authority takes longer than 40 working days to comply with a request it will have breached section 10(1) unless the Commissioner is persuaded that such an extension is reasonable because of exceptional circumstances.
84. In this case the DoH acknowledged the complainant's request on 30 November 2007. It confirmed that it held information relating to his request, but informed him that it was unable at that time to provide the information to him / refuse access to that information, as it was still considering the public interest test in relation to section 43(2). It estimated that it would need an extra 20 working days in order to

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf

consider the public interest, and would therefore be in a position to respond by 2 January 2008 (see paragraph 4 above). However, the DoH did not provide a further response to the complainant until 22 January 2008.

85. At internal review the DoH explained to the complainant that it had been unable to respond by 2 January 2008 due to, delays caused by, “the consultation undertaken in order to respond to your request and delays occasioned by the extended holiday period...”
86. In considering whether the DoH’s delay in fully responding was reasonable the Commissioner has taken into account the date on which the request was made, the fact that the DoH informed the complainant after 17 working days that it needed an additional 20 working days in order to consider the public interest, and the additional delay in providing a full response. Whilst he acknowledges that a holiday period may cause some disruption he does not consider that this, in itself, equates to the ‘exceptional circumstances’ referred to at paragraph 83 above. Therefore the Commissioner finds that the DoH breached the requirements of section 10(1).
87. The Commissioner has also considered whether the DoH met with the requirements of section 17. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1) (e.g. within twenty working days of receipt of the request), 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.
88. During the course of the investigation the DoH informed the Commissioner that it believed that some of the withheld information was also exempt from disclosure under sections 40(2) and 40(3)(a)(i). This had not been previously reported to the complainant by the DoH. In failing to do this the Commissioner believes that the DoH did not comply with section 17(1)(b) and (c).
89. The full texts of sections 10 and 17 can be found in the Legal Annex at the end of this Notice.

The Decision

90. The Commissioner’s decision is that the DoH dealt with the following elements of the request in accordance with the requirements of the Act:
- It correctly withheld the information provided by companies (a) to (d) under section 41 of the Act.
 - It correctly withheld the names of individuals under sections 40(2) and 40(3)(a)(i).

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The DoH failed to meet the requirements of sections 10(1) and 17(1)(b) and (c).

Steps Required

91. The Commissioner requires no steps to be taken.

Right of Appeal

92. 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 10th day of November 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Section 1

- (1) 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.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) 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.
- (4) 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.
- (5) 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).
- (6) 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) 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.

(2) 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.

(3) 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.

(4) 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.

(5) Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) 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) 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.
- (2)** 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.
- (3)** 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.
- (4)** 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.
- (5)** 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.
- (6)** Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) 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.
- (3) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

- (5) The duty to confirm or deny-
- (a) 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), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
- (7) In this section-
- "the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

Section 41

- (1) Information is exempt information if-
- (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

Section 43

- (1) Information is exempt information if it constitutes a trade secret.

- (2)** Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
- (3)** The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).