

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2010

Public Authority: Ministry of Justice
Address: Access Rights Unit
Selbourne House
54 Victoria Street
London
SW1E 6QW

Summary

The Complainant requested information in relation to cases which had been referred to the 'Clearing House' within the MOJ by various government departments. Some of the information was released to the complainant during the course of the Commissioner's investigation.

The Commissioner considers the MOJ was correct to apply section 42(1) to the legal information in this case.

However the Commissioner's decision is that the MOJ was not correct to apply section 36(2)(b) and (c) to the remaining withheld information and it was thus in breach of section 1(1)(b) and section 10 of the Act.

The Commissioner also finds that the MOJ in breach of sections 17(1)(b) and (c) and 17(3).

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.

Background

2. The Government established the 'Access to Information Central Clearing House' in Autumn 2004, located within the former Department of Constitutional Affairs¹. The Clearing House was established to ensure consistency across central government in the way the Data Protection Act (DPA), the Act and the Environmental Information Regulations (EIRs) are applied. Guidance from the MOJ states that the role of the Clearing House is as follows:

*"We offer advice and assistance to Whitehall departments (including non-Ministerial departments) in dealing with complex information requests, to ensure that government takes a consistent and appropriate approach. In particular, we provide expert advice on requests for information that have been appealed to the Information Commissioner or Information Tribunal."*²

The Request

3. On 13 June 2005 the complainant made a request for information in relation to a list of matters published by the Department of Constitutional Affairs ('DCA') Clearing House at the following address:
'<http://faculty.maxwell.syr.edu/asroberts/foi/ukfoia.html>'.
During 2007 the Department of Constitutional Affairs became the Ministry of Justice ('MOJ') and all of the former liabilities and functions transferred to the newly created MOJ. For the remainder of this decision notice the public authority will be referred to as the MOJ.

"please would you provide me with the following information in respect of each of the items listed below: (some or all of which appear to be requests originating from Friends of the Earth)

1: Date on which the Clearing House became involved in the matter (and how);

¹ For further information on the role of the Clearing House please see <http://www.foi.gov.uk/guidance/pdf/toolkit.pdf>.

² Freedom of Information Working with the Access to Information Central Clearing House Toolkit for practitioners November 2006, page 3. Available at <http://www.foi.gov.uk/guidance/pdf/toolkit.pdf>.

2: Details of advice sought from Clearing House (including copy of request for advice);

3: Details of any advice given by Clearing House (including both the date of advice given and a copy of advice given if in writing) and steps taken by DCA since request for advice received;

4: Current status of the request including whether further action to be taken, if so by whom, or whether the matter is closed (from Clearing House perspective)."

4. The complainant listed the requests quoting the numbering system used by the Clearing House List. A full text of the request is found at Annex A of this decision notice.
5. On 15 November 2005, the MOJ responded to the complainant's request applying sections 36(2)(b)(i) and (ii) and 36(2)(c) of the Act
6. On 28 November 2005 the complainant wrote to the MOJ requesting an internal review of its decision.
7. On 19 May 2006 the MOJ upon completion of its internal review upheld reliance on section 36(2)(b)(i) and (ii) and 36(2)(c) of the Act. The MOJ also apologised to the complainant for the delay in this case.

The Investigation

Scope of the case

8. On 6 June 2006 the complainant contacted the Commissioner to complain about the way this request for information had been handled. The complainant highlighted several issues forming the basis of the complaint, raising specifically the issue of delay on the part of the MOJ in dealing with this request. The complainant also highlighted the failure of the MOJ to provide further information requested as to the identity of the qualified person and when their opinion was given, as well as disputing the application of the exemptions in this case. The complainant has confirmed to the Commissioner that his request did not include the names and identities of government officials or Clearing House staff.
9. Subsequent to the Commissioner beginning his investigation the MOJ confirmed to the Commissioner that it was releasing

that information in relation to part 1 and part 4 of the request at paragraph 2 above (i.e. the date on which the Clearing House became involved in the matter and the current status of the request). The MOJ also confirmed to the Commissioner that it was releasing to the complainant certain documents covered by parts 2 and 3 of the request. It is the Commissioner's understanding from correspondence with the MOJ, that this information has now been released to the complainant. It is also the Commissioner's understanding that the MOJ have released to the complainant details of the qualified person and the date on which the qualified person's opinion was received.

10. In reviewing the substance of the complainant's request, the Commissioner is aware of a body of information, which the public authority considered to fall within parts 2 and 3 of the complaint, but which the complainant and indeed the general public will already have received by virtue of previous requests made under the Act and decisions which have ordered the release of that information. The Commissioner considers that the following information is already available to the complainant:
 - (i) original withheld information in the Friends of the Earth / Export Credits Guarantee Department case (released following the High Court ruling [2008] EWHC 638 (Admin))
 - (ii) 2004 file list which is referred by the complainant in their request of the 13 June 2005 as having been provided.
11. The Commissioner's decision in this case will focus on the remainder of the information sought under parts 2 and 3 of paragraph 2 above ('the withheld information').

Chronology

12. On 20 December 2007 the Commissioner wrote to the MOJ seeking production of the withheld information as well as seeking further detail from the MOJ in regard to its handling of this request. The Commissioner issued reminders to the MOJ on several further occasions for this information.
13. On 26 February 2008 the Commissioner informed the MOJ that an information notice under section 51 of the Act had been prepared in this case and would be issued if the

information sought in the Commissioner's letter of the 20 December 2007 was not produced.

14. On 28 February 2008 the MOJ issued its substantive response to the Commissioner. The MOJ's response contained two schedules – the first in relation to information it was now releasing to the complainant, namely part 1 and part 4 of his request set out at paragraph 2 above. The second schedule was entitled 'disputed information' and with this was enclosed withheld information in relation to each of the referred cases requested by the complainant with the names of some MOJ staff redacted. The MOJ did not issue the Commissioner with the entirety of the withheld information in this case. It stated that part of the withheld information would not be disclosed to the Commissioner under section 51(5) of the Act as it contained communications between a professional legal advisor and his client (i.e. the MOJ). MOJ considered this information to be legal advice given by its solicitors in respect of its obligations, liabilities and rights under the Act.

15. 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, 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.

s.51 (8) "In this section "information" includes unrecorded information."

16. Following a telephone call between the Commissioner and the MOJ, the MOJ wrote to the Commissioner on 29 May 2008 and advised him that as well as refusing to provide the Commissioner with the above legal communications by virtue of section 51(5), it also wished to rely upon section 42 to withhold this information from the complainant. The MOJ also provided further arguments in support of its case.

17. Having considered at length MOJ's reliance on section 51(5) of the Act in not providing some of the withheld information, the Commissioner has proceeded to a decision notice in this case without having viewed the information withheld from the Commissioner under section 51(5).
18. In deciding to follow this course of action, the Commissioner considered the Information Tribunal's ruling in the case of the Ministry of Justice v the Information Commissioner (Appeal No: EA/2007/0016, 06 August 2007) in respect of an appeal by the MOJ of an information notice served by the Commissioner under section 51 of the FOIA. The Commissioner has taken account of the arguments put forward by both the MOJ and the Information Tribunal in that case, and especially those arguments advanced by the MOJ at paragraphs 22-25 of the decision.
19. In March 2010 the Commissioner contacted the MOJ with some further queries. On 25 March 2010 the MOJ provided the Commissioner with a copy of the submissions that had been considered by the qualified person.

Analysis

Exemptions

Section 42 (Legal Professional privilege)

20. As noted above, the MOJ only relied upon section 42 during the course of the Commissioner's investigation. In line with the Information Tribunal's comments in *DBERR v the Information Commissioner and Friends of the Earth EA/2007/0072* the Commissioner considers that whilst he is not obliged to consider exemptions that are claimed late, he does have the discretion to do so. In this case, taking into account the findings of the Information Tribunal in the case of the Ministry of Justice v the Information Commissioner mentioned at paragraph 18 above, the Commissioner considered that it was appropriate to consider the exemption at section 42(1) of the Act which relates to legal professional privilege. The full text of section 42 is available in the Legal Annex at the end of this notice.

Is the section 42(1) exemption engaged in this case?

21. For the exemption at section 42(1) to be engaged, the Commissioner must be satisfied that a claim to legal professional privilege could be maintained in respect of the requested information. Where the Commissioner is satisfied that a claim to legal professional privilege could be maintained he must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

22. The doctrine of legal privilege protects the confidentiality of communications between a lawyer and their client. The Information Tribunal in the case of Mr Christopher Bellamy and The Information Commissioner and the DTI Appeal Number EA/2005/0023 described the concept of legal professional privilege as,

“a set of rules or principles which are designed to protect confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication of exchanges come into being of the purpose of preparing for litigation” (paragraph 9)

23. There are two separate categories of legal professional privilege; legal advice and litigation privilege. Legal advice privilege relates to confidential communications such as draft statements and reports passing between lawyer and client for the purpose of receiving legal advice in both a litigation and non-litigation context. Communications passing between the lawyer and the client may be privileged even though litigation may not be contemplated or in progress.

24. Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect or is pending. The sole or dominant purpose of the communications must be to give or get advice in relation to the litigation or collect evidence for use in the litigation.

25. For the avoidance of doubt, the Tribunal in the case of Calland and the Financial Services Authority (EA/2007/013) confirmed that in-house legal advice or communications between in-

house lawyers and external solicitors or barristers also attracts legal professional privilege.

26. In this case the Commissioner was informed by the MOJ that the information comprises communications between a professional legal advisor and his client, or between such an advisor or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of the Act. When the MOJ provided the Commissioner with the schedule of withheld information, it included a brief description of the information withheld under section 42(1). As noted above, the Commissioner has not viewed the information withheld under section 42(1) in this case. However, from the context of the request, and the description of the documents in question he accepts the MOJ's assurance that the information consists of confidential communications between MOJ and its in-house lawyers for the purpose of receiving legal advice about the application of the Act, or between lawyer, client and third party in contemplation of legal proceedings. From his knowledge of the development of case law in relation to the Act, and the appeals process for requests made under the Act, the Commissioner accepts that legal proceedings were in reasonable prospect at the date of this request.
27. The Commissioner notes that confidentiality is an essential prerequisite to a claim for legal professional privilege. Where legal advice loses confidentiality, because it is in the public domain, privilege will cease to exist. In addition the client in any case may waive privilege. In either of these circumstances, the section 42(1) exemption will not apply. The Commissioner has no reason to believe that either of these circumstances applies and he therefore accepts that the exemption at section 42(1) of the Act is engaged in this case.

The public interest test

28. Section 42 is a qualified exemption which means that once it has been determined that the exemption is engaged further consideration needs to be given to the public interest test as set out at section 2(2)(b) of the Act. Section 2(2)(b) requires the consideration of whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest factors in favour of maintaining the exemption.

29. The Commissioner recognises that there is a strong public interest in protecting the doctrine of legal professional privilege. The doctrine has developed to ensure that the clients are able to receive advice from their legal advisers in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the principle of legal professional privilege could therefore harm the ability of parties to provide or receive legal advice on a full and frank basis. This could in turn damage the parties' ability to effectively determine their legal opinions, or to defend or seek legal restitution against other parties in accordance with their rights. In the 2006 *Bellamy v the Information Commissioner and the DTI (EA/2007/0043)* the Information Tribunal found that at least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest and stated,

*"... there is a strong element of public interest inbuilt into the privilege itself. At least equally countervailing considerations would need to be adduced to override that inbuilt public interest test...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 case."*³

30. However, the Commissioner also considers that Parliament did not intend this exemption to be used as an absolute exemption. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v ICO and Mersey Travel (EA/2007/0052)* emphasised this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by the Mersey Travel. In particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and, therefore, the advice concerned issues which affected a substantial number of people. It stated that:

" We find, listing just the more important factors, that considering the amounts of money involved and numbers of

³ *Christopher Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry*, 27.03.2006 appeal number EA/2005/0023

people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining it..."

31. The MOJ's view is that it is of high importance that full and frank exchanges with their legal advisors are obtained without fear of such advice being disclosed to the public where it is deemed inappropriate to do so. MOJ argue that disclosing this information to the ICO would put at risk their key litigation aims

Public interest arguments in favour of disclosure.

32. The Commissioner considers there is a clear general public interest in favour of the public being informed of the reasons behind decisions made by public authorities in the interests of transparency and accountability. The Commissioner further considers that there is a public interest in increasing confidence and trust in legal advice being dispensed in an equitable and purposive manner to a public authority, which allows the public authority to make informed decisions with all of the relevant knowledge of the law.
33. The Commissioner also considers that there is a more specific public interest in knowing the reasons behind the advice that the Clearing House issues to Government departments on how to respond to Freedom Information requests. This is because the Clearing House advice directly affects the amount and nature of information that is put into the public domain.

Where does the balance of the public interest lie?

34. The Commissioner considered MOJ's arguments for withholding the legal advice from the general public under the Act. The Commissioner also considered the wider public interest arguments in favour of the legal communications being disclosed under the Act.
35. From the brief description of the information withheld under section 42(1) and the Commissioner's knowledge of the development of case law in relation to the Act and the appeals procedure for requests made under the Act, the Commissioner accepts that the withheld information related to issues that were "live" as at the date of the request. By this the Commissioner means the advice was still being implemented,

relied upon, or was likely to give rise to legal challenge via litigation. In the Commissioner's view this means that substantial weight should be given to the public interest in protecting the doctrine of legal professional privilege so that parties are able to avail themselves of full and frank legal advice.

36. On balance, whilst the Commissioner considers there are public interest arguments favouring the release of the information, he finds that these are not strong or weighty enough to override the public interest in maintaining the exemption in this case.
37. As the Commissioner has upheld the application of section 42(1) to the legal advice in this case, he has only gone on to consider the application of section 36 to the remaining withheld information.

Section 36(2) (Prejudice to the effective conduct of public affairs)

38. The MOJ sought to apply the exemptions at section 36(2) b) (i) and (ii) and (c) to the remaining withheld information.
39. The remaining withheld information viewed by the Commissioner comprises internal deliberations about the handling of the underlying original requests for information. The MOJ has claimed that more than one "limb" of the exemption at section 36, namely section 36(2) (b) (i); section 36(2) (b) (ii) and 36(2) (c), applies to this information. Section 36(2) states:

"36 (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the 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 to prejudice, the effective conduct of public affairs."

The full text of section 36 is available in the Legal Annex at the end of this Notice.

40. The application of each sub-section of this exemption is dependent on the reasonable opinion of a qualified person that the disclosure of the relevant information would or would be likely have the specified inhibitory effect.

The Reasonable Opinion

41. The MOJ confirmed to the Commissioner that the qualified person in this case was the then Secretary of State and Lord Chancellor Lord Falconer who gave his reasoned opinion on 31 October 2005 that disclosure would or would be likely to inflict the prejudices and inhibitions described in sections 36(2)(b)(i) and (ii) and section 36(2)(c). The MOJ also stated that when it undertook its internal review of its decision, the qualified person further clarified that his opinion was that the prejudices and inhibitions would occur.
42. In the case of *Guardian & Brooke v The Information Commissioner and the BBC* [EA/2006/0013], para 64, the Information Tribunal considered the sense in which the reasonable person's opinion under section 36 is required to be reasonable. It concluded that:

" .. in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at."

43. The Commissioner noted that in assessing the 'reasonableness' of an opinion given under section 36 the opinion must be both reasonable in substance and reasonably arrived at⁴. The Commissioner notes that the Tribunal concluded that the qualified person should take into account relevant matters and ignore irrelevant matters. The Tribunal's reasoning for this approach is contained fully at paragraph 64 of the BBC decision as follows:

" The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by s36 is a protection which relies on the good faith and proper exercise of judgement of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their

⁴ See BBC case para 64

minds appropriately to the right matters and disregard irrelevant matters.”

44. In considering whether the qualified person's opinion was reasonable in substance and reasonably arrived at the Commissioner took into account; the submissions he received from the MOJ about the process that was followed, the content of the withheld information, and the content of the submission that was put before the qualified person to assist him in reaching his conclusion. Whilst the submission to the qualified person was not structured to provide a distinct and separate analysis for each of the individual sub-sections claimed, the Commissioner considers that all the individual sub-sections were addressed within the overall content.
45. In structuring his own analysis of the section 36, the Commissioner has made a separate finding for each of the individual sub-sections claimed. However, as the arguments under 36(2)(b)(i) and (ii) are very similar, and to avoid unnecessary repetition, he has provided his analysis of the arguments for these two sub-sections together.

Section 36(2)(b)(i) & (ii)

46. Section 36(2)(b)(i) provides an exemption if, in the reasonable opinion of a qualified person, disclosure of the information under the Act would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides an exemption if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
47. The MOJ confirmed that the qualified person, in this case the Lord Chancellor, received a submission from officials about this request and that he accepted the reasoning within this submission as the basis for his opinion that the inhibitions at sections 36(2)(b)(i) and (ii) would or would be likely to occur. The MOJ also confirmed that, when it undertook its internal review clarification was sought from the qualified person, at which point he specified that in his view the inhibitions would occur. The Commissioner has considered the content of the submission and, based upon this, is satisfied that the qualified person took into account relevant factors and did not take into account irrelevant factors. He also satisfied that arguments within the submission are relevant to the information in question in this case. The Commissioner therefore accepts

that the qualified person's opinion in relation to both section 36(2)(b)(i) and (ii) was reasonably arrived at.

48. In considering whether the qualified person's opinion was reasonable in substance the Commissioner has considered the content of the withheld information. He has also considered the content of the submission upon which the qualified person's opinion was based, which is also reflected in the MOJ's later correspondence with the Commissioner.
49. The qualified person's opinion is that disclosure of information about the handling of previous requests for information would inhibit both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. This is because, in the qualified person's opinion, disclosure of views expressed and advice given in one case would deter officials from giving full and candid views and advice in future cases, for fear that such future views and advice would be subject to disclosure under the Act. This argument is commonly referred to as the "chilling effect" argument.
50. The Commissioner considers that the qualified person has correctly identified a prejudice relevant to section 36(2)(b)(i) and a prejudice relevant to section 36(2)(b)(ii). He further considers that the qualified person has identified a causal link between disclosure of the information in this case and the inhibition inherent in these sub-sections of the Act. Finally the Commissioner accepts that the qualified person's opinion, that the likelihood of such prejudice occurring is more probable than not, is a reasonable opinion and that the inhibition argued is not trivial. The Commissioner therefore finds that the qualified person's opinion is reasonable in substance.
51. As the Commissioner has found the qualified person's opinion in relation to both section 36(2)(b)(i) and (ii) to be reasonable in substance and reasonably arrived at, he finds these exemptions to be engaged.

The public interest test

52. Under section 36(2)(b)(i) and (ii), even though the qualified person has concluded that the exemption applies, the public interest test must be applied to determine whether to disclose the information. It is only where the public interest in maintaining the exemption outweighs the public interest in disclosure that the information should not be disclosed. The

Commissioner has therefore gone on to consider the public interest in this case.

53. The Commissioner, when considering the application of the public interest test, will follow the approach taken by the Information Tribunal in *DBERR v the Information Commissioner and the Friends of the Earth* (EA/2007/0072).

"When it comes to weighing the balance of the public interest, it is impossible for the Commissioner to make the required judgment without forming a view on the severity, frequency and extent of any prejudice and the Commissioner notes the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would be likely to have the stated detrimental effect. That means that the qualified person has made a judgment about the degree of likelihood that the detrimental effect would occur and does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur."

54. The Commissioner's approach will therefore be that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect; he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which the detrimental effect would occur.

Public interest arguments in favour of maintaining the exemption

55. The Commissioner considered the following argument in favour of the maintenance of the exemptions at sections 36(2)(b)(i) and (ii) in this case:
- The disclosure of exchanges between government departments and the Clearing house would weaken the frankness of advice and the candour of future deliberations. This would not be in the public interest because it would adversely affect the quality of FOI decision making with the result that the public might not gain access to information that they should be able to access. Alternatively, poor quality FOI decision making

could result in information being inappropriately disclosed. Again this would not be in the public interest because the harm which the exemptions within the Act are designed to protect might then occur.

Public interest arguments in favour of disclosure

56. The Commissioner has considered the following arguments in favour of disclosing the information:

-Disclosure of the information would promote the transparency and accountability of the Clearing House role in dealing with FOI requests. This would be in the public interest because it would inform public opinion on how Government departments handle FOI requests which could, via lobbying, public comment, or the development of FOI case law, lead to improvements in the Government's handling of requests.

- Disclosure of information by public authorities on request is in itself of value and in the public interest so as to promote transparency and accountability in relation to the activities of public authorities.

-Disclosure of information could further increase public confidence in the Government's handling of FOI requests.

Balance of the public interest arguments

57. As stated above, the Commissioner notes that he must give appropriate weight to the qualified person's finding that the stated prejudice would occur. However, he will need to determine the severity extent and frequency of the effects himself when considering the final weight to be placed on the public interest in maintaining the exemption.

58. In the circumstances of this case the Commissioner accepts the qualified person's opinion that disclosure would create a 'chilling effect' on the candour of exchanges between Government departments and the Clearing House and the frankness of the advice given. As he has accepted that this prejudice would occur, the Commissioner gives more weight to the public interest in favour of maintaining each of the two exemptions than he would give if he had only accepted that the prejudice would be likely to occur.

59. In considering the extent, severity and frequency of the stated prejudice the Commissioner considered the dicta in the

Department for Education and Skills v Information Commissioner⁵ in relation to Civil Servants which states "*in judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions*". The Commissioner considers that, taking into account the Tribunal's comments and the nature of the information withheld in this case, the extent, frequency and severity of inhibition to the advice and views provided by officials involved in responding to FOI requests would be not be significant.

60. Whilst he would accept that it is more probable than not that officials would be less free and frank in the way in which they provide advice and exchange views (for example by "toning down" comments and expressing views using less candid language), he does not consider that any alteration in their behaviour would be severe enough to mean that they would stop providing appropriate advice and views. He therefore considers that the MOJ's argument that disclosure of this information would lead to poorer quality FOI decisions and inappropriate disclosures or refusals to disclose is overstated.
61. In relation to the public interest arguments in favour of disclosure, the Commissioner considers that the first argument set out at paragraph 56 above is the weightiest factor in favour of disclosure, but that all the arguments at paragraph 56 carry some weight.
62. In conclusion, even taking into account the due weight given to the qualified person's opinion that the stated prejudice would occur, the Commissioner's view of the limited extent, frequency and severity of this prejudice leads him to conclude that the public interest in maintaining the exemption at section 36(2)(b)(i) of the Act is not sufficient to outweigh the public interest in disclosure of the information. Similarly the Commissioner considers that the public interest in maintaining the exemption at section 36(2)(b)(ii) of the Act does not outweigh the public interest in disclosure.

⁵ Department for Education and Skills v Information Commissioner⁵ EA/2006/0006 at paragraph 75 (vii)

Section 36(2)(c)

63. The MOJ have also claimed that the information is exempt by virtue of section 36(2)(c). In order to engage section 36(2)(c) – **otherwise** prejudice the effective conduct of public affairs – some prejudice other than that protected by another limb of section 36 must be indicated. In the Commissioner's view the exemption at section 36(2)(c) is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another specific exemption.
64. The Commissioner has noted MOJ's representations to him about the opinion of the qualified person being given in relation to section 36(2)(c). The Commissioner has considered the content of the submission put before the qualified person and, based upon this, is satisfied that the qualified person took into account relevant factors and did not take into account irrelevant factors when applying section 36(2)(c). He is also satisfied that the section 36(2)(c) arguments within the submission are relevant to the information in question in this case. The Commissioner therefore accepts that the qualified person's opinion in relation to section 36(2)(c) was reasonably arrived at.
65. In considering whether the qualified person's opinion was reasonable in substance the Commissioner has considered the content of the withheld information. He has also considered the content of the submission upon which the qualified person's opinion was based, which is also reflected in the MOJ's later correspondence with the Commissioner.
66. The qualified person's opinion is that responding to this request would prejudice the effective conduct of public affairs as responding to "meta-requests" (request about requests) would expand the administrative burden placed upon departments, as they would have to respond to the meta requests at the same time as dealing with appeals against original decisions about original requests. According to the qualified person this would also divert resources away from dealing with other FOI requests.
67. The Commissioner considers that the qualified person has correctly identified a prejudice relevant to section 36(2)(c), a prejudice to the effective conduct of public affairs other than an inhibition to the free frank exchange of views and provision of advice. He further considers that the qualified person has

identified a causal link between disclosure of the information in this case and the inhibition inherent in this sub-section of the Act. Finally the Commissioner accepts that the qualified person's opinion, that the likelihood of such prejudice occurring is more probable than not, is a reasonable opinion and that the inhibition argued is not trivial. The Commissioner therefore finds that the qualified person's opinion is reasonable in substance.

68. The Commissioner is satisfied that the opinion of the qualified person appears to be reasonably arrived at and objectively reasonable. He is therefore satisfied that section 36(2)(c) is engaged in relation to the remaining information that has been withheld.

Public interest

69. Section 36(2)(c) is a qualified exemption and therefore the Commissioner must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian and Brooke v Information Commissioner & BBC* [EA/2006/0011 & 0013] indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act.
70. As per the Tribunal's ruling in the above judgment the Commissioner has gone on to consider that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.

Public interest arguments in favour of maintaining the exemption

71. The Commissioner has considered the following public interest arguments, put forward by the MOJ, in favour of maintaining the exemption:

-Meta-requests can increase the burden on public authorities in handling FOI requests as the public authority is required to process and respond both to the original request and the supplementary request for information about the handling of that original request for information. It is not in the public interest to divert resources to handling meta-requests when

the official appeals process, including recourse to the Information Commissioner, is robust. Such activity does not make the best use of valuable public resources, which are in the public interest to be employed answering other FOI requests and complaints efficiently.

-It is not in the public interest to create the burden that would be placed on the public sector if all requestors were to adopt a strategy of personally investigating the handling of each of their requests.⁶

-The alternative option of applying subject-specific exemptions to the information requested would be impractical, unworkable and would undermine Parliament's decision to create an exemption to protect public authorities from the prejudices described in section 36. Such an approach would require the ICO to pass judgement on the original application of exemptions to the information requested in the originating request. Some of the original exempt information is contained in the correspondence between the Clearing House and the government department and this would involve the Commissioner investigating the original handling of the request and considering whether the applied exemptions were correct. This increased workload, for both public authorities and the Commissioner, would not be in the public interest.

Public interest arguments in favour of disclosing the requested information

72. The MOJ have informed the Commissioner that they considered the public interest in disclosing the requested information. They stated that disclosure would aid in the Clearing Houses role in the FOI case- handling process being made clear. The MOJ have also stated that openness and transparency in the FOI decision making process are in the public interest because of the accountability they bring to it. Disclosure would allow the public to see that decisions taken in relation to FOI requests were taken properly and only after full consideration of all the relevant issues. Furthermore they state that disclosure would enable the public to understand the reasoning behind these FOI decisions.
73. As the information that falls for consideration under section 36(2)(c) is the same information as fell for consideration

⁶ The estimated 34,000 requests received annually by central government would double. Estimate calculated by Frontier economics, 'Independent Review of the impact of the Freedom of Information Act (October 2006), para 1

under section 36(2)(b)(i) and (ii) the Commissioner considers that the same public interest arguments in favour of disclosure apply. These are that:

-Disclosure of the information would promote the transparency and accountability of the Clearing House role in dealing with FOI requests. This would be in the public interest because it would inform public opinion on how Government departments handle FOI requests which could, via lobbying, public comment, or the development of FOI case law, lead to improvements in the Government's handling of requests.

- Disclosure of information by public authorities on request is in itself of value and in the public interest so as to promote transparency and accountability in relation to the activities of public authorities.

-Disclosure of information could further increase public confidence in the Government's handling of FOI requests.

Where does the balance of the public interest lie?

74. As described above, the Commissioner considers that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and therefore does not necessarily imply any particular view as to the severity or extent of such inhibition or prejudice or how often it may occur, save that it will not be so trivial, minor or occasional as to be insignificant. Therefore, the Commissioner has given due weight to the opinion of the qualified person when assessing the public interest, and has also considered the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.
75. In this case the Commissioner accepts the qualified person's opinion that disclosing the information requested in this case would expand the administrative burden placed upon departments, as they would have to respond to the meta-requests at the same time as dealing with appeals against original decisions about original requests. This would divert resources away from dealing with other FOI requests. As he has accepted that this prejudice would occur, the Commissioner gives more weight to the public interest in favour of maintaining this exemption than he would give if he had only accepted that the prejudice would be likely to occur.

76. The Commissioner considers that meta-requests are normal requests and should be considered in the same way as any other request under the Act. In reaching his decision about where the balance of the public interest lies, the Commissioner considered the case of Home Office and Ministry of Justice (MoJ) v ICO (EA/2008/0062). In this case the applicant requested disclosure of any documents relating to internal communication within the Government and Government departments relating to the use of FOIA by the applicant or the applicant's company, John Connor Press Associates Ltd. The applicant clarified that he did not want information already received in answers or correspondence but internal communication about his requests or the way they should be handled. The public authority withheld the information under 36(2)(b)(i) and (ii) and 36(2)(c). The Commissioner was satisfied that the exemptions were engaged but that the public interest weighed in favour of disclosure. The PA appealed the decision and stated that the request in this case was a 'meta-request' by which they meant that the request was for information about another FOI request (paragraph 7).
77. The Tribunal agreed with the Commissioner's view that meta-requests do not differ in status or importance from any other type of request. There is no legal basis for concluding that public authorities can refuse a meta-request under FOIA simply because it is a meta-request; there is no provision in FOIA which permits requests to be refused on the basis they constitute requests for the disclosure of information as to how a public authority internally handles a particular information request. They should therefore be considered in the same way as any other request. This position was emphasised by the High Court in the subsequent appeal (CO/12241/2008, paragraph 4).
78. In the John Connor Press Associates case, the public authority identified factors in favour of maintaining the exemption at s36. The majority of the arguments closely considered the general effect of meta-requests as prejudicial to the effective conduct of public affairs rather than the actual circumstances of the request under consideration (paragraphs 19-25). They can be summarised as follows:
1. There would a chilling effect on the future conduct of those responsible for handling FOI requests;
 2. There was a resources issue;

3. Meta-requests circumvented other processes provided for under FOIA;
 4. Meta-requests serve irresponsible/private interests;
 5. Meta-requests provide backdoor access to information previously withheld
 6. The information in this specific case contains little or no material of value
79. The Tribunal noted that the public authority's approach was to treat meta-requests as a special category of requests; they were clear that there was no basis under the Act to do that and there is no separate class of request. They concluded that the public interest factors presented by the public authority were at a high generalised level and noted that a narrow approach focusing on how the information in question would impact upon the particular public interest the exemption is designed to protect (i.e. – the effective conduct of public affairs in this case) should be taken.
80. The public authority appealed the decision to the High Court, who ultimately upheld the Tribunal's (and the Commissioner's) decision that the public interest test in maintaining the exemption was outweighed by the public interest in disclosure (paragraph 38).
81. The MOJ have provided their views to the Commissioner that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. They consider that the prejudice to the effective conduct of public affairs outweighs the arguments for transparency and confidence put forward as public interest arguments to disclose the information.
82. The Commissioner accepts that the release of the information would be likely to cause the prejudice described. However, taking into account the findings of the Information Tribunal and the High Court in the John Connor Press Associates case, the Commissioner is not convinced that the harm would be severe or frequent enough to mean that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner therefore considers that on balance the public interest under section 36(2)(c) favours disclosure.

Procedural matters

Section 17

83. The MOJ relied upon section 42(1) for the first time during the course of the Commissioner's investigation.

84. 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.

85. 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.

86. The Commissioner finds the MOJ in breach of section 17(1) (b) and (c) for failing to advise the complainant that it wished to rely upon section 42(1) and failing to explain why this exemption applied.

87. The Commissioner further finds the MOJ in breach of section 17(3) for failing to explain its reasons for claiming that the public interest in maintaining the exemption at section 42(1) outweighed the public interest in disclosure.

88. The Commissioner notes that the MOJ's refusal under section 36 only provided reasoning for the exemptions at section 36(2)(b)(i) and (ii). At neither initial refusal stage, nor internal review stage, did the MOJ provide the complainant with its reasons for withholding information under section 36(2)(c).
89. The Commissioner therefore finds the public authority in breach of sections 17(1)(c) for failing to explain why section 36(2)(c) applied, and 17(3) for failing to explain why the public interest in maintaining section 36(2)(c) outweighed the public interest in disclosure.
90. The Commissioner also finds the MOJ in breach of section 17(1) for its failure to provide its refusal notice relying upon section 36 within the statutory time limit of twenty working days.

The Decision

91. In conclusion, the Commissioner's decision is that the MOJ did deal with some aspects of the complainant's request in accordance with the Act. The Commissioner considers that the MOJ were correct to apply section 42(1) to the 'legal information' in this case.
92. However, the Commissioner finds that the MOJ wrongly withheld information under sections 36(2)(b)(i) and (ii) and 36(2)(c), thus breaching section 1(1)(b) and section 10 of the Act.
93. He further finds that the MOJ breached section 10 in that it provided confirmation that it held the information requested (as required by section 1(1)(a) of the Act) outside the statutory time for compliance of twenty working days.
94. The Commissioner also finds the MOJ in breach of section 17(1)(a) and (b) and section 17(3) for; failing to advise the complainant of its reliance upon section 42(1), failing to explain why section 42(1) applied, and failing to explain why the public interest in maintaining this exemption outweighed the public interest in disclosure.

95. The Commissioner finds the public authority in breach of sections 17(1)(c) for failing to explain why section 36(2)(c) applied, and 17(3) for failing to explain why the public interest in maintaining section 36(2)(c) outweighed the public interest in disclosure.
96. Finally the Commissioner also finds the MOJ in breach of section 17(1) for its failure to provide its refusal notice relying upon section 36 within the statutory time limit of twenty working days.

Steps required

97. The Commissioner requires the MOJ to take the following steps to ensure compliance with the Act:
98. Release of the information as set out in Annex B to this notice. This is a confidential annex, which will only be sent to the MOJ.
99. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Right of Appeal

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

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

101. 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.
102. 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 30th day of March 2010

Signed

**Lisa Adshead
Senior FOI Policy Officer**

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

Annex A

"I refer to a list of matters referred to DCA Clearing House which was recently published at (<http://faculty.maxwell.syr.edu/asroberts/foi/ukfoia.html>.)

Please would you provide me with the following information in respect of each of the items listed below: (some or all of which appear to be requests originating from Friends of the Earth)

- 1: Date on which the Clearing House became involved in the matter (and how);
- 2: Details of advice sought from Clearing House (including copy of request for advice);
- 3: Details of any advice given by Clearing House (including both the date of advice given and a copy of advice given if in writing) and steps taken by DCA since request for advice received;
- 4: Current status of the request including whether further action to be taken, if so by whom, or whether the matter is closed (from Clearing House perspective).

The requests (using the numbering system on the Clearing House List) are as follows:

	Please would you provide us with the file lists for files managed by the following: Climate Change and Energy Group 9so far as this is different to our earlier request (5 January) for the file list for AMED.) Such file lists to include the same types of information as requested in our email of the 5 January and for the same period as agreed in relation to that requested.			
16		DCA To Process	FOI	Request (New case)
	The correspondence for notification from ECGD to the Relevant Government Departments (defined below) notifying that that an application (or prospective application) was being treated as 'potentially sensitive' and requesting comments; and 2. Any and all information received from the relevant government departments in response to that notification/request in relation to SAKHALIN LNG project			
71		Case Closed	Mixed	Request (New Case)
	DTI-What meetings and correspondence there have been between government or civil servants and employees from the CBI since the 5th May 2005?	Cabinet office to Process	FOI	Request (New Case)
431				
483	FCO-Documents on BTC Pipeline IR on refusal	DCA To process	Appeal	Internal Review
496	Co-Sakhalin Project Internal Review	Received	Appeal	Internal Review

Legal Annex

Section (1) provides that –

Any person making a request for information to the 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 the information communicated to him.

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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 17 provides that –

(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.

(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.

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 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.

(2) 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”