

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 June 2010

Public Authority: Department for Communities and Local Government (DCLG)
Address: Ashdown House
123 Victoria Street
London, SW1E 6DE

Summary

The complainant requested information held by DCLG relating to the Government decision to remove the 85 year rule from the Local Government Pension Scheme (LGPS). DCLG withheld some information under section 42 (legal professional privilege) of the Act, and withheld other information under section 35(1)(a) (formulation and development of government policy) of the Act. The Commissioner is satisfied that DCLG applied section 42 correctly to the withheld information in relation to part 1 of his request. In respect of part 2 of the request the Commissioner decided that DCLG had failed to correctly cite section 42 which the Commissioner determined was not engaged. The Commissioner found that section 35 was engaged in respect of part 2 of his request for information about internal discussions but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. Accordingly the Commissioner orders disclosure of the information previously withheld under section 35, subject to redaction of junior officials' names. The Commissioner also recorded a number of procedural breaches in relation to DCLG's handling of the request.

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. This request relates to the Government decision to remove the '85 year rule' in 2006. The '85 year rule', also known as the 'rule of 85' was one of the calculation criteria in Local Government Pension Schemes (LGPS) when working out the entitlement of pension on the retirement of LGPS members. The 85 year rule or calculation centred on the age of the member and the length of reckonable service when working out actuarial reduction in pension entitlements (the 85 year rule allowed members to draw an unreduced pension at retirement if their age plus their years of 'pensionable' service exceeded 85 years).
3. The Government decided to remove the 85 year rule with effect from 1 October 2006 as part of the Local Government Pension Scheme (Amendment) Regulations 2006 on the basis that it believed the 85 year rule was age discriminatory. UNISON took the case to court to attempt to quash the removal of the 85 year rule as it believed that the decision was based on an erroneous understanding of the Government's legal obligations under the EU discrimination directive (2000/78/EC)¹. This was the first case to be brought under the Employment Equality (Age) Regulations 2006. In *UNISON V The First Secretary of State* [2006] EWCH2373 (Admin) (27 September 2006) the High Court found that the 85 year rule in the LGPS was discriminatory on the grounds of age and that it was not unreasonable of the Government to take the view that it may not be able to defend the 85 year rule for younger employees. UNISON sought a judicial review of the decision which was refused by the Court because it considered that the Government did have a rational basis for making the decision to remove the 85 year rule.
4. On 15 June 2007 it was announced by the Minister for Local Government (Phil Woolas MP), that there would be statutory consultation on proposals to extend the levels of protection in the LGPS for older employees which was originally introduced by the Local Government Pension Scheme (Amendment) and (Amendment 2) Regulations 2006. The proposal was to provide full rather than tapered protection for affected scheme members to 2020.

¹ 2000/78/EC established a general framework for equal treatment in employment and occupation which forbids discrimination based on religion, belief, disability, age and sexual orientation.

The Request

5. On 22 June 2006 the complainant requested the following information from DCLG:
 - 1) *A copy of the Government's legal advice that the LGPS 85 year rule would breach the Age Discrimination legislation that comes into force 1 October 2006.*
 - 2) *Any internal discussions on this matter not covered by 1 above.*
 - 3) *Any mention of whether this ruling would breach the Human rights Act*

6. Following a number of holding letters DCLG provided a substantive response to the complainant on 3 August 2006. DCLG apologised for the delay in responding but advised that it had needed to consider the public interest test in relation to the requested information. DCLG provided the following response:
 - In respect of part 1 of the request, DCLG advised that it was withholding this information under section 42 (legal professional privilege) of the Act.
 - In respect of part 2 of the request, DCLG advised that it was withholding this information under section 35 (formulation or development of government policy) of the Act.
 - In respect of part 3 of the request, DCLG advised that it had not thought the Human Rights Act to be relevant and so had not considered it.

7. On 11 August 2006 the complainant requested an internal review of the decision by DCLG not to disclose information in relation to parts 1 and 2 of the request. DCLG acknowledged the request for internal review on 18 August 2006.

8. On 12 January 2007 the Commissioner received a complaint from the complainant in which he advised that he had not received an outcome to his request for internal review. The complainant raised a number of issues about DCLG's handling of his request.

9. On 8 February 2007 the Commissioner wrote to DCLG to enquire about the status of the complainant's request. DCLG informed the

Commissioner that it would now conduct an internal review as requested.

The Investigation

Scope of the case

10. On 27 May 2007 the complainant wrote to the Commissioner to advise that he had still not received the internal review outcome of his request and asking the Commissioner to reopen his complaint.
11. The Commissioner notes that during the course of his investigation DCLG advised that it did in fact complete an internal review and wrote to the complainant on 17 December 2008. However, the complainant advised that he did not receive this letter and remained of the view that an internal review was not undertaken.
12. In his original complaint to the Commissioner on 12 January 2007 the complainant specifically asked the Commissioner to consider the following issues (in addition to the alleged failure to conduct an internal review):
 - 1) The complainant was generally dissatisfied with DCLG's handling of his request.
 - 2) The complainant was of the view that legal professional privilege relating to the legal advice had been waived, therefore the exemption at section 42 could not apply. In any event the complainant argued that the public interest favoured disclosure of the information.
 - 3) The complainant challenged DCLG's reliance on the exemption at section 35 of the Act.
13. The complainant also referred to matters which are not subject to this Decision Notice and which have been dealt with separately by the Commissioner.
14. The Commissioner has issued a Decision Notice in relation to a similar complaint made by a different complainant (FS50161898, issued on 23 December 2009). That Decision Notice dealt with a request made to DCLG for the same information as that requested in part 1 of this complainant's request:

1. *A copy of the Government's legal advice that the LGPS 85 year rule would breach the Age Discrimination legislation that comes into force 1 October 2006*
15. DCLG withheld this information in reliance on section 42(1) in both cases. The Commissioner's decision in the previous case was that DCLG correctly applied section 42(1) in relation to the legal advice it held, and that the public interest favoured maintaining the exemption. Having already inspected the relevant information and DCLG's arguments in relation to the information, the Commissioner is satisfied that he does not need to reinvestigate this issue. Therefore the Commissioner's decision in relation to part 1 of the request mirrors that in the previous case. For clarity, the Commissioner has included full details of his reasoning in relation to this part of the request.
16. In light of the above the Commissioner's decision in this case relates to DCLG's application of sections 42 and 35 to the withheld information in respect of parts 1 and 2 of the request. The complainant did not refer to part 3 of the request as part of his complaint, and so the Commissioner has not gone on to consider it.

Chronology

17. Due to a backlog of cases the Commissioner was unable to commence his investigation of this complaint until late 2009.
18. On 4 January 2010 the Commissioner contacted DCLG in relation to the complaint. The Commissioner requested a copy of information relevant to part 2 of the request, as well as any copies of documentation recording the decision making process at the time the request was originally refused. The Commissioner invited DCLG to provide a submission in relation to its handling of the request.
19. Following a number of reminders, DCLG responded to the Commissioner on 12 March 2010. DCLG provided the Commissioner with a memory stick which held approximately 375 separate documents. DCLG did not provide a schedule or list of that information, but it advised the Commissioner that the files were labelled, and that the Commissioner could use a search tool included on the memory stick. Although DCLG provided some arguments in relation to the public interest test in relation to section 35, it did not explain whether DCLG had in fact considered each piece of information. DCLG did not provide any documentation in respect of the decision making process at the time of refusing the original request.

20. The Commissioner was dissatisfied with DCLG's response as it was difficult to determine what information was stored on the memory stick and which exemptions had been applied to which document. The Commissioner is of the opinion that it is not within his role to analyse the information and assume how exemptions have been interpreted and applied on behalf of a public authority.
21. On 15 March 2010 the Commissioner again wrote to DCLG and explained that he had looked at the content of the memory stick to establish the nature of the information. The Commissioner advised at that time that, without submissions from DCLG, it would not be possible or appropriate for the Commissioner to analyse the 375 pieces of information and make a determination on how DCLG had applied the exemptions to each piece of information, or to make a decision on whether the information should or should not be disclosed.
22. Therefore the Commissioner asked DCLG to provide him with any specific notes that existed in relation to the refusal notice or initial analysis of the request to be read in conjunction with the withheld information provided on the memory stick. The Commissioner requested that, if no such notes existed, DCLG confirm whether it could provide submissions in support of its reliance on the exemption(s) specific to **each** piece of the withheld information (with relevant public interest arguments).
23. On 26 March 2010 DCLG responded to the Commissioner's correspondence of 4 January 2010 and 15 March 2010. At this stage DCLG advised that it had in fact completed an internal review on 17 December 2008 and enclosed a copy of that letter. The Commissioner asked the complainant whether he had received the internal review letter which he confirmed he had not. On closer inspection the Commissioner has noted two errors with the address on that letter which comprise of a misspelling of the street name and an incorrect postcode, the complainant's name was also misspelled. After considering the content of the letter the Commissioner has determined that there is nothing of significance contained therein that would change DCLG's initial refusal notice and has not given any significant weight to the content of it in this Notice.
24. In its letter of 26 March 2010 DCLG provided comments on the handling of the request which will be discussed later in the analysis section of this Notice. However, it was clear to the Commissioner from the content of that letter that DCLG had still failed to provide the Commissioner with the information he needed in order to make a decision as he had requested in his correspondence of 4 January 2010 and 15 March 2010.

25. On 31 March 2010 the Commissioner served an Information Notice on DCLG. This Notice required DCLG to provide an explanation, in respect each of the 375 withheld documents, as to which exemption was being relied on and the reasons why. The Notice also required DCLG to provide public interest arguments in relation to each document.
26. DCLG responded to the Information Notice on 29 April 2010. DCLG provided the Commissioner with 6 separate emails, each containing a 'batch' of compressed files of information. Each email contained a general paragraph stating that the compressed files attached to each email engaged either section 42(1), or section 35, or both. No specific reference was made to which documents engaged which exemption or why. A list of those batches is provided at Annex A of this Notice. The Commissioner notes that this was the first time DCLG had indicated that any information relating to part 2 of the request was exempt under section 42(1).
27. On 30 April 2010 a further email was received from DCLG with a letter attachment. The letter provided some general and overarching comments on the application of exemptions to the documents received in the 6 batches the day before, but still did not provide a breakdown of which document engaged which exemption and why. DCLG also identified 7 documents which it claimed were reasonably available elsewhere and claimed a late reliance on section 21 of the Act.
28. In the absence of the information required from DCLG to progress his investigation, the Commissioner determined that an examination of the withheld documents was required. The Commissioner therefore undertook a cursory examination of the information contained in batch 1, which contained 18 documents all being withheld under section 42(1) of the Act. In the absence of specific supporting arguments from DCLG as to why it believed the documents in batch 1 attracted legal professional privilege, it was difficult for the Commissioner to draw any conclusions on the application of section 42(1) of the Act.
29. The Commissioner wrote to DCLG on 4 May 2010 to explain that he had conducted an initial examination of batch 1 and was struggling to identify some of the documents as attracting legal professional privilege. The Commissioner asked DCLG to provide comments within 10 working days, otherwise he would proceed to a Decision Notice ordering disclosure of the information.
30. As DCLG had not responded within 10 days the Commissioner proceeded to draft this Decision Notice, however during the drafting DCLG contacted the Commissioner to claim a late reliance on section

41 in respect of one document within batch 1 and to inform the Commissioner that they had been wrong to rely on section 42(1) solely in respect of the information on batch 1 which they said was an oversight on their part.

31. The Commissioner is of the view that he has given DCLG every opportunity to provide the information he needs in order that he can make a decision in accordance with section 50 of the Act. Unfortunately DCLG have continued to fail to provide the necessary information and in the absence of the information required the Commissioner has had no option other than to proceed with this Decision Notice without DCLG's full cooperation.

Analysis

Exemptions

Section 41 – information provided in confidence

32. 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.

33. As stated at paragraph 30 of this notice DCLG sought a late reliance on section 41 in relation to one document contained within batch 1.
34. The Commissioner has discretion to decide whether, in the circumstances of the case, it is appropriate to take an exemption into account if it is raised in the course of his investigation. In doing so, the Commissioner will take into consideration what risks could arise if the information was disclosed together with what impact disclosure would have. This issue was considered by the Information Tribunal in the case of *Department of Business and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). The Tribunal held that:

"The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases and there is now considerable jurisprudence on the matter. In summary the Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss.10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA."

35. The Commissioner notes that DCLG did not provide any explanation as to why it had not previously raised section 41 during the course of the Commissioner's investigation. The Commissioner also notes that DCLG failed to provide any reasons why it would be appropriate for the Commissioner to consider it at a late stage.
36. Given the late stage of the investigation the Commissioner is not minded to accept DCLG's late reliance on section 41 and has therefore not gone on to consider it as part of this Notice.

Section 42 – Legal professional privilege

37. For ease of reference, the Commissioner has split the analysis of the application of section 42 into 2 parts. The first deals with the information already inspected by the Commissioner for case FS50161898, and which relates to part 1 of the complainant's request as detailed in paragraph 14 of this Notice. The second aspect of the analysis of the application of section 42 relates to the information provided by DCLG on 30 April 2010 which DCLG considered fell under this exemption as well as section 35.

Information relating to part 1 of the request (already considered by the Commissioner in relation to case FS50161898).

38. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim could be maintained in legal proceedings. Section 42 is a

class based exemption and it is not necessary to demonstrate that any prejudice may occur to the professional legal adviser/client relationship if information were to be disclosed. Instead it is already presumed that the disclosure of information might undermine the relationship of the lawyer and client.

39. Legal professional privilege (privilege) protects the confidentiality of communications between a lawyer and client. It has been defined by the First-tier Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* as:

"a set of rules or principles which are designed to protect the 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 their parties if such communication or exchanges come into being for the purpose of preparing for litigation."
(para. 9)

40. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
41. As stated at paragraph 14 above the Commissioner has inspected and considered the information requested in part 1 of the complainant's request which was previously provided to the Commissioner in relation to case FS50161898. The Commissioner understands that this was the only information withheld by DCLG under section 42(1) in relation to part 1 of the request. It is the Commissioner's view that this information does attract advice privilege as it was provided for the sole purpose of advising on the duties, rights and obligations of the public authority. Therefore the Commissioner is of the view that the exemption at section 42 of the Act is engaged in relation to this portion of the withheld information.

Waiver of legal professional privilege

42. The complainant has argued to the Commissioner that privilege was waived as a result of regular media appearances of Ministers explaining why the 85 year rule was to be scrapped due to new age discrimination legislation. The complainant points to the Tribunal's decision *Kirkaldie v ICO & Thanet District Council (EA/2006/001)*.
43. The Commissioner has noted the complainant's views as outlined in para 42 above. However the Commissioner is guided by more recent Tribunals which reached a different conclusion on the issue of waiver of privilege, namely *Kessler v ICO & HMRC (EA/2007/0043)*, *Merseytunnel users v ICO & Mersey Travel (EA/2006/0052)* and *FCO v ICO (EA/2007/0092)*
44. In *Kessler*, the Tribunal commented at paragraphs 40 and 44:
- 40 *'Waiver is an objective and not a subjective principle. The intention of a party is not the relevant issue, rather an objective analysis of what the party has actually done.'*
44. *'We are satisfied that the rule that by relying upon part of a privileged document before a court the party doing so waives privilege in the whole document does not apply to partial disclosure of privileged information outside the context of litigation. The decision in Kirkaldie, supra, can be distinguished as it related to a very different factual scenario.'*
45. The Commissioner's view is that a mere reference to or a brief summary of the advice will not be sufficient to amount to waiver, whether full or partial. The Commissioner understands that partial waiver will occur where the substantial contents of the legal advice have been disclosed, which is not the situation in this case. In any event partial waiver can only happen in the context of litigation before a court. Therefore the Commissioner considers that the complainant's argument that there had been a waiver of privilege simply because of *'the regular media appearances of ministers explaining why the 85 year rule was to be scrapped due to new age discrimination legislation'*, does not amount to waiver.

The public interest test

46. As section 42 is a qualified exemption the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information (part 1 of the request)

47. The complainant argued to the Commissioner that there is a public interest in disclosing this information as the Government's position has not been consistent. The complainant considered that the decision had been presented as a reaction to legal opinion on age discrimination grounds – and that this inconsistency deserved greater transparency.

48. The Commissioner considers that general factors in favour of disclosing information may include the following:

- the assumption in the Act in favour of disclosure
- the amount of money involved
- the number of people affected
- the transparency of the public authority's actions
- and any other circumstances that may relate to a particular case

49. The Commissioner believes that Parliament did not intend section 42 to be used as an absolute exemption. Indeed the Tribunal's decision in *Merseytunnel* underlined this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel, and in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration 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 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..."

50. DCLG accepted that there is a public interest in public authorities being accountable for the quality of their decision making and for ensuring that decisions have been made on the basis of good quality legal advice. DCLG also acknowledged that providing transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.

51. The Commissioner has considered the general public interest in public sector pay and pensions that has come to the fore in the media in recent years. He considers that, as public sector pay and pensions are funded by public taxes, that there is a legitimate public interest in the

public being assured of value for money. The LGPS fund amounts to current and future costs of many billions of pounds. There has been significant coverage in the media of the cost of public sector pension schemes and the need for reform on public sector pay. More recently, and in the past 18 months, there has been further pressure with the national and international financial situation and the decline in value of pension funds and potential shortfalls which may require additional injections of public money. The Commissioner understands that any attempt to reform public sector pay and pensions would be subject to debate and discussion and advice from Government legal advisers and that the public may, in certain circumstances, have a right to know how such advice is interpreted during the decision making process.

Public interest factors in favour of maintaining the exemption (part 1 of the request).

52. The Commissioner has considered the following factors in relation to the public interest in maintaining the exemption at section 42(1):
- the inbuilt weight of the concept of legal professional privilege.
 - the likelihood and severity of harm arising by disclosure.
 - whether the advice is recent; live or protects advice relating to the rights of individuals.
 - other circumstances relating to this particular case.
53. DCLG expressed the view that legal advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may be afterwards disclosed and used to their prejudice. DCLG argued that if the information were to be disclosed the quality of confidentiality in the material may be lost, in which case no further claim for LPP could be made in respect of that material, including in subsequent legal proceedings. DCLG also told the complainant that disclosure of legal advice has a high potential to prejudice government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear of favour. DCLG believed neither of these would be in the public interest.
54. The Commissioner recognises that there is a strong and inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that 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. The protection afforded by privilege 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 in turn could 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 case of *Bellamy v the ICO and the DTI (EA/2007/0043)* the Tribunal commented that:

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

55. The Commissioner notes that if legal advice has been recently obtained, it is more likely to be used in a variety of decision-making processes and have current or future significance. The Commissioner recognises that these decision-making processes would be likely to be affected by disclosure. In particular the Commissioner is mindful that there has already been legal action in the High Court which is open to legal challenge through the judicial process and there continues to be consultation and negotiation on the transitional provisions and protections for those affected by the 85 year rule.
56. In *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Tribunal said that there may be a stronger argument in favour of disclosure where the subject matter of the requested information would affect "a significant group of people". Whilst the Commissioner understands that the number of LGPS scheme members affected by the decision is large, he recognises that the number of taxpayers who would have been affected by increased costs of public sector spending is greater.
57. The Commissioner has noted the information already in the public domain at the time of the request relating to the ongoing debate about the LGPS, particularly the view of the Government which was highlighted in the judgment of the High Court on 27 September 2006 (CO/1944/2006), and the reasons behind the removal of the 85 year rule. It is clear that one of the intentions of the Government in removing the 85 year rule was the reduction in cost to the taxpayer. There has been ongoing consultation with LGPS members in respect of protection arrangements and in this respect the reasons are reasonably transparent, and would not be added to by the release of the legal advice.

Balance of the public interest arguments

58. The Commissioner accepts that the established public interest arguments in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court case of *DBERR v Dermod O'Brien [2009] EWHC 164 (QB)*:

“Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)... The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight” (para 53)

59. Justice Williams indicated though that section 42 should not accordingly become an absolute exemption “by the back door”. Public interest favouring disclosure would need to be of “equal weight at the very least...” (para 53). The Commissioner is also mindful of the Tribunal’s comments in *Bellamy* in relation to identifying public interest arguments in favour of disclosure.
60. The Commissioner notes the decision of the High Court on 27 September 2006 (CO/1944/2006) that the 85 year rule was discriminatory on the basis of age. The Commissioner has had sight of the full judgment which outlines arguments and reasoning put before the court. This is available to the public and contains the views and the considerations of the Government on the subject of the 85 year rule. In this respect it assists in identifying the nature and volume of information that was already in the public domain at the time of the request which provided clarity and transparency for the public to understand the decision of the Government to remove what was in its view, a discriminatory rule. There is also detail within the judgment of the Government view on the value for money of schemes such as LGPS. It is the view of the Commissioner that making the legal advice behind the decision available publicly would not necessarily provide any additional understanding of how the decision was made and does not sufficiently sway the arguments in favour of disclosure.
61. The Commissioner understands that there is and always will be a public interest in the decisions made by Government. The Commissioner also considers that there is a strong public interest in disclosing information

that aids in the public's understanding of how government works. There should also be transparency to aid the public in being informed on matters under debate. However, the Commissioner believes that the release of the legal advice in this case would not add to or aid the understanding of the decision based on it, and that it could in fact cause harm to the client relationship between the Government and its legal advisers and subsequently affect its ability to defend its legal interests.

62. In the Commissioner's opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the legality of the removal of a rule from a pension scheme. Disclosure of the legal advice may therefore assist the public's understanding of the legality of the removal of this rule. The Commissioner has placed significant weight on the fact that the removal of the 85 year rule does affect the financial position of the scheme members, however he believes that this is outweighed by the additional financial burden placed on the taxpayer.
63. The Commissioner understands the strong arguments for maintaining legal professional privilege given the client lawyer relationship and as such being able to carry out full and frank discussions in that context is fundamental to the administration of justice. The Commissioner also understands that in such circumstances decision making would be not fully informed and therefore be affected to its detriment if comprehensive and candid legal discussions were not able to be held.
64. In considering where the public interest lies the Commissioner has taken into account the sensitivity and significance of the advice provided which, in his view, leads him to conclude that there is added weight to the inbuilt weight of legal professional privilege in relation to the information relating to part 1 of the request. The Commissioner has attached weight to the fact that the legal advice affects a significant number of LGPS members but moreover has balanced this with the effect on taxpayers. Disclosure of the advice would enable the public to further understand, challenge and debate the reasoning behind the Government's views and decisions, although much of this is available through information already available such as the court judgment and ongoing press releases from the Minister as well as information provided to the LGPS members. The Commissioner has also noted that the advice remains 'live' in terms of the issues to which it relates and therefore at the time of the request the potential for harm to the privilege holder was reasonably significant and again adds more weight in favour of the exemption. Taking all these factors into account: the proportion of people it affects; the 'live' nature of the advice; its sensitivity and significance and the possible harm resulting

from the release of the information itself, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information relating to part 1 of the request, under section 42.

Information withheld by DCLG (provided to the Commissioner firstly on a memory stick and latterly in batches 1 to 6) relating to part 2 of the complainant's request and withheld under section 42

65. In part 2 of his request the complainant asked for any internal discussions on the 85 year rule which did not consist of the legal advice referred to in part 1.
66. In its letter of 30 April 2010 accompanying the 6 batches of information DCLG told the Commissioner that some of the withheld information relating to part 2 of the request may fall within section 42(1) of the Act; or, to the extent that the information did not fall within that exemption, it fell within section 35(1)(a) of the Act. DCLG was of the view that some information would fall within both exemptions. DCLG recognised that it had not identified precisely which information fell within each of these two exemptions or both.
67. DCLG advised the Commissioner that section 42 was engaged as a 'matter of fact' as the information constituted legal advice to which a claim to legal professional privilege could be maintained in proceedings, and it believed that the exemption was therefore engaged and correctly applied. For example, DCLG advised the Commissioner that the information in batch 1 consisted of some of the following types of documents:
 - Legal advice from the Department's Legal Directorate
 - Legal advice from colleagues in other government departments,
 - Legal advice from the Law Officers relating to the interpretation of the EU Framework Directive on discrimination,
 - Correspondence with legal advisers
 - Papers relating to the UNISON judicial review of the Government's decision.
 - Various briefing notes.
68. As stated at paragraph 28 of this Notice the Commissioner conducted a scoping examination of the information held on batch 1 in relation to part 2 of the request which was withheld by DCLG under section 42(1). This was done in the absence of sufficient supporting evidence from

DCLG on how section 42 was engaged in relation to the documents, but as previously stated in this Notice, the Commissioner is of the view that it is not his role to assume how exemptions have been interpreted and applied on behalf of a public authority.

69. The Commissioner had some difficulty in identifying some of the documents in batch 1 as those that attracted privilege, and was unsure if there was a client-lawyer relationship in evidence within the documents. The Commissioner noted that there also appeared to be draft briefing notes which did not appear to be legal advice at all. It was also difficult to identify the roles of the officials as legal advisers.
70. It is the Commissioner's view that only some of the information he inspected in respect of part 2 of the request may attract advice privilege in having been provided for the sole purpose of advising on the duties, rights and obligations of the public authority. Unfortunately, despite being given the opportunity to provide specific evidence for its reliance on section 42 in respect of batch 1, DCLG failed to do so. Therefore, although the Commissioner is of the view that some of this withheld information may be legal advice, and section 42 of the Act may apply, the Commissioner can not confidently conclude that section 42(1) is engaged.
71. In the interests of thoroughness the Commissioner did review the public interest arguments put forward by DCLG for not disclosing the documents from batch 1, in order to establish whether this would illuminate the reliance on section 42(1) in respect of the withheld information.
72. DCLG considered that the public interest arguments were set out in the annex to its original response of 3 August 2006 to the complainant's request. DCLG argued that, whilst these arguments were general in nature, it took the view that there were no particularly powerful public interest arguments in favour of disclosure of legally professionally privileged information in this case which would override the inherent public interest in the protection of such information. DCLG also pointed out that particularly strong countervailing arguments would be necessary to outweigh that interest, and was of the view that no such arguments existed. DCLG further stated that this position and the public interest arguments cited applied to all of the information in all of the documents that it categorised as falling within section 42(1).
73. The Commissioner finds that DCLG's comments do not clarify or aid his understanding of the application of section 42(1) to batch 1. The Commissioner concludes, that in the absence of any other supporting information, the exemption cannot be considered to be engaged in

relation to batch 1. The Commissioner has also compared the nature of the information in batch 1 with that inspected in relation to case FS50161898. The Commissioner is of the opinion that the nature and content of the information in batch 1 is of much less significance than the information considered in the previous case. In the absence of adequate clarification from DCLG the Commissioner is also of the view that where reliance is claimed on section 42 in the other batches, likewise the exemption cannot be considered as engaged as there is insufficient evidence to support this conclusion.

74. As discussed above the Commissioner finds that section 42(1) is not engaged in relation to the information in batch 1. However, he is mindful that DCLG's reliance in the alternative on section 35(1)(a) to that information requires consideration. In the following section the Commissioner will consider whether section 35(1)(a) is engaged specifically in relation to that information.

Section 35 - Formulation and development of government policy

Information withheld by DCLG (provided to the Commissioner firstly on a memory stick and latterly in batches 1 to 6) relating to part 2 of the complainant's request and withheld under section 35

75. Section 35(1)(a) of the Act provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test. The full text of section 35 is detailed in the attached Legal Annex.
76. As indicated above the withheld information in this case consists of approximately 375 documents including exchanges of emails between officials within DCLG, letters, notes, briefings and memos. The Commissioner accepts that discussions between officials within a public authority in relation to policy options would be likely to form a standard part of the policy formulation and development process. The Commissioner notes that the policy in this case is the Government's position on how LGPS entitlements are calculated. The Commissioner has conducted an initial examination of the information contained within all 6 batches and concludes that the various email exchanges and papers in question formed part of the policy making process relating to the removal of the '85 year rule'
77. The Commissioner has also considered the case of *DfES v The Information Commissioner & Evening Standard (EA/2006/0006)* in which the Tribunal suggested that whether an item of information can

be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of the information rather than on a line by line dissection. The Commissioner has therefore looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a minute dissection of the content of the information. When considering whether the exemption is engaged he has also applied a broad interpretation of the term 'relates to' bearing in mind the Tribunal's comments in *DfES* (paragraphs 50 to 59).

78. The Commissioner asked DCLG for evidence of its decision making process at the time the request was originally refused, but this has not been provided. In the absence of any information to support DCLG's decision making process the Commissioner has considered the nature of the withheld information in the round and is satisfied that it is likely that the information relates to the formulation or development of Government policy and that section 35(1)(a) is engaged.

The public interest test

79. As noted above section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DfES* the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case. In particular he has borne in mind the principle that any arguments presented should be considered in the context of the case and with reference back to the actual information in question.
80. In its letter to the Commissioner of 30 April 2010, DCLG accepted that its original response of 3 August 2006 to the complainant's request, failed to explain which limb of section 35 applied, and failed to set out the public interest arguments.

Public interest arguments in favour of disclosing the information

81. DCLG acknowledged the principle that there is a general public interest in information held by public authorities being made publicly available. This goes towards ensuring accountability and transparency and, in turn, helps promote public engagement and trust and confidence in the way that government takes decisions on matters of policy. DCLG

recognised that the public interest is served by the public being able to assess the quality of advice and decision making.

82. DCLG advised the Commissioner that in this particular case the release of information relating to internal discussions about policy considerations relating to the 85 year rule in the LGPS might have further helped to explain the Government's thinking on why the rule could not remain unchanged, the options for change and how those options were being assessed. Disclosure might have helped confirm that the assessments taking place were objective ones taking account of all relevant considerations and implications.
83. The Commissioner is of the view that disclosing the requested information would further the public understanding of and participation in an informed public debate of the issue of public sector pensions and the affordability of those pensions on the public purse. The Commissioner understands that there was significant media coverage of the Government's intention to remove the rule of 85 and the reasons why as far back as 2003 through to the timing of the complainant's request in June 2006, which reflected the wider public concern about the issue. The proximity of the request to the completion of the policy formulation does not necessarily provide a strong argument in favour of maintaining the exemption. Whilst the Commissioner has accepted that it can be seen to add some weight to the chilling effect argument that disclosure would enable the public to participate in debate from a more informed position, given the timing of the request and the information already publicly available in the media the issue was very much 'live'. The public could have fed into the debate and reached a more informed understanding of all the options that were considered leading up to the final policy decision.
84. Disclosure would promote the accountability and transparency of the DCLG for the decisions it has taken in respect of the LGPS. Placing an obligation on the officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration. Disclosing this information carries significant public interest in the knowledge that the decisions being made about funding such schemes with public money were done so with the public interest at heart.

Public interest arguments in favour of maintaining the exemption

85. DCLG advised the Commissioner that, at the time of the removal of the 85 year rule, the particular weight of argument linked to European Council Directive 2000/78/EC, which laid down a general framework "for combating discrimination on the grounds of religion or belief,

disability, age or sexual orientation as regards employment and occupation...". This Directive required age discrimination provisions to be in force in domestic legislation no later than December 2006. DCLG also explained that this was relied upon as part of the overarching aim of controlling the cost of the LGPS. Discussions of a highly sensitive and political nature on this matter ran through the period from December 2003 to August 2006. DCLG referred the Commissioner to its internal review letter dated 17 December 2008 in relation to the public interest arguments it was relying on in favour of maintaining the exemption as well as reiterating some of these in correspondence.

86. DCLG also told the Commissioner that although resolution of a number of issues was in place by the time of the complainant's request (22 June 2006), the relevant trades unions were still pursuing a claim for treatment in line with other public services. It also said that no policy decision had been made at this time about further changes to protections or who should meet further costs associated with any changes to the 85 year rule. So in this context DCLG argued that its refusal to release the requested information was necessary in order to ensure and protect the ongoing need for rigorous and candid risk assessments of their policies.
87. DCLG went on to state that if officials' advice and internal discussion of such sensitive matters were routinely to be exposed to external scrutiny, officials might not feel able to express themselves as frankly as they might otherwise do, which is not in the public interest.
88. When considering DCLG's arguments the Commissioner has taken into account Tribunal and High Court decisions in similar cases. For example, in *FCO* the Tribunal considered the extent to which the disclosure of particular information requested under the Act could be said to create a 'chilling effect'. The Tribunal referred to its earlier decision of *HM Treasury* and stated that
- "...it was the passing into the law of the FOIA that generated any chilling effect [rather than the potential disclosure of any particular piece of information], no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential...Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity."*
89. In the case of *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department* [2008] EWHC 638 Mr Justice Mitting stated that chilling effect arguments

“are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between (paragraph 38)”.

90. Finally, in the case of *Cabinet Office v Information Commissioner and Lamb v Information Commissioner (EA/2008/0024 & 0029)* the Tribunal stated that

“early disclosure as a matter of routine will clearly have a greater impact than if it is seen that disclosure is ordered only in cases that merit it and then only after a reasonable passage of time.”

91. In this case the Commissioner does not consider that releasing the requested information would constitute routine disclosure. Rather, the Commissioner considers that there is a significant public interest in the information being made public in this particular case. Disclosure would enable people to better understand how this policy was developed and the different options explored.
92. When considering the arguments put forward by DCLG the Commissioner has also considered the timing of the request, the nature of the information and how these factors affect the weight of DCLG’s chilling effect arguments. At the time of the request (22 June 2006) the Commissioner notes that there was already much information in the public domain about the intention of the Government to remove the 85 year rule. EU directive 2000/78/EC was passed on 27 November 2000 and the Government was already in the process of drafting legislation which ultimately became The Employment Equality (Age) Regulations 2006, SI No 1031 which came into effect on 1 October 2006. Regulations had been drawn up (The Local Government Pension Scheme (Amendment No 2) Regulations 2004, SI 2004/3372) and laid before Parliament on 22 December 2004 and came into force on 1 April 2005. The Commissioner notes that, following protests from Members of Parliament and trades unions, those original regulations were revoked and this was announced by Phil Woolas on 13 July 2005. On 2 December 2005 Phil Woolas made a further announcement in a written statement to the House that the rule of 85 would have to be

abolished from 1 October 2006 to comply with EC European Directive 2000/78/EC. After a period of consultation new regulations including some transitional provisions for existing scheme members were laid before Parliament in March 2006, abolishing the rule of 85 with effect from 1 October 2006 (The Local Government Pension Scheme (Amendment) Regulations 2006, SI 2006/966).

93. It is clear from the information identified by the Commissioner from various sources² that discussions about affordability and the cost to the public purse were also well in the public arena. It is also clear to the Commissioner that a series of strikes on the issue of LGPS were high profile and prompted public discussion and debate in the media.
94. As stated the date for the implementation of the new rule was 1 October 2006. The Commissioner notes the court case (UNISON V The First Secretary of State [2006] EWCH2373 (Admin) (27 September 2006) which found that the 85 year rule in the LGPS was discriminatory on the grounds of age and that it was not unreasonable of the Government to take the view that it may not be able to defend the 85 year rule for younger employees. This court case was on 27 September 2006 and details of it are in the public domain.

Balance of the public interest arguments

95. As explained above the Commissioner considers that civil servants must be expected to provide full and candid advice as part of their professional duties. Therefore he does not accept that they will be easily discouraged from contributing fully during the policy formulation process if the requested information is released. Moreover, given the interests that other stakeholders have in shaping policy to meet with their own interests, he does not believe that they would readily be less candid or refuse to contribute to future policy in the event of the material being disclosed. However, he is also mindful of the proximity of the timing of the request to the announcement of the change and the nature of the content of the disputed information.
96. The timing of the request is key to the argument here. By the time the request had been made (22 June 2006), the decision on the removal of the rule of 85 had already been made, the policy written and the announcement made public. The Commissioner accepts that there were additional and separate discussions to be had around future transitional provisions, which necessitated consultation and negotiations between

² BBC website 'Pensions strike bites across UK' (28 March 2006); BBC website 'Q&A: Local government pensions (3 April 2006); Explanatory memorandum to the Local Government pension Scheme (Amendment)(No 2) Regulations 2004 No.3372

the Government and the stakeholders involved, but these were ancillary matters after the fact. As these ongoing discussions were expected and would likely have been subject to formal consultation with union members, the Commissioner fails to see how the release of information relating to a decision already made prior to the request would impact on those discussions. The Commissioner therefore does not give weight to the chilling effect arguments put forward by DCLG, and in fact it is the Commissioner's view that such arguments would be more relevant to information held after the request and so not relevant to the request given the timing of it.

97. The Commissioner has balanced the arguments for maintaining section 35(1)(a) against the arguments in favour of disclosure. He considers that each of the arguments for releasing the requested material have significant weight. Therefore, on the basis of the information provided by DCLG, whilst he has attributed weight to the chilling effect he does not consider it sufficient in this particular case to favour maintaining the exemption, given the timing of the request and DCLG's failure to provide robust arguments in support of its position.
98. During his investigation the Commissioner has been able to locate a variety of information already in the public domain about the removal of the rule of 85. In releasing the information subject to this request, the Commissioner believes there will be additional understanding and transparency for the public on how the Government makes decisions and the Commissioner believes this could be positive for the Government given the arguments about affordability and acceptability of the LGPS to taxpayers. In the absence of more specific public interest arguments in relation to the specific documents provided to the Commissioner by DCLG why the information should be withheld the Commissioner has concluded that the weight of the public interest in disclosure outweighs the public interest in maintaining the exemption. The Commissioner has decided that all of the information (as provided to the Commissioner by DCLG) should be disclosed to the complainant but that names of junior officials should be redacted as he considers it to be exempt by virtue of section 40(2) of the Act.

Section 40(2) personal information

99. The Commissioner is mindful that DCLG did not claim reliance on the exemption at section 40(2) in relation to any information. However, in directing that information should be disclosed the Commissioner is equally mindful of his dual role as the data protection regulator. Therefore the Commissioner considers it appropriate for him to look at the exemption at section 40(2) in relation to the names of junior officials.

100. Section 40(2) of the Act provides an exemption for information which relates to individuals other than the applicant. Personal data is defined in section 1(1)(a) of the Data Protection Act 1998 (the DPA) as:

"...data which relate to a living individual who can be identified: - from those data, or; from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."

101. Personal data is exempt if either of the conditions set out in section 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the data protection principles as set out in Schedule 1 to the DPA.

102. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individuals' reasonable expectations of what would happen to their information;
- The seniority of the individuals;
- Whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
- The legitimate interests of the public in seeing the withheld information.

103. The Commissioner is mindful that he has issued guidance which gives advice to public authorities on when the names of staff, officials, elected representatives or third parties acting in a professional capacity should be released in response to an access request. The key point to consider when disclosing names is to consider whether it would be fair in all the circumstances to identify an individual. The presumption is in favour of protecting privacy, so the release of personal information will in most cases only be fair if there is a genuine reason to disclose that information. The Commissioner is of the view that public authorities should consider the following:

- The public authority should identify the legitimate interests which a member of the public might have in the information. These may not be the same as, or limited to, any interest expressed by the particular requester, although any arguments they put forward should be considered.

- The public authority should consider whether the names add to the value of the information, or whether the interests would be fully met by providing information with the names redacted.
 - The public authority should decide whether the benefits of disclosure are proportionate to any potential harm, distress or intrusion to the individuals named.
104. In this case the Commissioner is satisfied that junior officials would be unlikely to expect that their names would be disclosed into the public domain. Given that junior staff are less likely to be accountable for decisions taken by a public authority, the Commissioner considers that the benefit to the public of disclosing this information is minimal. Rather, the Commissioner is of the view that disclosure of the names of junior staff would be likely to draw undue attention to these individuals. Therefore the Commissioner concludes that disclosure of this information would be unfair and would breach the first data protection principle.

Procedural Requirements

Section 1(1)(b) duty to provide information

105. *Section 1(1) of the Act provides that -*

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

106. DCLG provided the complainant with a response on 3 August 2006 in which it confirmed it held the information but advised that it would not release it citing sections 42 and 35 of the Act.
107. As DCLG confirmed that it held the information, the Commissioner does not find that DCLG breached 1(1)(a). However, as the Commissioner has found that the information relating to part 2 of the request should have been disclosed, the Commissioner has determined that DCLG breached 1(1)(b) in failing to provide this information to the complainant.

Section 10(1) duty to respond within the statutory time limit

108. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt'

109. As the Commissioner finds that the withheld information in relation to part 2 of the request ought to have been provided to the complainant, it follows that DCLG breached 10(1) of the Act in failing to disclose this information within the time limit set out at section 10(1).

Section 17 refusal notice

110. 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."*

111. The complainant made his request on 22 June 2006, DCLG's refusal notice of 3 August 2006 cited section 42 and section 35 generally, but but did not specify which subsection of each exemption was being applied. Nor did DCLG explain why each exemption applied.

112. 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."*

113. The Commissioner is of the view that DCLG failed to adequately state its public interest arguments in its refusal notice 3 August 2006.
114. Therefore Commissioner finds that DCLG breached sections 17(1), 17(1)(b) and (c) and section 17(3)(b) in failing to issue an adequate refusal notice within 20 working days.

The Decision

115. The Commissioner's decision is that DCLG dealt with the following elements of the request in accordance with the requirements of the Act:

- DCLG correctly withheld information relating to part 1 of the request under section 42 of the Act.

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

- DCLG incorrectly applied section 42(1) to some of the information relating to part 2 of the request.
- DCLG incorrectly applied section 35(1)(a) to the withheld information because, although the exemption was engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
- In respect of part 2 of the request DCLG breached section 17(1), 17(1)(b) and (c) and 17(3) of the Act for failing to issue a refusal notice within 20 days, failing to state the exemptions it was relying on and the reasons why, and for failing to provide public interest arguments.
- DCLG breached 1(1)(b) as the information relating to part 2 of the request should have been disclosed.
- The withheld information in relation to part 2 of the request ought to have been provided to the complainant, so DCLG also

breached 10(1) of the Act in failing to disclose this information within the time limit set out at section 10(1).

Steps Required

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

- To provide the complainant with the information relating to part 2 of his request subject to redaction of the names of junior officials.
- In respect of paragraph 27 of this notice, where DCLG confirmed to the Commissioner that section 21 applied to 7 of the previously withheld documents, to provide the complainant with a list of those documents and details of the locations that they are reasonably accessible from.

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

Failure to comply

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

Other matters

120. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

121. The complainant requested an internal review on 11 August 2006 and this was acknowledged in a letter dated 18 August 2006. DCLG told the Commissioner that they completed an internal review on 17 December 2008, yet the complainant states that he did not receive this letter. Paragraph 23 of this notice explains why this may well be the case.

122. Part VI of the section 45 Code of Practice makes it desirable practice that internal review procedures encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it would seem that no internal review outcome was communicated to the complainant.
123. The Commissioner is disappointed that such a delay ensued despite repeated attempts to secure conformity with Part VI of the Code of Practice more generally, as described in his [practice recommendation](#) of the 3 November 2008.

Right of Appeal

124. 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 sent.

Dated the 17th day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Annex A

Batches of information attached to emails of 29 April 2010

- Batch 1** This batch comprises: 18 documents and emails which DCLG considered the exemption at section 42(1) of the FOI Act applied
- Batch 2** This batch comprises: emails covered by both section 35 and 42 exemptions of the FOI Act applied. .
- Batch 3** This batch comprises: documents covered by both section 35 and 42 exemptions of the FOI Act applied.
- Batch 4** This batch comprises: documents DCLG considered the exemption at section 35 of the FOI Act applied.
- Batch 5** This batch comprises: emails DCLG considered the exemption at section 35 of the FOI Act applied.
- Batch 6** This batch comprises Microsoft Word documents DCLG consider the exemption at section 35 of the FOI Act applied.

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Time for Compliance

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."

Refusal of Request

Section 17(1) provides that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

“Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 42 - Legal Professional Privilege

(1) 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.

Section 35 – Formulation of Government Policy etc.

(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to—

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

Section 41 – Information provided in confidence

(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 rise 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.