

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 June 2010

Public Authority: Government Equalities Office
Address: 9th Floor Eland House
Bressenden Place
London
SW1E 5DU

Summary

The complainant requested information relating to the government's decision to legislate at Westminster to implement an EU Gender Directive (2004/113/EC) in Northern Ireland under the auspices of the Sex Discrimination (Amendment of Legislation) Regulations 2008 which is a devolved matter in respect of Northern Ireland. The public authority disclosed some limited information at the time of the request and also made additional disclosures during the course of the investigation. However, the public authority withheld the remainder of the information on the basis of the exemptions at sections 28 (relations within the United Kingdom), 35(1)(a) (formulation of government policy), 35(1)(b) (ministerial communications), and 42 (legal professional privilege). The public authority further argued that it was excluded from confirming or denying whether it had sought and/or received Law Officers' advice on the issue by virtue of the provisions of sections 35(1)(c) and 35(3).

The Commissioner finds that in all the circumstances of the case, the public interest favoured the public authority confirming whether or not it had sought and/or received Law Officers' advice. The Commissioner additionally finds that most of the disputed information (some of which was also withheld on the basis of section 42) was correctly withheld on the basis of the exemption at section 28(1). However, the remainder of the information (none of which was withheld on the basis of section 42) he found was not correctly exempt on the basis of section 28(1) and was also not exempt on the basis of the relevant exemptions at section 35. The Commissioner also finds the public authority in breach of sections 17(1) (refusal notice), 1(1)(a), and 1(1)(b) (right of access to information held by public authorities).

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. In April 2008, the Gender Directive 2004/113/EC¹ ('the Directive') was implemented at Westminster for the whole of the United Kingdom (including Northern Ireland) via The Sex Discrimination (Amendment of Legislation) Regulations 2008 ('the 2008 Regulation'). However, as equality policy is a devolved matter in relation to Northern Ireland, it was unusual that the Directive was implemented in Northern Ireland by the UK government ('the government') at Westminster rather than by the Northern Ireland Assembly.
3. It is however common knowledge that the First Minister of Northern Ireland at the time, Dr Ian Paisley, objected to the gender reassignment provisions in the Directive.

The Request

4. On 08 May 2008, the complainant requested the following information:

'...all minutes, memos and other correspondence passing between UK Ministers, officials and OFMDFM (Office of the First Minister and Deputy First Minister) which led to the decision to legislate at Westminster to implement in Northern Ireland the EU Gender Goods and Services Directive.'
5. On 24 June 2008, the public authority responded to the complainant's request. It made a number of disclosures (in the form of a summary) relating to the process which led to the decision to legislate at Westminster to implement the Directive in Northern Ireland. On the whole however, it refused to disclose copies of the documents requested by the complainant on the basis of specific exemptions at

¹ Which prohibits discrimination based on gender in relation to the provision of goods and services.

sections 28(1), 35(1)(a) and (1)(b), and 42 of the Act. It also explained that it was unable to either confirm or deny whether it held any information relating to the provision of advice by Law Officers.

6. On 08 July 2008, the complainant requested a review of the decision to withhold the remainder of the information held.
7. On 09 September 2008, the public authority wrote back to the complainant with details of the outcome of the review. It upheld the original decision.

The Investigation

Scope of the case

8. On 22 September 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The issue is one of immense general public importance in that it goes to the heart of the constitutional arrangements, and the functioning thereof, between central government and the devolved administrations in the UK.
 - The public interest in transparency in relation to a precedent setting decision.
 - The public interest in disclosure is further enhanced by the decision relating to an EU directive.
 - There is a public interest in knowing whether the decision to legislate at Westminster was taken at the behest of the Northern Ireland's First Minister or merely because of his refusal to agree to the Directive.
9. The substantive focus of the Commissioner's investigation therefore was to determine whether the remainder of the information held was correctly withheld on the basis of the relevant exemptions at sections 28, 35, and 42 of the Act.

Chronology

10. Unfortunately, due to a backlog of complaints under the Act at the Commissioner's office it was not until 13 October 2009 that he wrote to the public authority and requested copies of the disputed information.

He also asked the public authority to make any additional representations in support of the exemptions applied.

11. On 13 November 2009 the public authority provided copies of the disputed information to the Commissioner and made additional submissions in support of the application of exemptions.
12. On 02 December 2009 the Commissioner wrote back to the public authority following a telephone conversation between the public authority and the Commissioner's representative. The Commissioner requested amongst other things, the public authority's detailed submissions in respect of the application of the neither confirm or deny (NCND) provision relating to the exemption at section 35(1)(c) (Law Officers Advice). The Commissioner also asked the public authority to confirm that it no longer had any objections to the disclosure of the document marked item G in the bundle of disputed information provided
13. On 15 December 2009 the public authority responded with detailed submissions in respect of the application of the NCND provision.
14. On 18 January 2010 the Commissioner wrote to the public authority requesting that the document marked item G be made available to the complainant as soon as possible.
15. On 04 February 2010 the Commissioner wrote back to the public authority requesting additional clarifications in respect of aspects of the disputed information and the submissions provided.
16. On 09 February 2010 the public authority disclosed the document marked item G to the complainant.
17. On 04 March 2010 the public authority responded to the Commissioner's letter of 04 February 2010.

Analysis

18. A full text of all the statutory provisions referred to in this part of the Notice can be found in the legal annex

Exemptions

Sections 35(1)(c) and 35(3) – Law Officers' Advice

19. Information is exempt from disclosure on the basis of section 35(1)(c) if it relates to the provision of advice by any Law Officers or any request for the provision of such advice. However, section 35(3) excludes a public authority from the duty to confirm or deny (as stipulated in section 1(1)(a)) whether it holds any information relating to the provision of Law Officers' advice.
20. The public authority explained that it could neither confirm nor deny (NCND) whether or not it held information relating to the provision of Law Officer's advice regarding the decision to implement the Directive for Northern Ireland at Westminster. The Commissioner is satisfied that sections 35(1)(c) and 35(3) were correctly applied.
21. The exclusion from the duty to confirm or deny is however subject to a public interest test so that a public authority would need to demonstrate that in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether or not information is held.

Public interest arguments in favour of confirming or denying whether the public authority sought and/or received Law Officers advice

22. In the public authority's submission to the Commissioner on this issue, the public authority explained that it recognised the public interest in knowing that decisions have been taken with the benefit of sound legal advice.
23. In the public authority's general public interest arguments to the complainant, it explained that that it recognised the public interest in promoting better public understanding of how and why the decision was taken to legislate at Westminster even though the Northern Ireland administration had the power to implement the Directive in Northern Ireland.
24. In *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC* (EA/2006/0011 and EA/2006/0013), the Information Tribunal (Tribunal) commented on the general public interest in openness;

'While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of

abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.' (Paragraph 87).

25. Specifically in this case, the Commissioner considers that there was significant public interest in knowing whether the public authority held any information relating to the provision of Law Officers' advice in connection with the decision to legislate to implement the Directive in Northern Ireland at Westminster. Most observers conversant with the devolution arrangements for the UK would have been aware that there is a statutory provision in place to support the UK's decision to legislate for Northern Ireland regarding a devolved matter.² Nevertheless, because of the fundamental significance of the UK actually exercising this statutory power in relation to what could be considered a controversial issue in Northern Ireland, the Commissioner considers that there was a very strong public interest in knowing whether or not the public authority did in fact seek and/or receive Law Officers' advice before making that decision.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

26. The public authority explained that section 35 provided a statutory recognition of the public interest in allowing the government to have a clear space, immune from exposure to public view, in which to debate matters internally with candour and free from the pressures of public political debate. Therefore, as part of this principle, there is a public interest in ensuring that a government department is able to decide, free from external pressure, the nature of advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers.
27. The public authority explained that this long standing convention that neither the advice of Law Officers nor the fact that their advice has been sought should be disclosed has been observed by successive governments and also recognised in paragraph 2.13 of the Ministerial Code. It argued that the distinction between the particular form of words used in the exemption at section 35(1)(c) and the generality of the provision in section 42 further illustrates the strong public interest in not disclosing whether Law Officers advice has been sought and/or received.

² Section 26 of the Northern Ireland Act 1998 effectively permits the UK government to legislate for Northern Ireland where the government considers this necessary to ensure compatibility with the UK's international obligations.

28. The public authority argued that because Law Officers are the government's most senior legal advisers, their advice is considered quite authoritative. Therefore, the disclosure of whether or not the public authority sought and/or received advice from Law Officers could lead to a two fold detriment. On the one hand, disclosure could be taken to indicate that the government attached particular importance to the issue or even that the government was unsure about the strength of its legal position. This could discourage the government from seeking Law Officers' advice in appropriate cases in the future. On the other hand, it might leave the government open to criticism for not having consulted the Law Officers and hence failed to give sufficient weight to the issue or obtain the best advice and these could have the reverse effect of putting pressure on officials to consult Law Officers in inappropriate cases or in an unmanageably large number of cases.
29. The public authority explained that the Commissioner had also recognised the importance of the NCND provision regarding Law Officers' advice in his decision in case FS50093302. It specifically drew the Commissioner's attention to the part of the decision where the Commissioner had suggested that the public interest could override the NCND provision in relation to Law Officers' advice only in exceptional circumstances. The public authority also drew the Commissioner's attention to the decision of the High Court in *HM Treasury v Information Commissioner & Evan Owen* [2009] EWHC 1811 (HM Treasury).

Balance of the public interest arguments

30. The Commissioner recognises that there is a long standing convention reflected in the Ministerial Code against the disclosure of not only the content of Law Officers' advice but also whether or not they have actually provided advice on a particular issue. He further notes that this principle must be accorded significant weight even in the absence of evidence of any potential damage. This inbuilt public interest against disclosure is similar that which is applied to the legal professional privilege exemption at section 42 of the Act.
31. As a class-based exemption, there is already an assumption of a good reason against disclosure and as such there is no need to demonstrate that the disclosure would likely result in any prejudicial effect. The Commissioner however acknowledges the significance of the possible detrimental effects of disclosure outlined by the public authority in its public interest arguments against disclosure and has therefore also attached significant weight to those arguments.

32. In terms of case FS50093302, although the Commissioner notes the general principle of taking into account exceptional circumstances, each case must still be decided on its own merits. The High Court did also point out in the HM Treasury case that its decision was not intended to:

‘... undermine the important new principle of transparency and accountability that the FOIA has brought to government in many ways. The Law Officers’ Convention will now operate subject to the principles of the FOIA... I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was of such public importance that ... the strength of public interest in disclosure of the advice as to the legality of the Iraq war might well have outweighed the exemption in its general and particular aspects.’
(Paragraph 64)
33. The Commissioner agrees with the complainant that the decision to legislate to implement the Directive for Northern Ireland was one of fundamental significance in relation to the UK’s devolution arrangements, particularly in respect of Northern Ireland. Notwithstanding its statutory power to do so, it is rare for the government to legislate over a devolved matter because it goes against the spirit of devolution as reflected in the devolution legislation. Specifically, in the case of Northern Ireland, where there is a power sharing arrangement in place, the Commissioner would argue that the decision to legislate over a devolved matter assumed added significance because of the potential adverse effect on relations between the Democratic Unionist Party and Sinn Fein, the two largest parties which form the Northern Ireland Executive.
34. Therefore, having carefully considered the circumstances of this case, the Commissioner is of the opinion that there was a significant public interest in knowing whether or not the public authority held any information relating to the provision of Law Officers’ advice before the decision to legislate over a devolved matter in relation to Northern Ireland. The matter was one of significance in terms of the law and operation of the constitutional arrangements. He considers that this outweighs the very strong public interest in maintaining the exclusion from the duty to confirm or deny.
35. The Commissioner therefore finds that, on balance, in the circumstances of this case, the public interest in confirming whether information is held outweighed the public interest in maintaining the exclusion from the duty to confirm or deny.

Disputed Information

36. A list of all the documents and the exemption(s) relied on by the public authority in respect of each document can be found in annex A to this Notice.
37. A confidential annex (to be supplied to the public authority only) which further details the Commissioner's analysis which is not reproduced in the main body of this Notice in order not to reveal disputed information can be found at annex B.
38. Furthermore, for reasons which are clearly explained in the confidential annex, the Commissioner considers that not all of the information supplied by the public authority falls within the scope of his investigation. The specific information not considered in the investigation can be found in:
 - The penultimate paragraph of the letter dated 29 November 2007 and marked item A (also annex C to item B(i)).
 - Paragraph 1a of the originating email (at 12:58pm) in the chain of emails dated 10 December 2007 and marked E.
39. Therefore, any subsequent reference to item A and the chain of emails marked E in the Notice does not include the information identified above.

Section 28 (1) – Relations with the United Kingdom

40. The public authority withheld all of the disputed information on the basis of the above exemption.
41. Information is exempt under the above exemption if its disclosure would or would be likely to prejudice relations between any administration in the United Kingdom and any other such administration. In section 28(2) 'administration in the United Kingdom' includes both the Executive Committee of the Northern Ireland Assembly ('the Executive Committee') and the government of the United Kingdom.
42. In considering the likelihood of prejudice, the Commissioner was guided by the Information Tribunal's (Tribunal) comments in Hogan v the ICO and Oxford City Council (EA/2005/0026 & EA/2005/0030);

'The application of the prejudice test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of

prejudice being claimed must be considered....A third step for the decision-maker concerns the likelihood of occurrence of prejudice.' (Paragraphs 28 to 34).

43. The public authority was keen to impress upon the Commissioner that, generally, the relationship between the government and the Northern Ireland administration is particularly sensitive. Specifically in this case, it argued that it was vital that the UK met its European Union obligations by implementing the Directive without destabilising the devolution arrangement with Northern Ireland.
44. Therefore, in order to meet its EU obligations and also maintain good working relations with the Executive Committee, the public authority explained that it had to address the issue through official rather than political channels of communications. It argued that official channels of communications offer a means of addressing issues at central government level if political channels are no longer practicable.
45. The public authority explained that the need to use a range of communication channels may be crucial to future dispute resolution of devolution issues in Northern Ireland in particular and also generally in relation to the devolution arrangements elsewhere in the UK.
46. The public authority's concern is the maintenance of good relations between the government and the Executive Committee of the Northern Ireland Assembly to ensure the smooth delivery of the benefits of the devolution arrangement with Northern Ireland. The Commissioner is satisfied that such an interest is recognised within the provisions of section 28(1).
47. There is no disputing the fact that the implementation of power sharing arrangements in a devolution framework between central government and devolved bodies does sometimes generate a number of difficulties, not least, in the case of the United Kingdom which has to also take into account its EU obligations. It is also important to note that the devolution arrangement in Northern Ireland has in the past suffered a number of setbacks due to the breakdown of the Belfast Agreement.³ Therefore, in assessing the likelihood of prejudice, significant weight needs to be attached to what perhaps could be described as the fragile nature of the devolution arrangement in Northern Ireland.
48. Specifically in this case, the Commissioner notes that because of Dr Ian Paisley's objections to the inclusion of the gender reassignment provision in the Northern Ireland Sex Discrimination Regulations, a

³ Also referred to as the Good Friday Agreement, a peace deal struck by the British government between most of the political parties in Northern Ireland. As part of the peace deal, a Northern Ireland Assembly with devolved legislative powers was established.

balance needed to be struck between implementing the Directive and maintaining good relations with the Northern Ireland Assembly.

49. The Commissioner is therefore satisfied that the public authority withheld the disputed information in order to preserve and protect the relationship between the government and the Executive Committee which is one of the interests section 28 of the Act seeks to protect.
50. As always, the Commissioner must consider whether at the time of the request, the disclosure of the disputed information could have been prejudicial to the interests in question.
51. Although not explicitly specified by the public authority in any of its correspondence both to the Commissioner and the complainant, on the basis of its submissions, the Commissioner is content that it is relying on the lower (would be likely), rather than the higher (would), level of prejudice. In any event, in the absence of an explicit statement to the contrary, the Tribunal has suggested that the lower of prejudice should be applied. (*McIntyre v The Information Commissioner & The Ministry of Defence* – EA/2007/0068 at paragraph 45).
52. In the Commissioner's opinion, 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote
53. The Commissioner has therefore considered the information in each document (also bearing in mind the context in which they were produced) to determine whether the exemption was correctly engaged in light of the public authority's explanation and test set out above.
54. **Item A** – is a letter from Rt Hon Shaun Woodward MP, Secretary of State for Northern Ireland (Secretary of State) to Rt Hon Harriet Harman MP, Leader of the House of Commons.
55. The Commissioner is persuaded that the disclosure of this letter at the time of the request would have been likely to prejudice relations between the government and the Northern Ireland's Executive Committee. The letter needs to be considered in the context of the decision to implement the gender reassignment provision for Northern Ireland at Westminster. He finds that in that context the possibility of prejudice to relations between the government and the Executive Committee, were this letter to be disclosed, was real and significant and the exemption at section 28(1) was correctly engaged.
56. **Item B** – is a draft memo from senior officials at the public authority to Rt Hon Harriet Harman MP. A draft response to the Secretary of State's letter is also attached.

57. For the same reasons as above in relation to item A, the Commissioner is persuaded that section 28(1) was correctly engaged in respect of the draft memo and the draft response.
58. However, the Commissioner finds that Annex B to the draft memo was incorrectly withheld under the Act. Annex B is essentially an extract from section 26 of the Northern Ireland Act 1998 which in summary stipulates that the Secretary of State is empowered to act if he considers that an action taken by a Minister or Northern Ireland department is inconsistent with the UK's international obligations.
59. As this information was already in the public domain, no prejudice could arise from disclosure so the Commissioner finds that it was incorrectly withheld under section 28.
60. **Item B(i)** – is the final version of a document relating to achieving compliance with the Directive in Northern Ireland.
61. This document is essentially a more detailed version of item B and the Commissioner is satisfied that it was correctly withheld under section 28(1). Annex C of the document is a copy of the letter from the Secretary of State to Rt Hon Harriet Harman (item A). For the same reasons above, the Commissioner finds that the exemption at section 28(1) was correctly engaged in respect of item B(i).
62. **Item B(ii)** – is a draft memo to Rt Hon Harriet Harman MP from a senior official at the public authority in response to specific queries from the Leader of the House of Commons.
63. The Commissioner is not persuaded that the information in this draft memo would have been likely to prejudice the relations between the UK government and Northern Ireland. It mainly consists of factual information and the rest of the information is such that would have been publicly known at the time of the request. The Commissioner therefore finds that this document was incorrectly withheld on the basis of the exemption at section 28(1).
64. **Items E & F** – item E is a letter from a senior official at the public authority to a senior official at the OFMDFM. Item F is a similar letter to Dr Ian Paisley MP from the Parliamentary Under Secretary formally notifying him of the contents of the letter marked item E. This letter was also copied to Martin McGuinness, the deputy First Minister of Northern Ireland.
65. The Commissioner is not persuaded that the disclosure of the information in both letters would have been likely to prejudice

relations between the UK government and Northern Ireland's Executive Committee.

Chain of Emails

A - 04 December 2007 (4:29pm) – 04 December 2007 (17:19)

66. These contain free and frank discussions between officials at the public authority on how best the government could address the issues regarding the implementation of the Directive in Northern Ireland. Having carefully reviewed the contents of this chain of emails, the Commissioner notes that the frank nature in which some of the options under consideration were presented would have been likely to prejudice relations between the government and the Executive Committee, and he therefore finds that the exemption at section 28(1) was correctly engaged.

B – 04 December 2007 (12:30pm) – 06 December 2007

67. Having carefully reviewed the above email correspondence, the Commissioner is not persuaded that disclosure of this email would have been likely to prejudice relations between the government and the Executive Committee.

C – 05 December 2007 (17:13 – 18:01)

68. The Commissioner is again persuaded that the candid nature of the options put forward in relation to ensuring Northern Ireland's compliance with the Directive would have been likely to prejudice relations between the government and the Executive Committee.

D – 05 December 2007 (17:56) – 07 December 2007 & E – 10 December 2007 (12:58pm – 2:37pm)

69. For the same reasons as above in relation to chain A and C, the Commissioner is persuaded that the information in these chains of email would have been likely to prejudice relations between the government and the Executive Committee.

F – 10 December 2007 (18:38) – 11 December 2007

70. Although the issues discussed in the above chain relate to the implementation of the Directive in Northern Ireland and are also of substance, the Commissioner is not persuaded that the issues discussed and/or the nature of the discussions would have been likely to prejudice relations between the government and the Executive Committee.

Public Interest Test

71. The Commissioner must also decide whether in all the circumstances of the case, the public interest in maintaining the exemption in respect of the information he considers was correctly exempted on the basis of section 28(1) outweighed the public interest in disclosure. For ease of reference, the Commissioner has outlined below the documents he considers were caught by the exemption at section 28(1).

- Documents marked items A, B, and B(i)
- Chain of emails marked A, C, D, and E

Public interest arguments in favour of disclosing the requested information

72. The public authority acknowledged the strong public interest in ensuring the public understood why the implementation of the Directive, the subject matter of which was a delegated matter, was dealt with by the Westminster Parliament. It additionally recognised that knowledge of the circumstances of this case would enhance understanding of how the devolution arrangement with Northern Ireland has worked in practice.

73. More generally, the public authority recognised that there is a public interest in ensuring the transparency of the process leading up to important decisions.

Public interest arguments in favour of maintaining the exemption

74. The likely prejudicial effects of disclosure identified above are equally valid public interest considerations against disclosure. The public authority did however also point out that there had been an opportunity for public scrutiny of the government's decision as the issues had been debated by both Houses of Parliament. The Commissioner was provided with copies of the debates.

75. The public authority further argued that the public interest in disclosure has to be balanced against the wider and stronger public interest in ensuring the effective delivery of government across the UK and the preservation of good working relationships.

Balance of the public interest arguments

76. In addition to the general public interest in openness, the Commissioner considers that there is a significant public interest in disclosing the disputed information in this case. The devolution of

powers over specific matters from Westminster (i.e. to Scotland, Wales, and Northern Ireland) is underpinned by the principle that the UK government will only legislate over those matters which have not been devolved. Although there are statutory provisions which could override the power of the devolved administrations to legislate over those matters excluded from the reserve list, in order to preserve the spirit of devolution arrangements, it is rare that the government legislates over those matters not included in the reserve list.

77. Therefore, as pointed out by the complainant, the decision by the government to implement the Directive for Northern Ireland is fundamental to the constitutional arrangements between Westminster and the devolved administrations.
78. Given that it was common knowledge at the time of the request that Dr Paisley objected to the gender reassignment provisions in the Directive, the Commissioner agrees that there is also a public interest in knowing whether the decision to legislate over an excluded matter was taken with or without the approval of the then First Minister. This also feeds into the more general public interest in knowing the extent to which devolved bodies are, or are not, cooperating with the government on specific issues.
79. The Commissioner agrees that the 2008 Regulation was thoroughly debated by both Houses of Parliament at Westminster. However, the Commissioner disagrees that those debates alone necessarily provided answers to the questions posed by the complainant in relation to the extent of the First Minister's involvement or otherwise in the decision to implement the Directive for Northern Ireland at Westminster.
80. However, as already noted, the Commissioner has also attached significant weight to the fragility of the devolution arrangement in Northern Ireland. Therefore, notwithstanding the fundamental significance of the government's decision, the prejudicial effect on relations between the government and the Northern Ireland which would no doubt have an adverse effect on the devolution arrangement cannot be underestimated. The timing of the request is therefore crucial. The request was made a month after the Directive had been implemented in Northern Ireland, and a month before Dr Paisley was succeeded by Peter Robinson as First Minister. The Commissioner is therefore of the view that there was considerable public interest in not disclosing the relevant information so soon after the Directive had been implemented in Northern Ireland.
81. The Commissioner recognises that there is a significant public interest in devolution issues generally and particularly in a situation where the government decides to, and consequently exercises its legislative

authority over a delegated matter. However, in the circumstances of this case, the Commissioner is also mindful of the significant public interest in ensuring that the government maintains good relations with the Northern Ireland Executive Committee.

82. The Commissioner has therefore decided that, in the circumstances of this case, the balance of the public interest slightly tips away from disclosure of the nature and detail of the interactions between officials leading up to the decision by the government to legislate over a matter devolved to the Northern Ireland Assembly.
83. The Commissioner therefore finds that in all the circumstances of the case, the public interest in withholding the documents identified in paragraph 70 above outweighed the public interest in disclosure.

Section 35

84. For ease of reference, the Commissioner has outlined below the documents he considers were not exempt on the basis of section 28 but to which the public authority also applied an exemption(s) at section 35:
- Documents marked items E and F
 - Chain of emails marked items B and F
85. The public authority withheld item E on the basis of the exemption at section 35(1)(b) and item F on the basis of the exemption at section 35(1)(a).

Item E - Section 35(1)(b)

86. Information is exempt from disclosure on the basis of the exemption at section 35(1)(b) if it is held by a government department and relates to Ministerial Communications.
87. As noted above, item E is a letter from a senior official at the public authority to a senior official at the OFMDFM.
88. The Commissioner generally accepts that correspondence between Ministers of the Crown and between civil servants who have written on behalf of their Ministers fall within the ambit of the Ministerial Communications exemption. The Commissioner does not, however, consider that correspondence or other communications between a Minister of the Crown and a Minister of one of the devolved administrations amount to ministerial communications as defined for the purposes of the exemption.

89. The letter marked item E was written and sent by a senior civil servant on behalf of the public authority to a senior civil servant at the OFMDFM. Therefore, the Commissioner finds that the letter does not relate to ministerial communications and was incorrectly withheld on the basis of the exemption at section 35(1)(b).

Item F – section 35(1)(a)

90. As noted above, item F is a letter from the Parliamentary Under Secretary of State to Dr Ian Paisley.
91. Information is exempt from disclosure on the basis of the exemption at section 35(1)(a) if it relates to the formulation or development of government policy.
92. Although both may sometimes be used interchangeably, 'formulation' suggests the early stages of government policy making. 'Development' on the other hand implies a review of existing policy which may result in alterations.
93. As already noted, equality policy is a devolved matter in the case of Northern Ireland. There is however a statutory provision which allows the government to legislate over matters which have been transferred to the Northern Ireland Assembly under the devolution framework.⁴ The prevailing consensus, however, is to avoid such a situation in practice in order not to weaken the principles underpinning the devolution of powers as well as to minimise any political risk. Therefore, although there is a statutory provision for the action taken by the government in relation to implementing the Directive in Northern Ireland, a range of options was considered before the decision to legislate at Westminster was made.
94. However, in light of the fact that there is already legislation in place to address a potential conflict of interests between Westminster and the Executive Committee in relation to the government's EU obligations, the Commissioner is not persuaded that the discussions which took place regarding this issue could be accurately described as relating to the formulation of government policy.
95. Nevertheless, the Commissioner is of the opinion that the discussions could be accurately described as relating to the development of government policy. The discussions were aimed at resolving the stalemate with the Executive Committee so that the government would not have to rely on its statutory powers to compel compliance with the Directive, or by exercising those powers in such a way that would not

⁴ Referred to above in Paragraph 25

harm the devolution framework in Northern Ireland. To that extent therefore, the Commissioner is prepared to accept that the documents produced pursuant to those discussions relate to the development of the government's policy on how to effectively address potential conflicts which could arise from attempts by the government to legislate over delegated matters in Northern Ireland.

96. In *DFES v Information Commissioner & the Evening Standard EA/2006/0006* (at paragraphs 53 – 58), the Tribunal noted that 'relates to' could be safely given a broad interpretation so that it would not be necessary to consider whether any of the withheld information deviates from section 35(1)(a) activities. It is sufficient that the context in which it was produced and the subject matter cover section 35(1)(a) activities.
97. The Commissioner is therefore satisfied that the letter from the Parliamentary Under Secretary to Rt Hon Dr Ian Paisley marked item F relates to the development of government policy. He therefore finds that the basis of the exemption at section 35(1)(a) was correctly engaged.

Public Interest Test

98. As section 35 is a qualified exemption, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.
99. In light of the reason for which he found that the letter was not exempt under section 28(1), the Commissioner finds that the public interest in maintaining the exemption at section 35(1)(a) did not outweigh the public interest in disclosure. In the Commissioner's view, the broad contents of the letter was already public knowledge at the time of the request.

Chain of Emails

100. The public authority did not cite a specific exemption under section 35 for the chain of emails marked items B and F. The Commissioner has however considered whether either section 35(1)(a) and 35(1)(b) cited above apply to the chain of emails.
101. For the same reasons as in paragraphs 92-97 above, the Commissioner finds that the chain of emails marked B and F relate to the development of government policy and section 35(1)(a) therefore applies.

Public Interest Test

102. In summary, the public authority argued that in view of the sensitivity of the issue under consideration, officials needed private space to consider a number of options in relation to whether or not the UK government should legislate to implement the Directive in Northern Ireland. It argued that if the disputed information had been disclosed at the time of the request, the officials' judgement about how best to handle a similar policy matter would be open to unwarranted questioning and criticism before any decision about the direction of the relevant policy could be taken.
103. In addition, disclosure would have a chilling effect on the ability of officials to reach an agreement in the future in relation to similar issues which might arise from the implementation of the devolution arrangement with Northern Ireland.
104. The Commissioner is not persuaded that the nature of the discussions in both email chains lend themselves to the public authority's assertions above. They do not, in his view, contain information which if disclosed, would result in a chilling effect as explained above. He also notes that the request was made after the decision had been taken to implement the Directive in Northern Ireland so the issue of private thinking space could not have arisen.
105. Having carefully considered all of the emails in the chain, he accepts that they contain free and frank exchanges between officials in relation to the implementation of the Directive but he respectfully disagrees that the discussions are of such a nature that their disclosure would inhibit the frankness and candour of officials in future policy deliberations.
106. Therefore, given that there is an inherent public interest in disclosure in the Act, the Commissioner considers that the chain of emails marked B and F should not have been withheld.
107. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) did not outweigh the public interest in the disclosure of the information in the email chains marked B and F

Section 35(1)(b)

108. For the same reasons he found that item E did not constitute information relating to ministerial communications within the meaning of section 35(1)(b) (see paragraphs 88-89 above), the Commissioner

also finds that the chain of emails marked B and F are not exempt under section 35(1)(b).

Section 42 – Legal Professional Privilege

109. The public authority did not apply section 42 to any of the documents the Commissioner has considered not exempt from disclosure on the basis of either the exemption at section 28 or the exemptions at section 35. He has therefore not gone on to consider the applicability or otherwise of this exemption.

Procedural Requirements

110. A public authority is required under section 17(1) to issue a refusal notice within 20 working days.

111. The Commissioner finds the public authority in breach of section 17(1) for responding to the complainant's request of 08 May 2008 outside of the statutory time frame.

112. In addition, under section 17(1)(b), a public authority must issue a refusal notice which specifies the exemption it is relying within 20 working days.

113. The public authority breached section 17(1)(b) by failing, in respect of some of the withheld information, to cite the relevant exemption in or subsection of section 35.

The Decision

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

- The public authority correctly withheld the information in the documents marked items A, B, B(i), and B(ii) on the basis of the exemption at section 28(1) of the Act.
- The public authority correctly withheld the information in chain of emails marked A, C, D, and E on the basis of the exemption at section 28(1) of the Act.

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

- The public authority breached section 1(1)(a) for refusing to confirm or deny whether it held any information relating to the provision of Law Officers advice or any request for the provision of such advice.
- The public authority breached sections 1(1)(b) and 10(1) of the Act because the information in the document marked item B(ii) was not exempt on the basis of the exemption at section 28.
- The public authority breached sections 1(1)(b) and 10(1) of the Act because the information in the documents marked items E and F was not exempt on the basis of the exemptions at sections 28(1), 35(1)(b) and 35 (1)(a) respectively.
- The public authority breached section 1(1)(b) and 10(1) of the Act because the information in the chain of emails marked B and F was not exempt on the basis of sections 28(1), 35(1)(a) and (1)(b) respectively.
- The public authority breached section 17(1) by its late response to the complainant's request.
- The public authority breached section 17(1)(b) by failing, in respect of some of the withheld information, to cite the relevant exemption in or subsection of section 35.

Steps Required

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

- Confirm or deny in accordance with the provisions of section 1(1)(a) whether the public authority held any information relating to the provision of Law Officers' advice or any request for the provision of such advice..
- Disclose all the information in the documents marked items E and F.
- Disclose all the information in chain of emails marked B and F.

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

Failure to comply

118. 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

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

120. Part VI of the section 45 Code of Practice (the "section 45 code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should 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 these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned at the length of time it took the public authority to complete its internal review despite the publication of his guidance on the matter.

Right of Appeal

121. Either party has the right to appeal against this Decision Notice to the First- Tier Tribunal (Information Rights) Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
Arnhem House Support Centre
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

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 24th day of June 2010

Signed

**Graham Smith
Deputy Commissioner**

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

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."

Section 1(3) provides that -

"Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that -

"The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that -

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

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 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Relations with the United Kingdom

Section 28(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.”

Section 28(2) provides that –

“In subsection (1) “administration in the United Kingdom” means-

- (a) the government of the United Kingdom,
- (b) the Scottish Administration,
- (c) the Executive Committee of the Northern Ireland Assembly,
- (d) the National Assembly for Wales.”

or

Section 28(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

Formulation of Government Policy

Section 35(1) provides that –

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

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

Section 35(2) provides that –

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

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

Section 35(3) provides that –

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

Section 35(4) provides that –

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

Section 35(5) provides that –

"In this section-

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

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

"Ministerial communications" means any communications-

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

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the

Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

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

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Section 42(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."

Annex A

Documents containing disputed information	Exemptions relied on by PA		
	Section 28	Section 35	Section 42
Item A – letter from Secretary of State for N/Ireland to Harriet Harman MP	x	x	x
Item B – draft Memo to Harriet Harman MP	x	x	
Item B(i) – Final version of document relating to achieving compliance in Northern Ireland	x	x	x
Item B(ii) – Memo to Harriet Harman (11 December 2007)	x	x	
Item E – Letter from senior official at public authority to senior official at OFMDFM	x	x	
Item F – letter from Parliamentary Under Secretary to Rt Hon Dr Ian Paisley	x	x	
Chain of Emails	Section 28	Section 35	Section 42
A – 04 December 2007 (4:29pm) – 04 December 2007 (17:19)	x	x	x
B – 04 December 2007(12:30pm) – 06 December 2007	x	x	
C – 05 December 2007 (17:13 – 18:01)	x	x	
D – 05 December 2007 (17:56) – 07 December 2007	x	x	x
E – 10 December 2007 (12:58pm – 2:37pm)	x	x	x
F – 10 December 2007(18:38) – 11 December 2007	x	x	