

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2010

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information relating to the proscription of the Baluchistan Liberation Army. The Home Office refused the request citing sections 23 (information supplied by, or relating to, bodies dealing with security matter), 27 (international relations), 35 (formulation of government policy) and 42 (legal professional privilege). During the course of the Commissioner's investigation, the Home Office additionally cited section 24 (national security). The Commissioner finds that some information was incorrectly withheld under section 27 and 35 and orders its disclosure. He also finds the public authority in breach of sections 1(1)(a) and (b), 10(1), 17(1) and 17(1)(b) and (c).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Terrorism Act 2000 came into force in February 2001. Under Part II of the Terrorism Act 2000, the Secretary of State has the power to proscribe any organisation which he/she believes 'is concerned in terrorism'. An organisation is 'concerned in terrorism' if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism either in the UK or abroad. The proscription process outlaws the terrorist group and makes it illegal for them to operate in the UK.

3. The grounds for proscription as a terrorist organisation are set out in section 3 of the Terrorism Act 2000.
4. The Terrorism Act 2006 amended the grounds for proscription to include organisations which glorify terrorism and provided new powers in respect of those groups which have changed their name but are identified as being the same organisation as one of those already proscribed.
5. Proscription means that an organisation is outlawed in the UK as soon as the order comes into force. It is a criminal offence for a person to belong to or encourage support for a proscribed organisation. It is also a criminal offence to arrange a meeting in support of a proscribed organisation or to wear clothing or to carry articles in public which arouse reasonable suspicion that a person is a member or supporter of a proscribed organisation.
6. Any organisation that is proscribed, or anyone affected by a proscription, can appeal to the Home Secretary for the organisation to be de-proscribed. If this is refused, the applicant can appeal to the Proscribed Organisations Appeal Commission (POAC).
7. Baluchistan is the largest of Pakistan's four provinces, although the region also spills over the borders into Afghanistan and Iran. Baluchis demanding independence for the region operate under the name of the Baluchistan Liberation Army.
8. The Baluchistan Liberation Army was proscribed in 2006.

The Request

9. The complainant wrote to the Home Office on 31 January 2008 requesting the following information relating to the proscription of the Baluchistan Liberation Army (the BLA):

'I would be grateful if you could provide me with copies of the following documentation relating to the proscription of the BLA either electronically or by means of hard copies:

- *Any background information, correspondence, briefing notes and documents that relate to the proscription of the BLA.*
- *Any background information, correspondence, briefing notes and documents that relate to why the BLA have been proscribed.*
- *Any documentation that the Home Office holds as evidence that the BLA is a terrorist organisation, including details of the sources of such information.*
- *Any minutes or other records of meetings at which the proscription of the BLA was discussed or recommended by government Ministers.*
- *Any other documents held within the Home Office that relate to the proscription of the BLA under the 2000 Terrorism Act.'*

10. The Home Office responded on 20 May 2008, confirming that it held the information which the complainant had requested but advising that it was exempt from disclosure by virtue of sections 23(1) (information supplied by, or relating to, bodies dealing with security matters), 27(1)(a) and (d) (international relations), 35(1)(a) and (b) (formulation of government policy) and 42(1) (legal professional privilege).
11. The complainant requested an internal review on 10 June 2008. In her correspondence, the complainant argued:

'At the very least, basic information about the grounds on which the BLA have been proscribed should be released in the public interest'
12. Following correspondence from the Commissioner's Office reminding the Home Office of the Commissioner's guidance in relation to the time limits for carrying out internal reviews, the Home Office responded to the complainant on 13 November 2008. In its correspondence, the Home Office upheld its decision not to disclose the requested information. However, the Home Office did advise the complainant that background information about proscription was available in the public domain and provided her with the relevant links.

The Investigation

Scope of the case

13. On 27 November 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. In particular, the complainant asked the Commissioner to focus his investigation on:
 - whether or not the Home Office was correct to refuse to disclose the requested information; and
 - the timeliness with which the Home Office responded to her request.

Chronology

14. The Commissioner wrote to the Home Office on 25 March 2009 asking it to provide further information about its decision to cite the exemptions and how it conducted the public interest test.
15. Under section 51 of the Act, the Commissioner has the power to serve a Notice on a public authority requiring it to furnish him with any information he requires to enforce the requirements of the Act. Having not received a substantive response to his questions, despite further correspondence and several telephone calls, the Commissioner issued the Home Office with an Information Notice on 21 July 2009.
16. The Home Office responded on 20 August 2009. In its correspondence, it additionally cited section 24(1) (national security) in relation to some of the

withheld information. It also provided a letter from a senior Home Office official confirming that some of the information in this case is exempt under section 23.

17. Further correspondence in relation to the withheld information was received on 7 and 11 December 2009 and 6 January 2010.

Analysis

Exemptions

18. Where a public authority seeks to rely on several exemptions in relation to the same piece of information, the Commissioner considers that in many cases it will be appropriate to consider absolute exemptions first. If he decides that absolute exemptions have been incorrectly applied, he will then move on to consider qualified exemptions.
19. Although the Home Office is relying on a number of exemptions in this case, the Commissioner notes that it is citing section 23 in relation to the majority of the withheld information, with sections 24 and 27 being cited, separately or together, in relation to most of the remaining information, leaving only a small residual amount to which only section 35 or 42 has been applied.

Section 23 - Information supplied by, or relating to, bodies dealing with security matters

20. Section 23(1) states:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

21. The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by, or relates to, security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests.
22. The Commissioner is satisfied that the Assistant Director of the Office for Security and Counter Terrorism occupies such a position in this case. Accordingly, he has concluded, in the light of the representations made about the information and in all the circumstances of the case, that the information withheld by the Home Office under section 23(1) engages the exemption.
23. Since section 23(1) is an absolute exemption no public interest test applies and the Commissioner has therefore concluded that it is appropriate for the Home Office to withhold the information to which this exemption has been applied.

Section 27 - International relations

24. Section 27(1) provides that –

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

- (a) relations between the United Kingdom and any other State,*
- (b) relations between the United Kingdom and any international organisation or international court,*
- (c) the interests of the United Kingdom abroad, or*
- (d) the promotion or protection by the United Kingdom of its interests abroad.'*

25. In this case, the Home Office is citing section 27(1)(a) and (d) together in relation to the majority of the remaining withheld information.

26. In the Commissioner's view, the exemption does not necessarily focus on the scale or importance of the issue or on the subject or type of information but on whether UK interests abroad or the international relations of the UK would be prejudiced through the disclosure of the information relating to the issue.

27. Because of its sensitivity, the Commissioner is necessarily restricted in what he is able to say about the nature of the information withheld under this exemption in this case. However, he considers it appropriate to describe it as including correspondence and minutes.

Applicable interest

28. In order for section 27 to be engaged, the Home Office must show that the disclosure would, or would be likely to, prejudice the stated interest. Accordingly, the Commissioner has only considered as relevant those arguments about whether or not disclosure of the withheld information could be prejudicial to relations between the United Kingdom and any other State and to the promotion or protection by the United Kingdom of its interests abroad.

Nature of the prejudice

29. The Information Tribunal in *Hogan* (EA/2005/2006 and EA/2005/0030) commented:

'An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoronton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827)'

30. When making his assessment regarding the prejudice test, the Commissioner must consider not only whether the prejudice identified can be said to have a real, detrimental or prejudicial effect but also whether or not the nature of the prejudice can be adequately linked back to the disclosure of the information in question.
31. In this case, the Home Office has argued that releasing the withheld information is likely to harm '*relations between the UK and foreign governments*'.
32. The Home Office has also provided the Commissioner with its arguments regarding the prejudice in relation to the United Kingdom's interests abroad. However, given the sensitivity of the topic, the Commissioner is unable to rehearse the arguments in this Decision Notice without disclosing the nature of the withheld information.

Likelihood of prejudice

33. With respect to the likelihood of prejudice in this case, in its refusal letter to the complainant the Home Office advised that disclosure '*would be likely to harm the relations of the UK with foreign governments*'. However, during the course of his investigation, the Home Office has told the Commissioner it considers that prejudice would, as opposed to would be likely to, occur as a result of disclosure.
34. While the Commissioner considers that the lower threshold test of 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote, in his view '*would prejudice*' places a much stronger evidential burden on the public authority and must be at least more probable than not.
35. In the Commissioner's view, prejudice under section 27(1) can be real and of substance if it makes international relations more difficult or calls for a particular diplomatic damage limitation exercise. This is in accordance with the Information Tribunal's comments in the case of *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/004).
36. Although restricted in what he is able to say because of the nature of the withheld information, having duly considered the arguments put forward by the Home Office, the Commissioner's view is that the level of 'likelihood' has been demonstrated in the case of most of the information withheld by virtue of section 27(1)(a) and (d). In respect of this information therefore, he finds the exemption engaged and he has carried this lower level of 'likelihood' through to the public interest test.
37. However, in respect of one piece of correspondence withheld only under this exemption, he does not find the exemption engaged. He therefore orders disclosure of this piece of information, details of which are contained in the confidential annex attached to this Notice.
38. The Commissioner has gone on to consider the public interest arguments relating to the relevant information which engages the exemption.

Public interest arguments in favour of disclosing the requested information

39. The Home Office acknowledged that the public interest in disclosing this information '*would be that it would improve understanding of international diplomacy and would increase the transparency of the decision to proscribe the BLA [Baluchistan Liberation Army]*'.
40. In support of her argument that the information should be disclosed, the complainant told the Home Office that:

'The proscription of the BLA is public knowledge and releasing information related to the grounds for this decision is not much more likely to prejudice international relations than the proscription itself.'
41. She also argued that disclosure would be in the public interest not only in relation to improving the public's understanding of international diplomacy and of the process of proscribing a terrorist organisation but also in relation to improving government transparency around significant decisions of this kind.
42. In this case, the Commissioner gives some weight to the argument that disclosure would further the understanding of, and participation in, the public debate of issues of the day, such as the issue of organisations considered to be involved in terrorism.
43. In relation to the argument that disclosure would promote transparency of the process of proscribing a terrorist organisation, the Commissioner notes that details of the statutory test which must be met in order for proscription to be lawful were in the public domain at the time of the request for information.

Public interest arguments in favour of maintaining the exemption

44. In favour of withholding the information, the Home Office has argued that '*disclosure is likely to harm the relations of the UK with foreign governments*'. It has also argued that disclosure will harm '*the promotion or protection by the UK of its interests abroad*'.
45. Although the Home Office has provided the Commissioner with further detail in support of the argument that disclosure is not in the public interest, the Commissioner is restricted in his ability to include further detail here without disclosing the nature of the withheld information. However, having taken this additional detail into account, he gives weight to the Home Office's argument that disclosure '*will further harm the promotion or protection by the UK of its interests abroad*'. He also gives weight to the Home Office's arguments regarding the probable reaction of other State(s) to disclosure and the consequent damage to international relations.
46. When considering the public interest test, the Commissioner considers that the age of the information requested is a relevant factor to the extent that, in general, the public interest in maintaining the exemption will diminish over time.

47. In this case, the Home Office confirmed during the Commissioner's investigation that, in its view, and taking into account the passage of time, the public interest remains strongly in favour of non-disclosure.

Balance of the public interest arguments - relations between the United Kingdom and any other State

48. As the Home Office is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in disclosing the information under consideration equals or outweighs the public interest in maintaining the exemption. In doing so, he notes that, in this case, the public interest arguments put forward by the Home Office in relation to section 27(1)(a) are broadly similar to those cited in relation to section 27(1)(d).
49. The Commissioner has considered firstly the public interest arguments in respect of relations between the United Kingdom and any other State.
50. The Commissioner considers that, when applying the public interest test to information withheld under section 27(1), the content of the information is likely in itself to have a significant bearing on the decision of whether to disclose, since there must be some detriment to the public interest for the balance of the test to justify maintaining the exemption.
51. In balancing the opposing interests in this case, and in order to illustrate the nature and sensitivity of the withheld information in this case, the Commissioner considers it relevant to refer to the criteria used to decide whether or not to proscribe an organisation under terrorism legislation.
52. The grounds for proscription as a terrorist organisation are set out in section 3 of the Terrorism Act 2000. They are that the Secretary of State believes the organisation to be concerned in terrorism. An organisation is considered to be concerned in terrorism if it:
- (a) commits or participates in acts of terrorism;
 - (b) prepares for terrorism;
 - (c) promotes or encourages terrorism; or
 - (d) is otherwise concerned in terrorism.
53. If an organisation meets the criteria for proscription, the Secretary of State then has discretion as to whether or not to proscribe. In exercising that discretion successive Secretaries of State have had regard to five factors in particular, which, the Commissioner understands, were published in 2001. They are:
- the nature and scale of an organisation's activities;
 - the specific threat that it poses to the United Kingdom;
 - the specific threat that it poses to British nationals overseas;
 - the extent of the organisation's presence in the United Kingdom; and
 - the need to support other members of the international community in the global fight against terrorism.

54. In this case, when considering the balance of the public interest, the Commissioner also considers it relevant to take into account the publication in July 2006 of the '*Explanatory Memorandum to the Terrorism Act 2000*'. This memorandum summarises the activities of the Baluchistan Liberation Army (BLA) in relation to the criteria used in deciding whether or not to proscribe an organisation.
55. In reaching his decision in this case, the Commissioner is mindful of the fact that terrorism remains an issue of concern and interest to the public. Nevertheless, having considered the information and the opposing arguments in this case, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption at section 27(1)(a) outweighs the public interest in disclosing the information.
56. The Home Office is citing section 27(1)(d) in relation to the same information for which it is citing section 27(1)(a). As he has found the section 27(1)(a) arguments in favour of maintaining the exemption persuasive, the Commissioner has not gone on to consider the public interest arguments in relation to section 27(1)(d).

Section 24 - National security

57. Section 24(1) states that:

'Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security'.

58. During the course of the Commissioner's investigation, the Home Office belatedly identified that some of the information within the scope of this request is exempt by virtue of section 24(1). In this respect, it has argued that, although not originating from or relating to security bodies specified in section 23(3) of the Act, disclosure of the information into the public domain '*would none-the-less damage the national security of the United Kingdom*'.
59. In this case, the Home Office is citing section 24(1) on its own in relation to a small amount of information. However, it is also citing section 24(1) in relation to other information that it considers is exempt under both section 24(1) and section 27 of the Act.
60. Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised in the course of his investigation.
61. In considering the circumstances of the case when exercising his discretion on whether to accept late claims for exemptions / exceptions, the Commissioner will be pragmatic, taking into consideration the potential risks associated with

disclosure of the information in question. This will include considering the topic of the information, its profile, its sensitivity and the impact of release.

62. In this case, having taken these factors into account, the Commissioner's view is that although the Home Office did not cite section 24 until his investigation was underway, it is appropriate in this case to include the exemption in his considerations.
63. Having already found section 27 engaged in respect of some of the information also withheld under section 24, the Commissioner has only considered the Home Office's section 24 arguments with respect to the small amount of information being withheld under both section 24 and 27 that he has not already accepted is exempt under section 27 and in relation to the information withheld solely by virtue of section 24. (For clarity, this does not include the information at paragraph 37 to which section 24 is not applied).

Is exemption required for the purpose of safeguarding national security?

64. The exemption at section 24(1) of the Act only applies where the exemption itself is *required* for the purpose of safeguarding national security. The approach of the Commissioner is that *required* in this context means reasonably necessary. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged.
65. The Commissioner acknowledges that the term 'national security' is not defined in the Act. However, in his view, the interests of national security are not limited directly to preventing military and terrorist attacks on the UK, but include the safety of UK citizens abroad, the protection of the UK's democratic constitution, the effective operation of national security bodies and co-operation with other countries in fighting international terrorism.
66. In assessing, in this case, whether the exemption is required for the purpose of safeguarding national security, the Commissioner considered it appropriate to refer to the House of Lords debate on 24 July 2006 in which Baroness Scotland of Asthal said:

'Given the wide-ranging impact of proscription, the decision to put forward a group for proscription is taken only after a thorough review of all the relevant information. This includes open source material as well as intelligence material and advice that reflect consultations across government and with the law enforcement agencies.'
67. In this case, having viewed the information to which the Home Office has applied section 24(1) the Commissioner is satisfied that exemption from disclosure is required for the purpose of safeguarding national security. He therefore finds the exemption is engaged.

Public interest arguments in favour of disclosing the requested information

68. The public interest arguments put forward by the Home Office in favour of disclosing the requested information are, in the main, the same as those it put forward in relation to section 27. It has additionally recognised the public interest in the release of information regarding the specific threat to UK assets from proscribed groups, enabling the public to take appropriate steps to ensure their continued safety. In this regard, the Commissioner notes that the Home Office provided the complainant with relevant general background information, albeit only at the time of the internal review.

Public interest arguments in favour of maintaining the exemption

69. The Home Office has provided the Commissioner with arguments in support of its view that the exemption should be maintained. At a time when terrorism is a recognised threat, it has argued that disclosure of the information would be damaging to the national security of the UK which would not be in the public interest.
70. In support of its arguments, the Home Office has advised the Commissioner that the decision to proscribe an organisation is taken only after detailed consultation.

Balance of the public interest arguments

71. In the Commissioner's view, increasing the risk to national security will always be a consideration of significant weight in favour of maintaining the exemption. If non-disclosure is required to safeguard national security it is likely to be only in limited circumstances that consideration of other public interest factors will result in disclosure.
72. Having given due consideration to the information which in his view engages the exemption, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption.

Section 35 - Formulation of government policy

73. Section 35(1) of the Act provides that:

'Information held by a government department or by the Welsh Assembly Government 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'.

In this case, the Home Office has confirmed it is relying on section 35(1)(a) and (b) in relation to a very small amount of information, amounting to one short line of text in one document in both its draft and final versions and two short lines of text in another piece of correspondence.

74. Although, during the course of his investigation, the Home Office also cited sections 24 and 27(1)(a) and (d) in relation to some of this information, as the Commissioner has not found either exemption engaged in relation to these few lines of text, he has next considered the Home Office's arguments in relation to the exemption at section 35.
75. The exemptions in section 35(1) apply where the information 'relates' to the matters set out in the sub-sections. On the basis of decisions of the Information Tribunal, the Commissioner accepts that the term 'relates to' in section 35(1) can safely be interpreted broadly.
76. In accordance with the Home Office's citing of the sub-sections of the exemption in this case, the Commissioner has considered the extent to which the withheld information relates to the formulation or development of government policy or Ministerial communications. In doing so, the Commissioner has taken into account the fact that this small amount of information exists within the context of information withheld by virtue of other exemptions.
77. The Commissioner has first considered whether or not the information withheld under section 35(1)(a), is, or relates to, the formulation or development of government policy. Having viewed the withheld information and considered its context, the Commissioner is satisfied that the information relates, in its broadest sense, to the formulation of government policy in relation to proscription. He therefore finds the exemption engaged in relation to this information.
78. In relation to whether or not the information withheld under section 35(1)(b) relates to Ministerial communications, the Commissioner notes that the Act defines these at section 35(5):

"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'.*

79. With respect to the remaining information withheld under this exemption, and having due regard to the definition at section 35(5), the Commissioner is satisfied

that the exemption is engaged in that the information relates to communications between Ministers of the Crown.

Public interest arguments in favour of disclosing the requested information – formulation or development of government policy

80. In favour of disclosure, the Home Office acknowledges that:

'release of this information could encourage greater public involvement in the development of policy relating to the proscription of terrorist organisations set out in section 3 of the Terrorism Act 2000, therefore increasing public participation in the political process and the level of public debate.'

Public interest arguments in favour of maintaining the exemption - formulation or development of government policy

81. In favour of maintaining the exemption, the Home Office has argued that disclosure:

'could lead to poorer decision making in the future as it would reduce the ability of officials and ministers to think in private, and would deter them from candidly assessing policy proposals, providing free and frank advice and ensuring that all options are thoroughly discussed before a decision is reached.'

Balance of the public interest arguments - formulation or development of government policy

82. In the circumstances of this case, and given the paucity of the information withheld under this exemption, the Commissioner does not consider that the standard section 35(1)(a) arguments apply. In his view, while the public interest in disclosure is limited, so too is the public interest in maintaining the exemption. Therefore, having due regard to the general presumption in the Act in favour of disclosure unless and until this is outweighed by factors to the contrary, he orders disclosure.

Public interest arguments in favour of disclosing the requested information – Ministerial communications

83. The Home Office has confirmed that:

'Considerations which favour disclosure of information covered by this exemption include the following: increase in the openness of decision making and the transparency of the particular decision to proscribe the BLA...'

84. The Home Office also acknowledges that:

'Disclosure would allow a more informed debate about why proscription was considered for the BLA and might increase trust in the quality of the decision making.....It could also lead to an increased knowledge in the way Ministers communicate and come to decisions...'

Public interest arguments in favour of maintaining the exemption – Ministerial communications

85. In favour of maintaining the exemption, the Home Office has argued that:

'The release of these ministerial communications would go against collective responsibility, which is a constitutional convention as described in the ministerial code....Ministers might feel inhibited from discussing all the options and risks available if they felt that their opinions were routinely published, leading to a less effective system of government'.

86. The convention of collective responsibility allows Government to be able to engage in free and frank debate in order to reach a collective position and to present a united front once a decision has been made.

87. In the case of *Scotland Office v The Information Commissioner* (EA/2007/0070), the Information Tribunal addressed the issue of collective Cabinet responsibility, describing it as:

'the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed' (para 82.)

88. The Commissioner notes that, in this case, the Home Office argued that disclosure would breach the collective responsibility that decision makers had as Ministers. Although not all Ministers are Cabinet members, all Ministers are bound by the ministerial code to promote Cabinet positions to Parliament and the general public. Therefore the Commissioner's view is that all Ministers are bound by the collective Cabinet responsibility convention.

89. The Commissioner considers that the ability for Ministers to be able to engage in free and frank debate in order to reach a collective position, and to present a united front after a decision has been made, is a powerful argument when considering the public interest test.

Balance of the public interest arguments – Ministerial communications

90. In respect of the public interest argument that disclosure would increase openness and transparency, the complainant has argued that the Home Office *'could release information detailing the agreed grounds for proscription and simply seek to exempt information related to the decision making process'.*

91. In considering the balance of the public interest, the Commissioner has taken into account the fact that that the Home Office provided the complainant, at the

- internal review stage, with links to information about the criteria for considering proscription. He also accepts that the complainant was advised where to find published grounds for the proscription of the BLA and provided with the relevant link.
92. He therefore gives weight to the Home Office's argument that *'there is information in the public domain which explains the criteria for considering proscription'*. However, the Commissioner is also mindful of the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013). In this, the Information Tribunal concluded that *'there is an assumption built in to FOIA that the disclosure of information by public authorities on request is itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities'*, and that there is always likely to be some public interest in favour of disclosure.
93. In the Commissioner's view, the mere fact that information comprises, or relates to, communications between Ministers does not of itself weigh in favour of maintaining the exemption.
94. On this subject, the Information Tribunal in the Scotland Office case (EA/2007/0070) stated:
- 'Some communication may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated. The very fact that certain information constitutes Ministerial communication does not therefore mean that there is a public interest in non-disclosure'*.
95. The Commissioner therefore considers that, when applying the public interest test to information withheld under section 35(1)(b), the content of the communication is likely in itself to have a significant bearing on the decision of whether to disclose, since there must be some detriment to the public interest for the balance of the test to justify maintaining the exemption.
96. In this case, having considered the content of the withheld information, and with due regard to the minimal amount of information involved, in all the circumstances of the case the Commissioner has concluded that the public interest in maintaining the exemption at section 35(1)(b) does not outweigh that in disclosing it. He therefore orders disclosure.

Section 42 - Legal professional privilege

97. This exemption applies to information that would be subject to legal professional privilege (LPP). In other words, section 42 sets out an exemption from the right to know for information protected by LPP.
98. LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice or documents created by or for lawyers for the dominant purpose of litigation. This exemption ensures that the confidential relationship between lawyer and client is protected.

99. In this case, the Home Office is citing section 42(1) which 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.'

Is the information privileged?

100. Legal professional privilege (LPP) is not defined in the Act or any other legislation. It is a common law concept shaped by the courts over time. It is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments.
101. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.
102. There are two categories of LPP – litigation privilege and legal advice privilege. In this case, the Home Office is claiming advice privilege.
103. Legal advice privilege may apply whether or not there is any litigation in prospect. In the Commissioner's view, this form of LPP covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice.
104. The dominant purpose of the communication must be to obtain legal advice, or to give it. The advice itself must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context.
105. In this case, the Home Office is citing section 42(1) in relation to a short section of information contained within a larger piece which the Commissioner has already considered and found exempt under a different exemption. It has argued that the information was sought to make clear the legal basis for proscription.
106. On the basis of the above, and having viewed the withheld information, the Commissioner is satisfied that it constitutes legal advice privilege. He has consequently concluded that the exemption is engaged in respect of this information.

Public interest arguments in favour of disclosing the requested information

107. The Home Office acknowledges that there is a public interest in public authorities *'being accountable for the quality of their decision making'*. In this respect, it has told the Commissioner:

'Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability in relation to proscription. Transparency in the

decision-making process and access to the information upon which decisions have been made can enhance accountability. It can also enhance public understanding of the proscription process'.

Public interest arguments in favour of maintaining the exemption

108. In the Home Office's view, *'it is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant'*. To this extent, it has argued that *'safeguarding the openness in all communications between client and lawyer to ensure access to full and frank legal advice is vital'*.

Balance of the public interest arguments

109. The Commissioner understands that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege. The Information Tribunal recognised this in *Bellamy v Information Commissioner* (EA/2005/0023).
110. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: *'There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest.'* In summary, legal professional privilege was referred to as being *'a fundamental condition'* of justice and *'a fundamental human right'*, not limited in its application to the facts of particular cases.
111. The Commissioner accepts that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately, and also where disclosure would help further the understanding of issues of the day such as, in this case, the question of proscription.
112. However, the Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure of the information.

Procedural Requirements

Section 1 – General right of access

113. Section 1(1) states:

'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'.*

114. During the course of the Commissioner's investigation, the Home Office confirmed that it holds some further information within the scope of the request in relation to which it had not addressed the question of disclosure or exemption. It has provided the Commissioner with a representative sample of this information.
115. In the Commissioner's view, given the broad nature of the complainant's request, this information falls within the scope of the request. He therefore finds the Home Office in breach of section 1(1)(a) of the Act in that it failed to advise the complainant that it held this part of the information relevant to her request.
116. During the course of his investigation, the Commissioner has concluded that some of the information withheld by the Home Office has been incorrectly withheld. As he considers that this information should have been disclosed, he finds the Home Office in breach of section 1(1)(b) of the Act in that it failed to provide this information to the complainant.

Section 10 - Time for compliance

117. 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.'

118. In this case, the complainant made her request for information on 31 January 2008 but the Home Office did not issue its refusal notice confirming that it held some information within the scope of the request, but that the information was exempt under various exemptions, until 20 May 2008. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the Home Office in breach of section 10(1) of the Act.
119. In failing to provide the complainant with the information which it incorrectly withheld within the statutory timescale, the Commissioner finds the Home Office in breach of section 10(1) of the Act.

Section 17 – Refusal of request

120. 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'.*

121. The Commissioner notes that, in taking more than 100 working days to issue its refusal notice, the Home Office was clearly in breach of the statutory timescale. This constitutes a breach of section 17(1).
122. In *Bowbrick v the ICO* the Information Tribunal stated that '*If a public authority does not raise an exemption until after the s17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect it is giving part of its notice too late*'. In this case, the Home Office failed to specify or explain in its refusal notice an exemption, namely section 24, on which it relied during the course of the Commissioner's investigation. It did not rectify this omission at the internal review stage.
123. The Commissioner has therefore concluded that the Home Office breached sections 17(1)(b) and 17(1)(c) of the Act in failing to supply a notice compliant with the requirements of those paragraphs of section 17(1) within 20 working days.

The Decision

124. The Commissioner's decision is that the public authority dealt with the following elements of the request for information in accordance with the Act.
 - It properly withheld some information by reference to the section 23 exemption;
 - it properly refused to disclose some of the information requested on the basis that it was exempt from disclosure by virtue of section 24(1) and the public interest favoured maintaining the exemption; and
 - it properly refused to disclose some of the information requested on the basis that it was exempt from disclosure by virtue of section 42(1) and the public interest favoured maintaining the exemption.
125. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - It breached section 1(1)(a) by failing to notify the complainant in writing whether it held information of the description specified in the request;
 - it breached section 1(1)(b) by not providing the complainant with some of the requested information by the time of the completion of the internal review;
 - it breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request;
 - it breached section 10(1) by not providing the complainant with some of the requested information within 20 working days of the request;
 - it breached section 17(1) by failing to issue the refusal notice within the statutory time limit; and
 - it breached section 17(1)(b) and (c) by failing to specify an exemption it later relied on.

Steps Required

126. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The Home Office should provide the complainant with the information identified in the confidential annexe with which it has been provided.
 - The Home Office should disclose to the complainant the further information that it has identified as being within the scope of the request, or else issue a refusal notice explaining why the information is exempt. This is the information referred to in paragraph 114 of this Notice and for the avoidance of doubt, details of this information are also included in the confidential annexe.
127. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

128. 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

129. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
130. Part VI of the section 45 Code of Practice 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.
131. The Commissioner is concerned that, in this case, it took more than 100 working days for an internal review to be completed and would remind the public authority of its obligation in this regard.

Right of Appeal

132. 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,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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

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

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of February 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Legal Annex

Section 23(1) provides that –

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

Section 23(2) provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

Section 23(3) provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

Section 24 National Security

Section 24(1) provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

Section 27 International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 35 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(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."

Section 42 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.”