

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 October 2010

Public Authority: Cwm Taf Health Board
Address: Ynysmeurig House
Navigation Park
Abercynon
Mid Glamorgan
CF45 4SN

Summary

The complainant requested a copy of report into flooring defects at Ysbyty Cwm Rhondda. The public authority refused the request by virtue of section 43 of the Act. During the Commissioner's investigation the public authority also sought to rely on section 36 of the Act. The Commissioner has investigated and concluded that section 43 is not engaged in respect of the requested information and he has not accepted the late application of section 36. Accordingly, the Commissioner has ordered disclosure of the information. The Commissioner has also identified a number of procedural shortcomings in the way the Board handled the complainant's request.

The Commissioner's Role

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

Background

2. The initial information request was made to Cwm Taf Health Trust which ceased to exist from 30 September 2009. All functions were transferred to Cwm Taf Health Board, including the handling of this request. It is necessary to refer to the actions of both public authorities during this Notice; Cwm Taf Health Trust will be referred to as 'the Trust' and Cwm Taf Health Board will be referred to as 'the Board'.
3. The request in this case relates to a report that the Trust commissioned into damage caused to flooring at a new hospital, Ysbyty Cwm Rhondda. The problems with the flooring were thought to have been caused by the underfloor heating system and the damage delayed the opening of the hospital. There was considerable press coverage about the matter at the time the problems occurred¹.

The Request

4. On 9 September 2009 the complainant contacted the Trust and requested:

"...disclosure of the independent report prepared by Cwm Taf NHS into the flooring defects which have postponed the opening of the new Ysbyty Cwm Rhondda"
5. The Trust issued a refusal notice on 24 September 2009 confirming that it held the requested information. The Trust stated that the report was exempt by virtue of section 43(2) of the Act and that the public interest lay in withholding the information at that time.
6. On 25 September 2009, the complainant requested an internal review of the Trust's decision not to release the information requested.

¹ <http://www.walesonline.co.uk/news/health-news/2009/06/03/problems-means-new-hospital-is-still-not-open-91466-23772535/>
<http://www.walesonline.co.uk/news/south-wales-news/rhondda/2009/09/10/hospital-delay-to-spark-claim-91466-24637874/>
<http://www.walesonline.co.uk/news/south-wales-news/rhondda/2010/01/22/new-hospital-set-to-open-91466-25663890/2/>

7. The Board provided the outcome of its internal review on 7 January 2010. It upheld its decision not to release the information requested because it considered that "premature disclosure would prejudice the position of the Health Board". The Board confirmed that once the final settlement of the contract with the construction company had been determined, its Director of Finance and Procurement would be happy to meet with the complainant to discuss the report prior to providing a copy.

The Investigation

Scope of the case

8. On 11 January 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she had requested should be disclosed.
9. The withheld information in this case comprises two reports that the Board commissioned into the flooring and underfloor heating at Ysbyty Cwm Rhondda. The first report was undertaken by Ove Arup ('the Ove Arup report') and looked at the technical capacity of the heating system, its design and installation in order to determine whether either were at fault in the damage caused to the flooring. The second report was undertaken by BRE ('the BRE report') and looked at the impact of the overheating on the flooring in order to determine whether the overheating, which occurred in February 2009, damaged the floor and whether there was any long term damage. The BRE report also considered whether any other aspects of the flooring were defective.
10. Late in the Commissioner's investigation the Board introduced its reliance on section 36 of the Act.
11. During the course of the Commissioner's investigation, the Board agreed to disclose some elements of the report, which largely consisted of background information and subject headings contained within the two reports. The Board maintained the view that the majority of the information contained in the two reports was exempt from disclosure under sections 43 and 36 of the Act.

Chronology

12. On 22 January 2010, the Commissioner wrote to the Board to confirm that the complaint had been deemed eligible for formal consideration and to request copies of the withheld information.
13. The Board wrote to the Commissioner on 26 January 2010 providing the withheld information and further representations to support its view that the information requested was exempt from disclosure.
14. The Commissioner wrote to the Board on 27 May 2010 and requested further representations in relation to its application of section 43 and its public interest test considerations.
15. The Board responded to the Commissioner on 12 July 2010 providing further arguments to support its view that the information was exempt under section 43(2) of the Act. In this response, the Board stated that, after further consideration, it also considered that the information requested was exempt by virtue of sections 36(2)(b) and (c).
16. The Commissioner wrote a further letter to the Board on 2 August 2010 to clarify a number of issues in relation to its application of exemptions. The Board provided a substantive response on 11 August 2010.

Findings of fact

17. Ove Arup is an independent firm of designers, planners, engineers, consultants and technical specialists offering a broad range of professional services. BRE is an independent and impartial, research-based consultancy, testing and training organisation, offering expertise in every aspect of the built environment and associated industries.

Analysis

Exemptions

Section 43

18. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the

commercial interests of any person (including the public authority holding it). Full details of the relevant legislation relevant to this case are reproduced in the attached legal annex.

19. For the Commissioner to agree that section 43(2) of the Act is engaged the Board must first demonstrate that prejudice would, or would be likely, to occur to the commercial interests of the Board or any other third party. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Board (EA/2005/0030)* ('Hogan') the Tribunal stated that:

"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."

20. When considering the nature of the prejudice, the tribunal stated in the hearing of Hogan that:

"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 Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

21. As stated in paragraph 19 above, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The tribunal stated that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

22. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
23. If the prejudice test is satisfied and the exemption is engaged, then the Board would need to apply the public interest weighing up the arguments for, and against, disclosure.

Applicable interests

24. In this case the Board has argued that, as it is involved in formal legal negotiations with the contractors involved in the project in order to determine the final settlement of the contract, agree final accounts for the project and determine liability for any additional costs and other liabilities, disclosure both would, and would be likely to prejudice its commercial interests. The Board is of the view that disclosure would be likely to prejudice its ability to negotiate with the parties involved and may lead to prolonged discussions or a refusal by the parties involved continue negotiations. The Board argues that this could lead to formal Court proceedings.

Does the information relate to, or could it impact on, a commercial activity?

25. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his Guidance the application of section 43. This states that:

'...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services'.

26. In this case the Commissioner is satisfied that the withheld information does relate to a commercial activity, as it is information relating to a contract for the provision of flooring and heating at Ysbyty Cwm Rhondda.

Nature of the prejudice

27. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the section 43 exemption. It implies not just that the disclosure of

information must have some effect on the application of the interest, but that this effect must be detrimental and/or damaging in some way.

28. In this case, the Board believes that disclosure of the requested information both would, and would be likely to prejudice its position in the ongoing negotiations with the contractors involved in the Ysbyty Cwm Rhondda project that have the aim of agreeing final accounts for the project and liabilities for additional costs. These negotiations are being carried out as part of the formal contract adjudication process. The Board's view is that disclosure would weaken its position in the negotiations and the contractors involved would have nothing further to lose in terms of reputational damage. The Board believe that disclosure could lead to the contractors prolonging discussions, or refusing to negotiate further based on any potential reputational damage which may result from disclosure of the reports.
29. The Board has advised the Commissioner that negotiations with the main contractor began on 29 August 2008, and were ongoing at the time of the request. The Board has advised that the outcome of the negotiations remains unclear and it argues that disclosure may lead to a refusal on the part of the contractors to negotiate further, or to prolong discussions, which could lead to Court proceedings. The Board argued that it is likely that the information contained within the withheld reports would form part of the evidence to be used in any legal proceedings. The Board believes that it has a fiduciary responsibility to avoid the cost of Court proceedings.
30. The Board has confirmed that the Ove Arup report was jointly commissioned by itself (as the client), the Mechanical and Engineering Contractor and the Mechanical Engineering Designers. The report was circulated to all three parties as well as the main contractor both in draft format on 7 May 2009 and in its final format on 18 May 2009. The Board has also confirmed that the BRE report was circulated to Tract Project Management (appointed by the Trust) and Nightingales (the contract administrator) in May 2009.
31. The Board confirmed to the Commissioner that the flooring formed part of the main contract. When it became clear that the Board needed to commit further expenditure to rectify the problems with the flooring, it deducted an agreed amount from the next available certificate submitted by the main contractor, as per the terms of the contract. This took place

around March/April 2009. The Board has advised that the ongoing contract adjudication process is in relation to all aspects of the contract settlement, including the final account.

32. The Board has advised that, once the final accounts for the project have been settled with the parties involved, it intends to publish a significant amount of the requested information. The Board has also indicated that, once the process is completed it would be happy to meet with the complainant to discuss the matter and provide a copy of the reports.
33. The complainant appreciates that the requested information will be relied on by the Board in its negotiations with the parties and may possibly be used in a legal context in the future. However, the complainant is of the view that should any legal action result in the future, especially if the proceedings are civil proceedings, any publicity surrounding publicity of the reports is unlikely to jeopardise the legal process, as civil cases are decided by a judge alone, who would not swayed by media coverage.
34. In reviewing the information requested and the arguments put forward by the Board, the Commissioner has considered the nature of any prejudice to the interests of the Board likely to result from releasing the reports. The Commissioner has seen no evidence that the prejudice would be 'real, actual or of substance', and he does not consider there to be a clear causal link between disclosure of the information and the prejudice identified by the Board.

Likelihood of prejudice

35. As the Board is claiming that disclosure both would and would be likely to prejudice its commercial interests, the Commissioner has considered the lower threshold of prejudice in reaching his decision.
36. The Commissioner is not persuaded that disclosure of the information would be likely to prejudice the Board's commercial interests. The Commissioner understands that, at the time of the request, the Board was involved in a formal legal process in order to agree final accounts for the Ysbyty Cwm Rhondda but he does not accept that disclosure of the information would be likely to adversely affect the Board's commercial interests or this negotiation process. In reaching this view, the Commissioner has taken into account the fact

that the parties involved in the negotiation process have already had sight of the withheld information.

37. The Commissioner does not accept the Board's arguments that disclosure would be likely to affect the progress of the negotiations. In the Commissioner's view, negotiations surrounding final accounts and liabilities for such projects would be based on the facts of the case rather than any potential risk to any reputational damage. The Commissioner is not persuaded that disclosure would be likely to lead to the contractors involved prolonging discussions, or refusing to negotiate further based on any potential reputational damage which may result from disclosure of the reports. The Commissioner also considers that the reputation of the contractors had, to an extent, already been affected by the media coverage about the flooring problems at Ysbyty Cwm Rhondda prior to the request. The Commissioner also notes that the Board has indicated that it will disclose a copy of the report once the negotiations have completed.
38. It is the Commissioner's view that the Board has not, to date, submitted any convincing arguments to demonstrate how disclosure of the requested information in this case would be likely to prejudice its commercial interests, or any evidence of the likelihood of a real and significant risk of prejudice being caused to its commercial interests. For this reason, the Commissioner has concluded that section 43(2) is not engaged.
39. As the Commissioner has concluded that section 43(2) is not engaged in this case, there is no need to go on and consider the public interest test.

Section 36

40. In its letter to the Commissioner dated 12 July 2010 the Board informed the Commissioner that after re-considering the matter it believed that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) also applied to the withheld information. In this response, the Board advised that:

"In reconsidering this case...we have also come to the view that those parts of report we wish to protect from disclosure are also subject to S.36 (2)(b) and (c). We have consulted our Chief Executive on this matter who has considered the information we wish to protect from disclosure in great detail. She has agreed that in the reasonable opinion of the qualified

person the exemption available to us under this exemption can be engaged in relation to the remaining information which we do not feel it would be proper to disclose at this time. We are strongly of the view that those involved in attempting to bring this unfortunate episode to a successful conclusion must be allowed to do so uninhibited by the glare of publicity which would undoubtedly follow disclosure at this point. These negotiations must be based on mutual respect, integrity and trust. Not only will the discussions which must necessarily take place be inhibited by such disclosure, but such publicity will prejudice the Health Board in its relationships with the external interest parties to the detriment of the Health Board now and in relation to any future negotiations. This can only be to the prejudice of our Health Community and the wider NHS in Wales”

41. In this case the Commissioner recognises that the Board applied the exemption available at section 36 of the Act at a very late stage in the process (some ten months after the initial request) and only after a formal complaint had been submitted to the Commissioner. In considering whether to accept a late application of this exemption, the Commissioner has been mindful of the Information Tribunal’s position in the case of *the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072)*. In this hearing, the Tribunal considered whether a new exemption can be claimed for the first time before the Commissioner. The Tribunal stated that:

“it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations.”
42. The Commissioner has adopted a discretionary approach to the late application of exemptions, based on a case by case basis and considering the particular circumstances of each case, which he believes is in line with the Tribunal’s position on this issue.
43. When assessing the circumstances of the case and the late application of exemptions the Commissioner must carefully consider his obligations as a public authority under the Human Rights Act 1998 (‘the HRA’), which prevent him acting incompatibly with rights protected by the HRA. It will

therefore be difficult for the Commissioner to refuse to consider any exemptions that relate to rights under the convention (e.g. articles 6 and 8). This would include sections 38 and 40 and in some cases 30, 31 and 41.

44. Factors which the Tribunal has accepted as being reasonable justifications for the application of exemptions before the Commissioner and/or the Tribunal for the first time include:
- where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure;
 - where the authority has correctly identified the harm likely to arise from disclosure however applies these facts and reasoning to the wrong exemption;
 - where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution; and
 - where the refusal notice was issued at an early stage of the implementation of the Act when experience was limited, although this factor is likely to become far less relevant in the future.
45. In considering the late application of section 36 in this case the Commissioner has been mindful of the factors listed above. After considering the circumstances of this case, the Commissioner believes that it does not raise any issues under the HRA. Further, in relation to the above bullet points, after considering the information provided by the Board, the Commissioner does not believe that the late application of section 36 in this case falls under any of these criteria.

In addition to this, the Commissioner has noted that:

- The Board has not provided any explanation as to the late application of these exemptions;
- The Board did not previously refer to disclosure being likely to inhibit the free and frank provision of advice or prejudice the effective conduct of public affairs in its correspondence with the complainant in this case;
- In respect of the application of section 36 exemptions, where the reasonable opinion of the qualified person determines whether the exemptions are engaged or not, the Commissioner considers that it is extremely important that the opinion was given at the time of the applicant's

request so that only those factors which were relevant at the time would have been taken into consideration. Given that the opinion of the qualified person was clearly not sought prior to the Commissioner's investigation, the Board has not, in the Commissioner's view, adequately demonstrated that the opinion reflects the circumstances that existed at the time of the request;

- The Board has not adequately explained why it considers each limb of section 36 that it has claimed to be engaged; and
- The Board has not provided the Commissioner with sufficient evidence to understand the scope or basis of the opinion of the qualified person.

46. In light of these considerations, and in all the circumstances of this case, the Commissioner does not believe that it is appropriate for him to take these exemptions into account when reaching a view on this case.

Procedural Requirements

Section 10

47. As the Commissioner has decided that the withheld information is not exempt from disclosure under section 43(2), the Commissioner believes this information should have been provided to the complainant in line with the duty at section 1(1)(b). By failing to provide this information within 20 working days of the request the Board breached section 10(1) of the Act.

Section 17

48. During the Commissioner's investigation, the Board sought to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) in respect of the request. By failing to specify that it was relying on these exemptions during its initial handling of the request, the Board breached sections 17(1)(a), (b) and (c). The Commissioner also finds that section 17(1) was breached because the Board failed to apply these exemptions within the statutory time limit for complying with section 1(1).

The Decision

49. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- i. It incorrectly applied section 43(2) to the withheld information.
 - ii. It breached section 10(1) for failing to provide the information requested within 20 working days of the request.
 - iii. It breached sections 17(1)(a), (b) and (c) for late reliance on sections 36(2)(b)(i), 36(2)(b)(ii) or 36(2)(c) during the Commissioner's investigation.

Steps Required

50. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose the information previously withheld under sections 43(2), 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c); namely the report entitled "Technical Review of Underfloor Heating System: Ysbyty Cwm Rhondda", comprising the Ove Arup Report and the BRE Report.
51. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

52. 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

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

Late Application of exemptions

54. As detailed in the decision of the Information Tribunal in *Bowbrick v Information Commissioner & Nottingham City Council*² [2006] the fact that an exemption is introduced after the initial refusal does not in itself disentitle an authority from relying upon it. However, as detailed in 'The Decision' section of this Notice, the Commissioner would inevitably find that the authority had breached the requirements of section 17 by failing to inform the applicant of the exemption it sought to rely on within the appropriate timescale. In effect, the authority would be providing part of its refusal notice too late.
55. Furthermore, the application of an alternative or additional exemption at a late stage may suggest the initial refusal or internal review (or possibly both) was not afforded appropriate consideration.
56. In light of this the Commissioner expects the Board to take steps to minimise the likelihood of additional exemptions being applied during the course of future investigations.

Internal Review

57. 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

² Available at

[http://www.informationtribunal.gov.uk/Documents/decisions/Dr%20P%20Bowbrick%20v%20Information%20Commissioner%20and%20Nottingham%20City%20Council%20\(28%20September%202007\)v7307.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/Dr%20P%20Bowbrick%20v%20Information%20Commissioner%20and%20Nottingham%20City%20Council%20(28%20September%202007)v7307.pdf)

may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 60 working days for an internal review to be completed, despite the publication of his guidance on the matter

58. Paragraph 39 of the section 45 Code of Practice encourages authorities to '...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.'
59. The outcome of the review in this case, as communicated to the complainant, was very limited and did not demonstrate that a full reconsideration of the factors had taken place. The Commissioner, therefore, advises that the public authority ensures that future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice and communicated in full.

Right of Appeal

60. 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 sent.

Dated the 21st day of October 2010

Signed

**Anne Jones
Assistant 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."

Time for Compliance

Section 10(1) provides that -

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

Refusal of Request

Section 17(1) provides that -

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

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states -

"Where-

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

- (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

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

Section 17(3) provides that -

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

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

Prejudice to effective conduct of public affairs

Section 36(1) provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 43 – Trade Secrets and Commercial Interests

Section 43 (1) provides that –

“Information is exempt if it constitutes a trade secret”.

Section 43 (2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43 (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 the interests mentioned in subsection (2).”