

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 24 January 2011**

**Public Authority:** The Treasury Solicitor's Department  
**Address:** One Kemble Street  
London  
WC2B 4TS

### Summary

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The complainant made a request to the Treasury Solicitor's Department (TSol) for information to complement and complete information requested under the Data Protection Act. In respect of one part of the request, TSol disclosed some information but withheld the balance citing the exemption in section 42(1) (legal professional privilege). TSol applied section 14(1) to the remainder of the request. The Commissioner has decided that TSol was correct to do so, but finds that it failed to comply with the procedural requirements of sections 1(1)(a) and 17(1) in its handling of the request.

### The Commissioner's Role

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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.

### The Request

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2. The complainant wrote to the Treasury Solicitor's Department (TSol), on behalf of his client, on 21 July 2009. The following paragraphs from this correspondence contain the request for information made under the Freedom of Information Act:

*Paragraph 1*

*"Please treat this letter as a formal combined Subject Access Request and Freedom of Information Request and for advice and assistance in connection with such matters so as to ensure that the objectives of my request are met – such advice and assistance is, also, likely to be of assistance to you in concentrating the requests appropriately bearing in mind that there have been and are other requests (some outstanding)."*

*Paragraph 4*

*"Some of my personal data may be recorded in documentation and electronic records that contain information that is not considered to be my personal data and I shall be grateful if the balance of the material in such records can be provided to me under the Freedom of Information Act so that I have the complete recorded information. This should make the provision of information easier for you."*

*Paragraph 8*

*"The letter of 12.12.2008 did not provide answers to a number of points raised in my solicitor's letter of 10.11.2008. For ease of reference they included: [lengthy extract from letter redacted, in which complainant seeks clarification and explanations of various matters and asks questions]."*

*Paragraph 9*

*"Why did the Treasury Solicitor contend that you understood that my status was relevant to my application for an exhumation licence? What do (i) you and (ii) the MoJ contend was relevant and why (especially bearing in mind the obligation not to obstruct the lawful and Christian funeral)?"*

*Paragraph 10*

*"If there was no intention to offend me in anyway 'by the wording of the Reply' then what has been and is the intention of the MoJ (and your office) towards her by other conduct not merely in connection with the Reply? In this regard it is noted that there has still to be any apology by the MoJ regarding matters to do with my father (and indeed a lack of common courtesy and humanity)."*

*Paragraph 11*

*"Please will you obtain and provide [name redacted]'s observations and explanation as to why he made pejorative reference to me – was he instructed to do so by you and or the Ministry of Justice?"*

*Paragraph 12*

*"I understand that there are provisions that require complaints to be handled within 10 working days and that Treasury Solicitor personnel are contractually required to work the necessary hours to complete their work (which, presumably, includes dealing with my complaints and requests for information and more generally, complying with the responsibilities under the Freedom of Information Act and Data Protection Act). I further understand that there are rules of professional conduct which apply (even to solicitors without practicing certificates) and I shall be grateful if you will let me know, as my solicitor has already requested in respect of the Information Tribunal proceedings, which individuals (who are subject to external professional regulation) have been involved with and or responsible for the matters relating to me and my father [name redacted] deceased."*

3. TSol responded on 7 September 2009. In its response, TSol provided the complainant with some information, but withheld other information, within four documents, in accordance with section 42 of the Act (legal professional privilege). With respect to paragraphs 8 to 12 of the request, it told the complainant that it considered the request to be vexatious and therefore that section 14(1) of the Act applied.
4. The complainant requested an internal review on 6 October 2009. In this correspondence, he told TSol:  
  
*"I have no idea why it is contended that such serious matters .... should be regarded as vexatious."*
5. TSol upheld its decision to cite sections 14 and 42(1) in its internal review correspondence of 4 November 2009.

## **The Investigation**

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### **Scope of the case**

6. On 5 November 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled.
7. In accordance with his powers under the Data Protection Act (DPA), the Commissioner has made an assessment with respect to the personal data issues. This Decision Notice addresses TSol's handling of the request with respect to the Freedom of Information Act.

## Chronology

8. Following completion of an assessment in accordance with his powers under the DPA, the Commissioner commenced his investigation into the freedom of information related issues. In this respect, he wrote to TSol on 24 September 2010 asking it for further explanation of its reasons for citing section 42 and 14 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemptions outweighed the public interest in disclosure of the information requested.
9. TSol responded on 8 October 2010.

## Analysis

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### Substantive Procedural Matters

#### Section 14 Vexatious or repeated requests

10. Under section 14(1), a public authority does not have to comply with vexatious requests. There is no public interest test.
11. Section 14(1) of the Act states:

*"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".*
12. The term "vexatious" is not defined further in the Act. The Commissioner notes, however, that it is the request rather than the requester which must be vexatious.
13. The Commissioner issued revised guidance entitled "*Vexatious or repeated requests*" in December 2008 as a tool to assist in the consideration of when a request can be treated as vexatious. The guidance sets out key questions, for public authorities to consider when determining if a request is vexatious, which are set out below.
  - i. Could the request fairly be seen as obsessive?
  - ii. Is the request harassing the authority or causing distress to staff?
  - iii. Would complying with the request impose a significant burden in terms of expense and distraction?
  - iv. Is the request designed to cause disruption or annoyance?
  - v. Does the request lack any serious purpose or value?

14. The guidance indicates that an affirmative response to all of the questions is not necessary for a request to be deemed vexatious. However, it states that to judge a request as vexatious a public authority should usually be able to make persuasive arguments under more than one of the above headings.
15. Accordingly, the Commissioner has considered whether TSol has provided sufficient arguments in support of any of the criteria above in its application of section 14(1) in this particular case.
16. The Commissioner notes that the Information Tribunal in *Hossack v Department for Work and Pensions* (EA/2007/0024) stated, at paragraph 11, that the threshold for finding a request vexatious need not be set too high as the consequences are much less serious than the finding of vexatious conduct in other legal contexts.
17. In *David Gowers v Information Commissioner* (EA/2007/0114, paragraph 27) the Information Tribunal noted that when considering section 14:

*"The proper inquiry must be as to the likely effect of the request on a reasonable public authority. In other words, the standard to be applied is an objective one"*.
18. In considering whether or not a request is vexatious, the Commissioner considers it appropriate to take into account the context and history of a request in addition to the request itself in relation to one or more of the five factors listed above.

***Could the request fairly be seen as obsessive?***

19. In the Commissioner's view, the test to apply here is one of reasonableness. In other words, would a reasonable person describe the request as obsessive or manifestly unreasonable? In answering this question, the Commissioner's view is that the wider context and history of a request is important as it is unlikely that a one-off request could be obsessive. This may therefore include taking into account any Subject Access Requests, that are distinct from the request under the Act but pursue the same underlying issue or obsession, as part of the overall context.
20. The Commissioner's published guidance states:

*"A request may not be vexatious in isolation, but when considered in context (for example if it is the latest in a long series of overlapping*

*requests or other correspondence) it may form part of a wider pattern of behaviour that makes it vexatious".*

21. In relation to the request in this case, TSol described the complainant's way of conducting affairs as one of:

*"bombarding us with long-winded repetitive correspondence, complaints, DPA and FOIA requests and satellite litigation surrounding the main claim".*

22. The Commissioner has not been provided with copies of all this correspondence but notes the complainant's reference to other similar matters at paragraph 1 of his request:

*"Please treat this letter as a formal combined Subject Access Request and Freedom of Information Request and for advice and assistance in connection with such .... bearing in mind there have been and are other requests (some outstanding)."*

23. Similarly, in considering the context of this request, the Commissioner notes that this request for information relates directly to previous correspondence from TSol which was itself in response to correspondence from the complainant.

24. The Commissioner has also considered TSol's claim that the issue could have been pursued through alternative channels. In this respect, he understands that the request was made against a background of litigation. TSol has argued that *"if there were serious points to be made"* these could, and should, have been pursued in the course of lawyer-to-lawyer correspondence.

25. Having considered the arguments put forward in this case, the Commissioner finds that the obsessive nature of the request is a significant factor in favour of applying section 14(1).

***Does the request have the effect of harassing the public authority or its staff?***

26. In the Commissioner's view, when establishing whether a request can be viewed as harassing or distressing, the focus should be on the likely effect of the request (seen in context), not on the requester's intention. Relevant issues here could include a very high volume and frequency of correspondence, the use of hostile, abusive or offensive language, an unreasonable fixation on an individual member of staff, or mingling requests with accusations and complaints.

27. In this case, TSol has brought to the Commissioner's attention what it considers to be a "campaign" of correspondence from the complainant, arguing:

*"It is our view that the further questions, dressed as an FOI request, are intended to harass TSol without any purpose or value".*

28. TSol told the Commissioner that it considered some parts of the request to be "*merely argument*" and "*inflammatory innuendo*". Similarly, TSol told the complainant that it considered his requests to be "*harassing in nature*".

29. In this case, there is no evidence of abusive or offensive language, nor specifically of attention being directed to a particular member of staff. However, TSol has argued that the complainant implies unprofessionalism with respect to a specific individual's conduct.

30. In considering the effect of the request on the public authority and its staff, the Commissioner considers it relevant to take account of the tone, as well as the content, of the correspondence in this case.

31. In this respect, he notes that, at paragraph 12 of his request, the complainant specifically refers to the time limits inherent in the Act and the fact that TSol staff:

*"are contractually required to work the necessary hours to complete their work (which, presumably, includes dealing with my complaints and requests for information ...)".*

32. Having considered all the arguments put forward, the Commissioner finds the likely harassing effect of the request is a significant factor in favour of applying section 14(1).

***Would complying with the request impose a significant burden in terms of expense and distraction?***

33. When determining whether complying with a request would impose a significant burden, the Commissioner considers it relevant to consider whether responding would divert or distract a public authority's staff from their usual work.

34. When considering whether this factor applies, the Commissioner would expect a public authority to be able to show that complying with a request would cause a significant burden in terms of both costs and diverting staff away from their core functions.

35. TSol has argued that the request is intended to cause a distraction in terms of both time and resources. It told the Commissioner, that, in its view, the requests in this case:

*"are intended to harass TSol and to cause such a distraction in terms of time and resources as to disrupt TSol and prevent it from performing its functions".*

36. TSol did not provide specific examples of the nature of the distraction, nor of the manner in which it would be prevented from performing its functions. However, with regard to the burdensome effect of the requests, it told the Commissioner:

*"this can particularly be seen to be the case when added to the other requests made by [complainant] which taken together form part of a campaign of correspondence".*

37. In this case, the Commissioner notes that the requests for information relate directly to previous correspondence from TSol, which was itself in response to correspondence from the complainant.

38. Accordingly, he has considered, in his determination in this case, the approach of the Information Tribunal in *Betts v The Information Commissioner* (EA/2007/0109). In that case the Tribunal indicated that it would be reasonable for the public authority to consider its past dealings with the complainant, particularly in relation to its experience of answering one request which would likely lead to still further requests. This had the effect of perpetuating the requests and adding to the burden placed on the authority's resources. The Tribunal said:

*"...it may have been a simple matter to send the information requested in January 2007, experience showed that this was extremely likely to lead to further correspondence, further requests and in all likelihood complaints against individual officers. It was a reasonable conclusion for the Council to reach that compliance with this request would most likely entail a significant burden in terms of resources."*

39. Having considered the arguments put forward in this case, the Commissioner considers that this factor can be viewed as supporting the application of section 14(1) of the Act.

***Is the request designed to cause disruption or annoyance?***

40. The Commissioner's published guidance on section 14 ("*Vexatious or repeated requests*") states:



*"As this factor relates to the requester's intention, it can be difficult to prove. Cases where this is a strong argument are therefore likely to be rare. However, if a requester explicitly states that they want to cause maximum inconvenience, the request will almost certainly be vexatious."*

41. The Commissioner accepts that the effect of the complainant's contact with TSol may well cause disruption and annoyance. In this respect, he notes TSol's view that some of the words the complainant used in his request *"are merely intended to irritate"*.
42. However, the Commissioner has not been provided with any strong evidence that indicates that any disruption or annoyance caused to TSol was intended. For this reason, the Commissioner is not persuaded that this factor should weigh in favour of the application of section 14(1).

***Does the request lack any serious purpose or value?***

43. Whether a request has value is generally not of significance given that the Act is not concerned with the motives of an applicant, but rather in promoting transparency for its own sake. However, the Commissioner acknowledges that should any authority be able to show that a request has no value or purpose, this may help bolster the application of section 14(1) when taken together with other supporting factors.
44. Although he has made no comment as to whether or not he considers his request has serious purpose or value, the complainant has argued:  
  
*"I have no idea why it is contended that such serious matters .... should be regarded as vexatious."*
45. In contrast, TSol told the complainant that it viewed his requests as being:  
  
*"argumentative of matters dealt with in a separate chain of correspondence rather than serving any constructive purpose and seem to us to be designed more for nuisance 'value' than a genuine attempt to obtain information."*
46. Similarly, in correspondence with the Commissioner, TSol has referred to the requests as being *"petty and quarrelsome"* and serving no useful purpose.
47. Although TSol has treated the matters raised as requests for information, it has brought to the Commissioner's attention the fact

that some of the 'requests' could more properly be seen as questions. Nevertheless, in considering this matter, the Commissioner is not satisfied that TSol has demonstrated that the request in this case lacks any serious purpose or value.

### ***Is the request vexatious?***

48. Section 14 of the Act is intended to protect public authorities from those who might abuse the right to request information. The Commissioner recognises that having to deal with clearly unreasonable requests can strain an organisation's resources, damage the credibility of the Act and get in the way of answering other requests.
49. He also acknowledges that there is a fine balancing act between protecting a public authority from frivolous and vexatious applications and the promotion of transparency in the workings of an authority.
50. In considering the circumstances of this case in relation to the five questions set out above, the Commissioner acknowledges that the questions, to a greater or lesser extent, overlap and that the weight accorded to each will depend on the circumstances. He also reiterates that, in his view, it is not necessary for every factor relevant to vexatious requests to be satisfied in order to refuse a request on the basis of section 14(1).
51. The Commissioner recognises that each request must be judged on its own merits and that while the complainant may not intend to cause the detrimental effects outlined above the Commissioner must consider whether this was the effect.
52. In this instance, the Commissioner does not consider that the issue of vexatiousness is clear-cut. In considering the arguments in this case, he is mindful of the decision of the Information Tribunal in *Michael Jacobs v the Information Commissioner (EA/2010/0041)*. In that case, the Tribunal stated that a public authority should not be over-protected and should expect to be exposed to "*an element of robust and persistent questioning, sometimes articulated in fairly critical tones.*"
53. However, based on the evidence that has been provided to him, and taking into account the context and history of the request, the Commissioner has found that the arguments in favour of applying section 14(1) are of sufficient weight to deem the request as vexatious.

## Exemptions

### Section 42 Legal professional privilege

54. Section 42 of the Act sets out an exemption from the right to know if the information requested is protected by legal professional privilege (LPP). LPP is not defined in the Act, or in any other legislation. It is a common law concept shaped by the courts over time.
55. The Commissioner's guidance states that:

*"LPP 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. This in turn ensures the administration of justice. LPP belongs to the client, and material protected by LPP cannot ordinarily be revealed without the consent of the client, even to a court."*
56. There are two categories of LPP – litigation privilege and legal advice privilege. In this case, TSol has argued litigation privilege applies to the withheld information. In the alternative, it has argued that it considers it also attracts legal advice privilege.
57. 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. The advice itself must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context.
58. For information to be covered by litigation privilege, it must have been created for the "dominant purpose" (the main purpose) of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Litigation privilege can cover a wide variety of information, including advice, correspondence, notes, evidence, reports and other documents. It will for example include confidential communications with third parties outside the lawyer-client relationship, as long as those communications were made to assist the lawyer with the preparation of the case.

***Has LPP been waived?***

59. In this case the Commissioner is satisfied that there is no reason to believe that LPP has been waived in relation to the withheld information.

***Is the exemption engaged?***

60. The Commissioner has first considered TSol's claim that the withheld information constitutes litigation privilege. Having considered TSol's explanation of the context and circumstances at the date of the request, and having viewed the withheld information, the Commissioner has concluded that the exemption is engaged. He has therefore gone on to consider the public interest.

***Public interest arguments in favour of disclosing the requested information – litigation privilege***

61. The Commissioner considers the public interest arguments put forward in this case were poor: TSol simply told the complainant that, in its view, in comparison with the public interest in upholding LPP:

*"there is no real public interest in disclosure".*

62. The Commissioner has taken into account that there exists within the Act itself a general presumption in favour of disclosure. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation.

63. The Commissioner has also taken into account the Information Tribunal decision in *Pugh v Information Commissioner and Ministry of Defence* (EA/2007/0055). In that case, the Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "*a significant group of people*".

64. Although the Commissioner recognises that the issue under consideration is of importance to the complainant, he does not consider it reasonable to argue that a significant group of people are affected by the information covered by litigation privilege nor the resulting decision. In the circumstances of this case, therefore, the Commissioner does not consider that this factor carries weight.

***Public interest arguments in favour of maintaining the exemption – litigation privilege***

65. TSol told the complainant that the public interest in upholding LPP is recognised as being "*a strong consideration*".
66. In the Commissioner's view, the concept of LPP and the rationale behind the concept, namely ensuring frankness between lawyer and client which goes to serve the wider administration of justice, in itself carries weight.
67. In considering such matters, the Commissioner will also take into account whether, at the time of the request, the advice was recent or live. In his view, the public interest will be particularly strong if the advice, in relation to litigation, is recent or still live: in other words, if it is still being relied upon or relevant to litigation in prospect.
68. In this respect, the Commissioner understands the matter to which the withheld information relates remains a live issue and that the advice, at the time of the request, was still being relied on.

***Balance of the public interest arguments***

69. The Commissioner has referred to his guidance "*The exemption for legal professional privilege*" when considering the relevance of various factors with respect to the balance of the public interest arguments.
70. 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.
71. However, the exemption is not absolute and the Act therefore requires consideration of whether the public interest in disclosure in a particular case is strong enough to equal or exceed the public interest in maintaining legal professional privilege (LPP).
72. In his view, to disclose legal advice where litigation on the relevant issues is in prospect or may be likely would be unfair to a public authority. The legal advice would reveal the basis (and potentially the weaknesses) of the public authority's case, while a private opponent not subject to the Act would not have to reveal their position.
73. Furthermore, in the circumstances of this particular case, he considers the number of people affected to be too small to be a significant factor.

74. The Commissioner has therefore concluded that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
75. As he has reached this decision with respect to litigation privilege, the Commissioner has not considered TSol's claim that legal advice privilege also applies.

### **Procedural Requirements**

76. Section 1(1) of the Act creates a general right of access to information held by public authorities. It provides for any person making a request for information to be informed in writing by the public authority whether it holds the information of the description specified in the request, and, if that is the case, to have that information communicated to him. The time limit for complying with section 1(1), set out in section 10(1), is twenty working days.
77. In this case, the complainant made his request on 21 July 2009 but it was not until 7 September 2009 that the TSol responded. Accordingly the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, TSol breached the requirements of section 10(1), and that it also breached section 17(1) by failing to provide the details required by that section within 20 working days.
78. In its response of 7 September 2009, TSol told the complainant that it was withholding information '*on the grounds of legal professional privilege*'. By referring to the subject matter of the exemption rather than specifying the section number of the exemption claimed, the Commissioner finds TSol in breach of section 17(1)(b).
79. Furthermore, the Commissioner takes the view in this case that TSol failed to give the complainant adequate reasons as to why the public interest favoured maintaining the exemption, and that it therefore acted in breach of section 17(3)(b) of the Act.

### **The Decision**

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80. 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:
  - it was entitled to apply section 14(1); and

- it properly applied the exemption at section 42.

81. 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 10(1) by failing to inform the complainant whether it held 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 section 17(1)(b) by failing to specify by name the exemption claimed; and
- it breached section 17(3)(b) by failing to give adequate reasons why the public interest favoured maintaining the exemption.

### **Steps Required**

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82. The Commissioner requires no steps to be taken.

## Right of Appeal

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83. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 24<sup>th</sup> day of January 2011**

**Signed .....**

**Jon Manners  
Group Manager**

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



## Legal Annex

### Vexatious or repeated requests

Section 14(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

### 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.”

### 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,
- (a) specifies the exemption in question, and
- (b) 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
  - (i) 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."