

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 January 2011

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Summary

On 23 October 2009, the complainant requested copies of written communications exchanged between the Director of Public Prosecutions (DPP) and the public authority's press office relating to media coverage of the DPP's annual lecture of 21 October 2009. The public authority refused to provide this information arguing that it was exempt under section 36(2) of the Act (Effective conduct of public affairs) and that the public interest favoured maintaining this exemption. It upheld this position on internal review. The public authority later made a disclosure of some information to the complainant having concluded that the passage of time altered the balance of public interest in relation to that information. The Commissioner has concluded that the majority of the information that remains withheld is exempt under section 36(2)(b)(i) and (ii) and section 36(2)(c) and that the public interest in maintaining those exemptions outweighs the public interest in disclosure. However, he has found that in relation to a small section of the withheld information, the public interest favours disclosure and he now requires the public authority to disclose it. The Commissioner also identified a number of procedural shortcomings in the way the request was handled.

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 Director of Public Prosecutions (DPP), Keir Starmer QC, who is the head of the public authority delivered his first annual lecture at the Royal Society of Medicine on 21 October 2009. In this lecture, the DPP mounted a robust defence of the Human Rights Act and sought to dispel some myths about that legislation which he believed had arisen.
3. This gave rise to considerable debate and the DPP was interviewed on the Today Programme on BBC Radio Four about the views he expressed in his lecture. Evidently the complainant heard this interview and submitted an information request to the public authority shortly afterwards.

The Request

4. On 23 October 2009, the complainant requested information of the following description:

"...copies of all written communications, including emails, between the Director of Public Prosecutions (and his office) and the CPS press office or director of communications relating to media coverage of the DPP's annual lecture on October 21 [2009] and any subsequent interviews including that on the BBC Radio Four Today programme, conducted either that day or the following day.

In particular, I would like this information to include copies of any advice given to the DPP by the CPS press office or director of communications before his speech about the likely media and political impact of the lecture."

5. The public authority sent a response dated 23 November 2009 in which it refused to disclose information it held within the scope of the request on the basis of the exemptions contained in sections 36(2)(b)(i) and (ii) and section 36(2)(c). It added that the public interest in maintaining those exemptions outweighed the public interest in disclosure.

6. The complainant requested an internal review of the public authority's decision on 26 November 2009. On 2 December 2009 the public authority wrote to him with the details of the result of the internal review it had carried out. It upheld its original position.

The Investigation

Scope of the case

7. On 22 December 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. On 13 January 2010, the Commissioner wrote to the complainant to acknowledge receipt of his request. He also wrote to the public authority to advise receipt of the complaint and to ask for a copy of the information that had been withheld from disclosure in this case.
9. Following a further exchange of correspondence and telephone conversations with the Commissioner, the public authority wrote to the Commissioner on 3 March 2010 enclosing a copy of the withheld information. It also reiterated some of its arguments but advised that it had reconsidered its position as to the application of the public interest test in relation to some of the withheld information. It explained that it now intended to make a further disclosure to the complainant. In relation to the information to which section 36 had been applied it stated:

"As set out in the refusal notice issued to [the complainant] pursuant to FOIA section 17, the CPA – and in the CPS's [sic] Chief Executive, Mr Peter Lewis, - considered that disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs, including by: (a) inhibiting the free and frank provision of advice; and/or (b) the free and frank exchange of views for the purposes of deliberation. Accordingly, the CPS decided that the exemptions in FOIA section 36(2) – and, more particularly, section 36(2)(b)(i), (b)(ii) and (c) were engaged. (Although Mr Lewis satisfied the relevant legal requirements to act as the "qualified person" for the purposes of section 36(2) as applied by the CPS, I can nevertheless confirm, for the avoidance of doubt, that the DPP has himself confirmed that he agrees with, and endorses, Mr Lewis's [sic] opinion that disclosure

of the requested material, would or would be likely to, cause prejudice of the kinds referred to in those provisions".

10. On 11 March 2010, the public authority wrote again to the Commissioner with a copy of a letter it had sent to the complainant that same day. It explained that it had decided that it was disclosing information it had previously withheld on that basis that disclosure did not give rise to the strong public interest concerns detailed in its earlier correspondence. It explained that the names of junior civil servants had been redacted under section 40(2) of the Act (Unfair disclosure of personal data). This was not contested by the complainant.
11. In light of the further disclosure made to the complainant on 11 March 2010, this notice will therefore only address the application of exemptions in relation to information that it continues to withhold from the complainant.

Chronology

12. On 1 June 2010, the Commissioner wrote to the complainant setting out the scope of his investigation.
13. On 2 June 2010, the Commissioner wrote to the public authority to set out the scope of his investigation and to seek the public authority's further comments on the application of exemptions. The Commissioner asked a series of questions regarding the process by which an opinion was sought from the public authority's qualified person. He also invited any further comments as to the balance of public interests. In accordance with his standard approach, the Commissioner asked the public authority to identify any factor which, in its view, carried particular weight.
14. The Commissioner noted that as part of its submissions of 3 March 2010, the public authority had made reference to the application of section 22 (Information intended for future publication) in the alternative to section 36 (Effective conduct of public affairs) in relation to the final text of any press release and the lecture itself. The Commissioner drew attention to the fact that the final versions of these had been published on-line two days before the date of the request. As such, section 22 could not apply.
15. The Commissioner also set out a series of questions arising from his analysis of the withheld information which he does not

propose to set out on the face of this notice in order to avoid inadvertent disclosure of that information.

16. The Commissioner had identified from the content of the withheld information that there may be an additional item of information missing from the bundle already supplied. The Commissioner asked for clarification about this information.
17. The public authority responded on 28 June 2010. It queried whether the Commissioner had the power to enquire into the process by which the opinion of the qualified person was obtained:

"except to the limited extent necessary to resolve any genuine doubt on the part of the Commissioner that a qualified person within the relevant organisation has in fact come to the relevant opinion."

18. Subject to that caveat, it stated that it was content to provide detail about the process *"on a voluntary basis"*.
19. It commented that each of the matters it had identified as part of its view that the public interest in maintaining the exemption outweighed the public interest in disclosure should not be viewed as self-contained. These could not, in its view, be accorded a particular amount of weight each in isolation.
20. It noted the Commissioner's comments about *"the way the Commissioner understands section 22 to operate in circumstances where drafts of material intended for future publication are requested after publication has taken place"*. It commented that given the strength of its case as regards the application of section 36 *"it may be that the Commissioner will not find it necessary to reach a view on this exemption [that is, on section 22] since the refusal decision can be upheld on the basis of section 36 in any event."*
21. It provided responses to the specific questions that the Commissioner had asked regarding the withheld information. It noted that it had intended to include a particular item of information with the previous bundle that had been sent but, having rechecked its file, realised that it had not done so. It commented that it had enclosed the information with this letter.
22. On 30 June 2010, the Commissioner wrote to the public authority to advise that certain attachments had not arrived with its letter of 28 June 2010. Noting the public authority's

concerns as to the Commissioner's power to request information about the process by which the qualified person's opinion was sought, the Commissioner drew the public authority's attention to two adjudications of the Information Tribunal where this very point had been discussed, namely *McIntyre vs Information Commissioner (EA/2007/0068)*¹ and *Home Office & Ministry of Justice v the Information Commissioner (EA/2008/0062)*².

23. On 2 July 2010, the public authority responded with the missing attachments and with further information about the process through which it obtained the opinion of the qualified person. It reiterated the caveats it had asserted in its earlier correspondence.

Analysis

Exemptions

24. The public authority has sought to rely on provisions contained in section 36 as its basis for refusing to provide certain information within the scope of the complainant's request. Section 36 is set out in full in a Legal Annex to this Notice.
25. In summary, provisions of section 36 can apply where, "*in the reasonable opinion of a qualified person*", disclosure would give rise to one of the prejudicial outcomes described in that section.
26. In order to establish whether the exemption has been applied correctly the Commissioner must establish:
- The identity of the qualified person;
 - Whether an opinion was given;
 - When was it given; and,
 - Whether the opinion is reasonable in substance and whether it has it been reasonably arrived.
27. If the Commissioner decides that the exemption is engaged he must then go on to consider whether the public interest in

¹ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

² [http://www.informationtribunal.gov.uk/DBFiles/Decision/i273/Home%20Office%20O%20MoJ%20v%20IC%20\(EA-2008-0062\)%20Decision%2020-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i273/Home%20Office%20O%20MoJ%20v%20IC%20(EA-2008-0062)%20Decision%2020-11-08.pdf)

maintaining the exemption outweighs the public interest in disclosure.

Is the opinion reasonable in substance and was it reasonably arrived at?

28. The DPP is the public authority's qualified person for the purposes of the Act by virtue of section 36(5)(c) (see Legal Annex). The public authority is a non-ministerial government department³. The DPP is the "*person in charge of that department*".
29. As referred to above, the Tribunal has commented on the need to see more detail about the process by which an opinion is obtained from the qualified person. The public authority in this case did not agree that the Commissioner has the power to enquire into this process "*except to the extent necessary to resolve any genuine doubt on the part of the Commissioner that a qualified person within the relevant organisation has in fact come to the relevant opinion*".
30. Noting the public authority's view in this case, the Commissioner nevertheless defers to the requirements of the Tribunal when seeking to gather information about the process by which the qualified person reached a view and gave an opinion. He would also observe that, in this case, genuine doubt has arisen as to who, within the public authority, came to the relevant opinion.
31. According to the public authority, the DPP was approached on this matter on 18 November 2009 and he was given a copy of all the information which fell to be considered for disclosure in this case. No written submissions about the application of section 36 were put to the DPP and therefore no record is available for the Commissioner to consider. However, the public authority advises that the DPP formed his opinion in a meeting of 18 November 2009. No record appears to have been made which directly represents the opinion given by the DPP at that meeting.
32. Given a perceived conflict of interest, the Commissioner understands that the public authority also put the matter to another senior member of staff, its Chief Executive, Peter Lewis two days later. In a memo to Mr Lewis dated 20 November

³ <http://www.parliament.uk/deposits/depositedpapers/2010/DEP2010-1387.pdf>

2009 which it supplied to the Commissioner, the public authority commented:

"The application of section 36 requires the approval of a qualified person. For the CPS this would be the DPP, however, as this request directly involves the Director, it is for this reason that the submission has been sent to you."

33. In its letter to the Commissioner dated 3 March 2010, it described Peter Lewis, its Chief Executive, as having "*satisfied the relevant legal requirements to act as 'the qualified person' for the purposes of section 36(2)*". It added that the DPP had "*himself confirmed that he agrees with, and endorses, Mr Lewis's [sic] opinion*".
34. Unfortunately, it would appear to the Commissioner that Mr Lewis does not, in fact, satisfy the relevant legal requirements to act as the qualified person for the purposes of section 36(2). The Commissioner acknowledges that the public authority found itself in an unusual situation and was concerned at a perceived conflict of interest where its qualified person had been asked to give an opinion about information which related to him.
35. According to its own website, the role of its Chief Executive
"is responsible for running the business on a day-to-day basis, allowing the Director of Public Prosecutions (DPP) to concentrate on prosecution, legal issues and criminal justice policy".
36. The Commissioner accepts that the public authority might reasonably assume that its Chief Executive could, in effect, "stand in" for the DPP on this matter because it does not specifically relate to his decision-making responsibilities regarding criminal justice. Unfortunately, it is in error on this point. The Commissioner considers that the Chief Executive cannot act as a qualified person for the purposes of the Act unless he is formally designated as such by an appropriate external authority, for example, the Secretary of State for Justice. The Commissioner has received no evidence which indicates that the public authority obtained a formal designation of this kind in this case.
37. To assist the Commissioner, the public authority submitted detail (including written evidence) as to the process by which it obtained an opinion from Mr Lewis. However, while

acknowledging the public authority's genuine concerns about avoiding a perceived conflict of interest, the Commissioner must focus primarily on the process by which it obtained an opinion from the DPP, himself.

38. There is no requirement in the Act for the qualified person to sign a certificate to give an opinion in writing. However, based on the Tribunal's observations in the cases referred to above, the Commissioner considers it good practice for public authorities to keep a formal record of the process by which an opinion is obtained. This record should, in the Commissioner's view, include a copy of the request for access to information under the Act, a note of the information which was considered to be within the scope of that request, any arguments which support a recommendation for applying the provisions of section 36 and any contrary arguments which were considered. Where the matter falls to be considered by the Commissioner, he is then able to check that only relevant factors were taken into consideration before the opinion was given.
39. Although the public authority was unable to provide copies of any written submissions it made to the DPP, the Commissioner is satisfied that the DPP's opinion as to the application of section 36 was sought during a meeting of 18 November 2009 and that his opinion was given on that date. The Commissioner accepts the public authority's assertions in this regard.
40. On balance, despite the absence of a written record of the event, the Commissioner is satisfied that all the information falling within the scope of the complainant's request was given to the DPP for his consideration during that meeting and that no irrelevant factors were proposed for consideration. The Commissioner has reached this view having seen a copy of the submissions that were made two days later to Mr Lewis. Here the information under consideration is itemised in some detail. The Commissioner is satisfied that Mr Lewis and the DPP were given sight of the same information.
41. The Commissioner notes that the memo of 20 November 2009 to Mr Lewis focuses more on seeking his view as to the balance of public interest in maintaining the provisions of section 36 that it has claimed rather than establishing whether the exemptions apply in the first place. As such, Mr Lewis does not, in any event, appear to have been consulted on the primary question as to whether any of the provisions of section 36 actually applied. In the absence of any written record, the Commissioner has some difficulty in assessing whether the

public authority made the same error when applying to the DPP for his opinion on 18 November 2009. However, he notes the public authority's comments in its letter to him of 28 June 2010:

"At that meeting, officials' concerns about the public interest consequences of releasing the information were discussed in some detail. The DPP understood the concerns and was of the opinion that release of the information would prejudice the effective conduct of public affairs."

42. In the Commissioner's view, the public authority should have maintained focus on obtaining and recording the opinion of its designated qualified person, the DPP, rather than the Chief Executive. The Commissioner also notes that it failed to rectify this problem at internal review. However, the Commissioner is satisfied that the public authority did in fact seek an opinion from its designated qualified person, namely the DPP.
43. For the avoidance of doubt, the Commissioner does not consider that the qualified person's opinion can be construed as unreasonable simply because the information in question relates to the qualified person himself or herself. Given that the qualified person will inevitably be one of, if not, the most senior person in a public authority, information requests under the Act may well relate to decisions that he or she has made. While the qualified person may find himself or herself in a somewhat awkward situation when considering the application of section 36 in such circumstances, any opinion they might give will not automatically be undermined by such an apparent conflict. A proper record of the process and of the matters considered would help a public authority (and its qualified person) fend off accusations a conflict of interest in this situation.
44. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*⁴, the Information Tribunal considered the sense in which the qualified person's opinion under s36 is required to be reasonable. It concluded that, *"in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at."* (para 64)

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

45. In *McIntyre* it went a little further, and found that an opinion that was "*overridingly reasonable in substance*" might not be invalidated by a flawed process.

46. It commented (at paragraph 31) that

"We are prepared to adopt the test in Guardian and Brooke but subject to two caveats. Firstly where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion. Secondly, we take a broad view of the way the opinion is reasonable arrived so that even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review."

47. The Commissioner has taken the Tribunal's comments in *Guardian & Brooke* as well as its comments in *McIntyre* into account when considering whether the DPP's opinion as the qualified person is reasonable in substance and reasonably arrived at.

48. The Commissioner notes that the public authority has sought to rely on provisions of section 36(2)(b) and section 36(2)(c). These provisions are set out in a Legal Annex to this notice. However, the Commissioner notes that section 36(2)(c) is engaged where disclosure would *otherwise* [the Commissioner's emphasis] prejudice, or would be likely otherwise to prejudice the effective conduct of public affairs.

49. In *R Evans v The Information Commissioner & the Ministry of Defence*⁵ the Tribunal commented on the relationship between s36(2)(c) and the other subsections of 36(2). In that case, the public authority claimed before the Tribunal that both section 36(2)(b)(i) and section 36(2)(c) applied to the withheld information. The Tribunal commented at (paragraph 53) that:

"The principle arguments in favour of this exemption [section 36(2)(c)] advanced by the MOD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves feely and frankly if there were a

⁵ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i73/Evans.pdf>

real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the same arguments are to be advanced, then the prejudice feared is not "otherwise". Some prejudice other than that to the free and frank expression of advice (or views as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged."

50. In *McIntyre*, the Tribunal commented on the intention behind the exemption at s36(2)(c). It said (at paragraph 25) that

"this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another exemption, and where disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure".

51. As part of his analysis, the Commissioner has therefore sought to establish whether the public authority has advanced arguments which can satisfy the description of prejudice described in section 36(2)(c).

52. In correspondence with the Commissioner, the public authority advanced the following arguments regarding the application of the exemptions at section 36(2)(b)(i) and (ii) and section 36(2)(c). Unfortunately, the public authority did not specifically set out arguments as to why any of the provisions of section 36 applied. The Commissioner has extrapolated them from its arguments as to what it considers are relevant factors in consideration of the balance of public interests:

- All those who assist the DPP in his decision making must have trust in the forum in which they discuss sensitive matters. Disclosure could give rise to participants becoming more inhibited and less able to consider and discuss all advice/opinion in a free and candid manner.
- Officials must be able to undertake their daily tasks without the minutiae of their work being disclosed. Such disclosure would hinder officials from carrying out their role in an efficient and effective manner.

- Because of the DPP's constitutional sensitive position, it is important that the DPP obtains frank advice (often very quickly) to enable him to make judgements as to how he can promote the better administration of justice by expressing the CPS perspective on matters of public importance concerning criminal justice policy while at the same time protecting his political independence. It commented that "*the DPP needs to be able to rely on the free and frank provision of advice by, and free and frank exchanges of views with, trusted advisers*".
 - The request was made just 2 days after the lecture was given. Advice given freely or frankly about the lecture should not be disclosed so promptly after the lecture itself is delivered. This defeats the purpose of giving frank advice from which decisions as to presentation can be made.
 - A media adviser needs to be confident that advice given fully and frankly does not become the subject of media coverage in itself, particularly if it is misrepresented.
 - Disclosure would be likely to have a chilling effect on frank media advice handling.
53. The Commissioner notes that similar arguments were put to Mr Lewis in the memo of 20 November 2009. The Commissioner presumes that these were points also discussed with the DPP on 18 November 2009 because he has no reason to believe that the public authority's arguments as to the application of section 36 developed significantly in the period between 18 November 2009 and 20 November 2009.
54. In that same memo to Mr Lewis and elsewhere in the public authority's submissions to the Commissioner, the public authority set out one counter argument as to the application of exemptions, or rather, in relation to the public interest in disclosure. The Commissioner has extrapolated the public authority's counter argument as to the application of exemptions in the first instance from these comments:
- Disclosure would give the public an insight into the media handling arrangements at the public authority

"Would" or "would be likely"

55. The provisions of section 36 are engaged where, in the opinion of the qualified person the prejudicial outcomes described in those provisions would or would be likely to arise. "Likely to

prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. “Would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not. In the Commissioner’s view, where the level of prejudice has not been specified then, unless there is clear evidence that the higher level should apply, the lower threshold should be used.

56. The Commissioner notes that the public authority has on separate occasions argued that the prejudicial outcome would arise or would be likely to arise. For example, it asserted in its letter to the Commissioner of 28 June 2010 that the DPP had concluded that disclosure “would” prejudice the effective conduct of public affairs. However, in the arguments itemised above, it is more circumspect and comments that various prejudicial outcomes “could” or even “would be likely to” arise as a result of disclosure. Given the lack of clarity on the part of the public authority, the Commissioner has decided that the lower threshold of “would be likely” is being relied upon. In doing so, the Commissioner is not seeking to replace the opinion of the qualified person with his own.
57. The Commissioner has examined the withheld information and is satisfied that the DPP’s opinion given in relation to section 36(2)(b)(i) and section 36(2)(b)(ii) and section 36(2)(c) is overridingly reasonable in substance. He observes that there were shortcomings in the public authority’s handling of the request in that it originally attempted to rely on the opinion of the Chief Executive to engage section 36 and that the public authority did not correct this mistake at internal review. Nevertheless, the DPP did provide an opinion and the Commissioner has concluded that the DPP’s opinion was reasonably arrived at and that no irrelevant factors influenced him in reaching that opinion.
58. The Commissioner would also observe that two of the prejudicial outcomes listed above would seem to satisfy the description of “*otherwise [giving rise to prejudice] to the effective conduct of public affairs*”. These are the public authority’s second and penultimate points. The Commissioner is therefore satisfied that the public authority identified for the qualified person prejudicial outcomes to the effective conduct of public affairs which are clearly separate from the prejudicial outcomes described in section 36(2)(b)(i) or (ii). Although the Commissioner has concerns about the public authority’s decision not to make a record of the meeting held with it the

DPP, the Commissioner is also satisfied that the qualified person (namely the DPP) has given his opinion on whether these prejudicial outcomes would be likely to arise. The Commissioner is therefore satisfied that section 36(2)(c) is also engaged.

59. In light of all the points considered above, the Commissioner is satisfied that the information in question is exempt information by virtue of section 36(2)(b)(i) and (ii) and section 36(2)(c). In other words, he has accepted the qualified person's opinion that disclosure would be likely to give rise to the prejudicial outcomes described in those exemptions.
60. Having concluded that the information is exempt under these provisions, the Commissioner has considered whether the public interest in maintaining those exemptions outweighs the public interest in disclosure.

Balance of public interests

61. In reaching a view on the public interest the Commissioner has noted the comments of the Tribunal in *Guardian & Brooke* at paragraph 87, which held that the application of the public interest test in section 36 cases entails a consideration of the following factors:
 - The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
 - Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
 - The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.
 - In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption

is designed to protect, in this case the free and frank provision of advice and/or the free and frank exchange of views for the purpose of deliberation.

- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

62. The Tribunal qualified the first of these tests, by stating that it was for the qualified person to decide whether prejudice was likely, and thereby whether the exemption was engaged. However, in making a decision on the balance of the public interest, the Tribunal (and therefore the Commissioner) would need to make a decision as to the severity, frequency, or extent of any prejudice that would or might occur.

Public interest arguments in favour of disclosing the requested information

63. As outlined above, the public authority identified one argument in favour of disclosure, namely that this would give the public an insight into the media handling arrangements at the public authority

64. The complainant identified other public interest arguments in favour of disclosure which can be summarised as follows:

- The speech has attracted criticism that the DPP was deliberately entering into a party political debate and that, as a public servant, this was inappropriate.
- Disclosure of the full content of any emails is substantially in the public interest. It could be significant in revealing whether the DPP was, or was not, acting in a knowingly political manner when making the speech in question.
- Disclosure would give a clearer picture as to whether – or to what extent - the aforementioned criticism was justified.

Public interest arguments in favour of maintaining the exemptions

65. The public authority identified a number of factors in favour of maintaining the exemptions:
- It is in the public interest to avoid any mischaracterisation of the DPP's statements where background exchanges about draft content are disclosed because this may have a negative impact on public trust and confidence in the fair and impartial administration of justice.
 - The core purpose of media advice is to assist the DPP in deciding what to say and how and where to say it. Release of the requested information such a short time after the lecture to which it relates was given defeats the purpose of giving frank advice. This is contrary to the public interest
 - Disclosure would give rise to a chilling effect upon the free and frank provision of advice which is contrary to the public interest. The DPP is a public figure whose actions and decisions are regularly reported on and scrutinised in the press. He needs to be able to access prompt and candid advice.
 - The public interest is not served by the disclosure of draft text which, by its very nature, is not an officially endorsed or authorised statement by the DPP. The final authorised version was published on the evening of the DPP's lecture.
 - The withholding of the requested information does not prevent an informed public debate on the comments made by the DPP in this lecture or elsewhere.
66. The public authority also countered the complainant's argument that disclosure would serve the public interest in giving a clearer picture as to whether criticism of the lecture was justified. It observed that views as to the appropriateness of the DPP's comments in the lecture are matters of opinion that can be judged on the basis of the content of the lecture itself.
67. It should be noted that the public authority did reconsider the balance of public interest in relation to some of the information during the Commissioner's investigation because it considered that the passage of time altered the arguments. As a consequence it disclosed some of the requested information.

Section 36(2)(b)(i) – Free and frank provision of advice – balance of the public interest arguments

68. In the Commissioner's view, the timing of the request has a particular bearing on the balance of public interest. The request was made two days after the DPP gave his first annual lecture. The information that has been withheld in this case was recorded in the days immediately leading up to that lecture.
69. The public authority sought to argue that disclosure would have a "chilling effect" on any future advice given by the DPP's media advisers and that this was contrary to the public interest. The Commissioner is prepared to acknowledge that there is some merit to this argument for as long as the DPP's lecture remained a live issue. If media advice to the DPP given in the run up to his lecture were to be disclosed at the time of the request, it is likely that media handlers would have needed to consider, not only how to prepare an appropriate response to media queries about the lecture itself, but also what reaction would arise in response to disclosure of such preparations. The Commissioner agrees this likely inhibition was, for the period that the lecture was a live issue, contrary to the public interest such that the public interest in avoiding this likely outcome, outweighed the public interest in disclosure.
70. As such, the public interest in maintaining section 36(2)(b)(i) outweighs the public interest in disclosure.

Section 36(2)(b)(ii) – Free and frank exchange of views – balance of the public interest arguments

71. The public authority has sought to argue that it is entitled to protect a safe space for a free and frank exchange of views. The Commissioner recognises that there is a public interest in increasing understanding as to how a public authority prepares itself to respond to questions on controversial subjects. However, in this case, the subject of the lecture was still a live issue at the time of the request. The public authority is entitled to make preparations in private in order to handle media queries on a live issue without that preparation itself becoming a secondary live issue through disclosure. It is in the public interest to allow the public authority to protect the safe space that it would reasonably require to conduct discussions on its media handling strategy, particularly in the days leading up to and after such a keynote speech.

72. The Commissioner also agrees the likely inhibition to a free and frank exchange of views that disclosure would give rise to was, for the period that the lecture was a live issue, contrary to the public interest such that the public interest in avoiding this likely outcome, outweighed the public interest in disclosure.
73. As such, the public interest in maintaining section 36(2)(b)(ii) outweighs the public interest in disclosure.

Section 36(2)(c) – Prejudice to the effective conduct of public affairs – balance of the public interest arguments

74. By virtue of section 10 of the Act, the public authority was obliged to comply promptly and no later than 20 working days from the date of the request. The DPP's lecture was somewhat controversial and prompted considerable debate. While recognising that this could add weight to the public interest in disclosure, the timing of the request is important here. In the Commissioner's view, had the public authority released all the information within the scope of the request at the time of the request, it is likely that there would have been considerable media attention paid to the withheld information. This may have been in conjunction with or possibly instead of the final text of the lecture itself. Given that the lecture was the first of the DPP's annual lectures, it constituted a keynote speech of his tenure. It is reasonable, in the Commissioner's view, that the public authority would wish to avoid distraction from discussion and debate around the main points of the lecture itself. Such a distraction would have required media handling in parallel to the substantive matters put forward by the DPP in his lecture. In the Commissioner's view, this would be an inefficient use of the public authority's media advice resource and such a prejudicial impact on the effective conduct of public affairs is contrary to the public interest.
75. In light of the above, the Commissioner has therefore concluded that in relation to the majority of the withheld information which continues to be withheld under section 36(2)(b)(i) and (ii) and section 36(2)(c), the public interest in maintaining those exemptions outweighs the public interest in disclosure. However, the Commissioner has identified one section of the withheld information where the arguments for maintaining either of these exemptions are not as compelling.
76. In order to avoid inadvertent disclosure of the withheld information, the Commissioner has set out his arguments as to the balance of public interest in relation to this information in a

Confidential Annex to this Notice which is to be sent to the public authority only.

77. For reasons set out in the Confidential Annex, the Commissioner is not persuaded that the balance of public interest favours maintaining section 36(2)(b)(i) and (ii) and section 36(2)(c) in respect of this particular information. In summary, the Commissioner believes that the level of inhibition that might arise to the free and frank provision of advice and the free and frank exchange of views would have diminished by the time of the request due to factors set out in the Confidential Annex. He also considers that the severity of prejudice to the effective conduct of public affairs that was also likely to have arisen as a result of disclosure would have diminished due to these same factors.

Section 36 - Conclusion

78. The Commissioner is satisfied that the information which remains withheld is exempt information under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Act. He is also satisfied that the public interest in maintaining these exemptions outweighs the public interest in disclosure in relation to the majority of that information. However, for reasons set out in a Confidential Annex to this Notice, the Commissioner has concluded that the public interest in maintaining these exemptions does not outweigh the public interest in disclosure in relation to a short section of the withheld information.

Procedural requirements

79. In failing to provide the information that the Commissioner has identified in a Confidential Annex to this Notice within 20 working days, the public authority contravened the requirements of section 1(1)(b) and section 10(1) of the Act. These provisions are set out in a Legal Annex to this Notice.

The Decision

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 is entitled to withhold most of the information which it has continued to withhold under the Act by virtue of section 36(2)(b)(i), (ii) and section 36(2)(c).
81. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority should have disclosed the information which is identified in a Confidential Annex to this Notice. In failing to provide it within 20 working days of the date of the request it contravened the requirements of section 1(1)(b) and section 10(1) of the Act.

Steps Required

82. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose the information identified in the Confidential Annex to this Notice.
83. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

84. 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.

Right of Appeal

85. 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

86. 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.
87. 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 10th day of January 2011

Signed

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

Legal Annex

Section 1 - General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

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

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

Section 10 - Time for compliance with request.

(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

Section 36 - Prejudice to effective conduct of public affairs.

(1) This section applies to—

(a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) 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 Cabinet of the Welsh Assembly Government.

(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.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(5) In subsections (2) and (3) "qualified person"—

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

(b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,

(c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

(d) ...