

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2011

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested all records held by the Cabinet Office in connection with the negotiations of a Prisoner Transfer Agreement with Libya. The Cabinet Office refused to provide the information it held relying variously on the exemptions contained at sections 21, 27(1)(a), 27(1)(c), 27(2), 28(1), 35(1)(a), 40(2) and 41(1) of the Act. The Commissioner has concluded that the majority of these exemptions have been correctly relied upon. However, he has also concluded that a small number of documents should be disclosed either because the relevant exemptions are not engaged or if the exemptions are engaged then the public interest favours disclosure of the information.

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. Abdelbaset Ali Mohamed Al Megrahi was convicted in January 2001 of 270 counts of murder for the bombing of Pan Am flight 103 over Lockerbie, Scotland in December 1988 and sentenced to life imprisonment.
3. In November 2008 the British and Libyan governments signed a Prisoner Transfer Agreement (PTA). Despite the preference of the Scottish government, the PTA that was signed did not exclude al-Megrahi from making an application under it.
4. In May 2009 al-Megrahi made an application under the PTA to the Scottish Executive. This application was turned down specifically on the basis that the US Government and families of victims in the United States had been led to believe that such a prisoner transfer would not be possible for anyone convicted of the Lockerbie atrocity.¹
5. In July 2009 al-Megrahi's legal team submitted an application to Scottish Executive for him to be released on compassionate grounds.
6. On 20 August 2009 al-Megrahi was released by the Scottish Executive on compassionate grounds.

The Request

7. The complainant submitted the following request to the Cabinet Office on 7 September 2009:

'I request access to all records held by the Cabinet Office or the Prime Minister's Office in connection with the negotiations of a Prisoner Transfer Agreement with the Great Socialist People's Libyan Arab Jamahiriya.

If the amount of documents is too large under the cost threshold provision of the Freedom of Information Act 2000, I ask you to restrict this query only to documents created in December 2007'.

8. The Cabinet Office contacted the complainant on 23 October 2009 and explained that it considered the exemptions contained at sections 27(1)(a), 35(1)(a) and 42 of the Act to apply to the requested

¹ See the comments in Alex Salmond's open letter to Senator Kerry:
<http://politics.caledonianmercury.com/2010/07/22/alex-salmonds-letter-to-senator-kerry/>

information and it needed to extend the time period it needed to consider the balance of the public interest in line with section 10(3).

9. On 20 November 2009 the Cabinet Office contacted the complainant again. In this response it explained that it had concluded that the requested information was exempt on the basis of a number of sections of the Act, namely 27(1)(a), (b) and (c); 35(1)(a) and 42, and in all the circumstances of the case the public interest favoured maintaining these exemptions.
10. On 30 November 2009 the complainant contacted the Cabinet Office and asked for an internal review to be conducted of its application of the exemptions contained at sections 27 and 35. The complainant confirmed that although he was not asking for a review of the Cabinet Office's reliance on section 42, he requested a schedule of documents which the Cabinet Office believed this exemption to apply to.
11. The Cabinet Office informed the complainant of the outcome of the internal review on 30 April 2010. This review made a number of points:
 - Firstly, the review confirmed that to search all records falling within the scope of the request would have exceeded the cost limit contained at section 12 of the Act and therefore the Cabinet Office had restricted its search to documents created in December 2007 in line with the preference expressed in the original request.
 - Secondly, the review explained that some documents were exempt from disclosure on the basis of section 21 of the Act as they were available via the Ministry of Justice's website. (The review provided a link to the relevant site.)
 - Thirdly, the review explained that in fact no information falling within the scope of the request was exempt from disclosure on the basis of section 42 and thus the Cabinet Office could not provide a schedule as requested in the internal review request.
 - Fourthly, the review confirmed that the exemptions that were being relied on to withhold the remaining requested information were those contained at sections 27(1)(a), 27(1)(c), 27(2), 35(1)(a), 40(2) and 41(1). (The review noted that section 27(1)(b) had been incorrectly cited in the refusal notice.) For the exemptions that were qualified, the Cabinet Office confirmed that it had concluded that the public interest favoured maintaining the exemptions.

The Investigation

Scope of the case

12. The complainant contacted the Commissioner on 1 May 2010 and asked him to review the Cabinet Office's handling of this request. The Commissioner subsequently confirmed with the complainant that the scope of his complaint was the Cabinet Office's application of all of the exemptions set out in the internal review outcome with the exception of section 21. The Commissioner also confirmed with the complainant that he was satisfied with Cabinet Office's decision to only consider documents created in December 2007.

Chronology

13. The Commissioner wrote to the Cabinet Office on 19 May 2010 and asked to be provided with a copy of the information withheld from the complainant along with a response to a number of questions in relation to the application of the exemptions cited in the internal review. The Commissioner asked for a response to be provided within 20 working days.
14. Having received no response, the Commissioner contacted the Cabinet Office again on 21 June 2010 and asked a full response to the points set out in his letter of 19 May 2010. The Commissioner asked for this response to be sent within 10 working days and explained that if a response was not sent within this timeframe, an Information Notice would be issued.
15. On 6 July 2010 a representative of the Cabinet Office called the Commissioner's case officer responsible for the investigation of this complaint. The Cabinet Office's representative apologised for the delay in sending a response but confirmed that a reply should be sent by the end of that week, i.e. 9 July 2010. The case officer at the Commissioner's Office explained that he was on annual leave from 9 to 21 July and therefore as long as the Cabinet Office could ensure that a response would be sent by his return to the office, i.e. 21 July, the deadline for responding could be extended to that date.
16. Having received no response to this letter of 19 May 2010 by 21 July 2010, the case officer at the Commissioner's office called the Cabinet Office on 23 July 2010. The Cabinet Office explained that a response had not been sent because of an unexpected development, namely the Cabinet Secretary had ordered a cross-Whitehall review of all information relating to the PTA and the release of al-Megrahi in order

- to establish whether any further information about this issue should be released. The Cabinet Office explained that the consequences of the review in respect of this complaint were two fold: firstly the papers falling within the scope of the request would be considered as part of the review and secondly the officials at the Cabinet Office responsible for responding to the Commissioner's letter were busy undertaking the review and thus had been unable to complete the response. The Cabinet Office suggested two options in terms of taking this complaint forward: Either it could not respond to the Commissioner's letter until the review had been completed or it could provide a response now. The case officer at the Commissioner's office explained that he preferred the latter option.
17. In further communications in late July and early August 2010 the Cabinet Office informed the Commissioner that because of the time and resource undertaking the Cabinet Secretary's review was continuing to take up it was still not in a position to provide the Commissioner with a response to his letter of 19 May 2010.
 18. In light of the further delays in the Cabinet Office responding to his letter of 19 May 2010 the Commissioner served it with an Information Notice on 17 August 2010. The Information Notice requested the Cabinet Office to provide the Commissioner with a copy of the information that the complainant had initially requested along with detailed submissions to support its application of the various exemptions which the Cabinet Office had relied upon to withhold this information.
 19. The Cabinet Office provided the Commissioner with a response on 17 September 2010. This response included copies of the information falling within the scope of the complainant's request (in the form of 21 separate documents) and arguments to support the Cabinet Office's application of the exemptions cited in the refusal notice and internal review. However, the Cabinet Office's response also indicated that it was now seeking to rely on the exemptions contained at sections 28(1) and 35(1)(b) of the Act to withhold some of the requested information albeit that the response did not include any explicit explanation as to why the Cabinet Office considered these exemptions to apply nor any explanation as to why these two exemptions had only recently been cited. Furthermore, the Cabinet Office also explained that some of the information contained in the 21 documents provided to the Commissioner did not fall within the scope of the request and such information was identified as being 'Not in Scope'.
 20. Having considered this response the Commissioner contacted the Cabinet Office again on 15 October 2010 and explained that his preliminary view was that the information which the Cabinet Office had

indicated as 'not in scope' clearly was within the scope of the request. The Commissioner therefore asked the Cabinet Office to explain which exemptions, if any, it was seeking to rely in order to withhold such information. The Commissioner also asked the Cabinet Office to explain why it believed that the two exemptions it had only recently cited, i.e. sections 28(1) and 35(1)(b), applied.

21. The Cabinet Office provided the Commissioner with a response to his letter on 2 December 2010. In this response the Cabinet Office re-affirmed its position that the information marked as 'Not in Scope' remained as such. However, if the Commissioner was of the opposite view, it would seek to rely on the exemptions cited in the refusal notice and internal review to withhold this information.

Analysis

Substantive Procedural Matters

22. As indicated in the Chronology section above, the Cabinet Office has argued that some of the information contained in the 21 documents provided to the Commissioner falls outside the scope of the complainant's request. The Cabinet Office explained that this was because such information refers to matters other than the PTA or because the substance of the information is administrative rather than in connection with the negotiations. Having considered such information the Commissioner is firmly of the opinion that such information does fall within the scope of the complainant's request. In reaching this conclusion the Commissioner placed particular weight on the fact that the request states:

'I request access to **all records** held by the Cabinet Office or the Prime Minister's Office **in connection** with the negotiations of a Prisoner Transfer Agreement with the Great Socialist People's Libyan Arab Jamahiriya. [emphasis added]'

23. In the Commissioner's opinion, on an objective reading of this request it is clear that the complainant was seeking information the Cabinet Office held 'in connection' with the negotiations. In the Commissioner's opinion, this means that any information held by the Cabinet Office which was in any way connected, or related to, the negotiations, falls within the scope of the request. The fact that some of the information contained within the 21 documents focuses on administrative arrangements about the negotiations, rather than the content of the negotiations themselves, does not mean that such information falls outside the scope of the request.

Exemptions

24. The Cabinet Office has provided the Commissioner with detailed submissions to support its application of the various exemptions to withhold the information which the Commissioner considers to fall within the scope of the request, i.e. the entire content of the 21 documents. For ease of reference the Commissioner has listed these documents in a schedule at the end of this Notice and indicated which exemptions the Cabinet Office has cited along with his findings in respect of the application of these exemptions. A number of these 21 documents consist of various separate documents, e.g. because they are email chains, and the Cabinet Office's position in respect of the separate parts of these documents is different. Where this is the case the Commissioner has subdivided a document in the annex and numbered them sequentially e.g. 2(a), 2(b), 2(c). (In order to ensure that there is no confusion as to which numbers relate to which documents the Commissioner has provided the Cabinet Office with a version of the schedule including its own descriptions of the documents.)
25. The Commissioner initially considered the Cabinet Office's reliance on sections 27(1)(a) and 27(1)(c) of the Act which had been applied to withhold 31 documents in total.

Section 27(1)

26. This section states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice:
- '(a) relations between the United Kingdom and any other State,
 - (b) relations between the United Kingdom and any international organisation or international court,
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad.'
27. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential

disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

28. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.²

The Cabinet Office's position

29. In submissions to the Commissioner the Cabinet Office noted that it was very difficult to separate out both the prejudice (and public interest) arguments under sections 27(1)(a) and 27(1)(c). Furthermore, in respect of the level of prejudice it was relying on the Cabinet Office also noted that it was difficult to separate out which documents, the disclosure of which, 'would' actually lead to prejudice and which would only be 'likely' to lead to prejudice. Nevertheless, the Cabinet Office was confident that the chance of prejudice occurring for all documents was clearly more than a hypothetical possibility.
30. The Cabinet Office provided the Commissioner with detailed submissions to support its reliance on sections 27(1)(a) and 27(1)(c). However, it noted that these submissions were provided in confidence and should not be disclosed. Therefore the Commissioner has not set out the content of these submissions in full, but has summarised them below:
31. The Cabinet Office explained that the Libyan government had made it clear to Her Majesty's Government that it considered government to government negotiations to be private and conducted in confidence. Therefore the Cabinet Office explained that it was strongly of the opinion that disclosing information relating to confidential negotiations would be perceived by the Libyans as a breach of trust. Such a breach

² *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

of trust would have a deleterious impact on the UK's relations with Libya and thus would prejudice the interests of the UK in Libya and UK's ability to protect those interests. (The Cabinet Office noted that although this request related to negotiations concerning the PTA, the subject matter of negotiations was immaterial as it was the breach of confidence which was sensitive to the Libyans.) The Cabinet Office also explained that the Libyan government had made it clear that they considered the issue of al-Megrahi to be closed. In order to demonstrate the likelihood of such prejudicial effects occurring the Cabinet Office noted the fragility of the West's relationship with Libya, a recent example of which was the dispute with Switzerland over the treatment of one of Colonel Gaddafi's sons.³

The Commissioner's position

32. The Commissioner accepts the Cabinet Office's argument that disclosure of the information which could harm the UK's relations with Libya and the UK's interests in Libya are clearly applicable interests which fall within the scope of sections 27(1)(a) and 27(1)(c) respectively. The first criterion set out at paragraph 27 is therefore met.
33. With regard to the second criterion, the Commissioner accepts that it is logical to argue that disclosure of information which relates directly to the content of the UK's discussions with the Libyan government could harm the UK's relations with Libya given the latter's expectation that such negotiations were private. (Such a position is especially true in relation to the parts of the withheld information which contain information provided in confidence to the UK by Libya.) For such information, the Commissioner is therefore satisfied that there is causal relationship between its potential disclosure and prejudice to the UK's relations with Libya. Furthermore the Commissioner accepts that if such prejudice occurred to this relationship then this would have the knock-on effect of harming the UK's interests in Libya. This is because the ability of the UK to protect such interests is inevitably dependent on it maintaining effective relations with Libya. Moreover, the Commissioner accepts that the resultant prejudice in respect of both of the exemptions, can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure of such information could result in making relations more difficult and/or demand a particular diplomatic response.

³ In 2008 in Geneva one of Colonel Gaddafi's sons was briefly arrested which escalated into the barring of two Swiss citizens from leaving Libya, the withdrawal of \$5bn from Swiss banks and the banning of entry to Libya of all Schengen citizens in February 2010.

34. However, having considered the content of the information that has been withheld on the basis of sections 27(1)(a) and 27(1)(c) carefully, the Commissioner does not accept that all of this information can be said to focus directly on the content of the negotiations themselves. Rather some of the information that has been withheld under these exemptions relates much more to administrative aspects of the discussions. (This is of course unsurprising given the discussion above regarding the information which the Cabinet Office maintains is not in the scope of the request.) In the Commissioner's opinion the content of such information is sufficiently innocuous that its disclosure could not realistically be linked to any potentially prejudicial effect on the UK's relations with Libya and thus any prejudicial impact on the UK's interests in Libya. For such information, which consists of the documents numbered 2(c) and 2(d), the Commissioner does not believe that sections 27(1)(a) or 27(1)(c) are engaged.
35. In relation to the third limb of the test, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
36. In light of the Cabinet Office's comments about separating out the parts of the withheld information and the level of prejudice, the Commissioner has simply considered whether all of the information which he accepts meets the second criterion meets the lower threshold of the likelihood test. Having considered the circumstances of this case, and the content of the relevant information carefully, the Commissioner is satisfied that there is clearly a real and significant risk of prejudice occurring. Sections 27(1)(a) and 27(1)(c) are therefore engaged in respect of this information.

Public interest test

37. Both exemptions are qualified and therefore the Commissioner must consider the public interest test at section 2 of the Act.

Public interest arguments in favour of disclosing the requested information

38. The Cabinet Office recognised that there was a legitimate public interest in understanding the UK's relations with Libya and how the UK conducts its diplomatic affairs, including the negotiation of the PTA with Libya.
39. The Cabinet Office also acknowledged that disclosure of the requested information could contribute to increasing transparency and openness. It could also serve to improve the trust and confidence the public has towards the government and the way it works and interacts with other States.

Public interest arguments in favour of maintaining the exemption

40. The Cabinet Office argued that it was clearly in the public interest that the UK enjoyed strong relations with its international partners. In the particular circumstances of this case prejudice to the UK's relations with Libya could impact on a range of bilateral issues, namely immigration, counter-terrorism, education and trade.

Balance of the public interest arguments

41. With regard to attributing weight to the public interest arguments in favour of disclosure the Commissioner recognises that issues of accountability and transparency are often cited in any consideration of the public interest test. Such concepts are inherent to the Act, but this should not diminish their relevance to this case and moreover the Commissioner would agree that there is a clear public interest in the public being informed as to how the UK manages its relations with its international partners.
42. Furthermore the Commissioner recognises that the UK's relations with Libya for the period in question were the subject of intense public concern in light of the release of al-Megrahi and allegations about links between the release and the UK's trade relations with Libya. In light of such concerns the Commissioner believes that the arguments for disclosure should be given further weight.
43. However, as with all cases, the weight that is attributed the particular public interest arguments will depend upon the actual content of the requested information. That is to say, to what extent will disclosure of the information which the Commissioner accepts is exempt from disclosure on the basis of sections 27(1)(a) and 27(1)(c) actually serve the public interest arguments in question? Having considered this information carefully, whilst the Commissioner accepts that their disclosure would contribute to the general public interest in openness

and transparency, the level of insight it would provide into how the PTA was negotiated and the British government's position in respect of al-Megrahi is limited.

44. With regard to attributing weight to the public interest in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed by any negative impact on the exchange of information between the UK and its foreign partners, either through information ceasing to be provided or by a failure by these foreign partners to respect the confidentiality of the information that the UK provided to them. The Commissioner accepts that this is particularly true of a partner such as Libya given its strategic position in Northern Africa and the Middle East and the relatively recent improvement in UK and Libyan relations. Moreover, the Commissioner accepts that the UK's relationship with Libya is important not just in respect of the al-Megrahi case but for wider bilateral issues such as trade, migration, counter-terrorism and trade. For these reasons the Commissioner has concluded that public interest in favour of the maintaining the exemptions outweighs the public interest in disclosing the information.

Section 35(1)(a) – formulation and development of government policy

45. The Cabinet Office argued that a number of the documents falling within the scope of the request were exempt from disclosure on the basis of section 35(1)(a). This section states that:

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

- (a) the formulation or development of government policy'

46. Section 35 is a class based exemption, therefore if information falls within the scope of a particular provision of section 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these activities.
47. The Cabinet Office has explained that the policy to which it believes this information relates to is the government's development and formulation of policy in respect of the PTA with Libya.
48. The Commissioner recognises that the term 'policy' is not a precise term and to some extent what is regarded as policy depends upon context. However, there would appear to be a general consensus that

policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action and when. The white paper 'Modernising Government' refers to it as the process by which governments translate their political vision into programmes and actions to deliver 'outcomes' or desired changes in the real world.

49. Policy can be sourced and generated in a variety of ways. For example, it may come from Ministers' ideas and suggestions, manifesto commitments, significant incidents such as a major outbreak of foot and mouth disease, European Union policies, public concern expressed through letters, petitions and the like. Proposals and evidence for policies may come from external expert advisers, stakeholder consultation, or external researchers, as well as civil servants. Policy is unlikely to include decisions about individuals or to be about purely operational or administrative matters. For instance decisions about applications for licenses or grants are not likely to involve the formulation of policy but rather its application.
50. With regard to drawing a distinction between the stages of formulation and development, the Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
51. In terms of applying these concepts to the particular facts of this case the Commissioner is prepared to accept that the government's negotiations with Libya can be described as government policy for the purposes of section 35(1)(a). Although this policy focuses on one relatively narrow issue, the Commissioner accepts that the government's position and handling of this case has broader dimensions and wider consequences. That is to say, the government's approach to the PTA clearly has a wider impact on UK-Libyan relations which in the Commissioner's opinion means that there is a clear political dimension to the issue. Furthermore having examined the

information that falls within the scope of this request it is clear that the negotiation of the PTA involved clear examples of decision making which involved the development of options and priorities for Ministers.

Public interest test

52. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must again consider the public interest test.

Public interest arguments in favour of disclosing the information

53. The Cabinet Office again acknowledged that there was a general public interest in openness and transparency and indeed a particular public interest in this particular policy. The Cabinet Office notes that disclosure of this information may contribute to the public's understanding of how this particular policy was developed and how this was conducted by Ministers and in conjunction with the devolved administration in Scotland. Such openness could arguably increase public trust and engagement with the government.

Public interest arguments in favour of maintaining the exemption

54. The Cabinet Office argued that Ministers and officials must be able to discuss policy freely and frankly, exchange views on all available options and understand their possible implications. If the requested information were disclosed, including the parts detailing options which were discontinued, there is a risk that Ministers and officials may feel inhibited from being candid and frank with one another in future discussions. The Cabinet Office argued that the generic 'safe space' and 'chilling effect' arguments were particularly forceful in the case of the negotiations concerning the PTA where options had been discussed but not implemented. As a result, disclosure would result in a decline in the quality of the debate underlying collective decision making, leading to worse informed and poorer decision making. Disclosure would also be likely to lead to prejudice of future consultations with the devolved administrations by inhibiting candid and frank discussions. Furthermore, the arguments in favour of disclosure have been to great extent addressed by the fact that the ultimate decisions taken and justifications for them have been made public and reported to Parliament.

Balance of the public interest arguments

55. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) which considered the application of section 35(1)(a).

56. In particular the Commissioner has considered two key principles outlined in the *DFES* decision. The first was the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

‘whilst policy is in the process of formulation, it is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy’. (Para 75(iv)).

57. The second being:

‘The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.’ (Para 75(i)).

58. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:

59. With regard to the ‘safe space’ arguments that the Cabinet Office made reference to, such arguments are only relevant if at the time of the request the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop live policy. In this case the Cabinet Office has acknowledged that at the time of the request the PTA had been negotiated and concluded. In light of this fact the Commissioner believes that it is accurate to conclude that at the time of the request the policy in respect of this issue had not only been formulated and developed but had also been implemented. In light of this the Commissioner does not believe that the safe space arguments are relevant to balance of the public interest under section 35(1)(a).

60. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:

- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;

- The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different policy debates.

61. Clearly, because in this case the policy formulation and development was complete at the time of the request the first two scenarios are not relevant. In considering the weight that should be attributed to the third scenario the Commissioner has taken into account the scepticism with which numerous Tribunal decisions have treated the chilling effect arguments when they have been advanced by other public authorities. The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* accurately summarises these views:

'we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner EA/2007/0001*. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.' (para 26).

62. However, the Commissioner has also taken into account the comments of Mr Justice Mitting when hearing an appeal in the High Court against the Tribunal decision *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department (EA/2006/0073)*. Whilst supporting the view of numerous Tribunal decisions that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases

raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

63. In light of the case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments has to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.
64. Taking this into account the Commissioner does not believe that any particular weight should be given to the chilling effect argument in this case. This is because, in the Commissioner's opinion, the Cabinet Office has not identified any particular evidence which would demonstrate why there would be a chilling effect on different policy makers when making submissions in the future on different challenging policy issues, beyond making an assertion that this would be likely to occur.
65. Furthermore having considered the content of the documents which the Commissioner is making a decision on under section 35(1)(a), in general, he does not believe that they contain any comments, options or opinions of particular substance. That is to say, as with the documents he does not consider are exempt under section 27(1), the content is relatively innocuous. In the Commissioner's opinion it would be very difficult to see how disclosure of such information could result in discussions about future policy making being particularly inhibited. The only exception to this are documents 7,(b), 9(a) and 9(b) which the Commissioner accepts are more substantive documents but again his comments in the preceding paragraph regarding the lack of specific chilling effect arguments apply.
66. In respect of the weight that should be attributed to the arguments in favour of disclosing the requested information the Commissioner reiterates his position that given the issues at the heart of this case, these arguments should be given notable weight. In respect of the actual content of the information that the Commissioner is considering

under section 35(1)(a), in contrast to a number of documents considered in respect of section 27(1)(a), he believes that they may be even less informative and thus not serve the public interest arguments in favour of disclosure to the same extent. However, the Commissioner is also of the opinion that given the content of this information any actual prejudice to future policy making following its disclosure would be negligible. Consequently, in the Commissioner's view, the public interest considerations are evenly balanced. In these circumstances the Act requires that the information should be disclosed. In respect of documents 7(b), 9(a) and 9(b) the content of which is more substantial, the Commissioner considers that the public interest positively favours disclosure, given the weighty public interest in the subject matter..

Section 35(1)(b) – Ministerial communications

67. The Cabinet Office has also argued that document 7(b) is exempt from disclosure on the basis of section 35(1)(b) of the Act. The section states that:

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

Ministerial communications’.

68. Section 35(5) provides the following definition of Ministerial communications:

“Ministerial communications” means any communications-

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

69. The Commissioner understands that document 7(b) is a briefing note prepared by a civil servant for a particular Minister ahead of a Cabinet Committee meeting. Strictly speaking then the document could not be described as a Ministerial communication in the sense that it was a

communication between two Ministers. However, the Commissioner is conscious of the comments of a number of Tribunal decisions which argue that the term 'relates to' in the context of section 35(1) should be read broadly. In particular in *Scotland Office v The Information Commissioner* (EA/2007/0070) which considered the scope of section 35(1)(b), the Tribunal concluded that:

'The exemptions in section 35(1) apply where the information "relates to" the matters set out in the sub-sections, so information is exempt if it relates to the formulation or development of government policy in the case of sub-section (a), or relates to Ministerial communication, in the case of sub-section (b). This means that the information in question does not have to be, for example, Ministerial communications; it comes within the scope of the exemption if it "relates to" Ministerial communications.... In the context of this case, communications between a Private Secretary writing on behalf of his/her Minister and another Minister, constitutes Ministerial communications'.

70. In light of this the Commissioner is therefore prepared to accept that document 7(b) falls within the scope of section 35(1)(b) on the basis that it 'relates to' a Ministerial communication, namely the proceedings of the particular Cabinet Committee. In other words, the information contained in document 7(b) would have been communicated at the Cabinet Committee meeting.

Public interest arguments in favour of disclosing the information

71. The Commissioner believes that the arguments in favour of disclosing the information effectively mirror those set out above in relation to sections 35(1)(a) and 27(1) and he has not therefore repeated them here.

Public interest arguments in favour of maintaining the exemption

72. In support of its application of section 35(1)(b) the Cabinet Office noted that there was a significant crossover with the public interest arguments in maintaining the exemption contained at section 35(1)(a). However, in relation to the Ministerial communications exemption, the Cabinet Office also submitted the following arguments:
73. The very existence of the exemption at section 35(1)(b) is designed to protect the way in which government Ministers communicate with each other and conduct the business of government through the Cabinet and Cabinet Committee system. At the very heart of that system is the constitutional convention of collective responsibility. That is to say, Ministers must have the freedom to communicate and to express their views frankly and fully without the fear of being exposed to premature

disclosure of their views. The convention also requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front once a decision is made. Disclosure which undermines this convention will change the rules and practices under which the government functions and it will do so to the detriment of the policy-making process; therefore the quality of debate underlying collective decision making will be diminished, leading to poorer decision making. The maintenance of this convention is therefore fundamental to the continued effectiveness of Cabinet government and its continued existence is therefore manifestly in the public interest.

Balance of the public interest

74. In considering the weight that should be attributed to the public interest in protecting the principle of collective responsibility, the Commissioner takes into account a number of factors, again previously identified by the Tribunal. These include the context of the information, whether it deals with issues that are still live, the extent of the public interest and debate in the issues, the specific views of Ministers it reveals, the extent to which Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context.
75. As noted above in his consideration of the public interest test under section 35(1)(a), the Commissioner does not believe that at the time of the request the negotiations involving the PTA with Libya could be described as live. Furthermore, as also noted above the Commissioner acknowledges that there is a significant public interest in the issues concerning the release of al-Meghrai, and thus the negotiations surrounding the PTA with Libya. However, whilst the document itself does not reveal the views of specific Ministers, the information is still of some substance and furthermore at the time of the request some of the Ministers involved in the negotiations of the PTA were still in office. In the Commissioner's opinion these latter two points mean that sufficient weight should be attributed to the public interest in protecting the principle of collective Cabinet responsibility that the public interest favours maintaining the exemption.

Section 28(1) – relations within the UK

76. The Cabinet Office has argued that a number of documents are also exempt from disclosure on the basis of section 28(1). The Commissioner has only considered the applicability of this exemption to the documents which he has not already concluded are exempt on the basis of another exemption. This leaves two documents, namely 4(a) and 16. Section 28(1) states that:

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

The Cabinet Office's position

77. In support of its reliance on this exemption the Cabinet Office explained that the Memorandum of Understanding (MOU) between the UK government and the Scottish Executive sets out the principles which underlie relations between the two. Unlike the implicit need for confidentiality and trust, which is recognised in international relations, the Cabinet Office emphasised that this agreement sets out explicitly the principle of confidentiality in the UK's relations with the Scottish Executive. The Cabinet Office therefore believed that this exemption was engaged because the information related to the negotiation of policy where there was an explicit understanding that it was undertaken in confidence.

The Commissioner's position

78. As section 28(1) is a prejudiced based exemption the Commissioner has considered the three part test set out in relation to his consideration of section 27(1) in order to determine whether the exemption is engaged.
79. In respect of the first limb of this test, it is clear that the prejudice which the Cabinet Office believes could occur following disclosure of the information is clearly an applicable interest falling within the scope of section 28(1).
80. With regard to the second criterion, the Commissioner accepts that it is logical to argue that disclosure of information exchanged with the Scottish Executive could prejudice the UK's relations with this body in light of the expectations of confidentiality created by the MOU. The Commissioner is therefore satisfied that there is a causal relationship between disclosure of the information and prejudice to relations between administrations in the UK. Moreover, the Commissioner accepts that such prejudice would be real and of substance.
81. In relation to the third limb of the prejudice test the Commissioner notes that the Cabinet Office's submissions were somewhat ambiguous with regard to which level of prejudice it was seeking to rely on. In such circumstances the Commissioner will consider whether the exemption has been engaged at the lower level unless there is clear evidence that it would be engaged at the higher level. In the circumstances of this case taking into account consequences of the expectations created by the MOU, the significance of the PTA

negotiations with regards to relations between the UK government and the Scottish Executive and the content of the withheld information, the Commissioner is satisfied that likelihood of prejudice occurring is more than one which is hypothetical and indeed one that poses a real and significant risk.

Public interest test

82. Section 28(1) is a qualified exemption and thus the Commissioner must once again consider the balance of the public interest test.

Public interest arguments in favour of disclosing the information

83. The Commissioner believes that the arguments in favour of disclosing the information effectively mirror those set out above in relation to his previous considerations of the public interest test and therefore he has not repeated them here. Additionally, the Commissioner believes that there is also a public interest in disclosure of information about how the two administrations in Scotland and England are (or are not) cooperating in practice.

Public interest arguments in favour of maintaining the exemption

84. The Cabinet Office explained that as with the application of section 27(1), it was difficult to make a hard and fast distinction between the prejudice and public interest arguments in relation to the application of section 28(1). In this case the Cabinet Office argued that there was a clear public interest in ensuring effective administration in Scotland. As this depends on the maintenance of good relations between the UK government and the devolved administrations, the release of material that would damage those relationships could not be considered to be in the public interest.

Balance of the public interest

85. With regards to the balance of the public interest test the Commissioner would again, for the reasons given earlier in this notice, attribute notable weight to the disclosure of the information given the public interest arguments in favour of disclosing information in relation to this topic. Disclosure of the information withheld under section 28(1) could provide particular insight into how the PTA negotiations were conducted in respect of the involvement of the Scottish Executive. The Commissioner also notes that as the negotiations were no longer live, and thus arguably less sensitive, this adds further weight to the public interest in disclosure. However, balanced against this the Commissioner recognises the very strong public interest in preserving strong relations between the UK government and the devolved administrations and the fact that disclosure of this information would

be likely to harm not simply the UK government's relations with the Scottish Executive in relation to this particular issue but a range of future policies and issues. It is because of these wider and more long term prejudicial effects that the Commissioner has concluded that the public interest favours maintaining the exemption.

Section 41(1) – information provided in confidence

86. Finally, the Cabinet Office has argued that two documents are exempt from disclosure on the basis of section 41(1) of the Act. These documents relate to communications with a third party and whilst the Cabinet Office provided the Commissioner with some submissions to support its application of section 41 in this case, it also referred the Commissioner to more detailed submissions provided to him in respect of an earlier case involving similar considerations. The Commissioner has taken these earlier submissions into account.

87. This section states that:

'41-(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

88. Therefore for this exemption to be engaged two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

89. The Commissioner has reviewed the two documents in question and is satisfied that their content is such that both documents meet the requirements of section 41(1)(a).

90. With regard to section 41(1)(b) the Commissioner considers that, in the circumstances of this case, the following two criteria have to be met in order for the provisions of section 41(1)(b) to be engaged:

- The information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
- Disclosure of the information would infringe the confider's right of privacy as protected by Article 8(1) ECHR.

91. Details of the Commissioner's reasoning as to the application of these criteria to the facts of this case cannot be disclosed without revealing the information considered to be confidential, Therefore further details are given in a confidential annex, available to the Cabinet Office only.
92. For the reasons stated there the Commissioner accepts that the criteria are met in this case and that disclosure of the withheld information would constitute an actionable breach of confidence.
93. Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner must therefore consider whether the public interest in disclosing the information overrides the duty of confidence that is owed.
94. Again, the relevant arguments are rehearsed in the confidential annex to this notice. The Commissioner is satisfied that in this particular case the public interest in protecting the confidence outweighs the public interest in disclosing the information.

Section 40 – personal data

95. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
96. The Cabinet Office argued that disclosure of officials' names where they appeared in the withheld information would contravene the first data protection principle. Specifically it explained that it wished to apply on the 'convention' that the names and job titles of officials who were at the time not senior civil servants are withheld.
97. The first data protection principle states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless–

 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'
98. The Commissioner is conscious of the Tribunal's findings in *Creekside Forum v Information Commissioner and Department for Culture Media*

and Sport (EA/2008/0065) which considered the redaction of junior civil servants' names from requested information. The Tribunal found that the more junior an official in an organisation the less necessity there is to disclose their name and the more unwarranted the intrusion. The Tribunal accepted that the role of junior civil servants is largely administrative, without significant responsibility, or a public profile or personal responsibility for policies and therefore they should not be exposed to public censure.⁴

99. In light of the Tribunal's comments the Commissioner accepts that disclosure of the names, job titles and contact details of junior officials in the withheld information would represent an unwarranted infringement of their privacy and would constitute a breach of the first data protection principle. Such information is therefore exempt from disclosure on the basis of section 40(2).

Procedural Requirements

100. Section 1(1) of the Act provides the right of access to information and is in two parts, both of which are subject to the application of exemptions:

'(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.'

101. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt. If a public authority wishes to rely on an exemption to refuse to provide the information requested, in line with section 17(1) it must issue a refusal notice to the applicant within the time period required by section 10(1).
102. In this case the complainant submitted his request on 7 September 2009 but the Cabinet Office did not issue its refusal notice until 23 October 2009. The Cabinet Office therefore breached section 17(1) of the Act by failing to provide a refusal notice within 20 working days.
103. As the Commissioner has decided that certain documents are not exempt from disclosure, in failing to provide these documents to the complainant within 20 working days of the request the Cabinet Office breached sections 1(1)(b) and 10(1) of the Act.

⁴ EA/2008/0065 – paragraphs 64-67 and 75-80.

The Decision

104. 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:

- As detailed in the schedule below the majority of the documents which the Commissioner considers to fall within the scope of the request are exempt from disclosure on the basis of sections 27(1)(a), 27(1)(c), 28(1), 35(1)(b) or 41(1). For the qualified exemptions, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.
- Where the names, job titles and contact details of junior officials appear in the documents these are exempt from disclosure on the basis of section 40(2).

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

- The documents numbered 2(c) and 2(d) are not exempt from disclosure on the basis of sections 27(1)(a) or 27(1)(c) and although section 35(1)(a) is engaged in respect of these documents the public interest in maintaining the exemption does not outweigh the public interest in disclosing the documents.
- Similarly, although the documents numbered 4(b), 9(a), 18(a) and 18(c) are also exempt from disclosure on the basis of section 35(1)(a) for these documents the public interest in maintaining the exemption does not outweigh the public interest in disclosing the documents.
- By failing to provide the complainant with these documents within 20 working days of his request the Cabinet Office breached sections 1(1)(b) and 10(1) of the Act.
- The Cabinet Office also breached section 17(1) by failing to provide a refusal notice within the same timescale.

Steps Required

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

- Disclose to the complainant the documents numbered 2(c), 2(d), 4(b), 9(a), 9(b), 18(a) and 18(c) with the names, job titles and contact details of junior officials redacted.

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

Failure to comply

108. 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

109. The Commissioner notes that on 7 February 2011 the Cabinet Secretary published his review of the papers relating to the release of al-Megrahi. As a part of this review, two of the documents which the Commissioner has concluded are exempt from disclosure (documents 11 and 14) have now been placed into the public domain. However, the Commissioner does not believe that this development should alter his findings in respect of this complaint because his role under Part I of the Act is limited to considering the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17, i.e. within 20 working days following the receipt of the request. The Commissioner's approach follows that set out in a number of Information Tribunal decisions and is endorsed by the High Court.⁵

⁵ See *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072) and *Office of Government Commerce and Information Commissioner and Her Majesty's Attorney General on behalf of The Speaker of the House of Commons*, [2008] EWHC 737 (Admin) (11 April 2008).

Right of Appeal

110. 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

111. 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.

112. 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 23rd day of February 2011

Signed

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

Document number	Cabinet Office's original position set out in letter of 17 September 2010 – exempt or not in scope?	Cabinet Office's amended position set out in letter of 2 December 2010	Commissioner's findings
1	27(1)(a), 27(1)(c), 27(2)	27(1)(a), 27(1)(c), 27(2)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
2(a)	27(1)(a), 27(1)(c)	27(1)(a), 27(1)(c)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
2(b)	27(1)(a), 27(1)(c), 28(1), 35(1)(a)	27(1)(a), 27(1)(c), 28(1), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
2(c)	Not in scope (NIS)	NIS but in the alternative 27(1)(a), 27(1)(c), 35(1)(a)	27(1)(a) and 27(2) not engaged. 35(1)(a) engaged but the public interest favours disclosing the information. Document needs to be disclosed.
2(d)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 35(1)(a)	27(1)(a) and 27(2) not engaged. 35(1)(a) engaged but the public interest favours disclosing the information. Document needs to

			be disclosed.
3(a)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 28(1), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(b)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 27(2), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(c)	27(1)(a), 27(1)(c), 28(1), 35(1)(a)	27(1)(a), 27(1)(c), 28(1), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(d)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(e)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c),	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(f)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 28(1), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(g)	27(1)(a), 27(1)(c)	27(1)(a), 27(1)(c)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
3(h)	NIS	NIS but in the alternative 27(1)(a),	27(1)(a) and 27(1)(c) engaged and public interest

		27(1)(c), 28(1), 35(1)(a)	favours maintaining the exemptions.
3(i)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 35(1)(a)	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
4(a)	NIS	NIS but in the alternative 28(1), 35(1)(a)	28(1) engaged and public interest favours maintaining exemption.
4(b)	NIS	NIS but in the alternative 35(1)(a)	35(1)(a) engaged but the public interest favours disclosing the information. Document needs to be disclosed.
5	27(1)(a), 27(1)(c), 27(2), 28(1), 35(1)(a). The latter two apply to paragraph 3 only.	27(1)(a), 27(1)(c), 27(2), 28(1), 35(1)(a). The latter two apply to paragraph 3 only.	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
6	21 – Already released.	21 - Already released.	
7(a)	27(1)(a), 27(1)(c), 35(1)(a) to first sentence only.	27(1)(a), 27(1)(c), 35(1)(a) to first sentence only.	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
7(b)	35(1)(a), 35(1)(b).	35(1)(a), 35(1)(b).	35(1)(a) engaged but public interest favours disclosure. 35(1)(b) engaged and public interest favours maintaining the exemption.

8(a)	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
8(b)	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
9(a)	NIS	NIS but in the alternative 35(1)(a).	35(1)(a) engaged but public interest favours disclosure. Document needs to be disclosed.
9(b)	NIS	NIS but in the alternative 35(1)(a).	35(1)(a) engaged but public interest favours disclosure. Document needs to be disclosed.
10	27(1)(a), 27(1)(c), 28(1), 35(1)(a) and some NIS.	27(1)(a), 27(1)(c), 28(1), 35(1)(a) and some NIS.	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
11	27(1)(a), 27(1)(c), 28(1), 35(1)(a), 35(1)(b).	27(1)(a), 27(1)(c), 28(1), 35(1)(a), 35(1)(b).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
12(a)	40(2), 41(1).	40(2), 41(1).	41(1) engaged.
12(b)	40(2), 41(1).	40(2),41(1).	41(1) engaged.
13	27(1)(a), 27(1)(c), 27(2), 28(1), 35(1)(a).	27(1)(a), 27(1)(c), 27(2), 28(1), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.

14	27(1)(a), 27(1)(c), 28(1), 35(1)(a), 35(1)(b).	27(1)(a), 27(1)(c), 28(1), 35(1)(a), 35(1)(b).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
15(a)	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
15(b)	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a), 27(1)(c), 28(1), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
16	NIS	NIS but in the alternative 28(1), 35(1)(a).	28(1) engaged and public interest favours maintaining exemption
17	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
18(a)	NIS	NIS but in the alternative 35(1)(a).	35(1)(a) engaged but public interest favours disclosure. Document needs to be disclosed.
18(b)	27(1)(a), 27(1)(c).	27(1)(a), 27(1)(c).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
18(c)	NIS	NIS but in the alternative 35(1)(a)	35(1)(a) engaged but public interest favours disclosure. Document needs to

			be disclosed.
19(a)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
19(b)	27(1)(a), 27(1)(c), 35(1)(a).	27(1)(a), 27(1)(c), 35(1)(a).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
20	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 27(2).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
21(a)	NIS, 27(1)(a), 27(1)(c), 40(2).	NIS but in the alternative 27(1)(a), 27(1)(c), 40(2).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.
21(b)	NIS	NIS but in the alternative 27(1)(a), 27(1)(c), 27(2).	27(1)(a) and 27(1)(c) engaged and public interest favours maintaining the exemptions.

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

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

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

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

the information is exempt information by virtue of a provision conferring absolute exemption, or in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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."

Information Accessible by other Means

Section 21(1) provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

International Relations

Section 27(1) provides that –

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

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

Section 27(2) provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

Relations with the United Kingdom

Section 28(1) provides that –

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

Section 28(2) provides that –

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

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

Formulation of Government Policy

Section 35(1) provides that –

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

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

Personal information.

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Information provided in confidence.

Section 41(1) provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."