

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 June 2011

Public Authority: Legal Services Commission
Address: 4 Abbey Orchard Street
London
SW1P 2BS

Summary

The complainant requested information concerning changes made that impacted upon which legal firms were able to carry out prison law work. The public authority disclosed some information, but withheld the remainder, citing the exemptions provided by the following sections of the Act: 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views), 40(2) (personal information), 42(1) (legal professional privilege) and 43(2) (prejudice to commercial interests). The Commissioner finds that the exemption provided by section 43(2) was cited incorrectly and the public authority is required to disclose to the complainant the information withheld under these exemptions. Sections 36(2)(b)(i) and (ii) are found to be engaged and the public interest in maintaining the exemption outweighs disclosure. The Commissioner upholds the citing of section 40(2). He also finds that the public authority breached several of the procedural requirements of the Act in its handling of the request.

The Commissioner's Role

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

The Request

2. The complainant made the following information request on 22 January 2010:

"[in relation to Prison Law] any communications passing between the LSC and the Government, responses to the LSC consultation in 2009 on Prison Law and any correspondence and recorded information about dealings with vested interest groups such as the Law Society and other groups..."

3. The public authority responded initially on 19 February 2010. At this stage some information was disclosed to the complainant. In relation to other information, the complainant was advised that the exemption provided by section 43(2) (prejudice to commercial interests) was engaged, but that further time was required in order to consider the balance of the public interest. The complainant was advised that section 36 (prejudice to the effective conduct of public affairs) was also being considered, but the response did not specify any subsection of 36, or confirm that this exemption was believed to be engaged.
4. The public authority responded further on 18 March 2010. This response confirmed that the public interest was believed to favour the maintenance of section 43(2). The public authority also at this stage confirmed that it was citing sections 36(2)(b)(i) and (ii). It also cited sections 42(2) (legal professional privilege) and 40(1) (personal information of the requester). The balance of the public interest in relation to sections 36(2)(b)(i) and (ii) and 42(2) was not addressed.
5. The complainant responded on 9 April 2010 and requested that the public authority carry out an internal review. The public authority responded with the outcome of the internal review on 17 May 2010. The outcome of this was that the refusal to disclose under the exemptions cited previously was upheld. No reasoning for this outcome of the review was given.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 27 May 2010. The complainant indicated that he was dissatisfied with the citing of exemptions in response to his request. The complainant also raised issues at this stage about the identity of the individual who had conducted the internal review and the date stated on the letter giving

the outcome of the review. The complainant was advised early in the case handling process that, whilst this case would cover the exemptions cited in response to his request, the issues he had raised about the internal review would not be included within the scope.

7. The request above was one of four requests made in the complainant's correspondence of 22 January 2010. The Commissioner's office contacted the complainant on 27 September 2010 and it was noted that the complainant had specified only that he wished the internal review to cover the exemptions cited in response to his requests. The complainant had also only referred to those exemptions when making his complaint to the Commissioner. As exemptions were cited only in response to the request above, and not in response to the other three requests made at the same time, the internal review covered only the request quoted above. The complainant was advised that for this reason this case would cover only the above request.
8. The complainant responded on 27 September 2010 and stated that he wished the Commissioner's investigation to cover all of the four information requests made in his correspondence of 22 January 2010. The complainant was therefore asked by email on 1 October 2010 to respond again setting out what his grounds for complaint were in relation to the other requests. The Commissioner received no further response from the complainant.
9. The Commissioner would note at this point that, not only did the complainant not request an internal review in relation to the other three information requests made in his correspondence of 22 January 2010, neither did he at any stage, despite having been invited to do so, specify any grounds for complaint in relation to these requests. For these reasons the scope of this case covers only the request quoted above and does not include the other requests made in the same correspondence.

Chronology

10. The Commissioner contacted the public authority initially on 27 September 2010. The public authority was asked to respond with explanations for the exemptions cited and with copies of the information withheld from the complainant.
11. It was also noted at this stage that, whilst the public authority had cited section 42(2), it had also confirmed that information falling within the scope of the request was held. It was not clear, therefore, how the citing of this exemption from the duty to confirm or deny could be sustainable. The public authority was asked to respond confirming whether this subsection had been cited in error and the public authority had intended to cite section 42(1).

12. Similarly, the public authority had cited section 40(1) despite it being unclear how the information in question could constitute the personal data of the complainant. The public authority was asked to respond confirming whether its position was that the information included personal data of third parties and so it had intended to cite section 40(2).
13. The public authority responded on 27 October 2010 with further explanations for the exemptions cited and with copies of the information withheld. It also confirmed that it believed that this information included personal data relating to third parties, thus indicating that it had intended to cite section 40(2), and that section 42(2) had been cited in error and instead its position was that section 42(1) was engaged.

Background

14. The wording of the request refers to "prison law". This covers such areas as challenging poor prison conditions, assisting prisoners through the parole process, providing representation for prisoners at disciplinary hearings and ensuring that prisoners' categorisation is appropriate.

Analysis

Exemptions

Section 36

15. The public authority cited section 36(2)(b)(i), which provides an exemption for information the disclosure of which would, or would be likely to, inhibit the free and frank provision of advice; and section 36(2)(b)(ii), which provides the same in relation to the free and frank exchange of views for the purposes of deliberation. These exemptions can only be cited where the reasonable opinion of a specified qualified person (QP) is that these exemptions are engaged.
16. Consideration of these exemptions is a two-stage process; first, they must be engaged, for which the Commissioner must conclude that the opinion of the QP is objectively reasonable. Secondly, these exemptions are qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
17. In reaching a conclusion as to whether these exemptions are engaged, the Commissioner will address the following:

- who the QP is for the public authority;
 - whether the QP gave an opinion in respect to the information in question;
 - when the opinion was given;
 - whether the opinion was reasonably arrived at and reasonable in substance.
18. As to the identity of the QP, the public authority has stated that these exemptions were cited based upon the opinion of the Chief Executive. The now archived website www.foi.gov.uk, via which the government provided advice on the Act, records that the QP for the public authority is the Chief Executive and, therefore, the Commissioner accepts that the correct individual within the public authority acted as QP.
19. Turning to whether this person gave an opinion on the citing of this exemption and when this opinion was given, the public authority stated that the QP gave an opinion on the citing of these exemptions on 18 March 2010. As evidence for this, the public authority has supplied to the Commissioner a copy of a submission provided to the QP on 16 March 2010 setting out the reasoning for the suggested citing of this exemption, which was signed and dated by the QP on 18 March 2010. On the basis of this evidence, the Commissioner concludes that the QP gave an opinion on the citing of these exemptions and that this opinion had been given by the date of the refusal notice.
20. Moving to whether this opinion was reasonably arrived at, the issue here is the process undertaken by the QP when forming their opinion and particularly what was taken into account in this process. If, for example, the QP had reached their opinion on the basis of a toss of a coin, the Commissioner would be likely to conclude that the opinion had not been reasonably arrived at.
21. As referred to above, in this case the QP was provided with a submission setting out the suggested reasoning for the citing of this exemption. A copy of this submission was provided to the Commissioner's office and the Commissioner notes that this sets out the background to the subject matter of the information in question and suggests factors in favour of withholding the information that are relevant to sections 36(2)(b)(i) and (ii). Importantly, the QP was also provided with copies of the information in question. The Commissioner assumes that the QP viewed this information when forming their opinion and, on the basis of this and the content of the submission, the Commissioner finds that the opinion of the QP was reasonably arrived at.
22. As to whether this opinion was reasonable in substance, the submission provided to the QP does not clarify whether the opinion of the QP was that inhibition *would* result, or *would be likely* to result. The

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (paragraph 15)

23. An important factor when considering whether this opinion was reasonable in substance is the content of the information in question and whether this supports the reasonableness of the opinion. The information withheld falls into three categories; first, draft ministerial submissions, secondly, a draft response from the public authority to a consultation on prison law, and, thirdly, email exchanges.
24. Covering the ministerial submissions first, the public authority has cited section 36(2)(b)(i) in relation to these and the Commissioner would accept the basic premise that a ministerial submission does record the provision of advice between officials and ministers. As noted above, some of this information is in draft form and includes comments and drafting suggestions made by staff within the public authority and within the Ministry of Justice (MoJ). The submission to the QP records that section 36(2)(b)(ii) is cited in relation to these drafting comments. Whilst the public authority has stated that the inclusion of these comments within this information was important to the opinion of the QP, it has not been clear as to whether the opinion of the QP was that disclosure would be likely to result in inhibition to the process of officials providing advice to ministers, or to officials within the public authority or the MoJ commenting on draft documents, or to both. On the basis that the entirety of this information was withheld, not only the drafting comments, the Commissioner has assumed that the opinion of the QP was that inhibition would be likely to occur to both of these processes and so has considered whether it was reasonable for the QP to hold this opinion.
25. Turning first to whether the content of the information supports the suggestion that the process of officials providing advice to ministers would be likely to be inhibited in future, the Commissioner has noted

above that the provision of submissions from officials to ministers does constitute the provision of advice, he also accepts that Ministers will expect all submissions to be a frank expression of views, though in some cases these views may be expressed more frankly than others. The Commissioner also notes that the drafting comments could be described as free and frank. Also notable is the duty that applies to civil servants to provide appropriate advice to ministers. This duty is therefore a counter to the argument that civil servants would be likely to be inhibited. The Commissioner also noted that the timing of the request is important, that it was made whilst the prison law reforms were still being implemented¹. The issue was to some extent still live even though a decision had been made. Having considered the circumstances the Commissioner accepts that the opinion of the QP in relation to section 36(2)(b)(i) is objectively reasonable. This exemption is therefore engaged in relation to the main content of the submissions and the comments.

26. Covering secondly the comments and drafting suggestions included on one of the submissions, the public authority has stated that these comments were made by staff within the public authority and from the MoJ and are suggestions made for future redrafts. As noted above the opinion of the QP was that section 36(2)(b)(ii) was engaged in relation to these comments and the Commissioner would accept that these comments could be accurately characterised as an exchange of views. He also accepts that at least some of these comments could be described as free and frank where staff have made suggestions as to changes to be made to the draft. Given the nature of the content of these comments and drafting suggestions, the Commissioner accepts that it was objectively reasonable for the QP to hold the opinion that disclosure of this information would be likely to result in inhibition to the free and frank exchange of views in future. The exemption provided by section 36(2)(b)(ii) is, therefore, engaged in relation to this information.
27. The second category of information here is a draft document titled *"Response to the Prison Law Consultation"*, which includes comments. The public authority has stated during its correspondence with the Commissioner's office that this information was withheld under both sections 36(2)(b)(i) and (ii). The submission provided to the QP was not clear on this point, but it appears to be the case that this entire document was to be withheld, not only the comments.

¹ http://www.legalservices.gov.uk/aboutus/press_releases_9098.asp

28. Covering the comments first, the Commissioner considers it clear why the QP was of the opinion that disclosure of these would be likely to lead to inhibition in future. Similarly to the comments on the ministerial submission covered above, these comments could be fairly characterised as both the provision of advice and an exchange of views, and the Commissioner would accept that at least some of these could be described as free and frank. The Commissioner accepts, therefore, that the opinion of the QP was objectively reasonable in relation to the comments within this document, and so concludes that the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged in relation to this information.
29. As to the main content of this document, the Commissioner is less clear as to the basis for the view of the QP here. The submission to the QP states the following which provides some insight as to the thinking of the QP in relation to this information:

"...[Ministers and officials would be] reluctant to share submissions and explore options with LSC in future if they thought that this would make them liable for release. These documents reveal the internal thinking processes and exchange of views in the development of policy..."

30. Although the position is less clear the Commissioner accepts that the content of this draft version could be compared with the final version that is publicly available and the details of the internal thinking process could be revealed through this. The Commissioner considers that the QP's opinion was objectively reasonable in respect of the draft document.
31. The third category of information consists of redactions made to the record of email exchanges between officials within the public authority and the MoJ about changes to Prison Law. The content of this information does record advice exchanged between officials that the Commissioner would accept is free and frank. In relation to this information, the Commissioner accepts that the opinion of the QP that disclosure of this would be likely to cause inhibition in future is reasonable and that the exemption provided by section 36(2)(b)(ii) is, therefore, engaged.

The public interest

32. In relation to the information in connection with which the Commissioner has concluded that the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged, it is necessary to go on to consider the balance of the public interest. It was the opinion of the QP that disclosure in this case

would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views. In accepting that the opinion of the QP was reasonable, the Commissioner has accepted that disclosure here would be likely to inhibit these processes. The role of the Commissioner here is to consider whether these concerns outweigh the public interest in disclosure.

33. In the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013; 08/01/07), the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption, *"involved a particular conundrum"*, noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, *"it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice"* (paragraph 88).
34. In the Tribunal's view, the reasonable opinion is limited to the *degree of likelihood* that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, *"does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant"* (paragraph 91). This means that, whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.
35. On the issue of the severity and extent of the inhibition resulting from disclosure here, the Commissioner accepts the importance to the ability of the public authority to function effectively of ministers receiving free and frank advice from officials, and of officials being capable of exchanging free and frank views. Having accepted as reasonable the QP's opinion that the free and frank provision of advice and the free and frank exchange of views would be likely to be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the provision of advice and the exchange of views to the functioning of the public authority. The Commissioner notes that the timing of the request is important, an announcement about prison law reform had been made before the request was made but it was relatively recent and the implementation of the reforms was still ongoing and issues were the subject of public debate, as was wider reform of legal aid.

36. As to the frequency of inhibition, having accepted that the provision of advice from officials to ministers plays an important role in the functioning of the public authority, it follows that such advice is likely to be provided relatively frequently. Having accepted the opinion of the QP as reasonable, the Commissioner recognises that this inhibition could result with some frequency; potentially in any situation where an official provides advice to a minister on an issue of a similar level of sensitivity as that which is the subject of the information in question here. However, the Commissioner notes that the policy announcement had been made by the time of the request and this would reduce the impact of any chilling effect, to some extent.
37. It is in the public interest for the public authority to be capable of functioning effectively. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to the ability of the public authority to conduct itself effectively, this contributes to the argument that maintaining the exemption is in the public interest.
38. Turning to public interest arguments in favour of disclosure, civil service officials are under a duty to provide appropriate advice to ministers. This duty extends to ensuring that it is as free and frank as necessary. Whilst the Commissioner accepts that, notwithstanding this duty, inhibition is made more likely as a result of disclosure than in a case where there is no possibility of disclosure, the argument in favour of maintenance of the exemption due to the severity of the inhibition is reduced as a result of the existence of this duty.
39. The subject-matter of the withheld information is highly relevant to where the balance of the public interest lies in this case. The complainant believes that the changes to prison law have been to the benefit of a minority of firms but have excluded the majority, and he believes that the public interest favours disclosure in order to explain what he considers to have been controversial changes. Whilst the Commissioner has is not aware of any evidence that this controversy is widespread and so this factor carries no additional weight as a result of any such controversy, the fact that disclosure would improve public understanding about the decision making of the public authority in this policy area is a valid public interest factor in favour of disclosure. The Commissioner also gives this general factor weight as he is aware the costs of legal aid were a matter of considerable public debate at the time of the request – both in terms of use of public money and the impact on fairness and justice of any reduction or cap in costs.
40. The Commissioner has recognised valid arguments here that the public interest would favour disclosure of this information. Amongst these, the argument that carries most weight is that related to the contents of the withheld information here. However, the Commissioner, having accepted

that the opinion of the QP that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views was objectively reasonable, has also recognised that, given the central role that the provision of advice from officials to ministers has to the work of the public authority, this inhibition would be extensive and of some frequency. For the public interest to favour disclosure where this would result in extensive and somewhat frequent harm to the ability of the public authority to function effectively, it would be necessary for the arguments favouring this to be appropriately compelling.

41. The Commissioner concludes that the public interest in maintaining the exemptions outweighs the public interest in disclosing the information. Whilst the Commissioner has recognised valid public interest arguments in favour of disclosure, the arguments in favour of maintenance of the exemption are strong. The arguments in favour of disclosure, whilst valid, are not sufficient to outweigh this factor in favour of maintenance of the exemption.

Section 40

42. The public authority has cited section 40(2) in relation to names of individuals within the email exchange that formed the third category of information covered above. Section 40(2) provides an exemption for information that constitutes the personal data of an individual aside from the requester and where the disclosure of this personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process; first, the information in question must constitute personal data, and secondly, disclosure of this personal data must be in breach of at least one of the data protection principles.
43. Covering first whether this information constitutes personal data, section 1(1) of the Data Protection Act 1998 (DPA) provides the following definition of personal data:

“personal data’ means data which relate to a living individual who can be identified-

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”.*

44. As noted above, the information in question records the names of individuals and so it is clear that this information both relates to the individuals named and that these individuals are identifiable from this

information. This information does, therefore, constitute personal data according to the definition in the DPA.

45. Turning to whether the disclosure of this information would breach any of the data protection principles, the Commissioner has focussed here on the first data protection principle, which requires that personal data be processed fairly and lawfully. In explanation for the citing of this exemption, the public authority has stated that the personal data withheld relates to junior staff members and that it did not believe it was *"appropriate or necessary"* to disclose this information.
46. Whilst the Commissioner will in general take the approach that it is less likely to be unfair to disclose information relating to an individual in their professional capacity than it would be to disclose information relating to an individual's private life, the level of seniority of an individual in their professional capacity is a relevant concern when considering if disclosure would be fair. In general, the more professionally senior an individual, the less likely it would be that disclosure of information relating to them in their professional capacity would be considered unfair.
47. The public authority has stated that it has withheld the names of junior staff and the Commissioner accepts that it is legitimate for a junior employee to have an expectation of privacy, even where personal data relates to them in a professional capacity. Potentially weighing against this expectation of confidentiality is any legitimate public interest in disclosure of this personal data, which may mean that disclosure would be fair despite the expectation of privacy held by the subjects of this information.
48. Section 40(2) is not cited in relation to the main content of the information here, rather it is cited only in relation to names and email addresses. Given this, the Commissioner does not believe that there is any compelling legitimate public interest in the disclosure of this information that would outweigh the expectation of privacy of the subjects of this information. On the basis of the junior professional status of the subjects of this information and in the absence of any compelling legitimate public interest in the disclosure of this information, the Commissioner finds that the expectation of privacy held by the subjects of this information means that its disclosure would be unfair and in breach of the first data protection principle. Having previously concluded that this information constitutes personal data, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) of the Act is engaged.

Section 43

49. The public authority has cited section 43(2), which provides an exemption for information the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, in relation to information redacted from disclosed documents described in the refusal notice of 18 March 2010 as *"Data on the volume and value of Prison Law cases completed by providers in the financial year 2008/09"*. This response also states that this is regarded as being within the scope of the complainant's request, as it was sent by the public authority to the MoJ during the process of developing the Prison Law scheme.
50. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of prejudice to commercial interests being at least likely to occur. Secondly, this exemption is qualified by the public interest, meaning that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
51. The redacted information consists of reference numbers, each of which relates to a legal firm that has provided Prison Law services. The public authority believes that disclosure of these reference numbers would enable the complainant to identify the firms to which they relate. The public authority believes that combining the detail provided in the remainder of this information, which was disclosed to the complainant, with knowledge of the firms to which this information relates, would be likely to prejudice the commercial interests of the legal firms to which this information relates.
52. In general, where a public authority has cited this exemption on the basis of prejudice that it believes would be likely to occur to the commercial interests of a third party, the Commissioner would require the public authority to have consulted the third party for its views on disclosure. In this case, the Commissioner is not aware of the public authority having consulted any third party for their views on disclosure. He does not, however, regard this as fatal to a finding that this exemption is engaged in this case for the following reasons.
53. First, the volume of the information in question. The public authority has provided to the Commissioner's office a sample of the information in question, and has stated that the entirety of this information consists of *"around 2,500"* pages. The Commissioner notes from the sample provided, which is a small part of the whole, that this includes information relating to a significant number of firms and accepts that it would not have been practical to canvass all of the firms to which this information relates for their views on disclosure.

54. Secondly, the Commissioner will accept arguments about prejudice to the commercial interests of third parties where it appears to be the case that these arguments genuinely reflect concerns held by the third party, even if that third party has not been consulted for their views on disclosure. The Commissioner has considered if this is the case here and his view on this is as set out below.
55. Turning to the likelihood of prejudice, the public authority has not specified whether it believes that prejudice *would* result, or *would be likely* to result. In the absence of this confirmation, the Commissioner has considered whether prejudice would be likely to result. The test that the Commissioner has applied here is that the likelihood of prejudice must be real and significant, and more than hypothetical or remote. This is in line with the approach taken by the Information Tribunal in the case *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005) in which it stated:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (paragraph 15)

56. The public authority has referred to the information disclosed to the complainant as having been anonymised. However, as noted above, it appeared that the redacted information was also anonymous given that it referred to the firms only by reference number. The public authority was asked to confirm if its stance was that it would be possible for the complainant to link these reference numbers to specific firms and, if so, how.
57. On this point, the public authority stated that, whilst it had not previously disclosed a list identifying which firms the reference numbers related to, it did not generally regard this information as confidential and believed that there were means by which one firm would become aware of the reference numbers of other firms. The example of this given by the public authority was *“firms working alongside each other in prisons and courts”*.
58. On the basis of these reference numbers not in general being regarded as confidential, the Commissioner accepts that it is likely that the complainant would be able to link at least some of the reference numbers to individual firms, albeit that this is likely to be the case in relation only to a minority of this information. Having accepted this point, this means that the Commissioner recognises that this information could reveal details relating to specific firms. The next step, therefore, is to consider whether what would be revealed would be likely to result in prejudice to the commercial interests of the firms to which this information relates.

59. The information in question records the sums paid to individual firms for Prison Law cases, with a breakdown of how these payments were calculated. The public authority has not been entirely clear as to why it believes that disclosure of this information would be likely to cause prejudice to the commercial interests of the firms to which it relates. Whilst it has stated that disclosure would provide to the complainant detailed financial information about other firms, and the Commissioner would not dispute that this information does reveal financial details about Prison Law case work undertaken by the firms listed, it has not explained how prejudice to commercial interests would be likely to result through this disclosure.
60. Neither, in the absence of such an explanation, does the Commissioner believe that it is clear from the content of the information how prejudice would be likely to arise. The public authority appears to be arguing that other legal firms could gain an unfair commercial advantage over the firms listed through disclosure of this information. Whilst, as noted, this information does include financial details, it is not clear how this information could be parlayed into an advantage by rival legal firms, to the commercial detriment of the firms listed.
61. The public authority has stated that the information in question is "*commercially sensitive*". Whilst the commercial sensitivity of information is relevant to the issue of whether the exemption provided by section 43(2) is engaged, this is not in itself sufficient for the exemption to be engaged. Instead, it must be clear that the disclosure of the commercially sensitive information would result in a real and significant likelihood of prejudice to commercial interests. In this case, the view of the Commissioner is that the public authority has not convincingly set out how prejudice to commercial interests would be likely to occur and so it is not clear that the objection to disclosure on the part of the public authority genuinely reflects concerns held by the legal firms to which this information relates. The Commissioner's conclusion is, therefore, that the exemption provided by section 43(2) is not engaged.

Procedural Requirements

Sections 1 and 10

62. In failing to disclose the information withheld under section 43(2), which the Commissioner finds is not engaged, within twenty working days of receipt of the request, the public authority did not comply with the requirements of sections 1(1)(b) and 10(1).

Section 17

63. In failing to confirm within twenty working days of receipt of the request that the exemptions provided by sections 36(2)(b)(i) and (ii), 40(2) and 42(1) were believed to be engaged, the public authority did not comply with the requirement of section 17(1).
64. In failing to address why the balance of the public interest was believed to favour the maintenance of the exemptions provided by sections 36(2)(b)(i) and (ii) and 42(1) at either the refusal notice or internal review stage, the public authority did not comply with the requirement of section 17(3)(b).
65. In failing to specify the correct subsections from 40 and 42 that it was relying on, the public authority did not comply with the requirement of section 17(1)(b).

The Decision

66. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, in that it applied the exemptions provided by sections 36(2)(b)(i) and (ii) and 40(2) correctly, but that the exemption provided by section 43(2) was cited incorrectly, and, in so doing, the public authority breached the requirements of sections 1(1)(b) and 10(1). The Commissioner also finds that the public authority failed to comply with the requirements of sections 17(1) and 17(3)(b) in its handling of the request.

Steps Required

67. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose to the complainant the information withheld under section 43(2).
68. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

69. 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

70. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. As referred to above at paragraph 5, when giving the outcome of the internal review, the public authority gave no reasoning for concluding that the refusal of the request should be upheld. Paragraph 39 of the section 45 Code of Practice states the following:

“The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.”

71. The internal review response from the public authority did not reflect that a reconsideration of the request conforming to the description above took place. The Commissioner would advise the public authority that a response giving the outcome to an internal review should state the reasoning for why the initial refusal was upheld and should reflect that there has been a genuine reconsideration of the request.

Right of Appeal

72. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

73. 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 13th day of June 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

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 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."

Section 17(1) provides that -

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

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

Section 17(3) provides that -

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

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

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 36(2) provides that –

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

(a) would, or would be likely to, prejudice-

1. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
2. the work of the Executive Committee of the Northern Ireland Assembly, or
3. the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

1. the free and frank provision of advice, or
2. the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Section 43(2) provides that –

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