

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 December 2013

**Public Authority:** Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to 'The Education Fellowship'.
2. The Commissioner's decision is that the DfE has correctly applied sections 21, 36, 42 and 43 to part of the withheld information. However, he finds that the DfE has incorrectly applied sections 22, 36 and 43 to other parts of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information identified in Appendix 1 at the end of this decision notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

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5. On 18 July 2012, the complainant wrote to DfE and requested information in the following terms:

*"any information held by the Department for Education on the Education Fellowship, academy company and any correspondence between the Education Fellowship and DfE officials, advisers or contract employees"*

6. The DfE responded on 8 October 2012. It provided some information within the scope of the request but refused to provide the remainder citing section 40(2) FOIA as its basis for doing so. It also advised that it was working on a second and third tranche of information that fell within the scope of the request.
7. On 31 October 2012 a further response was provided. The DfE provided some of the information requested but refused to provide the remainder citing sections section 21, 36(2)(b), 36(2)(c), 42, 43(2) and 40(2) FOIA.
8. Following an internal review the DfE wrote to the complainant on 1 February 2013. It upheld its original position with regard to section 21 but stated that, in undertaking the review it concluded that some information which had previously been withheld under sections 42 and 43(2) should also be withheld under sections 36(2)(b) and (c).
9. In addition, the review concluded that on further analysis some material withheld under section 42 and 43, should instead be withheld under sections 36(2)(b) and (c). Additionally, it cited section 22 with regard to Funding Agreements.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 4 October 2012 to complain about the way her request for information had been handled as she had not received a response.
11. The Commissioner wrote to DfE advising that it was required to either provide the information or issue a refusal notice in accordance with section 17 of the FOIA.
12. The DfE subsequently issued its responses as detailed above.
13. After clarifying with the complainant the Commissioner considers the scope of this case to be determine if the DfE has correctly applied sections 21, 22, 36(2)(b)(i) and (ii), 36(2)(c), 42 and 43(2) FOIA.

## Reasons for decision

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### Section 21 – information accessible by other means

14. Section 21(1) provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
15. The Commissioner accepts that information is reasonably accessible if the public authority:
  - Knows that the applicant has already found the information; or
  - Is able to precisely direct the applicant to the information. In this case the public authority has to be reasonably specific to ensure it is found without difficulty and not hidden within a mass of other information.
16. In its response to the Commissioner, DfE stated that a great deal of the material within the scope of the request related to factual information about the Trust and the schools they sponsor as well as the processes the DfE follows when brokering Academy projects.
17. In its response to the complainant of 1 November 2012 DfE had advised that some of the information requested related to tender documents and business Articles of Association which were already in the public domain. It highlighted that some of the information could be found at Companies House as well as at [www.mytenders.org/](http://www.mytenders.org/).
18. In its submission to the Commissioner, DfE advised that it had made clear to the complainant that some information was already in the public domain, for instance on The Education Fellowship (TEF) website<sup>1</sup>. It further stated that in its response of 1 November 2012 it had advised the complainant of Companies House<sup>2</sup> and [www.mytenders.org/](http://www.mytenders.org/).
19. The DfE stated that the website of Companies House provided clear instructions about the costs involved in accessing documents, and confirmed that the cost of accessing the information would be £1 if accessed online and £3 if ordered over the telephone.

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<sup>1</sup> <http://www.educationfellowship.net/>

<sup>2</sup> <http://www.companieshouse.gov.uk/>

20. DfE further explained that the 'mytenders' website is straightforward to use and although individuals have to sign up to access information, no costs are involved in accessing the information.
21. DfE stated that on no occasion did the complainant contact them to request any further clarification.
22. The Commissioner considers that parts of the information requested are accessible to the complainant through other means and the DfE has provided her with the appropriate assistance to locate it. Therefore, the DfE has correctly applied section 21(1) of the FOIA to the Articles of Association and the standard version of the Master Funding Agreement.
23. The DfE initially stated that any differences between the version available on its website<sup>3</sup>, and the final published version was covered by section 43.
24. However, in its submission to the Commissioner, DfE stated that this was covered by section 22.

### **Section 22 – information intended for future publication**

25. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:
  - the public authority holds it with a view to its publication;
  - the public authority or another person intends to publish the information at some future date, whether determined or not; and
  - in all the circumstances it is reasonable to withhold the information prior to publication.
26. DfE explained that during the course of the internal review it discovered that the draft Funding Agreement was in the process of being uploaded onto its website, and therefore concluded that section 22 was engaged.
27. DfE further stated that it had hoped it would be uploaded in time to for it to be shared with the complainant alongside the outcome of the internal review. However, this was not possible without delaying the response. In its letter to the complainant of 1 February 2013 it stated that it had asked the web team to provide the material and it would be sent to her as soon as it was received.

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<sup>3</sup> <http://www.education.gov.uk/cgi-bin/schools/performance/school.pl?urn+138879&downloadac=pdf&numfile=1>

28. In addition, on 5 February 2013 the first of the funding agreements was provided to the complainant and on 20 February 2013, hyperlinks to the relevant pages of the DfE website where the remaining information was available was also provided.
29. DfE stated that only one Funding Agreement was captured within the scope of the request and it provided the additional information as it felt it would be of interest to the complainant in light of her request regarding TEF.
30. DfE further explained that Funding Agreements are just one of a variety of pieces of educational information it seeks to make available on its website about schools to allow stakeholders to make informed decisions. However, in light of the volume of information made available online there is sometimes a delay in this information being uploaded.
31. It is the Commissioner's view that DfE had not evidenced a commitment to publish the information at the time of the request, and section 22 was only applied at the internal review stage some 9 months later. Therefore the Commissioner does not consider section 22 is engaged. However, as the information is now available no action is required.

### **Section 36 – prejudice to effective conduct of public affairs**

32. The DfE applied section 36(2)(b)(i) and (ii) and (2)(c) to some of the withheld information. It believed that these limbs are not mutually exclusive and there is some material that it felt fell under both sections 36(2)(b)(i) and 36(2)(c).
33. In addition, the DfE also applied section 43(2) to some of the same information. The Commissioner has considered the application of section 36(2) first.
34. Section 36 (2)(b) and (c) 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 -*

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

*(i) the free and frank provision of advice, or  
(ii) the free and frank exchange of views for the purposes of deliberation...'*

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

35. In order to consider the application of this exemption the Commissioner must first determine whether the opinion of the qualified person was reasonable.
36. The DfE has informed the Commissioner that the qualified person in this case was the Parliamentary Under-Secretary of State, Elizabeth Truss. It also confirmed that it sought her opinion on 22 October 2012 and that her opinion was given on 31 January 2013.
37. The Commissioner is satisfied that Ms Truss is a qualified person for the DfE and that her opinion was given at the relevant time. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that section 36 should be applied, and a copy of the qualified person's opinion.
38. In reaching a view on whether the opinion is reasonable the Commissioner will consider the plain meaning of the word 'reasonable' – i.e. whether the opinion is in accordance with reason, not irrational or absurd.
39. The submission to the qualified person presented a number of arguments, most of which are repeated in the public interest arguments in favour of maintaining the exemption detailed from paragraphs **42** to **53**.
40. The DfE has provided sufficient evidence to illustrate that the qualified person was provided with documentation explaining that she was required to form a reasonable opinion in relation to the application of section 36 of the FOIA to the information withheld by the DfE.
41. The qualified person has stated that in her opinion the disclosure of the information "*would be likely to have the effect set out in sections 36(2)(b)(i) or (ii) of 36(2)(c) of that Act*".
42. The Commissioner is satisfied that the opinion was reasonable and he agrees that all the relevant parts of the exemption are engaged in relation to all of the information withheld under this exemption apart from the Invitation to Tender. This is a public document as it was issued under a Part B procurement procedure as defined in the Public Contract Regulations 2006. No specific arguments were raised about this document. The Commissioner does not therefore consider that section 36(2)(c) would be engaged in relation to this information.
43. Section 36 is a qualified exemption and therefore it is subject to the public interest test. The Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

44. The Commissioner has first considered the application of section 36(2)(b).

**Public interest arguments in favour of maintaining the exemption – 36(2)(b)**

45. The DfE has provided arguments for each part of the exemption:

*Section 36(2)(b)(i)*

46. It is important that Ministers and officials are allowed space to develop their thinking and explore available options, including with relevant stakeholders and partners such as TEF.
47. The release of candid discussions between officials, Ministers and Special Advisers about concerns the DfE had about the sponsorship model that TEF originally proposed would inhibit future discussions and advice provided which are an important part of the process of effective government.
48. It is in the public interest that these conversations are protected to ensure that a thorough and rigorous assessment of potential Academy sponsors takes place especially when conversations relate to the principle of ensuring that sponsors do not benefit financially from sponsorship.
49. If released it is likely that officials would not couch assessments in such frank terms because of the damage this could do to relationships with the parties being discussed. This could result in a more opaque understanding of potential problems of issues and, consequently, a less effective decision-making process. This would not be in the public interest.

**Public interest arguments in favour of disclosing the requested information**

50. The DfE has recognised that there may be some public interest in releasing information that would highlight the robust process it undertook in ensuring that TEF was a suitable sponsor.

**Balance of the public interest arguments**

51. Section 36 of the FOIA provides an exemption where, in the reasonable opinion of a qualified person, the disclosure of the information would be likely to have the effects set out in that exemption.
52. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that the information would be likely to

have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.

53. The Commissioner considers that there is a public interest in furthering understanding of this topic which would increase the quality of public debate on the issue of academy policy in general as well as the specific project the request relates to.
54. The Commissioner also considers that disclosure increases public confidence in the decision making processes in this area. The Commissioner considers that this is also in the public interest, particularly as the academy projects are a significant change to education provision in England, with many more schools applying for Academy status as the policy becomes embedded.
55. The Commissioner does however consider that there is a strong public interest in the DfE being able to obtain free and frank advice when making decisions in relation to the improvement of schools.
56. He considers that it is in the public interest that the DfE has full and relevant advice and information necessary to maintain quality and produce well thought out decisions. At the time of the request, the TEF sponsorship model had already been approved, and some schools had been identified as suitable for TEF to sponsor. However, some projects were still under discussion. The Commissioner accepts that impact of disclosing this particular information at this time would be significant and considers that this gives further weight to this public interest argument.
57. The Commissioner considers that the public interest in favour of the disclosure of the withheld information is outweighed by the public interest in maintaining the exemption contained at section 36(2)(b)(i).

*Section 36(2)(b)(ii)*

**Public interest arguments in favour of disclosing the requested information**

58. The DfE has recognised that releasing the information could further the understanding of, and increase public debate around, Academies policy in general and TEF and their projects in particular. Releasing the information could increase public confidence that decisions are taken on the basis of the best available information, and releasing the information could enable individuals and organisations to better understand the reasons behind decisions affecting their lives.



### **Public interest arguments in favour of maintaining the exemption**

59. The DfE stated that it believed the public interest lies in protecting discussions between officials about issues such as possible areas where TEF could sponsor schools. There is the potential that the release of these documents will inhibit future discussions and negotiations which are an important part of the process of effective government.
60. Such discussions are likely to be sensitive, and it behoves officials to be as accurate, candid and robust as possible in giving advice, in order that those taking decisions are making them on the basis of the clearest understanding of the situation.
61. Release of these documents would be likely to inhibit the free and frank exchange of views for the purposes of deliberation for fear that those views would be made public in future.

### **Balance of the public interest**

62. In relation to the nature of the withheld information the Commissioner notes that it contains free and frank exchanges between DfE officials and external third parties.
63. The Commissioner considers that there is a public interest in furthering understanding of this topic which would increase the quality of public debate on the issue of academy policy in general as well as the specific project the request relates to.
64. The Commissioner also considers that disclosure increases public confidence in the decision making processes in this area. The Commissioner considers that this is also in the public interest, particularly as the academy projects relevant to individuals throughout the country.
65. The Commissioner however considers that there is a strong public interest in the DfE being able to discuss issues surrounding the academy projects freely and frankly to ensure academies are developed and set up to the highest standards possible. As stated above, at the time of the request the project was not complete and therefore discussions and deliberations were still being relied upon and were still on-going which adds weight to this public interest argument.
66. The Commissioner considers that the public interest in favour of disclosure of the requested information is outweighed by the public interest in maintaining the exemption cited at section 36(2)(b)(ii).

*Section 36(2)(c)*

67. The majority of the information withheld under this exemption has been applied to email correspondence.

**Public interest arguments in favour of disclosing the requested information - Section 36(2)(c) otherwise prejudice the effective conduct of public affairs**

68. The DfE has recognised that releasing the information could further the understanding of, and increase public debate around, Academies policy in general and TEF and their projects in particular. Releasing the information could increase public confidence that decisions are taken on the basis of the best available information, and releasing the information could enable individuals to and organisations to better understand the reasons behind decisions affecting their lives.

**Public interest arguments in favour of maintaining the exemption**

69. Among the documents are a number of pieces of correspondence between Ministers, officials and TEF. DfE has argued that disclosure of these types of sensitive sponsor discussions would be likely to prejudice the effective conduct of public affairs by inhibiting the effectiveness of future proposals or discussions with sponsors/stakeholders.
70. The DfE stated that if it was to release information provided by TEF in response to queries about their proposals this could directly influence their, and others, willingness to engage with its programmes of work which may well lead to a reduction in the quality and numbers of potential Academy sponsors. This could reduce the quality of education that pupils receive which would not be in the public interest.
71. Disclosing communications with TEF could harm future relations between the DfE and other sponsors.
72. There could also be damage to relationships between TEF and their partners, such as The John Lewis Partnership, and prospective schools if candid assessments were to be routinely released. This would not be in the public interest if it were to undermine a relationship of trust or to reduce the operating efficiency of a partnership.
73. Disclosing confidential communications between the DfE and TEF would be likely to undermine the relationship between the parties. This would be likely to have a negative impact upon the development of further TEF sponsorship of academies. The academies programme is an initiative to improve the quality of education available for children and their future

life chances. It would not be in the public interest to damage the relationship between the parties responsible for the establishment and on-going running of academies as it would affect a large number of pupils who attend these academies.

74. Disclosure would also be likely to damage the relationship between the DfE, TEF and its other stakeholders/partners in relation to the running of other academy schools which have now been established and which these parties are involved in. As the successful running of further academies would be likely to be undermined by the disclosure an even greater number of pupils may be adversely affected.
75. Finally, as disclosure would be likely to deter existing sponsors from taking on further projects as well as potentially deterring new sponsors for future projects, this again would not be in the public interest as it would be likely to hamper an initiative to improve the quality of education available for children and their future life chances.

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

76. In considering the balance of the public interest, the Commissioner will take into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the request.
77. At the time of the request the TEF model had been approved. TEF had already identified some schools and these were converted to Academies in September 2012.
78. The DfE has argued that the disclosure of confidential communications with TEF could prejudice its relations with that body. As this information also contained candid comments about the proposed model, disclosure could also damage relations between both those bodies and TEF's partners. Reducing the operating efficiency of those relationships would not be in the public interest.
79. The Commissioner considers there is a strong public interest in not damaging the relationship between the DfE, existing academy sponsors, potential/future academy sponsors and relevant local authorities which would be likely to undermine the academies programme in this instance.
80. Again the Commissioner has given weight the timing of the request and the impact of on these working relationships in the particular circumstances. Therefore the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Section 43 – Commercial interests**

81. Section 43(2) provides that information is exempt if its disclosure would, or would be likely, to prejudice the commercial interest of any person.
82. Given the consideration above of section 36(2) the Commissioner has not considered the joint application of section 43 to that information. Therefore, this relates to that information which section 43 has solely been applied to with the exception of the 'Invitation to Tender' which is not exempt under section 36(2)(c) FOIA.
83. The DfE has provided limited arguments in support of its application of section 43(2), despite advising the Commissioner that the majority the information had been withheld by virtue of this exemption. It is not the Commissioner's role to formulate these arguments for the DfE however he has taken a balanced view based on the evidence and arguments presented as well as previous decisions.

### **Engagement of section 43**

84. The Commissioner has initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied. Section 36 has also been applied to much of the information to which section 43(2) is applicable. The information that is exempt from disclosure under section 36 has not been reconsidered under section 43(2).

#### **(i) Applicable interest within the exemption**

85. The Commissioner considered whether the prejudice claimed by the DfE is relevant to section 43(2). The DfE has argued that disclosure of the information withheld under section 43(2) would be likely to prejudice the commercial interests of the DfE and TEF.
86. The Commissioner considers that the proposed prejudice would be relevant the commercial interests of DfE or TEF.
87. The Commissioner has gone on to consider the remaining criteria:

#### **(ii) The nature of the prejudice**

88. DfE argued that the prejudice would take the form of a commercial disadvantage for TEF if the information were disclosed and used by its competitors, and it could put the DfE at a commercial disadvantage as other potential sponsors may be deterred from making proposals in case their financial models and related information were made public. The Commissioner accepts that this prejudice would be substantial.

### **(iii) The likelihood of prejudice**

89. The DfE has argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of the DfE and TEF. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
90. The Commissioner accepts, after reviewing the withheld information that disclosure of much of this information would be likely to result in a real risk of other potential sponsors being deterred from making proposals in case their financial models and related information were made public.
91. However for some of the information the Commissioner finds that the DfE has not provided sufficient arguments to demonstrate that the prejudice claimed would or would be likely to occur. In particular the DfE has not provided specific arguments to explain why disclosure of the Invitation to Tender, two Agreements and a Deed would or would be likely to cause the prejudice claimed. Without specific arguments with direct reference to this information the Commissioner is unable to conclude that the exemption is engaged. This information along with a limited amount of correspondence has been identified at Appendix 1 at the end of this Notice as the Commissioner does not consider that section 43(2) is engaged.
92. The Commissioner accepts that section 43(2) is engaged in relation to the rest of the information solely withheld under this exemption and as it is a qualified exemption, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest test**

#### **Public interest arguments in favour of disclosing the information**

93. The Commissioner recognised that there is a general public interest in accountability and transparency in relation to the activities of public authorities. This is particularly the case where the public body obtains funding from the tax payer and in this case, it is particularly strong as the funding, or otherwise, will have a direct impact on children's education and future.
94. The DfE acknowledges that there is a public interest in the transparency and accountability of public funds to ensure that public money is being

effectively used, and that departments are getting value for money when purchasing goods and services.

### **Public interest arguments in favour of maintaining the exemption**

95. The DfE believes that disclosure of the information could result in the less effective use of public money, as well as prejudice the commercial interests of TEF.

### **Balance of the public interest**

96. The Commissioner acknowledges that there is a public interest in how the Academy sponsors are selected, and appropriate projects identified.
97. The Commissioner considers that the DfE's arguments that disclosing the information would be likely to deter other potential sponsors from approaching the DfE carry less weight as these arguments have not been clearly explained and linked to an specific impact on their commercial interests, rather than the more general public interests already covered under section 36.
98. However, he accepts that disclosure would be likely to prejudice the commercial interests of TEF rather than the DfE itself.
99. Based on the above, the Commissioner is satisfied that the DfE has correctly applied section 43(2) to the information withheld under this exemption and to which section 36 has not also been applied.

### **Section 42 – Legal Professional Privilege**

100. 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.'

101. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI EA/2005/0023*) as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such*

*communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph. 9)*

102. There are two types of privilege: litigation privilege and legal advice privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.
103. The Commissioner's view is that for LPP to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
104. The DfE is relying here on a claim of advice privilege. This is available where the information consists of confidential communications between a client and legal adviser made for the sole or dominant purpose of obtaining legal advice.
105. The Commissioner has obtained and considered a copy of the requested information. It is internal advice passed from the DfE's legal professionals to colleagues within the DfE involved in the Academies programme and the work of The Education Fellowship Trust. He is satisfied that the exemption is therefore engaged.
106. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in favour of disclosing the requested information**

107. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.



## **Public interest arguments in favour of maintaining the exemption**

108. The Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

*"...there is a strong element of public interest inbuilt in to the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."* (paragraph 35).

109. It is very important that public authorities should be able to consult with their lawyers in confidence and to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

*"Legal professional privilege is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".*

110. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is in effect, elevated to an absolute exemption.

## **Balancing the public interest arguments**

111. The Commissioner accepts that there is a public interest in disclosing information which will lead to greater openness and accountability.

112. However in balancing the opposing public interest arguments in this case, the Commissioner is mindful of the Information Tribunal's decision in *Bellamy*. The Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all



communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

113. The Commissioner considers that there is a very strong public interest in public authorities being able to consult with their lawyers in confidence and without fear that this information may be disclosed into the public domain.

114. On balance the Commissioner considers that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption.

### **Section 10 and 17**

115. Section 10(1) of the FOIA requires a public authority to respond to a request within 20 working days. If public authority is seeking to rely on an exemption to refuse to comply with a request then in line with section 17(1) it must provide the requestor with a refusal notice, within 20 working days, stating which exemption(s) is being relied upon.

116. The request was submitted on 27 July 2010, and the complainant did not receive the DfE's refusal notice until 25 October 2010. The Commissioner finds that the DfE has breached section 10(1) and section 17(1) of the FOIA, by failing to provide a valid refusal notice within 20 working days. He has therefore recorded this breach accordingly.

## Right of appeal

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117. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

118. 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.

119. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

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

## **Appendix 1**

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Information to be disclosed to the complainant:

From Annex B

Page 173 – in entirety

Page 327 – 350 – in entirety

Page 351 – email of 13 April 2012 at 16:57

Page 728 – 734 – in entirety

Page 1117 – 1121 – in entirety