

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 July 2009

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested a copy of the Gateway review report produced in September 2006 regarding the Department of Health's (the "Department") Modernising Medical Careers (MMC) programme. Some of the information was disclosed, however the majority of the requested information was withheld under section 35(1)(a) of the Freedom of Information Act 2000 (the "Act"). The Commissioner has reviewed the withheld information and considers that whilst the section 35(1)(a) exemption is engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Department is therefore required to disclose the requested information to the complainant. The Commissioner has concluded that, in failing to make available to the complainant information to which he is entitled, the Department has breached sections 1(1)(b) and 10(1) of the Act.

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. This Notice sets out his decision.

The Request

2. On 28 April 2007 the complainant wrote to the Department and requested the following information:

"the OGC [Office of Government Commerce] Gateway Review of MMC from September 2006..."

3. The Department responded on 2 May 2007 and provided a heavily redacted copy of the MMC OGC Gateway Review. The Department refused to provide the information in full on the grounds that it was exempt from disclosure under section 35(1)(a) of the Act, namely that the information related to the formulation or development of government policy, and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. On 22 May 2007, the complainant contacted the Department and requested an internal review into the handling of his request.
5. The Department contacted the complainant on 23 July 2007 to inform him of the outcome of the internal review. The Department confirmed its decision to withhold the full copy of the Gateway Review under section 35(1)(a) of the Act. The Department set out a number of public interest factors for and against disclosure, however confirmed its view that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Investigation

Scope of the case

6. On 23 July 2007 the complainant contacted the Commissioner to complain about the Department's refusal to provide him with the information requested.

Chronology

7. The Commissioner contacted the Department by letter dated 24 July 2008 and asked it to provide him with a copy of the information withheld from the complainant.
8. The Department responded on 8 August 2008 and provided a copy of the withheld information, albeit with some of the redactions remaining.
9. On 8 September 2008 the Commissioner wrote to the Department again. He requested a full and unredacted copy of the information withheld from the complainant. Further, the Commissioner asked the Department to clarify why it believed the withheld information related to the formulation or development of government policy (and thus why it believed the section 35(1)(a) exemption was engaged) and to explain, with reference to the withheld information, how it had reached its conclusion regarding the public interest. The Commissioner asked the Department to respond by 23 September 2008.
10. The Department telephoned the Commissioner on 9 September 2008. It stated that it was unlikely to be able to provide a detailed response by the deadline set and requested an extension. The Commissioner agreed that the Department could respond by 7 October 2008.

11. On 10 October 2007 the Department responded. It provided a full and unredacted copy of the information withheld from the complainant, and explained why it believed the section 35(1)(a) exemption applied to it. With regard to the public interest considerations, the Department provided a number of arguments to explain why, in its view, disclosure of the requested information would be detrimental to the Gateway Review programme, to those who had participated in this particular review, and to the Department itself.
12. The Commissioner considered the arguments the Department had raised to be very general in nature. Therefore, he contacted the Department again on 28 October 2008 to give it a final opportunity to explain how the public interest considerations it had raised related specifically to the withheld information. The Commissioner asked the Department to respond by 12 November 2008.
13. On 11 November 2008 the Department telephoned the Commissioner and requested an extension to the deadline for a response to his letter of 28 October 2008. The Commissioner agreed to allow until 26 November 2008 for a response.
14. The Department contacted the Commissioner by email on 30 November 2008 and apologised for the delay in responding. It stated that it was likely to be able to respond by 4 December 2008 "if not before". The Commissioner contacted the Department on 2 December 2008. He agreed to allow the Department until 5pm on 4 December 2008 to provide a response to his letter of 28 October 2008, however stated that he would consider whether it was appropriate to serve an Information Notice, to require the Department to respond, if a reply had not been provided by the revised deadline.
15. Having not received a response, the Commissioner telephoned the Department on 5 December 2008 to confirm whether a response had been dispatched. The Department advised that a response had not been sent and that it would be unlikely to provide such a response pending further internal discussions. The Department estimated it may be able to respond in approximately one week.
16. The Department wrote to the Commissioner on 12 December 2008 and responded to the points raised in his letter of 28 October 2008.

Background information

17. During the course of its correspondence with the Commissioner, the Department referred to an inquiry carried out into MMC, by Professor Sir John Tooke. The reports are publicly available and published online at the following link:

http://www.mmcinquiry.org.uk/Final_8_Jan_08_MMC_all.pdf
18. The Information Tribunal (the "Tribunal") in the case of *Office of Government Commerce v Information Commissioner* (EA/2006/0068 and EA/2006/0080) (the OGC case) set out some useful background information to the Gateway review process. The Commissioner does not intend to reproduce this information here, however the decision can be found online at the following link:

http://www.informationtribunal.gov.uk/Documents/decisions/office_of_govern_co_mmerce_v_infocomm%20_2May07.pdf

19. The OGC appealed this decision to the High court (*Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008)) where it was held that the Tribunal had taken an irrelevant consideration into account when reaching its decision, and the matter was remitted back to a differently constituted Tribunal to be reconsidered.
20. At the Tribunal's second hearing, the Commissioner's decision was again upheld. The Commissioner shall refer to this case as "OGC No 2". The Tribunal's decision in respect of OGC No 2 is available online at the following link:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i293/OGC%20v%20IC%20\(EA-2006-0068%20&%200080\)%20Decision%2019-02-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i293/OGC%20v%20IC%20(EA-2006-0068%20&%200080)%20Decision%2019-02-09.pdf)

Analysis

Procedural matters

General right of access

21. Section 1(1) provides –

“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.”

22. For reasons which shall be explained below, the Commissioner considers that the information the Department withheld from the complainant should be released to him. Therefore, the Department has breached section 1(1)(b) of the Act in failing to communicate this information to the complainant in response to his request.

Time for compliance

23. 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.”

24. By failing to provide the complainant with information to which he is entitled, within twenty working days of the date of receipt of the complainant's request, the Department has breached section 10(1) of the Act.

Exemption

Formulation of Government Policy

25. 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.
26. The Department explained in its refusal notice that it considered the section 35(1)(a) exemption to apply. It did not elaborate as to why the exemption applied, save to say that the requested information related to the formulation or development of government policy.
27. Following the decision of the Tribunal in *DfES v the Information Commissioner and the Evening Standard* (EA/2006/0006) (the “DfES case”), the Commissioner has taken a broad view of what is meant by the term ‘relates to’. In order to assess whether the withheld information in fact related to the formulation or development of government policy the Commissioner asked the following questions of the Department:
- Does the withheld information relate to the formulation of government policy or the development of government policy?
 - What policy was being formulated or developed?
28. The Department responded as follows:
- MMC is a policy “to ensure all doctors are properly and fully trained, to standards set by the relevant statutory body, and competent to provide the majority of front-line medical management and care for patients and support for their families in keeping with a National Health Service fit for [the] 21st century. The initiative aims to significantly reduce the extent to which medical services are delivered by doctors in training, improve the quality and safety of services delivered to patients, increase the efficiency and productivity of medical teams working in hospitals and provide doctors in training with an improved programme of professional development.”

29. The Commissioner has reviewed the full and unredacted copy of the information withheld from the complainant and has considered the arguments made by the Department as set out at paragraph 28. Further, the Commissioner has considered the nature of this Gateway Review report; namely that it is a “Gate 0” review. Gate 0 reviews are likely to fall within section 35(1)(a) if they relate to a major government programme, whereas later stage Gateway reviews may not necessarily fall within section 35(1)(a). The Commissioner is of the view that the information relevant to the request relates to the development of government policy and therefore the section 35(1)(a) exemption is engaged.
30. Section 35(1)(a) is a qualified exemption; the Commissioner has therefore gone on to consider the public interest test.

Public interest test

31. The Department offered the following arguments in favour of disclosing the information requested:
- the public interest in transparency, to allow public scrutiny of whether government projects are being managed effectively and are responding properly to information contained in Gateway reports;
 - the public interest in allowing public scrutiny of whether the Gateway process is effective; and
 - the public interest in accountability of projects involving considerable public expenditure or potential public benefit.
32. Conversely, the Department suggested the following arguments in favour of withholding the information, ultimately concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure:
- that the process of formulating policy had not been completed at the time of the complainant's request;
 - disclosure would inhibit candour amongst interviewees involved in future Gateway reviews, who would be concerned that comments made could be attributed to them;
 - disclosure may result in future Gateway reports being written for a wider audience than initially intended. This in turn would see the reports becoming less prompt, less robust, and/or narrower in scope;
 - disclosure may call into doubt the integrity of the Gateway review process, which may result in departments being less willing to make full use of the Gateway process; and
 - the Gateway review process has ‘led to demonstrable value for money gains’ and therefore there is a public interest in maintaining the integrity of this process.

Public interest in maintaining the exemption

33. The Tribunal in both of the OGC cases upheld the Commissioner's decision to order disclosure of Gateway review reports into the Home Office's identity cards programme. Both the Tribunal and High Court decisions make it clear that

Gateway review reports may be disclosed, if the public interest arguments are not sufficiently strong to outweigh the assumption in favour of disclosure.

34. The Commissioner asked the Department to provide specific examples, relating directly to the withheld information, to explain why it considered the negative outcomes set out at paragraph 32 may arise. This was because many of the arguments the Department had raised were generic ones which related to the notion of disclosing Gateway reviews in general, rather than the specific Gateway review report in question.

Timing

35. The Department had argued that the development of the MMC policy was ongoing, suggesting that the formulation, development, implementation and review of policy is a 'seamless web', rather than a process involving several distinct stages. This notion was rejected by the Tribunal in the DfES case and in the case of *the Secretary of State for Work and Pensions v Information Commissioner* (EA/2006/0040) (the DWP case), where it stated that policy formulation was a series of decisions rather than a continuing process of evolution' (paragraph 56). The Commissioner does not therefore accept the Department's argument that the development of MMC policy was ongoing at the time of the complainant's request; instead he believes that the formulation and development of the policy had come to an end at least by the date of the launch of MMC. He therefore considers that public interest factors that may have been relevant in maintaining the exemption during the process of policy formulation, had reduced by the time the request was made.

Names of interviewees/possibility of views being attributed to individuals

36. Whilst those interviewed may make recommendations about a particular programme, the decision whether to adopt the recommendations lies with the Senior Responsible Owner (SRO) of the programme. The Department has claimed that potential interviewees would not wish to take part in future reviews if it may appear that they had contributed to the formulation or development of unsuccessful policies, and that this would be contrary to the public interest, however it has not provided any specific examples of individuals who have refused to participate in Gateway reviews through fear of their comments being made public. This has become known as the 'chilling effect'.
37. The Tribunal, in the case of *Foreign and Commonwealth Office v Information Commissioner* (EA/2007/0047) considered the extent to which the disclosure of particular information requested under the Act could be said to create a 'chilling effect'. The Tribunal referred to its earlier decision of *HM Treasury v Information Commissioner* (EA/2007/0001) and stated that "it was the passing into the law of the FOIA that generated any chilling effect [rather than the potential disclosure of any particular piece of information], 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."

38. In OGC No 2, the Tribunal considered the issue of the identification of participants' by the comments that had been made. It stated at paragraph 171 that:

“...the OGC, rightly in the Tribunal's view, stressed that ... non-attributability of comments made in Gateway Reports underlay the success of the process... Reflecting the evidence it received from various witnesses, the Tribunal could see that the Reports, though including a list of interviewees, at no point attributed specific views to the names of the parties set out. In the case of one Report, the Tribunal found there to be little, if anything, to suggest such adverse comments as were contained could be in any way be attributable to any particular interviewees or parties. It may be that an educated observer or commentator could speculate on the originator of a particular statement or opinion, but in the Tribunal's view no-one apart from “insiders” could do so with any degree of assurance. Moreover, the insiders would already know, or be likely to know, who is likely to have said what...”

39. The Commissioner has reviewed the withheld information, which includes a list of the twenty individuals interviewed in the preparation of the Gateway review report. He does not consider that any of the comments contained within the report may be attributed to the individuals listed in it.
40. Further, even if comments within the report could be attributed to individual interviewees, many of the interviewees hold senior positions within high profile organisations. Whilst it appears that those who participated in the Gateway review did so voluntarily (the Department has implied that such individuals could have refused to participate if they had wished), the Commissioner considers it is reasonable to have similar expectations of the participants as the Tribunal does of civil servants (see paragraph 37 above). This is because it could be said that such individuals and organisations have a professional duty to advise the Government on areas in which they have expertise. The Commissioner therefore believes that it is unlikely that such individuals would have been deterred from participating in the Gateway review, on the grounds that comments they had made in the interviews may be able to be attributed to them and may be made public, on topics relevant to their professions and where they had lent expertise. In support of this argument, the Commissioner notes that a number of the individuals interviewed as part of the Gateway review were also interviewed by the MMC inquiry, and again this participation appears to have been on a voluntary basis. The list of the interviewees to the inquiry and the inquiry's reports have been published. Clearly, those interviewees were not deterred from participating in the inquiry, even though their participation has been made public.
41. Given that the Commissioner considers that if the interviewees in question had known this specific report would be made publicly available, they would still have participated in the review, he does not accept the Department's argument that disclosure of this report would inhibit candour and frankness of debate in respect of different, future projects.

Reports would take longer to produce and may result in inefficiencies

42. The Department claims that, if it were known that Gateway review reports may be made available to the public, the reviewers would take care to produce carefully worded reports which would take longer and cost more to produce. The Department suggests that the reviewers would prepare the report in such a way that would encourage the recommendations within it were taken up, as opposed to the current situation where the report is produced solely for the SRO, who decides how to respond to those recommendations.
43. The Commissioner has considered the Gateway review report in question. Whilst the report is fairly blunt, it is also well balanced and highlights positive as well as negative aspects of the MMC policy. The Commissioner considers that it would be unlikely the review team would have had to make considerable effort to word this report more carefully, and thus make it suitable for public dissemination, as the Department has suggested. Further, the Department has not highlighted a specific example, within the Gateway review report in question, where it believes the review team would have worded the report more carefully if it had been envisaged that the report would be made publicly available.
44. As with the arguments set out at paragraph 41, the Commissioner considers that given that he does not believe this Gateway review report would have been delayed or written in a different way if it had been known it were to be disclosed, he does not consider that future reviews would be subject to delay or would result in the Gateway process becoming less efficient if this information were to be disclosed.

Departments would be less willing to put forward projects for review

45. The Department has asserted that “policy officials have consulted with a large number of programme and project teams and confirm the view that the possibility of wider dissemination of these review reports is already a major inhibitor in projects coming forward for review” however has been unable to cite specific examples of such projects, as “these views have always been expressed verbally”.
46. In relation to a separate public interest consideration, the Department explained that significant ‘value for money gains’ could be attributed to the Gateway review process. Indeed, the Health Gateway review team estimated that £173 million had been saved through 11 Gateway reviews conducted in 2006/07. If the Gateway review process is responsible for such significant savings as the Department suggests, the Commissioner does not consider that responsible SROs would be deterred from bringing projects forward for review out of concern that the completed review may be made publicly available. He therefore considers that this public interest factor carries little, if any, weight.

Positive aspects of Gateway review process would be lost

47. As explained at paragraphs 36 to 46 above, the Commissioner does not consider that the Department’s concerns would be realised if the requested information

were to be released. Therefore, it follows that he does not consider that the positive aspects of the Gateway review programme would be lost if the information were disclosed.

Public interest in disclosure

48. There is an assumption in favour of disclosure, which the Tribunal described in the DWP case as:

“an *assumption* built into [the Act] that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities”.

Transparency

49. The Department has acknowledged that there is a public interest in transparency, to allow public scrutiny of whether government projects are being managed effectively and are responding properly to information contained in Gateway reports. The Executive Summary of the MMC inquiry's interim report sets out some useful background information regarding the problems arising following the launch of MMC, which it describes as a 'crisis'¹. There is a strong public interest in allowing the public to scrutinise whether the recommendations made by the Gateway review report were taken up and the extent to which the problems arising following the launch of MMC could have been avoided. Further, there is a public interest in being able to hold the Government to account, and to ensure that the stated aims of the MMC policy, for example the development of a NHS fit for the 21st century, which delivers high quality services to its patients, come to fruition.
50. There is a public interest in the public being made aware of the complete picture surrounding a policy, and avoiding the suspicion of 'spin', as recognised by the Information Tribunal in the cases of *Cabinet Office v Information Commissioner* and *Lamb v Information Commissioner* (EA/2008/0024 & 0029), where the Tribunal stated, at paragraph 82:

“the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision-making process in context.”

During the course of his investigation, the Commissioner asked the Department:

“What impact, if any, did [the failure of the Medical Training Application Service (MTAS) and the concerns regarding MMC] have on the health service, for example staffing issues?”.

The Department responded as follows:

¹ http://www.consultationfinder.com/econsult/uploaddocs/Consult1/MMC_InquiryReport.pdf

“there is little doubt that the MTAS difficulties experienced early in 2007 had an effect on the morale of trainee doctors. The Department of Health has acknowledged those difficulties and apologised unreservedly for the distress and anxiety caused to junior doctors and their families”.

The MMC inquiry, however, highlighted the following problems arising from the failure of MTAS and the subsequent concerns this highlighted regarding MMC:

- distress caused to applicants;
- concerns regarding selection for speciality training;
- concerns whether doctors classified as a consultant would be prepared for this role; and
- posts left unfilled.

The Department's response demonstrates how the public could be prevented from being made fully informed about an issue by not being provided with the source information.

Efficiency

51. The Department has stated that there is a public interest in allowing scrutiny of whether the Gateway process itself is effective. Disclosure of the requested information would allow the public to compare the recommendations made by the Gateway review report with the weaknesses with MMC as identified by the MMC inquiry, and thus satisfy themselves as to whether the Gateway review correctly identified the risks and weaknesses associated with the project. There is a considerable public interest in the public being able to assess whether the Gateway review process is responsible for the significant value for money savings as suggested by the Department.

Accountability

52. The Department has asserted that there is a public interest in the accountability of projects involving considerable public expenditure or considerable public benefit. The formulation, development and implementation of a new policy inevitably requires the spending of public money. The Department's intended aims as regards the MMC project are set out above at paragraph 28 and, if it had been successful, would have conferred considerable benefit for the public in reforming the health service. There is a strong public interest in allowing the public to scrutinise the spending of public money, especially where these projects have been unsuccessful.
53. The Commissioner's decision in this case is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The Decision

54. The Commissioner's decision is that the public authority did not deal with the following elements of the request for information in accordance with the requirements of the Act:
- It incorrectly withheld the information under section 35(1)(a), thus breaching section 1(1)(b) of the Act; and
 - It breached section 10(1) of the Act by failing to provide the requested information within twenty working days of the date of receipt of the request.

Steps Required

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

To disclose to the complainant a copy of the information requested.

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

Failure to comply

57. 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

58. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

In March 2008, the Commissioner issued the Department with a [practice recommendation](#) which identified various problems with the Department's handling of requests and with subsequent appeals to his office. The recommendation included a reference to the timeliness with which the authority responded to his case officers' enquiries. The Commissioner is concerned to note that in this case the delays in obtaining the Department's reasons for applying the section 35(1)(a) exemption postdate his practice recommendation.

The Commissioner is also concerned to note that the Department sought to rely on rather generic arguments to withhold information. The application of the exemption in this way is consistent with the poor practice highlighted in the Commissioner's practice recommendation of March 2008.

As he has noted in a previous Decision Notice ([FS50175121](#)), the Commissioner accepts that implementation of the actions outlined in his practice recommendation will take some time. He will continue to monitor the Department's progress in this regard and hopes that it will demonstrate an improvement in relation to both current and future requests and to subsequent investigations carried out by his office.

Right of Appeal

59. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of July 2009

Signed

**Steve Wood
Assistant Commissioner**

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

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.”

Section 1(3) provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

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.”

Section 10(2) provides that –

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

Section 10(3) provides that –

“If, and to the extent that –

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

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

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and

- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"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;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.”