Information Commissioner's Office

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 March 2010

Public Authority: Department for Business, Innovation and Skills (BIS)
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant requested the submissions the UK made to an EU strategy paper entitled 'Global Europe: Competing in the World'. The public authority explained that it did not make any formal written submissions, but the content of the paper was discussed at two meetings at which UK representatives were present and informal notes of these meetings were held. The public authority therefore explained that it considered these two meeting notes to fall within the scope of the complainant's request, however it considered these notes to be exempt from disclosure on the basis of section 35(1)(a) (formulation and development of government policy) and the public interest favoured maintaining the exemption. The Commissioner has concluded that although the information falls within the scope of section 35(1)(a) the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The Commissioner has therefore ordered the public authority to disclose the two meeting notes.

The Commissioner's Role

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

Background

2. In October 2006 the European Commission ('the Commission') published a strategy paper entitled 'Global Europe: Competing in the World' ('the paper').[1]

[1] http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm

This paper formed part of the Global Europe framework which aimed during the period of Autumn 2006 and Spring 2007 to set the agenda for EU trade policy with a series of linked strategies on market access, trade defence instruments, protection of intellectual property rights, EU policy on China and a new generation of bilateral trade agreements to complement the EU's commitment to the World Trade Organisation (WTO).

3. The request focused on the UK's submissions to this strategy paper and an earlier draft of the paper which had the reference number 318/06.

The Request

4. The complainant submitted the following request to the Department for Business, Enterprise & Regulatory Reform (BERR)[2] on 9 October 2007:

> 'I would like to access all submissions made by the UK government, and positions on, the formulation of the EU strategy paper: "Global Europe: Competing in the world", launched by Commissioner Mandelson in October 2006.
>
> Specifically I would like to request any UK government submissions on the EC:DG-Trade document 'Draft communication on external aspects of competitiveness', Brussels 28 June 2006, Ref. 318/06 and the UK government's position at the subsequent 133 Committee on 7 July 2006.'

5. On 7 November 2007 BERR contacted the complainant and explained that it had received his request and it considered the information falling within the scope of it to be exempt from disclosure on the basis of section 35(1)(a) of the Act (formulation and development of government policy) which was a qualified exemption and thus subject to the public interest test. However, BERR explained that it had not yet reached a decision as to where the balance of public interest lay and therefore in line with its right under the Act it was extending the time taken to consider the public interest test. BERR said it hoped to be in a position to provide a response by 23 November 2007.

6. BERR contacted the complainant again on 26 November 2007 and explained that the UK had not made any written submissions on draft paper 318/06 or on the Global Europe Communication published in October 2006. BERR went on to explain that the UK did express a position on the draft paper 318/06 at an ad-hoc meeting of the Enterprise Policy Group (EPG) on 30 June 2006 and at the meeting of the Article 133 Committee on 7 July 2006. However, BERR noted that no formal meeting notes were produced for either of the two meetings although it did hold an informal, internal note of each meeting. BERR confirmed that it considered both meeting notes to fall within the scope of the exemption contained

[2] BERR, the public authority to which the complainant submitted his request and the public authority which the Commissioner communicated with during his subsequent investigation ceased to exist on 5 June 2009 and was replaced with BIS. This notice is therefore served on BIS although the public authority referred to throughout the notice is addressed as BERR.

at section 35(1)(a) of the Act and that it had now concluded that the public interest favoured maintaining the exemption.

7. On 28 November 2007 the complainant asked BERR to conduct an internal review of this decision.

8. BERR subsequently contacted the complainant on 22 January 2008 and confirmed that the internal review had concluded that the information he requested had been correctly withheld on the basis set out in the refusal notice.

The Investigation

Scope of the case

9. On 27 February 2008 the complainant contacted the Commissioner to complain about BERR's decision to refuse to disclose the two notes falling within the scope of his request.

Chronology

10. Due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner was not able to begin his investigation of this complaint immediately. Therefore the Commissioner did not contact BERR until 28 January 2009 in relation to this complaint. In this letter the Commissioner asked to be provided with a copy of the withheld information and a detailed explanation as to why BERR had concluded this information was exempt on the basis of section 35(1)(a).

11. BERR provided the Commissioner with submissions to support its application of section 35(1)(a) and copies of the withheld information on 19 March 2009.

12. Having reviewed these submissions the Commissioner contacted BERR again on 25 March 2009 and asked it to clarify a number of points in relation to its reliance on section 35(1)(a), including identifying which particular policy or policies it believed the withheld information related to and when it believed the formulation and development of these polices had been completed.

13. On 22 April 2009 BERR provided the Commissioner with a response to the additional points on which he had sought clarification.

Findings of fact

14. The Commission consulted Member States, including the UK, on the draft 318/06 but it did not do so on the final version of the paper. Furthermore, the UK did not make any actual written submissions to the Commission on the draft paper 318/06.

15. The UK did however advance a position on the draft 318/06 at an ad-hoc meeting of the Enterprise Policy Group (EPG) on 30 June 2006 and at the meeting of the Article 133 Committee on 7 July 2006. No formal meeting notes of either meeting were created; however, informal, internal DTI (BERR's predecessor body) meeting notes for each meeting were created by the UK's representative at each meeting. It is these two notes which fall within the scope of this request.

16. The EPG was established by the Commission in 2000 which the aim of advising the Commission on enterprise policy issues. The EPG is composed of two different sections: one for representatives of Member States (Directors-General of industry and high-level administrators responsible for SME's) and the second being the Professional Chamber for high level experts from the enterprise community. The meeting note dating from 30 June 2006 relates to a meeting of the first section of the EPG.

17. The Article 133 Committee decides Community trade policy and is technically a Working Group of the Council of Ministers. (The Council of Ministers is an inter-governmental body which provides the opportunity for policy making and discussion Member States.) The Article 133 Committee is comprised of representatives of each Member State and discusses the full range of trade policy issues affecting the Community. The name of the Committee is derived from the relevant article of the EC Treaty.

Analysis

Exemption

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

18. Section 35 is a class based exemption; in order for the exemption to be engaged a public authority does not have to demonstrate any particular level of harm, only that the information falls within the scope of the exemption.

19. The limb of section 35 which BERR has argued the two pieces of withheld information are exempt under is section 35(1)(a) which states that:

> '35(1) 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

20. The first question the Commissioner has to therefore determine is whether the two pieces of withheld information relate to the formulation or development of government policy.

21. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are

put forward, often to a Minster. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Section 35(1)(a) cannot apply to information relating to the later stages of stages of a policy process, i.e. the implementation stage onwards.

22. In consideration of this case the Commissioner has been guided by the Information Tribunal decision in the case DFES v Information Commissioner & the Evening Standard (EA/2006/0006*)* in which the Tribunal commented on the term 'relates to' contained in section 35(1). The Tribunal suggested that the term 'relates to' could be interpreted broadly, and although this approach has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which causes no significant harm to the public interest. The Tribunal's approach also demonstrates that where the majority of the information relates to the formulation or development of government policy then any associated, incidental or background information that informs a policy debate should also be considered as relating to section 35(1)(a).

23. The Commissioner accepts that the decision making process identified by BERR, i.e. developing the UK's position on the issues likely to be covered in the paper and shaping how the paper should address various trade policy priorities to reflect the UK's government's position, is an example of policy formulation and development. Furthermore, having reviewed the withheld information it is clear to the Commissioner that it is directly related to this policy making process.

24. In reaching this conclusion, the Commissioner notes that although the two meetings to which the notes relate comprised representatives of numerous Member States and the purpose of each meeting was the discussion of Commission trade policy, the Commissioner has established that the content of the meeting notes relates solely to issues advanced by the UK's representatives. Thus the meeting notes are linked to the UK's government's position on how the EC policy should be shaped as opposed to simply being a discussion of the Commission's trade policy. The Commissioner is therefore satisfied that the although the ultimate policy which is being discussed is the Commission's position on trade policy and thus the withheld information inevitably has a European dimension, the withheld information focuses on the UK's views of how that European trade policy should be developed. It is these views which can be correctly categorised as 'government' policy. Section 35(1)(a) was therefore correctly engaged.

Public interest test

25. However, section 35 is a qualified exemption and therefore the Commissioner must consider the public interest test set out in section 2(2) of the Act and whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

26. BERR identified the following public interest arguments in favour of withholding the information:

27. There is a public interest in the public understanding what the UK's position was when the paper was being developed.

28. There is a general and inherent public interest in increasing the transparency of government.

29. In his request for an internal review the complainant argued that there was a high public interest in disclosure of the informal, internal notes because it would appear that these meetings appear to be the only place where the UK government expressed views to the Commission about the content of the paper. Furthermore, the complainant argued that Global Europe strategy as set out in the paper sets out a policy for internal EU liberalisation, and external liberalisation with certain developing countries which contain over 2 billion people. Given the significant impact which the paper will have across the EU and the world there is a high public interest in knowing what the UK's government's role in its formulation was.

Public interest arguments in favour of maintaining the exemption

30. BERR has identified the following arguments in favour of maintaining the exemption:

31. Disclosure of the information could provide a misleading picture of the UK's views on these aspects of trade policy because the notes were written for an internal, rather than an external, audience and moreover do not present the full picture of all of issues considered by UK officials.

32. The content of the two notes themselves is unlikely to add significantly to the public's understanding of the UK's position on the issues under discussion beyond that included in information already placed into the public domain.

33. Indeed BERR suggested that the public interest in disclosure of the notes after the paper had been published in October 2006 was low because the document itself sets out the EU's trade policy in a more considered and comprehensive way.

34. BERR suggested that the need for transparency was sufficiently served via a number of mechanisms: domestic parliamentary scrutiny processes; the UK's view of the final paper as detailed in the Explanatory Memorandum which is publicly available; the UK's general openness about its trade policy priorities.

35. In its internal review letter to the complainant BERR suggested that there was a need to maintain good relations with the Commission and Member States as debate on trade policy proceeds. Any discussion to this discussion of trade policy would be likely to diminish the effectiveness of that work.

36. Finally BERR provided detailed arguments to support its position that disclosure would result in a 'chilling effect'; i.e. disclosure of the withheld information would result in a loss of frankness and candour by officials who were required to write such notes in the future. This would lead to poorer quality advice and less well formulated policy and decision making.

37. To support this argument BERR made the following points:

38. Disclosure of these two notes would result in officials who wrote similar notes in the future to change their behaviour in one of two ways: firstly any comments they made would be less frank in nature and secondly officials would be less willing to record personal insights.

39. This change in behaviour would occur before because the public pressure of disclosure would mean that officials would alter what they recorded to ensure that they were proactively writing for an external audience rather than an internal one; in doing so officials would feel compelled to focus on wider issues about the policy discussions rather than specific policy points; the nature and tone of the notes would be altered resulting in a loss of frankness and candour.

40. BERR argued that these changes would have a significant and deleterious affect on the policy development process because of the nature of the notes which were focus of this request. This is because such notes were used by the official attending these meetings to provide initial comments and opinions on issues raised during the meeting and the policy is then discussed allowing the UK position to be considered privately during live negotiations. Furthermore, BERR explained that the recording of minutes in this fashion was key to ensuring that the department has a full record of exactly how policy positions were put forward in these forums.

Balance of the public interest arguments

41. In considering the balance of the public interest arguments the Commissioner has taken into account the underlying principles involved in balancing the public interest test under section 35(1)(a) which were set out by the Tribunal in the DFES case cited above. The Commissioner has focused on two of these principles in particular, the first being the timing of the request:

> 'The timing of a request is of paramount importance…Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the…threat of lurid headlines depicting that which has been merely broached as agreed policy.' (Para 75, (iv))

42. And the second principle being the content of the information itself:

> 'The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts

> and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.' (Para 75, (i))

43. In relation to the question of timing of the request, the complainant submitted his request a year after the policy formulation and development had been completed on the EC strategy paper and trade document. The Commissioner finds that he has not been provided with convincing arguments from BERR has to how the information in question was significantly linked to other ongoing policy developments. Disclosure of the information would not impact on the "safe space" required for these other related policy areas.

44. In terms of attributing weight to the public interest arguments in favour of maintaining the exemption, the Commissioner has not given the argument that disclosure of the information may prove to be misleading any real weight. Whilst the Commissioner accepts that the withheld information may only give a limited insight into the issues considered by UK officials, if the information was disclosed BERR would be entitled to provide further information into order to set this information into some sort of context to ensure that it was not misleading. In making this point the Commissioner has been influenced by the comments of the Tribunal in HM Treasury v Information Commissioner (EA/2007/0054) which considered how the public would use information disclosed under the Act:

> 'We were wholly unpersuaded by Mr Neales's further point, that the public might wrongly assume that a measure was adopted or rejected by reason of the rationale used by the Civil Servant as a working assumption for the provision of advice, whereas the Ministers actual reason for adopting or rejecting it might be different, and that would lead to difficulties. Any Minister in that position would be able to explain the status of the official's assumption and what his own thinking was'. (Para 64)

45. Similarly the Commissioner has not placed any real weight on BERR's argument as outlined its internal review letter that disclosure would affect its ability to maintain good relations with the Commission and Member States. This is because BERR has not provided the Commissioner with any clear reasoning as to how disclosure of the withheld information would affect its relations with other parties; the Commissioner presumes BERR's view is that disclosure would affect relations because the UK would be revealing what are effectively informal minutes of what were presumably private discussions and thus disclosure could be seen as betraying a confidence. Furthermore, the Commissioner believes an impact on relations with the Commission or Member States is not something which section 35(1)(a) is inherently designed to protect; rather it is an argument more akin to section 27, the international relations exemption. The Commissioner notes that BERR did not make reference to this argument in its submissions to him.

46. In relation to the mechanisms that already provide some form of transparency in the Commissioner's opinion the transparency provided by the domestic parliamentary scrutiny process is a fairly generic and top level one applicable to virtually all cases involving government policy. The Commissioner is not aware of

any reason why this argument attracts any particular weight in this case. That is to say BERR has not pointed at a particular parliamentary debate or select committee which scrutinised or debated the UK's contribution to the EU paper in question (although the Commissioner understands that there is a specific select committee, the European Scrutiny Committee which considers documents produced by the EU).

47. Nevertheless, the Commissioner is prepared to accept that the need for transparency on this issue is met, to some extent, by the other mechanisms BERR has highlighted; namely the Explanatory Memorandum, the UK's general openness on trade issues via for example the Trade and Investment White Paper 2004 and the regular discussions of the UK's trade policy between Ministers and officials with stakeholders; and the summary of the UK's position provided to the complainant in the internal review. In this summary BERR explained that the UK's position in the discussions was to emphasise the need to maintain an open EU market as one of the key means to deliver EU competitiveness; make clear UK opposition to any proposition that we should restrict access to EU markets as a means to gain access to third country markets; and to make clear the need to discuss WTO reform in more detail before putting forward particular proposals.

48. However, simply because there is similar information in the public domain, the Commissioner does not believe that this alleviates the need to disclose further information. Nor does the fact that by the time the complainant had submitted his request the paper itself had been published. In the Commissioner's opinion there is always a public interest in disclosure of information which would provide the fullest picture as possible. This view is supported by the comments by the Tribunal in Baker v Information Commissioner and DCLG, EA/2006/0043 which argued that disclosure of all information related to a particular decision could improve confidence in a public authority by removing and suspicion of 'spin' surrounding the decision. (See Tribunal comments at para 24). The issue that therefore becomes relevant is to what extent the content of the withheld information would actually add to the information that is already in the public domain or enhance the public's understanding of the issues at stake. The Commissioner has considered this point below in attributing weight to the arguments in favour of disclosure.

49. The final, and in fact the central, argument that BERR has advanced in favour of maintaining the exemption is that linked to the chilling effect. As summarised above the chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate and advice which would flow from the disclosure of information. This could result in poorer quality advice and less well formulated policy and decisions. The chilling effect can encompass a number of related scenarios:

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

and candour with which relevant parties will contribute to other future, different, policy debates; and

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

50. The first two scenarios are not relevant to the consideration of this case as the policy making process in question – i.e. shaping the content of the paper – was concluded by the time the request was submitted. In considering the weight that should be attributed to the third scenario the Commissioner has taken into account the scepticism with which numerous Tribunals have treated the chilling effect arguments when they have been advanced by other public authorities. The following quote from the Tribunal in Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047) accurately summarises the position of various Tribunals:

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

51. However, the Commissioner has taken into account the comments of Mr Justice Mitting when hearing a Tribunal decision which was appealed to the High Court. Whilst supporting the view of various Tribunals that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

> 'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

52. In light of the various pieces of case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence how disclosure of the information in question would result in effects suggested by the public authority.

53. The Commissioner has considered the content of the meeting notes and the timing of the request (the immediate policy development being complete, over a year had passed). He finds that disclosure would not be likely to lead officials who attend these forums in the future being significantly more circumspect in the comments which they chose to record or a significant change to the frankness of the views expressed. In considering the likelihood the Commissioner notes that the representatives of the UK will continue to take part in and will be under a duty to express the UK's position at forums to discuss trade policy issues. There will be a business need within the department for some form of record, reporting back from the meeting. In this case the notes are relatively short, mostly containing some limited comments about the meetings. The Commissioner does accept a small number of sentences are more revealing about UK views expressed at the meeting. The Commissioner considers that there will always be a business need for civil servants to report back their observations and civil servants have a duty to create such records. The Commissioner finds that, in all the circumstances, the disclosure of the notes cannot reasonably be expected to have the significant effects on candour or record keeping suggested. This is apart from one sentence (highlighted by BERR) which he accepts would be more likely to have a significant chilling effect on candour.

54. The Commissioner considers that the comments of the Tribunal in recent case, ECGD v Information Commissioner and Campaign Against the Arms Trade (EA/2009/0021) are also relevant:

> '70. We found that claims by Mr Radford and Mr Cauthery that parts of their advice would, in future, only be given orally was exaggerated. Mr Radford accepted that, in many instances, this would not be possible, as he had to have a paper record to demonstrate the analysis undertaken. By "taking the guts out of all the papers" he would not be doing his duty.'
>
> '82…. Although there may well be some inhibition on the amount of detail recorded in a Paper or Minutes, we consider that in order to provide the advice needed and to ensure that Risk Committee made the appropriate decision, the possibility of disclosure would not cause a significant effect on the way in which officials conducted the necessary work. We are sure that they would not fail in their duties, especially where the public purse was at risk….'

55. Therefore, apart from one sentence, the Commissioner has placed only limited weight on the arguments in favour of maintaining the exemption advanced by BERR. As noted above he has not been provided with convincing arguments from BERR as to how the information in question was significantly linked to other

ongoing policy developments related to EU trade. He would accept the need to place more weight in favour of maintaining the exemption if there was a clearer link, however the more general assertions were not supported by enough detail (e.g. scenarios) and the nature of the withheld information does not support a general chilling effect.

56. Turning to the weight which should be attributed to the arguments in favour of disclosure the Commissioner agrees with BERR that there is a strong inherent public interest in disclosure of information which would make government more transparent and accountable. Whilst these are of course factors which are regularly relied upon in support of concluding that the public interest favour of disclosure, this does not diminish their importance as they are central to the operation of the Act thus are likely to be employed every time the public interest test is discussed.

57. As discussed the weight attributed to such arguments must be made with reference to the content of the information itself. Clearly, although the Commissioner cannot discuss at any length or depth the content of the withheld notes, he does feel able to say that whilst they may contain specific comments which may provide further transparency about the UK's position during the discussions of the draft papers, the notes are both relatively short and thus the extent to which they add to the information already in the public domain could be seen as limited.

58. Nevertheless, the Commissioner accepts that the point advanced by the complainant that as the paper has the potential to affect huge numbers of people not just in the EU but also across the world, there is a high public interest in disclosing information which reveals how this paper was shaped, and in particular the UK's role in it. As noted above, no formal submission was made by the UK and these records are the only information available on the position the UK advanced on the strategy paper and draft DG-trade document. The full picture argument referenced above carries significant weight.

59. Having considered the public interest arguments carefully the Commissioner has concluded that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The decision for one sentence is more finely balanced but the balance still favours disclosure.

Procedural Requirements

60. Part I of the Act includes a number of procedural requirements with which public authorities must comply.

61. These include section 1(1) which states that:

> 'Any person making a request for information to a public authority is entitled –
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> (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.'

62. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt.

63. As the Commissioner has decided that public interest under section 35(1)(a) does not favour withholding the requested information, the two meeting notes must be disclosed to the complainant. Failure to provide this information initially in response to the request constitutes a breach of sections 1(1)(b) and 10(1) of the Act.

The Decision

64. The Commissioner's decision is that the public authority incorrectly applied section 35(1)(a) of the Act.

65. The public authority also breached sections 1(1)(b) and 10(1) of the Act by failing to provide the information requested.

Steps Required

66. The Commissioner requires the public authority to disclose the withheld information.

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

Failure to comply

68. 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.

ICO Information Commissioner's Office

Right of Appeal

69. 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.

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 1st day of March 2010

Signed ………………………………………………..

Steve Wood
Assistant Commissioner

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 –
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> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
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> (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 2(2) provides that –

> "In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –
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> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
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> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

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

Section 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
   (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant t the request, or
   (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

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.