

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 December 2010

Public Authority: The Treasury Solicitor's Department
Address: One Kemble Street
London
WC2B 4TS

Summary

The complainant requested that all the information that he was not provided under two previous Subject Access Requests (which concerned him) was provided to him by the public authority under the Freedom of Information Act. The public authority provided a schedule of the information that was held, provided some information and withheld other information by virtue of section 42(1) [legal professional privilege] and section 40(2) [third party personal data]. The public authority upheld its position in its internal review.

The complainant referred this case to the Commissioner. During the course of his investigation, some of the information was provided to the complainant that was originally withheld under the exemptions.

The complainant asked the Commissioner to consider the residue of the information. The Commissioner has determined that for all the information withheld under section 42(1) the exemption was engaged and the public interest favoured the maintenance of the exemption. For the information withheld under section 40(2), the Commissioner has concluded that some of the information was correctly withheld and other information was not.

The Commissioner has also found a number of procedural breaches and requires that the public authority discloses some of the information that it has withheld within 35 calendar days.

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. The complainant has raised a number of issues about how the public authority has dealt with cases that relate to his firm. He has made a number of information requests under both the Act and the Data Protection Act 1998 (the DPA) to understand how these issues have been dealt with. He has also made overlapping requests and has referred all the aspects for determination by the Commissioner.
3. It is helpful to outline the previous correspondence that was referred to in the request that was referred to the Commissioner. This is necessary to understand what was requested in this case.
4. On 1 July 2003 the complainant made a Subject Access Request that asked for all personal information and all material relating to him held by the public authority and any other organisation for which it was responsible. On 11 August 2003 the public authority provided some of his personal information and withheld other information because it believed that it was covered by legal professional privilege and exempt from the subject access provisions of the DPA.
5. On 20 September 2007 the complainant made another Subject Access Request that asked for all the information that related to him. On 24 September 2007 the complainant reiterated that he wanted all the information about himself. The public authority answered it on 12 November 2007. It provided some of information, explaining that it viewed the remainder as being exempt from the subject access provisions of the DPA.

The Request

6. On 14 November 2007 the complainant wrote to the public authority and requested the following information:

“Freedom of Information Request – linked to subject access requests

1. *With letters dated 11.08.2003 and 12.11.2007 the Treasury Solicitor provided some personal information relating to [complainant redacted].*
 2. *Pursuant to the Freedom of Information Act we shall be grateful if you will provide the balance of the recorded information from the documentation containing [the complainant redacted]’s personal data is available to [the complainant] – part under the Data Protection Act disclosure and the balance pursuant to the Freedom of Information request – in respect of each item containing [the complainant]’s personal data.”*
7. On 11 December 2007 the public authority issued its response. It explained that:
1. It was listing the items of information that it held on its own behalf in a schedule and it held nothing else other than on behalf of others;
 2. It was provided some of the information that was requested which was included in the list;
 3. It was withholding other information by virtue of section 40 [personal information]¹ and section 42 [legal professional privilege].
8. The public authority did not specify the subsections of the exemptions that it had cited or conduct a public interest test in respect to its application of section 42.
9. On 4 January 2008 the complainant replied and confirmed that he did not believe that all the relevant recorded information had been provided. The public authority viewed this response as an expression of

¹ All the statutory provisions that are mentioned in this Decision Notice can be found in full in the legal annex attached to the end of it.

dissatisfaction and was therefore a request for an internal review. The Commissioner agrees with this reading of the request.

10. On 14 March 2008 the public authority communicated the results of its internal review. It explained that:
 1. The response had been through the internal review and reviewed by a different person;
 2. The method of retrieving the relevant recorded information was sound;
 3. The application of the exemptions was being upheld;
 4. For section 42 it confirmed that it was satisfied that the public interest in maintaining the exemption outweighed that in disclosure (although it provided no further details); and
 5. That for section 40 it explained that its application of the exemption related to the information concerning third party individuals. Some individuals were approached and did not give their consent and others were not.
11. On 27 March 2008 the complainant and the public authority had a telephone conversation.
12. On 2 May 2008 the public authority issued another response. It confirmed that after further review it was content that its position was correct.

The Investigation

Scope of the case

13. On 31 July 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - That the complaint concerned the request for information dated 14 November 2007;

- [The complainant] has made subject access requests that were not in his view complied with; and
 - That he had requested internal reviews on 4 January 2008 and 27 March 2008.
14. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of Subject Access. The Commissioner has conducted an assessment under section 42 of the DPA into the public authority's compliance with that Act. This was dealt with separately and does not form part of this Decision Notice. This is because an assessment under section 42 of the DPA is a separate legal process from the consideration under section 50 of the FOI Act. The complainant has received this assessment in a separate letter.
 15. The scope of this (FOI) case was to determine whether the public authority was correct to apply section 42(1) and/or section 40(2) to the information that was requested and not provided.
 16. The case therefore concerns only the relevant recorded information that was identified by the public authority in the schedule that it provided the complainant on 11 December 2007 and the single document that was provided as part of the internal review process.
 17. The public authority also disclosed some of the withheld information during the course of the Commissioner's investigation because it was not exempt. This was done on 2 July 2010. The Commissioner will not consider the operation of the exemptions to the information that has been disclosed, although he will note the procedural breaches in respect to this information in his analysis below.
 18. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

19. On 19 September 2008 the Commissioner wrote to the complainant and the public authority to explain that he had received an eligible complaint. The Commissioner noted that it related to issues both under the DPA and the Act. He therefore said that he would first conduct an assessment under section 42 the DPA and then undertake his duties under section 50 of the Act. This was to ensure that all the complainant's information access rights were respected.

20. On 13 May 2009 the Commissioner wrote to the complainant and the public authority to explain the results of his assessment under section 42 of the DPA. On the next day, he wrote to the complainant and the public authority to explain that the case would now be considered under section 50(1) of the Act.
21. On 5 June 2009 the Commissioner wrote to the public authority. He asked for a copy of the withheld information to be provided and made preliminary enquiries about the application of the exemptions.
22. On 30 June 2009 the Commissioner received some correspondence from the public authority. On 2 July 2009 the public authority provided some arguments and some of the information that it had withheld. On 1 October 2009 the public authority provided the Commissioner with more of the withheld information and further arguments. On 29 October 2009 the public authority provided the Commissioner with the final batch of withheld information.
23. There followed a regrettable delay that was due a backlog of complaints received about the Act and this meant that the Commissioner could not begin a detailed investigation immediately.
24. On 11 June 2010 the Commissioner wrote to the complainant to explain the proposed scope of his investigation and explained that he would proceed with this case on that basis, unless the complainant reverted back to him within a reasonable time. He also wrote to the public authority to acquire more detailed arguments about its application of the exemptions.
25. On 2 July 2010 the public authority replied to the Commissioner. It explained that it was prepared to release further information and showed that it had done so. It also provided its detailed arguments about why it was withholding the remaining information.
26. On 3 August 2010 the Commissioner wrote to the complainant to ask whether he was satisfied with receiving the further information or whether he wanted the Commissioner to continue his formal investigation.
27. On 6 August 2010 the complainant confirmed that he remained dissatisfied with the answer to his requests and asked the Commissioner to outline the nature of the complaints that he has submitted to him. The Commissioner provided the clarification on 3 September 2010 and the complainant confirmed that he remained unhappy with the situation.

28. The Commissioner therefore decided that it was appropriate to draft a Decision Notice for this case.
29. On 2 November 2010 and 3 November 2010 the Commissioner wrote to the public authority in order to obtain further information. He was sent this information on 4 November 2010 and 5 November 2010.
30. On 9 November 2010 the Commissioner wrote a final set of enquiries to the public authority. He received answers on 29 November 2010 and the public authority also issued a correction to the complainant as part of this response.

Analysis

Substantive Procedural Matters

31. As a preliminary matter, it is important to note that any disclosure under this Act amounts to a disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed that, "Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions." (paragraph 52)².

What is the nature of the recorded information that is being withheld?

32. As noted above, the Commissioner's investigation is limited to the recorded information held that was mentioned in the schedule. The Commissioner has created an appendix of this information and this has been designated as Appendix A and attached to the bottom of this Notice. He has also specified the exemptions that have been applied to each document and where the information has been disclosed.
33. The Commissioner will consider the application of each exemption to the information to which it has been applied. Where the public authority has appropriately applied an exemption to a piece of

² This decision can be found at the following link:

http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_info_comm.pdf.

information, the Commissioner will not move on to consider the application of other exemptions to the same information. The reason for this approach is that each item of information only needs to be correctly withheld under one exemption.

34. The public authority has argued that it holds item 34 on behalf of the Home Office. This email related concerned an email from a Home Office official to other Home Office officials.
35. Section 3(2)(a) of the Act specifies that information is held where *'it is held by the authority, otherwise than on behalf of another person'*. The Commissioner's view is that this means that where the information is held to any extent for a public authority's own purposes it is held under the Act.
36. The Commissioner has considered the information and is satisfied that the only reason why the public authority would have held the information would be for it to inform its contact with the complainant. He is therefore satisfied that the information is held to some extent for its own purposes and is held under the Act.
37. He finds a breach of section 1(1)(a) as a result of the public authority wrongly denying that it held this information solely on another's behalf. He also finds a procedural breach in relation to timeliness which will be noted at the end of this Notice.
38. However, the public authority argued that in the alternative the information was exempt from disclosure because exemptions applied to it.

Section 42(1)

39. The Commissioner has decided to consider section 42(1) first. Section 42(1) has been applied to part of items 1, 2, 5, 6, 9, 12, 13, 15, 16, 18, 19, 20, 22, 24, 26, 27, 28, 30, 33, 34, 35, 38, 41, 42, 45, 46 and 48.
40. Section 42(1) of the Act is worded as follows:

"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"
41. The application of section 42(1) of the Act was considered by the Information Tribunal in the decision of *Bellamy v The Information*

Commissioner (The Secretary of State for Trade and Industry [EA/2005/0023] where legal professional privilege was described 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." (Paragraph 9)

42. The principle of legal professional privilege was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants) [2004] UKHL 48*, where Lord Rodger explained the policy reasons for the principle in respect to legal advice:

'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential.'

(at Paragraph 54)

(1) Is the exemption engaged?

43. There are two categories of legal professional privilege: litigation privilege where litigation is contemplated or pending and advice privilege where no litigation is contemplated or pending.
44. The public authority has explained to the Commissioner and the complainant that:
1. it is relying on litigation privilege for the information that it is withholding for all the items to which it is applying this exemption except for item 12;
 2. it is relying on both litigation and advice privilege for items 1, 2, 5, 6, 9, 13, 16, 18, 20, 22, 24, 29, 35 and 38; and
 3. it is relying on solely advice privilege for item 12.

Litigation privilege

45. Litigation privilege relates to confidential communications between a client or his lawyer and third parties that have come into existence after litigation is a real prospect or is pending. The sole purpose of the communications must be to give or obtain advice in relation to the litigation or collect evidence for use in the litigation. It includes exchanges between clients and third parties if such communications or exchanges come into being for the purposes of preparing litigation.
46. Confidentiality is an essential prerequisite to a claim for legal professional privilege. Communications will be confidential if they have taken place in circumstances where a relationship of confidence is express or implied.
47. The public authority explained that it was important to consider the context in which it acquired information about the complainant. It explained that the whole basis of its dealings with the complainant arises from various legal disputes, as between him or his clients and the public authority and/or other government departments.
48. The Commissioner has reviewed all of the items to which litigation privilege has been applied. He has been satisfied that there was a real prospect of litigation occurring and that the information that has been withheld under litigation privilege have only come into existence because of the prospect of litigation with the complainant.
49. He has also been satisfied that in all cases there was a relationship of confidence between the two parties who have corresponded.
50. The Commissioner has also noted that the confidentiality can be waived where the party which owns the information decides to waive the privilege. The Commissioner has not been presented with any evidence of the privilege being waived in this case. Waiver of legal professional privilege occurs when the owner of the information gives consent for the information to be published to a third party or where the information is treated in such a way that it can be implied from that action that the privilege has been waived. The Commissioner is content that there is no question of the information being treated in a manner where it can be implied that the privilege has been waived.
51. For completeness, the Commissioner wishes to confirm that the fact that some of the information was generated by in house lawyers does not change the fact that legal advice can be privileged. This issue was considered by the Information Tribunal in paragraphs 29 to 35 of *Calland v Financial Services Authority* [EA/2007/0136]. It explained

that it believed that in-house lawyers deserved the same protection as external ones and the Commissioner endorses this view.

52. Therefore the Commissioner is satisfied that litigation privilege has been correctly applied and that the exemption has been evidenced to be engaged in respect to items 1, 2, 5, 6, 9, 13, 15, 16, 18, 19, 20, 22, 24, 26, 27, 28, 30, 33, 34, 35, 38, 41, 42, 45, 46 and 48. He will not consider the parallel claim to advice privilege in respect to some of the items given that he has already determined that the exemption is engaged for these items.

Advice privilege

53. The remaining information to be considered is item 12. The category of privilege which the public authority is relying on to withhold this information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. It was considered in detail in the *Three Rivers* case above and it explained that there were three requirements for material to engage legal professional advice privilege. The Commissioner has adopted this approach in this case and these factors can be summarised as follows:

1. It must be between a qualified lawyer in their professional capacity and a client;
2. It must be created with the sole or dominant purpose of obtaining or providing legal advice; and
3. It must be confidential.

54. The first requirement is a question of fact. In this case the piece of withheld information related to advice provided by a lawyer in their professional capacity to the public authority. The information was also communicated in the legal advisor's professional capacity. The requirement is therefore satisfied.

55. The second requirement is also a question of fact. The determination of the dominant purpose can usually be found by inspecting the withheld information itself. The Commissioner has examined the withheld information and is satisfied that in the relevant case the sole purpose was the provision of relevant legal advice. The requirement is therefore also satisfied.

56. The Commissioner believes that the information contained in the remaining item can be deemed confidential. This is because the

information is of substance, was imparted in circumstances that led to an expectation of confidence (it was formal legal advice between a lawyer and their client) and the disclosure of the information could lead to an erosion of this confidence which would not accord with the expectations of the confider. This erosion of confidence could cause damage to the confider as its position may be prejudiced through unexpected disclosure. The final requirement is therefore satisfied.

57. The Commissioner's view is also that the public authority has not waived its privilege in this case. The Commissioner notes that this is a situation of advice privilege. He believes that, in circumstances other than litigation, partial disclosure will not result in waiver of legal advice privilege. His view has been confirmed by the Information Tribunal in *FCO v Information Commissioner (EA/2007/0092)*³ which stated:

'There is an obvious reason of principle for placing such a limit on the rule, namely that, outside litigation, a party is entitled, provided, of course, he does not falsify, to advance his case in public debate to the best advantage; if so advised, by selective quotation. If he does so, an alert opponent will see what he is doing and demand disclosure of the whole advice, if he is to be persuaded. Such is the cut and thrust of public debate. Even a public authority, whose advice is funded by the taxpayer, is entitled to declare the final upshot of the advice received without running the risk of revealing every last counterargument of which it has been warned. Quite different is the position where the parties come to court; if evidence is adduced, it is there to be fully tested or scrutinised in relation to any relevant issue, whether it be witness, document or object.' [at paragraph 22]

58. The Commissioner is satisfied that any information that has been provided to the public does not falsely represent the withheld information. He is also satisfied that on the facts of this case that there is no waiver, that the confidentiality of the advice remains and the exemption is engaged for this final item.

(2) The public interest test

59. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the

³ This decision can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/FCO_vICDecision_amendedWebsite_290408.pdf

information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors when weighing the public interest factors that favour disclosure.

60. It is important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. It is also important to note that just because a large section of the public may be interested in the information, does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public⁴.

Public interest arguments in favour of maintaining the exemption

61. In arguing that the public interest favoured withholding this information, the public authority has highlighted the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals.
62. It also explained that public authorities need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments; as a consequence legal advice may well set out the perceived weaknesses of the public authority's position. Without such comprehensive advice, the public authority's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
63. It also stated that it believed that the disclosure of legal advice would have a significant prejudice to its ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in

⁴ *Department of Trade and Industry v Information Commissioner (EA/2006/0007)* at paragraph 50.

serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis. This is particularly so in the context of this case.

64. It explained that in its view there is an important public interest in the proper administrative of justice and the concept of legal professional privilege plays an important role in maintaining this. The Commissioner believes that Lord Taylor of Gosforth CJ's dictum on this point in *R v Derby Magistrates Court, Ex p B* [1996] AC 487 is salient in this case:

'The principle that runs through all of these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client [in this case, the Home Office], must be sure that what he tells his lawyer in confidence will never be revealed without his consent.'

65. In addition, it may be the case that wider considerations about the consequences in other situations will need to be considered. It is proper that the public authority is able to consider the wider picture and potentially rely on its advice in the future (both in this case and others). This is a further public interest in maintaining the exemption.
66. The public authority concluded that although section 42(1) is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professional privileged material, this case is not one where there are public interest factors that outweigh it. It also explained that the advice was live at the date of the request. This is because it is actively being relied upon by the relevant public authorities.
67. The Commissioner acknowledges the strength of the arguments advanced by the public authority. Indeed, there is a significant body of case law to support the view that there is a strong element of withholding the public interest built into section 42(1). The Information Tribunal in *Bellamy* noted that:

'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.' (at paragraph 35)

Public interest arguments in favour of disclosing the requested information

68. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information; Parliament did not intend the exemption contained at section 42 of the Act to be used absolutely. Indeed the Tribunal's decision in the case of *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* [EA/2007/0052] ('Mersey Travel') underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel.
69. The complainant has offered no arguments at all to the Commissioner about why he believes that the public interest favours the disclosure of legally privileged material. The Commissioner has therefore decided to consider those factors that he believes are relevant in this case.
70. In the Commissioner's opinion there is a public interest in people understanding the reasons for decisions made by public authorities, or in this case how the public authority has dealt with the complainant. Disclosure of the legal advice may assist the public's understanding of why the public authority has made the decision it has. It is noted that disclosure would promote accountability and transparency for the decisions which given the nature of the prolonged exposure to correspondence result in a cost to the public purse.
71. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the public authority's position. It would also enable any challenge to be launched from a more informed perspective.

Balance of the public interest arguments

72. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* (EA/2007/1036)⁵ explained the Tribunal's approach when considering the balance of public interest in this exemption (at paragraph 37):

'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to

⁵This decision can be found at:

http://www.informationtribunal.gov.uk/Documents/decisions/JCallandvsICO_0136_webdecision_080808.pdf

outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'

73. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071)⁶, the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;
2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.

74. The Commissioner believes that the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege is important in this case. He notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of protection that is to be expected. He believes that this case represents the sort of circumstances that were envisaged to be covered by the exemption in section 42(1).

75. The Commissioner has had the opportunity of seeing the withheld information. Clearly he cannot reveal its contents. In his view,

⁶ At paragraph 15.

however, it does not reveal any of the potential concerns that the background of the complaint reveals might concern the complainant (outlined in the sixth point of paragraph 73), particularly that the public authority may have misrepresented the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.

76. The Commissioner has considered the weight of the public interest factors in disclosure. In this case he notes that there are some arguments around transparency, but he has not been satisfied that taken together they are equally strong countervailing factors that would override the public interest factors in maintaining the exemption on the circumstances of this case.
77. It follows that he is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure and that the exemption found in section 42(1) has been applied correctly.

Section 40(2)

78. Section 40(2) has been applied to part of items 2, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 19, 20, 21, 25, 26, 27, 29, 30, 33, 34, 35, 37, 38, 41, 43 45 and 46. In all of these cases (except item 34) the exemption was applied to the names of individuals.
79. There are no items where section 42(1) has been applied to names. The public authority has made the conscious decision to apply section 42(1) to the actual content of legal advice and section 40(2) to the names of those staff whom it did not want to disclose (including for those which appear within documents in which s42(1) was applied to some or all of the remaining contents). The Commissioner has therefore been required to consider this case on this basis.
80. Appendix A shows the context of the names. In many cases part of the content of the emails has been provided and part of the content has been withheld. The provision of the names will enable individuals to be identified in relation both to the information provided and information correctly withheld under section 42(1). The Commissioner has carefully considered whether the fact that the names may be provided by themselves (i.e. without reference to whether the remaining content of the documents in which they appear should be – or have been – disclosed) and whether that has an impact on the legitimate interests of the data subject within the analysis below.

81. The Commissioner has considered the case on the basis of the arguments that have been provided to him by the public authority. It follows that he believes in some cases that the seniority of individuals can be required to provide relevant accountability, where he has received no arguments to the contrary.
82. Section 40(2) is an exemption which may be applied to requested information which is personal data and where disclosure would contravene a data protection principle. To analyse the application of section 40(2) in this case, the Commissioner has considered:
- a) whether the information in question was personal data; and*
 - b) whether disclosure of the personal data under the Act would contravene the first data protection principle.*

Is the information personal data?

83. Personal data is defined in section 1 of DPA as data '*which relate to a living individual who can be identified—*
- (a) from those data, or*
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'*

84. When considering whether the information is personal data, the Commissioner had regard to his own published guidance called "Determining what is personal data".⁷

The names

85. The Commissioner accepts that the name of specified individuals in their context would amount to personal data. He accepts that this data directly links actions to the individual in question. The public authority was correct that the information would show an individual's employment and whereabouts at a set time, which would mean that it could be linked to them.

Item 34

⁷This can be accessed at the following link:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

86. The information withheld for item 34 relates to the interaction that an individual has had with the complainant. It relates to their concerns and how the situation was to be managed within the public authority. The Commissioner has been satisfied that the information that has been withheld relates to an identifiable individual and the public authority was correct that it amounts to personal data.

Would disclosure contravene the first data protection principle?

87. The first data protection principle has two main components. These are as follows:

- requirement to process all personal data fairly and lawfully; and
- requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data.

88. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

89. In this case it is useful to divide up the withheld information into the following seven categories:

- (1) The name of the members of staff of the public authority's clients who work for other departments in the public sector and hold roles that are senior grade civil service roles;
- (2) The name of senior members of its staff;
- (3) The name of the members of staff of the public authority's clients who work for other departments in the public sector and hold roles that are not senior grade civil service roles;
- (4) The name of junior members of its staff;
- (5) The name of staff who did work for in roles covered by (1) or (2), but have subsequently retired or left public service;
- (6) The name of two individual complainants; and
- (7) Item 34.

Would disclosure of any of the information be fair to the data subjects to which it relates?

90. The Commissioner wrote to the public authority to understand the seniority of all the individuals whose names had been withheld in the correspondence. The Commissioner has created a schedule of the names and in which piece of information they are found. This will be provided to the public authority in a confidential annex. There are 35 individuals and they have been catalogued in the following way:

- The first twenty six individuals were allocated letters of the alphabet for example 'Individual A'; and
- The next nine individuals were then differentiated using small letters, so they are known as 'Individual Aa' to 'Individual Ai'.

Category 1

91. Category one concerns the redactions that relate to Individuals A – N.

92. When deciding whether the disclosure of the information is fair, the important factors that required consideration in all the categories are summarised below:

- *What are the reasonable expectations of the individual in relation to the handling of their personal data?*

Including:

- *The seniority of the individual and how that may effect their expectations;*
 - *Whether their role was of a public nature and whether the data concerned that role rather than their private life; and*
 - *The accompanying expectations of the public about individuals in that role.*
- *The type of information that has been requested and the consequences of its disclosure;*
 - *Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual; and*
 - *Legitimate interests of the public in knowing the withheld information and obtaining transparency about the workings of the public authority in this area.*

93. The public authority has argued that none of the remaining names should be disclosed because of the nature of the information. It explained that all the names concern individuals whose names appear as part of the process of acquiring legal advice about how to deal with the grievances and complaints of the complainant. It said that the expectation must have been that the name of those individuals would be confidential and that their names would not be disclosed to the public.
94. The Commissioner has not been satisfied that all the names can be withheld due to this argument. As noted above, he believes that the names provide an important lever of accountability in themselves, quite apart from the accountability that would be provided by the disclosure of the remaining content of the documents in which they appear. He has only been satisfied that the expectations outlined above would be reasonable where the individual is not sufficiently senior that accountability would be expected as a matter of course. This concerns whether the position involves a significant level of personal judgement and exercise of individual responsibility. This is in line with the Information Tribunal decision in *The Corporate Officer of the House of Commons v IC and Norman Baker MP* [EA/2006/0015 & 0016].
95. When deciding when accountability would be expected as a matter of course, seniority is of crucial importance. Previous Decision Notices issued by the Commissioner have taken the line that there should be a lower expectation of privacy when information concerns a senior individual. This is because seniority can reduce the likelihood of the presence of any expectation against disclosure, makes any expectation (if it exists) less reasonable and adds weight to contention that the disclosure of the name to the public would be fair.
96. Having carefully considered this case, the Commissioner has decided that for this category the appropriate cut off point for fairness for public servants who continue to be in a role and in Grade 7 or above.
97. He has considered the civil service guidance when considering the appropriate seniority and notes that it says:

*'The key grade is Grade 7. Grade 7s are expected to know all there is to know about their policy area, and to know all the key players, pressure groups and so on. In a well run department, you will find that senior officials listen very carefully to their Grade 7s, and tend to operate in a way which supports their Grade 7s, rather than vice versa.'*⁸

⁸ <http://www.civilservant.org.uk/c2.pdf>

98. In the Commissioner's view the reasonable expectation of Grade 7 staff and above is that their names would be attached to decisions that are made and that this information will be disclosed to the public on request.
99. The Commissioner appreciates that the context of the information means that the names of the staff would be more sensitive than usual. However, the Commissioner notes that the public authority did not apply section 42(1) to these names and the Commissioner considers that the decision to seek legal advice should be seen to be analogous to any other high level decision.
100. The Commissioner can, however, appreciate the potential impact of disclosure on those named members of staff. It is possible that they could be subject to further communications and correspondence from the complainant. However, the Commissioner has been satisfied that Grade 7 is the appropriate benchmark where the seniority is sufficient for their names to be attached to their decisions and considerations about how to deal with the complainant. He believes that this accountability brings the potential for further scrutiny.
101. In the Commissioner's opinion, there is a strong legitimate public interest in people understanding the reasons for decisions made by public authorities, or in this case the seniority of person dealing with the complainant's complaints. This interest in accountability remains strong, despite the circumstances of there being a limited number of people interested in this case.
102. It follows that the Commissioner believes that it would be fair to disclose this personal data to the public. The Commissioner will need to consider the further conditions after he has considered the fairness for other categories.

Category 2

103. Category two concerns the redactions that relate to Individuals O and P.
104. The public authority has already disclosed the names of the majority of its senior staff that were involved in the interaction with the complainant.
105. In respect to individual O, the Commissioner has decided that the public authority has been inconsistent in not disclosing the name of this individual. The public authority has disclosed the name of an individual

that was in a similar role and has offered the Commissioner no reason for this inconsistency.

106. Given that this is so, the Commissioner believes that the disclosure of the second category of information would be fair. He will consider the remaining conditions in respect to this information later in this Notice.
107. In respect to individual P, the Commissioner notes that they are sufficiently senior to be analogous to his decision in category one. He therefore finds for the same reasons that the name would be fair to disclose.

Category 3

108. Category three concerns the redactions that relate to Individuals Q to W.
109. These individuals were employed at less than Grade 7 at organisations outside the public authority. In the Commissioner's view they would have reasonable expectations that their names would not be disclosed to the public in this case. The Commissioner believes that the disclosure of these names would be likely to cause unjustified damage and distress and that there would be no legitimate public interest which would outweigh this. The small benefit in transparency would not in the Commissioner's view outweigh the detriment in the individuals' right to privacy.
110. It follows that the disclosure of this information would be unfair, that the first data protection principle would be contravened and that section 40(2) was in the Commissioner's view appropriately applied to this information.

Category 4

111. Category four concerns the redactions that relate to Individuals X to Aa.
112. These individuals were employed in the public authority but not in legal roles and were instead relatively junior administrators.
113. In the Commissioner's view they would have reasonable expectations that their names would not be disclosed to the public in this case. The Commissioner believes that the disclosure of these names would be likely to cause unjustified damage and distress and that there would be no legitimate public interest which would outweigh this. The small

benefit in transparency would not in the Commissioner's view outweigh the detriment in the individual's right to privacy.

114. It follows that the disclosure of this information would be unfair, that the first data protection principle would be contravened and that section 40(2) was in the Commissioner's view appropriately applied to this information.

Category 5

115. Category five concerns the redactions that relate to Individuals Ab to Ad. These individuals were employed in relatively senior roles; however, they have subsequently retired or left the public sector.
116. The Commissioner would normally consider the effect of disclosure at the date of the request. These individuals would therefore fall within the analysis of category 1.
117. However, the Commissioner must consider his position as the Regulator of the DPA. The Commissioner must be satisfied that he is not ordering the public authority to take remedial steps that would contravene the DPA at the date of the Decision. The Commissioner is of the view that as these individuals have now retired or left public service the value in accountability is reduced and the expectation of privacy is increased.
118. The difference is so great that in the Commissioner's view it would be unfair to the data subjects to release their names at the date of this Notice. It follows that he believes that the disclosure of this information would now contravene the DPA (even though it would not have done at the date of the request). For this information the Commissioner therefore notes that even if the exemption was wrongly applied at the date of the request, the passage of time means that it could and should be applied now and he will order no remedial steps about its incorrect application at the time of the request.

Category 6

119. Category six concerns the redactions that relate to Individuals Ae and Af.
120. This information is the names of individuals who have made complaints that the public authority was also considering while considering the complainant's complaint.

121. The Commissioner does not believe that those individuals would have any expectation at all that their personal data would be disclosed to the world at large. Instead, they would have an expectation that their complaint was dealt with in confidence. They would only expect their names to be disclosed through their own actions and not that of the public authority.
122. The Commissioner accepts that the disclosure of their names would be likely to cause unwarranted and unjustified damage or distress to those individuals and there is no legitimate public interest that comes close to rendering this release of this information fair.
123. It follows that the disclosure of this information would be unfair, that the first data protection principle would be contravened and that section 40(2) was in the Commissioner's view appropriately applied to this information.

Category 7

124. Category seven concerns information that comprises names of individuals and also a commentary about an individuals' concerns.
125. The Commissioner believes that the reasonable expectation of this individual is that the information would remain private between employee, employer and the public authority. In the Commissioner's view this information is analogous to Human Resource information and that it was used in ensuring the exercise of its duty of care.
126. In the Commissioner's view the disclosure of this information would be highly likely to cause both unjustified damage and distress to the data subject (i.e. the individual to whom the information relates). The Commissioner believes that there would never be a legitimate public interest in disclosing information of this nature to the public.
127. He concludes that the disclosure of this information would be unfair to the data subject, it would amount to a breach of the first data protection principle and therefore section 40(2) has been applied appropriately to this information.

Can a condition of Schedule 2 of the DPA be satisfied?

128. Now the Commissioner has determined that disclosure would have been fair in respect to the information in category one and two, it is necessary to go on to consider whether the disclosure of the

information for those categories would be in accordance with a condition of Schedule 2 of the DPA.

129. There are two conditions of Schedule 2 that are generally relevant when considering disclosure under the Act. They are conditions 1 and 6.
130. Condition 1 requires the data subject to have given his consent to the processing of the data. The Commissioner notes that any consent must be sufficient to amount to permission to disclose the information to the public under the Act. The Commissioner finds that no consent of any sort has been provided by the data subjects in this case. It follows that condition 1 has not been satisfied in this case.
131. Condition 6 states that:

“the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

132. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas* [EA/2007/0060]. In that case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests of the public in disclosure of the information;
- the disclosure must be necessary for a legitimate interest of the public; and
- even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

The legitimate interests of the public

133. The Commissioner believes that there is a legitimate public interest in transparency due to the principle that there is a need for accountability in decisions made by senior public servants.

134. When considering the legitimate interests of the public, the Commissioner notes that there is a legitimate public interest in understanding information about the process that led to advice being sought and the decision making process to request advice. However, the Commissioner agrees with the public authority that the disclosure of the individual names of its staff would provide limited further accountability in this case. It would merely confirm who were informed of decisions being made. He therefore accepts that it would not provide anything of real value in respect to accountability.
135. Nevertheless, on balance the Commissioner is satisfied that there exists a legitimate public interest in the disclosure of this information.

Necessity for a legitimate interest of the public

136. 'Necessity' functions as a threshold condition. The Commissioner's view is that when considering necessity disclosure must be necessary to meet some of the legitimate interests above. There must not be a less intrusive means of meeting that end. He has therefore taken into account existing mechanisms and whether they satisfy these interests.
137. The Commissioner has considered this matter carefully. His view is that the disclosure of the names is necessary in this case for reasons of transparency. He does not believe that the same accountability can be provided through a lesser disclosure.
138. The Commissioner therefore accepts that there is a necessity in disclosing the requested names and that the second part of the test is therefore satisfied.

Unwarranted Interference

139. The Commissioner must then go on to consider the collective weight of the legitimate interests and whether meeting them would cause an unwarranted interference with or unwarranted prejudice to the rights, freedoms and legitimate interests of the data subjects.
140. The Commissioner has found that there are a number of legitimate interests that carry weight on the facts of this case. While the majority of the names of the individuals and their positions are in the public domain, their possible involvement in this case is not already apparent.
141. The Commissioner believes that the public authority would be likely to argue that any legitimate interests would not counteract the fact that further processing is unwarranted by reason of the ensuing prejudice to the data subjects. This is because in its view the release of this

information could lead to unjustified public attention for these individuals. The impact may affect their private and professional lives.

142. The Commissioner has concluded that the disclosure of these names would not constitute an unwarranted interference to the data subjects. His view is that, in the circumstance of this case, these individuals are sufficiently senior for the public interest in transparency and accountability to be dominant.
143. It follows that the Commissioner is of the view that the disclosure of the category one and two information would accord with the sixth condition of Schedule 2 of the DPA.

Would disclosure of the names be lawful to the data subjects?

144. As the Commissioner has come to the view that disclosure would have been fair for the two categories and satisfy schedule 2 conditions it is necessary to also consider whether disclosure would be lawful.
145. The public authority provided no further arguments about the disclosure of this information being unlawful. It follows that in the Commissioner's view that the disclosure of the names would be lawful.
146. The Commissioner has also considered the other data protection principles and has not been satisfied that the disclosure of these names would be in contravention of them.
147. The Commissioner concludes that section 40(2) has therefore not been appropriately applied to either the category one or category two information. The information should therefore be disclosed.

Procedural Requirements

148. The public authority has conceded that some of the information that was originally withheld should have been disclosed and it was released during his investigation. In addition, the Commissioner has found that some information that has been withheld should also be disclosed. These events have led to there being a number of procedural breaches in this case in relation to those categories of information which were incorrectly withheld.

Section 1(1)(b)

149. Section 1(1)(b) requires that the public authority communicates all the information that is not exempt under the Act. The public authority has failed to do this and has breached section 1(1)(b).

Section 10(1)

150. Section 10(1) requires that the public authority complies fully with section 1(1) within twenty working days (subject to limited exemptions – none of which are relevant in this case).
151. The public authority failed to comply with section 1(1)(a) in 20 working days because it wrongly believed that it held recorded information solely on behalf of another. This was a breach of section 10(1).
152. It also failed to comply with section 1(1)(b) within twenty working days. This was a further breach of section 10(1).

Section 17(1)(b)

153. Section 17(1)(b) provides that a refusal notice should specify the exemption that is relied on. In this case the public authority failed to specify the subsection that was being relied upon when applying both section 40(2) and section 42(1) and the Commissioner believes that this constitutes a breach of section 17(1)(b).

Section 17(1)

154. Section 17(1) requires that, if the public authority is refusing to disclose information, a refusal notice that fully satisfies the requirements of section 17 to be issued in 20 working days. The public authority failed to issue such a refusal notice and therefore breached section 17(1) in this respect.

The Decision

155. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It applied section 42(1) appropriately; and
 - It applied section 40(2) appropriately to some of the information that it withheld (the information embraced by categories 3, 4, 6 and 7).
156. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached section 1(1)(a) because it incorrectly decided that it held some information only on another's behalf.
- It breached section 10(1) because it failed to comply with section 1(1)(a) in the time of statutory compliance
- It wrongly applied section 40(2) to some of the names (categories 1, 2 and 5).
- It breached section 1(1)(b) because it wrongly withheld some information before the Commissioner's involvement.
- It breached section 10(1) because it failed to comply with section 1(1)(b) in the time of statutory compliance.
- It breached sections 17(1) and 17(1)(b) because it failed to specify the exemption it relied on down to the subsection.

Steps Required

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

- Disclose the names of Individuals A to P alongside the document number from the legal annex which indicates where they have been redacted from. The appropriate part of the confidential annex could be released to fulfil these steps.

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

Failure to comply

159. Failure to comply with the steps described above 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.

Right of Appeal

160. 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 sent.

Dated the 14th day of December 2010

Signed

**Alexander Ganotis
Group Manager - Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Appendix A (schedule of the information considered in this case)

Item	Date	Order*	Document Type	Current position and exemption(s) now being relied upon [^]
1	26 May 2006	48	Email	Partly disclosed – residue withheld by virtue of 42(1) [L/A].
2	6 July 2006	47	Email	Partly disclosed – residue names through 40(2) and content through 42(1) [L/A].
3	20 July 2006	6	Team minutes	Relevant information fully disclosed.
4	25 July 2006	45	Email	A single name through 40(2).
5	28 July 2006	46	Email	Partly disclosed – residue of content withheld by virtue of 42(1) [L/A] and single name through 40(2).
6	19 September 2006	44	Email	Partly disclosed – name withheld by 40(2) and title of advice by 42(1) [L/A].
7	6 October 2006	43	Email	Partly disclosed – single name of complainant withheld through 40(2).
8	17 October 2006	42	Email	Partly disclosed – single name of complaint withheld through 40(2).
9	31 October 2006	40	Email	Partly disclosed – two names withheld through 40(2) and some content withheld by virtue of 42(1) [L/A].
10	2 November 2006	41	Email	Partly disclosed – name withheld through 40(2).
11	9 November 2006	39	Email	Partly disclosed – names withheld through 40(2).
12	12 December 2006	4	Minutes of team meeting	Partly disclosed - 42(1) applied to one remaining paragraph [A]
13	14 December 2006	37	Email	Partly disclosed – residue withheld by virtue of 42(1) [L/A]
14	15 December 2006	38	Email	Relevant information fully disclosed.
15	22 December 2006	7	Email (1)	Partly disclosed – residue of content withheld by virtue of 42(1) [L] and two names through 40(2).
16	22 December 2006	8	Email (2)	Partly disclosed – names withheld by 40(2) and content withheld by virtue of 42(1) [L/A].
17	02 January 2007	36	Email	Relevant information fully disclosed.
18	08 January 2007	1	Memo	Content of information withheld by virtue of 42(1) [L/A].
19	08 January 2007	9	Email	Partly disclosed – names withheld by 40(2) and content withheld by virtue of 42(1) [L].
20	9 January 2007	33	Email	Partly disclosed – names withheld by 40(2) and content withheld by virtue of 42(1) [L].
21	10 January 2007	10	Email (1)	Partly disclosed – name withheld through 40(2).
22	10 January 2007	34	Email (2)	Partly disclosed – residue withheld by virtue of 42(1) [L/A]
23	10 January 2007	35	Email (3)	Relevant information fully disclosed.
24	11 January 2007	32	Email	Partly disclosed – residue withheld by virtue of 42(1) [L/A]
25	12 January 2007	31	Email	Partly disclosed – residue of names

				withheld through 40(2).
26	24 January 2007	11	Email (1)	Partly disclosed – names withheld by 40(2) and residue of content withheld by virtue of 42(1) [L].
27	24 January 2007	12	Email (2)	Partly disclosed – names withheld by 40(2) and residue of content withheld by virtue of 42(1) [L].
28	24 January 2007	30	Email (3)	Relevant information fully disclosed.
29	25 January 2007	29	Email	Partly disclosed – residue of content withheld by virtue of 42(1) [L/A] and names through 40(2).
30	31 January 2007	2	Email	Relevant information fully disclosed.
31	02 February 2007	28	Email	Relevant information fully disclosed.
32	07 February 2007	27	Email	Partly disclosed – residue of content withheld by virtue of 42(1) [L].
33	08 February 2007	13	Email	Partly disclosed – some names withheld by 40(2) and content withheld by virtue of 42(1) [L].
34	09 February 2007	14	Email from Home Office	Argues not to be held by it – names and further detail in relation to data subject withheld by 40(2) and other content withheld (line 1, 4 and 5) by virtue of 42(1) [L].
35	09 February 2007	26	Email	Partly disclosed – residue of content withheld by virtue of 42(1) [L/A] and a name through 40(2).
36	06 March 2007	25	Email	Relevant information fully disclosed.
37	04 April 2007	24	Email	Partly disclosed – two names withheld by 40(2).
38	11 April 2007	23	Email from Home Office	Partly disclosed – residue of content withheld by virtue of 42(1) [L/A] and some names through 40(2).
39	13 April 2007	5	Monthly report	Relevant information fully disclosed.
40	29 May 2007	22	CV and tender submission	Relevant information fully disclosed.
41	12 June 2007	15	Email to MOJ	Partly disclosed – some names withheld by 40(2) and content withheld by virtue of 42(1) [L].
42	13 June 2007	21	Two emails	One email fully disclosed. Second email partly disclosed with the residue withheld by virtue of 42(1) [L].
43	18 June 2007	20	Internal email	Partly disclosed – single name redacted through 40(2)
44	27 June 2007	19	Email	Relevant information fully disclosed.
45	6 July 2007	17	Email	Partly disclosed – name withheld by 40(2) and residue of content withheld by virtue of 42(1) [L].
46	12 July 2007	18	Email to MOJ	Partly disclosed – name withheld by 40(2) and residue of content withheld by virtue of 42(1) [L].
47	11 September 2007	16	Email	Information in scope fully disclosed
48	02 October 2007	3	Case list	Partly disclosed – residue of content withheld by 42(1) [L]
49	14 February 2003	-	Email	Information in scope fully disclosed

* the order category relates to the way that the public authority listed the documents in the schedule that it provided the complainant.

^ the type of legal professional privilege being claimed is marked too:

L – litigation privilege; and

A – advice privilege.

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

(1) 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.

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

(3) 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 10 - Time for compliance with request

(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid 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.

(3) 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.

(4) 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.

(5) Regulations under subsection (4) may—

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

(b) confer a discretion on the Commissioner.

(6) 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom

...

Section 17 - Refusal of request

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) 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 to 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.

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

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

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

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Section 40 – Personal information

“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

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

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) 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), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject’s right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.”

Section 42 – Legal professional privilege

“(1) 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.”

...

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the

purposes for which and the manner in which any personal data are, or are to be, processed;

- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) "using" or "disclosing", in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.