

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 15 March 2011

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

### Summary

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The complainant requested a copy of the minutes of the meeting of the Scientific Advisory Group for Emergencies, held on 11 January 2010. The public authority disclosed a limited amount of information in relation to the identities of the attendees and the topics on the meeting's agenda. However, it withheld the majority of the information under section 35(1)(a). During the investigation of the case the public authority disclosed much of the previously withheld information. However, it continued to withhold some information under section 35(1)(a). Additionally, it also relied upon section 40(2) to withhold some information. After investigating the case the Commissioner decided that the public authority was correct to rely upon section 35(1)(a) to withhold some of the information in question. However, he concluded that section 40(2) is not engaged in relation to some of the withheld information, and that therefore this information should be disclosed. In addition to this, the Commissioner also found that the public authority did not meet with the requirements of sections 1, 10 and 17.

### The Commissioner's Role

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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

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2. This case focuses on the minutes of a meeting of the Scientific Advisory Group for Emergencies ("SAGE") that met on 11 January 2010. This meeting was in relation to the (then) ongoing pandemic of the H1N1 virus (Swine Flu). SAGE was part of the DoH and was made up of scientific advisors, many of whom were members of the Scientific Pandemic Influenza Advisory Committee. SAGE was set up for the duration of the pandemic to provide the UK government with clinical and scientific advice on its response. SAGE's terms of reference were,

*"To provide consistent, timely and well-founded advice to the UK Government and devolved administrations on scientific matters relating to swine flu and the response to an influenza pandemic through the Ministerial Committee on Civil Contingencies."*<sup>1</sup>

## The Request

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3. The complainant wrote to the DoH on 19 January 2010 and made the following request:

*"Please send me copies of the minutes of the 'lessons learned' meeting, relating to the pandemic flu, involving the Scientific Advisory Group for Emergencies...held on Monday 11<sup>th</sup> January 2010."*

4. The DoH responded on 10 February 2010 and informed the complainant that it believed that the requested information was exempt from disclosure under section 35(1)(a).
5. The complainant requested an internal review on 11 February 2010.
6. The DoH carried out an internal review and responded on 26 March 2010. It upheld its use of section 35(1)(a) to withhold the requested information. It also stated that,

*"...a decision has now been taken, in principle, to publish the minutes of the 11 January meeting, as well as the minutes of the other meetings of SAGE, later this year."*

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[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_113660](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113660)

However, it did not provide any further details as to when it intended to publish this information.

## **The Investigation**

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### **Scope of the case**

7. On 31 March 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the refusal to provide the requested information.
8. During the course of the Commissioner's investigation the DoH disclosed some of the previously withheld information. In addition to this, the DoH noted that it was no longer relying upon section 35(1)(a) to withhold some of the outstanding withheld information. Instead it was relying upon section 40(2).
9. Therefore, the scope of this case is the DoH's use of section 35(1)(a) and 40(2) to withhold the outstanding information
10. In addition to this, the Commissioner has considered whether the DoH complied with the requirements of sections 10 and 17.

### **Chronology**

11. The Commissioner wrote to the DoH on 22 April 2010 and informed it that he had received a complaint. The DoH responded on 14 May 2010 and provided him with a copy of the withheld information. It informed him that it was now also relying upon section 40(2), as disclosure of the withheld information would breach the first principle of the Data Protection Act 1998 (the "DPA").
12. The Commissioner wrote to the DoH on 24 September 2010 and asked it to provide him with further submissions to support its use of sections 35(1)(a) and 40(2). Additionally, he noted its reference to the potential future publication of these minutes, and asked it to confirm whether it now intended to publish the minutes and – if so – whether these would be published in a redacted format or in full.
13. The DoH contacted the Commissioner on 13 October 2010 and informed him that it now intended to disclose a substantive part of the withheld information. However, it confirmed that it would continue to withhold some information under sections 35(1)(a) and 40(2). On the same day, the DoH disclosed a substantive part of the withheld information to the complainant.

14. The Commissioner wrote to the complainant on 14 October 2010. He noted that the DoH had now disclosed a substantive part of the withheld information, and asked her whether she wished to continue with her complaint. The complainant wrote to the Commissioner on 23 November 2010 and confirmed that she did.
15. The Commissioner wrote to the DoH on 25 November 2010 and asked it to provide further arguments to support its use of sections 35(1)(a) and 40(2).
16. The DoH responded on 13 December 2010 and provided further submissions to support its use of these exemptions. It confirmed to the Commissioner that it was relying upon section 35(1)(a) in order to withhold some of the outstanding information, and section 40(2) in order to withhold the remaining withheld information. In relation to the information that it believed that was exempt under section 40(2) it confirmed that it was solely relying upon this exemption, and was no longer relying upon section 35(1)(a).

## Analysis

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### Exemptions

#### Section 35

17. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption, and therefore if the information relates to the formulation or development of government policy it falls under the exemption.
18. The full text of section 35 can be found in the Legal Annex at the end of the Notice.
19. The Commissioner has first considered whether the withheld information relates to the formulation and development of government policy.
20. The Commissioner recognises that the government sometimes has to develop policies in response to external events, for example the outbreak of the foot and mouth disease in the UK in 2001. There will be times where the need to react rapidly to a problem places time constraints on the policy making process. As a result the process is less likely to follow a measured or formal approach when compared with say the formulation and development of policy from a White Paper through to legislation. Therefore the Commissioner accepts that the formulation

and development of government policy can be unstructured, made on the hoof and even be a form of crisis management.

21. In the refusal notice the DoH stated that SAGE was established in order to,

*"...provide advice to the UK Government and Devolved Administrations on scientific matters relating to swine flu, including the response to the pandemic subsequently declared on 11 June 2009. This advice is provided through the Ministerial Committee on Civil Contingencies."*

22. The Commissioner considers that the government policy in this case was its response to the swine flu pandemic. Bearing in mind SAGE's terms of reference, and the nature of the matters discussed at its meetings, the Commissioner is satisfied that this information relates to the formulation and development of that policy. Therefore the Commissioner finds that this exemption is engaged.
23. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider where the balance of public interest lies and decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

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

24. The complainant has argued that *"there is an overwhelming public interest in these minutes being disclosed, since pandemic flu has [a] potentially huge impact on the general public's health and safety."* She has also pointed out that the government's actions taken in relation to the pandemic had cost a large amount of public money.
25. In considering the public interest factors in favour of disclosure, the Commissioner recognises that there is a public interest in openness and accountability. He also believes that there is a strong public interest in the disclosure of information which would further the public's understanding and participation in debates on issues of public importance – especially in matters regarding public health.
26. In the particular circumstances of this case the Commissioner also considers that there is a public interest in gaining a better understanding of the actions taken by an expert group, whose actions helped shape government policy in areas where that policy had the potential to affect the public in a fundamental way – i.e. through the health of the nation. This is especially the case given the potential impact that an influenza pandemic could have on the health and economy of the nation.

27. He also considers that the disclosure of this information, which would increase the transparency of such an expert group, would increase public confidence in the actions of the expert group, and allow the public to gain an appreciation of whether their advice and actions were appropriate and effective. Additionally, it would increase public understanding of the reasons why the government took the actions it did in relation to the pandemic.

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

28. When considering the public interest arguments in favour of maintaining the exemption the Commissioner notes that in the internal review the DoH said that it had discussed the potential disclosure of this information with senior policy officials and members of the SAGE group. These individuals had objected to this disclosure and had,

*"... prefaced their remarks with a statement that the situation continues to evolve, and that the threat posed by swine flu remains real, although diminishing. They also argued that there was more to be learned from the pandemic and the effect of the swine flu virus, and the possibility of mutation in the virus cannot be excluded, Whilst SAGE has not met since the 11<sup>th</sup> January it has not yet been stood down, and any further input from members of the group may be based on incomplete information or evidence. This emphasises the importance of a confidential space in which views, possibly in their early stages, as well as tentative outcomes, may be expressed without apprehension of release..."*

The Commissioner has interpreted this as a 'safe space' argument.

29. Safe space arguments are about the need for a safe space to formulate policy, debate live issues, and reach decisions without being hindered by external comment and/or media involvement. The Commissioner accepts that there is a public interest in maintaining a safe space for the formulation and development of government policy, although the weight given to this argument will depend on the age of the information, and whether the formulation and development of that policy was still underway at the time of the request. The Commissioner has gone on to consider this argument further below.
30. In addition to this, the DoH added in the internal review that if the information was disclosed there would be a very real risk that,

*"...the very senior academics, clinicians and others who remain ready to give freely of their time to provide advice to government, often with incomplete information or evidence,*

*would at least feel inhibited from making tentative but crucial input to scientific and other expert committees providing advice to Ministers and Government, in the context of an emergency situation."*

The Commissioner has interpreted this as a 'chilling effect' argument.

31. A chilling effect argument is directly concerned with the potential loss of frankness and candour in debate or the provision of advice which, as a result, would lead to poorer quality advice and less well formulated policy and decisions. This, it is argued, would not be in the public interest. The Commissioner has gone on to consider this argument further below.

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

32. The Commissioner recognises that there is a public interest in openness and accountability. In the particular circumstances of the case there is a public interest in increasing public understanding of the government's response to the swine flu pandemic. Given the widespread public concern that existed at the time of the request about the virus, the Commissioner believes that there is a strong public interest in the public gaining understanding of whether the government's actions in relation to the pandemic were based on detailed, effective and appropriate scientific advice. The Commissioner considers that the disclosure of the withheld information would go towards satisfying these public interest factors.
33. However, the Commissioner has to balance these public interest arguments in favour of disclosure against those in favour of maintaining the exemption. As noted above, the Commissioner has identified the arguments in favour of maintaining the exemption as a safe space argument, and a chilling effect argument.
34. In considering the weight to give to safe space arguments the Commissioner has been mindful of the views of the Tribunal in *Department for Education and Skills v the ICO & The Evening Standard* [EA/2006/0006]. In that case the Tribunal recognised the importance of the safe space argument, stating that,

*"The timing of a request is of paramount importance to the decision [...] disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines*



*depicting that which has been merely broached as agreed policy.*"<sup>2</sup>

35. Therefore, in reaching a view on the weight to give to a safe space argument, the Commissioner considers that it is important to take into account the age of the information, and whether the formulation and development of the policy in question was still underway at the time of the request. In reaching this view he is mindful of the views of the Tribunal in *Department for Business, Enterprise and Regulatory Reform v the ICO & Friends of the Earth* [EA/2007/0072], where it commented in relation to the need for a private 'thinking' space that,

*"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."*<sup>3</sup>

36. Therefore, with regard to the safe space arguments, the Commissioner considers that these are strongest if, at the time of the request, the policy formulation and development was ongoing. In such circumstances these arguments focus on the need for a private space in which to develop live policy.
37. In this instance, the Commissioner notes that at the time of the request the swine flu pandemic was still ongoing. The Commissioner accepts that government policy decisions regarding the monitoring, attempted containment, and treatment of the swine flu virus had already been made by the date of the SAGE meeting in question. However, he considers that the situation at the time of this meeting was still fluid, and there was still the potential for the overall picture to change. Furthermore, having considered the withheld information the Commissioner believes that the matters discussed at the SAGE meeting in question were still feeding into the development of the government policy. The Commissioner also notes that the request was made only 8 days after the SAGE meeting in question took place. Therefore the Commissioner is satisfied that the development of the government's policy in relation to the swine flu pandemic was still ongoing at the time of the request.
38. In line with the comments of the Tribunal quoted at paragraph 34, the Commissioner considers that significant and notable weight should be given to the safe space arguments in cases such as this where the policy

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<sup>2</sup> EA/2006/0006, para 75.

<sup>3</sup> EA/2007/0072, para 114.



making process is live and the requested information relates directly to that policy making. As the Tribunal noted, in such scenarios the public interest is very unlikely to favour disclosure unless for example it would expose some level of wrongdoing. The Commissioner notes that this has not been suggested by the complainant, and nor is there any suggestion of this in the withheld information. Furthermore in the Commissioner's opinion, it is clearly in the public interest that an expert body, appointed by the government in order to provide it with expert advice in regard to an influenza virus, would be able to do so away from external scrutiny.

39. In considering the weight to give to the chilling effect arguments the Commissioner has again been mindful of the views of the Tribunal in *Department for Education and Skills v ICO & The Evening Standard* [EA/2006/0006] which stated that,

*"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."*<sup>4</sup>

40. Therefore in considering arguments of this kind the Commissioner will consider the contents of the withheld information. In addition to this, he will also consider the timing of the request, and especially whether the requested information relates to an issue that was still live at the time of the request?
41. With regard to the contents of the withheld information the Commissioner notes that it contains extracts of minutes of an expert scientific committee, put in place to provide expert advice to the government in relation to an influenza pandemic. The Commissioner is satisfied that the minutes reflect a meeting in which a free and frank exchange of views took place, and in which a range of issues relating to the spread and treatment of the virus were discussed.
42. The Commissioner notes that it could be argued that many of the attendees at the SAGE meeting were senior figures and experts in their field; and that the public would expect that a committee of this nature, dealing with issues relating an ongoing influenza pandemic, would discuss these topics in a full and frank manner. Therefore the Commissioner accepts that it is arguable, to a certain extent, that the disclosure of this information would not have a severe chilling effect on future discussions, as these are senior scientific experts, discussing

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<sup>4</sup> EA/2006/0006, para 75(i).

relevant issues in a manner that would be expected by the general public.

43. However, in order to determine what weight to give this public interest factor, it is crucial to consider the context of the information, and the timing of the request. The SAGE meeting in question met to discuss the progress and treatment of the swine flu pandemic, and to feed into the development of government policy in regard to this virus. Although by the time of the request public concern had dropped somewhat as the pandemic did not appear to be as severe as previously predicted, the topic under discussion was still a highly infectious influenza virus which had spread rapidly, and was still spreading amongst the populace (both nationally and globally). The Commissioner considers that public concern about the spread of the virus, and the potential for the virus to mutate, was still very much alive at the time of the request. Bearing in mind the timing of the request (as discussed at paragraph 37 above), and given the serious nature of the matters that the SAGE group was debating, the Commissioner is satisfied that the disclosure of the minutes of this meeting, only 8 days after the meeting took place, would have been likely to have a chilling effect on future meetings of the SAGE group which – at the time of the request – were still a possibility.
44. Therefore, due to the particular circumstances of this case, the Commissioner is persuaded that the disclosure of the withheld information would be likely to have a chilling effect on the members of the SAGE group.
45. Despite the strong public interest factors in favour of disclosure, the Commissioner believes that the public interest factors in favour of maintaining this exemption are particularly significant, especially given the timing of the request only 8 days after the SAGE meeting took place. In particular, the Commissioner notes that the role of the SAGE group was to provide advice to the UK government and devolved administrations on scientific matters relating to the swine flu pandemic. Given the potentially serious effects that the swine flu pandemic could have had on the health of the nation and the UK economy, the Commissioner considers that the public interest in protecting the safe space within which the government's response to that pandemic could be developed to be crucially significant. In addition, he considers that the public interest in avoiding any inhibition to that advice to also be particularly weighty.
46. Taking this into account, the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(a) in relation to the withheld information to which it has been applied outweighs the public interest in disclosure. Therefore this information should be withheld.

## Section 40

47. The DoH has relied upon sections 40(2) and 40(3)(a)(i) in order to withhold some of the withheld information. In its letter to the Commissioner dated 13 December 2010 it confirmed that it was now solely relying upon this exemption in relation to some of the information.
48. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
49. The condition listed at section 40(3)(a)(i) applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. In this case the DoH has stated that the disclosure of the withheld information would be in breach of the first principle of the DPA.
50. The full text of section 40 can be found in the Legal Annex at the end of this Notice.
51. In order to establish whether this exemption has been correctly applied the Commissioner has first looked at whether the withheld information constitutes the personal data of a third party.
52. Section 1 of the DPA defines personal data as data which relates to a living individual, who can be identified:
  - from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
53. In this case the DoH has relied upon this exemption in order to withhold the identity of a geographical location in relation to an outbreak of the swine flu virus. It has argued that this information relates to a small group of individuals, and to a study that was done of the infected members of that group. It has argued that the disclosure of this information, *"along with any subsequent release of information on [the geographical location], has the potential to allow the future identification of those individuals involved in that study."*
54. In addition to this, the DoH has also referred the Commissioner to information already in the public domain in regard to the study. It argued that, *"Revealing the name of [the geographical location] at which the study took place has the clear potential to allow the revelation of medical information about individuals through deductive disclosure."*

55. Given that – if these submissions were correct – the disclosure of this information would disclose sensitive personal medical information about individuals, the Commissioner has considered these arguments at length. In addition, he has again carefully considered the withheld information, together with other publically available information that the DoH has directed him to.
56. The Commissioner notes that the DoH has not argued that it holds other information that enables it to identify the individuals it has stated this information relates to. Instead its arguments focus solely on the potential for the disclosure of this information, together with other information which is in the public domain, to lead to the disclosure of information about specific identifiable individuals.
57. After considering the withheld information and the other information publically available, the Commissioner is not satisfied that an individual can be identified from this information. Whilst the Commissioner accepts that the study referred to by the DoH relates to a relatively small geographical location, and a relatively small group of individuals, he is not persuaded that that group of individuals is so small as to reasonably assume that the disclosure of this information would lead to the identification of individuals. Therefore he is not persuaded that the disclosure of this information would involve the disclosure of personal data. As such, the Commissioner finds that this exemption is not engaged.
58. As the Commissioner has found that this exemption is not engaged, he has not gone on to consider whether the disclosure of the information would be in breach of the data protection principles.
59. As noted at paragraph 16 above, during the investigation of the case the DoH informed the Commissioner that in relation to the information that it believed was exempt under section 40(2), it was no longer relying upon section 35(1)(a) to withhold this information as well. Therefore, as the Commissioner has found that section 40(2) is not engaged, and as the DoH has not applied any other exemption to this information, this information should be disclosed.

## **Procedural Requirements**

60. Section 1(1) states that:

*“Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

(b) *if that is the case, to have that information communicated to him."*

61. Section 10(1) states 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."*

62. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under the exemption cited by the DoH, he considers that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The DoH's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the DoH also breached section 10(1).

63. The Commissioner has also considered whether the DoH has complied with its obligations under section 17(1).

64. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.

65. During the course of the investigation the DoH sought to rely upon section 40(2) to withhold some of the requested information. However, it did not cite this exemption in the refusal notice or the internal review in relation to this request. For this reason the Commissioner finds that the DoH did not comply with the requirements of section 17(1).

66. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

## **The Decision**

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67. The Commissioner's decision is that the DoH dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly withheld some of the requested information under section 35(1)(a).

68. However, the Commissioner has also decided that the DoH did not deal with the request for information in accordance with the Act in that:
- It did not deal with the request in accordance with section 1(1)(b) in so far as it inappropriately relied upon section 40(2), in conjunction with section 40(3)(a)(i), to withhold some of the requested information.
  - In failing to comply with section 1(1)(b) within 20 working days, it also breached section 10(1).
  - It also failed to meet the requirements of section 17(1) in that it failed to inform the complainant that it was seeking to rely upon section 40(2), in conjunction with section 40(3)(a)(i), to withhold some of the requested information.

### **Steps Required**

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69. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:
- It should disclose the information it has withheld under section 40(2), i.e. the references to the geographical location referred to in the minutes of the SAGE meeting.
70. The DoH must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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71. 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.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

73. 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.
74. 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 15<sup>th</sup> day of March 2011**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

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### Section 1

- (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 the 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.
- (4) The information –
  - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

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

## Section 10

- (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 paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (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 Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

## Section 17

- (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 section (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 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,
  - (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.
- (2)** Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-
- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
  - (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
- (3)** The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (4)** In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.
- (5)** In this section-
- "government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;
- "the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;
- "Ministerial communications" means any communications-
- (a) between Ministers of the Crown,
  - (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
  - (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet

or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

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

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

## **Section 40**

- (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 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 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 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) he 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 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 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 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 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.