

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 April 2011

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

Summary

The complainant made a request to the Department of Health for information it held in relation to the plain packaging of tobacco products. The public authority refused the request under section 35(1)(a) (Formulation and development of government policy). Some information was subsequently disclosed at the internal review stage and some other information was disclosed during the course of the Commissioner's investigation. However, a small amount of information continued to be withheld. The Commissioner has considered the complaint and has found that in respect of the remaining undisclosed information, the section 35(1)(a) exemption is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The public authority also cited the section 40 (personal information) and section 42 (legal professional privilege) exemptions during the course of the investigation but the Commissioner has decided that these exemptions are not engaged. The Commissioner also found that in its handling of the request the public authority breached section 1(1)(b), section 10(1) and section 17(1) and now requires the public authority to disclose the withheld information within 35 calendar days of the date of this notice.

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.

The Request

2. On 21 December 2009 the complainant made a freedom of information request to the public authority for information related to plain packaging on tobacco products. The request read as follows:
 - (a) "Information which has been obtained by, or provided to, the DoH since 25 June 2009 which could be treated as being of evidential relevance to the development of regulation concerning 'plain packaging' of tobacco products and/or '*advertising on tobacco packaging*'";
 - (b) "Information on the extent to which, since 25 June 2009, the DoH has funded (in whole or in part) research or analysis in respect of 'plain packaging' of tobacco products and/or '*advertising on tobacco packaging*'"; and
 - (c) "Correspondence entered into since 25 June 2009 between the DoH and organisations supporting 'plain packaging' regulation (for example, Action on Smoking and Health, the Centre for Tobacco Control Research, the UK Centre for Tobacco Control Studies, Cancer Research UK and the British Heart Foundation) and individuals acting on behalf of such organisations in respect of 'plain packaging' of tobacco products and/or '*advertising on tobacco packaging*'".
3. The public authority responded to the request on 22 January 2010 at which point it confirmed that it held information falling within the scope of the request. However, the request was refused under section 35(1)(a) which provides for an exemption for information which relates to the formulation or development of government policy. The public authority concluded that the public interest in maintaining this exemption outweighed the public interest in disclosure.
4. On 5 February 2010 the complainant wrote to the public authority to ask it to carry out an internal review of its handling of the request. In particular the complainant asked the public authority to reconsider the request in light of what they saw as the strong public interest in disclosure.
5. The public authority presented the findings of its internal review on 16 March 2010. It now said that 'the publication of the new tobacco control strategy, *A Smokefree Future*' meant that it could now disclose some information which had previously been withheld. For part (a) of the request the public authority confirmed that information was held

- but that it was exempt under section 35(1)(a). This is a qualified exemption and the public authority said that it was carrying out a public interest test and would inform the complainant of the result of this within 10 working days. For part (b) of the request the public authority confirmed that no information was held. As regards part (c) of the request the complainant was provided with a number of letters from relevant organisations together with the responses to these letters.
6. The public authority presented the second part of its internal review on 31 March 2010 and wrote to the complainant with details of its public interest determination in respect of part (a) of the request. It now confirmed that the information falling within the scope of this part of the request was exempt under section 35(1)(a) and that it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
 7. On 12 April 2010 the complainant wrote a 'pre-complaint letter' to the public authority to give it a further opportunity to release the information in part (a) of the request. The complainant also asked the public authority to confirm that it had received all of the information falling within the scope of part (c) of the request.
 8. The public authority responded to the complainant on 19 April 2010 stating that its position on part (a) of the request had not changed. As regards part (c) of the request the public authority said that all relevant information had been disclosed.

The Investigation

Scope of the case

9. On 13 May 2010 the complainant complained to the Commissioner about the public authority's decision to refuse the request. In particular the complainant provided a detailed submission to support its view that the information in part (a) of the request should be disclosed. The complainant also confirmed that it was satisfied with the public authority's response to parts (b) and (c) of the request and so the Commissioner has not considered the public authority's response to these elements of the request.
10. As noted at paragraph 13 below, some further information under part (a) of the request was made available to the complainant during the course of the Commissioner's investigation. However further

information continued to be withheld and it is this information which the Commissioner has considered as part of this decision notice.

11. The complainant also asked the Commissioner to consider the time taken to respond to the request and the time taken to complete the internal review.

Chronology

12. The Commissioner first wrote to the public authority with details of the complaint on 22 June 2010. The Commissioner asked to be provided with copies of the withheld information, clearly marked to show where any exemption was being applied.
13. The public authority responded to the Commissioner on 8 July 2010 and provided copies of the withheld information. The public authority also provided further details on its handling of the request and its reasons for refusing to disclose some of the information. As regards part (a) of the request it now said that some additional information could be disclosed and this was being made available to the complainant. As for the remaining information under part (a) of the request the public authority argued that it continued to engage the section 35(1)(a) exemption. However, it also said that it now believed that other exemptions could be applied to this information and cited section 27(1)(a) and (b) (International relations), section 40 (Personal information) and section 42 (Legal professional privilege).
14. The Commissioner contacted the public authority again on 12 October 2010, once the complaint had been allocated to one of his case officers. The Commissioner now asked for some further details on its application of the section 35(1)(a) exemption. In particular the Commissioner asked the public authority to confirm which policy the withheld information related to. The Commissioner also asked for further details on the background to the policy and an outline of what stage the policy process had reached by the time the request was received. Finally, the Commissioner asked the public authority to explain, with reference to the withheld information, why it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
15. The public authority responded to the Commissioner's enquiries on 14 October 2010.

Findings of fact

16. On 1 February 2010 the Government published *A Smokefree future: A Comprehensive Tobacco Control Strategy for England* outlining a number of measures to reduce tobacco consumption in England.¹ It considered the option of plain packaging in relation to the aim of reducing the attractiveness of tobacco products and concluded that the evidence base regarding 'plain packaging' needed to be more carefully examined. The Strategy encouraged research to further understanding of the links between packaging and consumption, especially by young people.

Analysis

17. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 35(1)(a) – Formulation or development of government policy

18. The public authority has, in the first instance, withheld the remaining small amount of information falling within the scope of part (a) of the request under the exemption in section 35(1)(a) of the Act. Section 35(1)(a) provides that information is exempt if it relates to the formulation or development of government policy. Section 35(1)(a) is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
19. The Commissioner considers that the term 'relates to' can safely be given a broad interpretation. This is because the exemption is qualified and a public authority would be obliged to disclose information where there is no significant harm to the public interest. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or

¹http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_111789.pdf

altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

20. In this case the public authority has confirmed that the withheld information relates to the evidence used to inform the possible introduction of plain packaging in the wider context of the government's overall tobacco strategy. It explained that plain packaging was one of many possible areas of tobacco control activity under consideration for potential policy action ahead of the previous government's tobacco control strategy, *A Smokefree Future*. The Commissioner is satisfied that the work carried out by the public authority in relation to plain packaging amounts to government policy within the meaning of section 35(1)(a). Having reviewed the withheld information the Commissioner is satisfied that this relates to the early evidence gathering stage of the policy process and that therefore the information can be said to relate to the formulation of government policy. Therefore the Commissioner is satisfied that section 35(1)(a) is engaged in respect of the withheld information.
21. When submitting its complaint the complainant had referred the Commissioner to section 35(2) of the Act which provides that once a decision as to government policy has been taken, any statistical information used to provide an informed background to that decision cannot be exempt information under section 35(1)(a). The Commissioner wishes to stress that the majority of the withheld information is not statistical. A very small amount of information that provides details of the progress of tobacco control methods internationally could be said to be statistical insofar as it relies on charts and graphs to evidence this information. However, at the time the request was received the policy process was still ongoing and so no decision had been taken and therefore, in any event, section 35(2) is not relevant in this case.

Public interest test

Public interest arguments in favour of disclosing the requested information

22. The public authority had suggested that disclosure would damage relations with third parties involved in the policy process. With this in mind the complainant argued that there is strong public interest in transparency where third parties have or appear to have privileged access to government and where they are able to influence or directly influence the formulation or development of government policy.

23. The complainant highlighted section 35(4) of the Act which requires public authorities when balancing the public interest to have regard to the particular public interest in the disclosure of factual information which has, or is intended to be used to provide an informed background to decision taking.
24. The complainant also suggested that when explaining its reasons for withholding the information the public authority had failed to identify what specific harm would result from disclosure but had instead relied on general arguments as to why the public interest favoured maintaining the exemption.
25. The Commissioner also considers that there is a public interest in aiding public understanding on issues being considered by the government in its tobacco control strategy.

Public interest arguments in favour of maintaining the exemption

26. The public authority has argued that the public interest favours maintaining the exemption in respect of the remaining withheld information because of the importance of ensuring good relations with third party stakeholders involved in the policy process. The withheld information relates to a seminar, or 'Roundtable discussion' which was convened by one of the public authority's stakeholders to consider the evidence on plain packaging at which a number of representatives of other governments were present. The public authority has explained that the seminar took place under 'Chatham House' Rule – 'a widely recognised, reputable way in which Government and other worldwide organisations operate policy discussions in that they provide both anonymity to speakers and encourage openness and the sharing of information'. Neither the identity nor the affiliation of the participants was to be revealed. It argues that the stakeholder concerned would not have agreed to convene the seminar and the other participants would not have agreed to take part if they thought that there was any possibility that the information would have been disclosed. Therefore it argued that disclosure would have damaged relations with the stakeholders concerned and said that in its view there was a strong public interest in protecting the basis of trust which is essential for the positive working relationship between the public authority and the third parties concerned.
27. The public authority has also referred to the public interest in having a safe space within the policy making process. It argues that there is a public interest in ensuring that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation, including the exploration of all policy options.

Balance of the public interest arguments

28. The Commissioner accepts that there is a public interest in disclosure in terms of aiding public understanding of the issues being considered in relation to the government's policies on tobacco control. Disclosure would go some way to helping the public understand the evidence base for plain packaging and therefore the Commissioner has given some weight to this factor. The general arguments in favour of transparency and accountability are also important here to allow the public to engage in debate about a potential policy which involves issues of consumer choice –v- public health in relation to the sale of a legal product.
29. The complainant had referred to the decision of the Information Tribunal in *Department for Business, Enterprise & Regulatory Reform v Information Commissioner* which highlighted the public interest in disclosure of information on the role played by lobbyists in the policy process because they represented a 'sectional interest'.² In the *BERR* case the Tribunal had decided that the Confederation of British Industry (CBI) had privileged access to the public authority and that there was a public interest in seeing the impact such bodies have on policy making and the nature of their relationship with government. In particular it concluded that disclosure:

*"...subjects the relationship to a certain degree of scrutiny which can assist in ensuring that a particular relationship does not become unduly influential or dependent."*³

30. Whilst the circumstances in the two cases are not exactly the same the Commissioner does accept that a parallel can be drawn between the two and that in this particular case there is a public interest in transparency of how government formulates policy including who it consults with. Disclosure would help further public understanding of the extent of the influence held by third parties in relation to tobacco control policies, on government. In reaching this view the Commissioner is mindful of the fact that the roundtable meeting was organised by the stakeholder in question and that the presentations were sympathetic to that stakeholder's publicly stated agenda. The issues discussed appear to focus on one side of the argument and how any arguments to the contrary could be countered. In this sense the roundtable discussion can be seen as a lobbying exercise rather than a discussion with neutral third parties. Therefore the Commissioner has

² *Department for Business, Enterprise & Regulatory Reform v Information Commissioner and Friends of the Earth* [EA/2007/0072]

³ *Ibid*, para. 133e

given arguments in favour of greater transparency in how and by whom government policy is influenced significant weight.

31. As regards the public interest in maintaining the exemption the Commissioner accepts that policy making depends on being broad based from a variety of sources including external stakeholders. Since the discussions at the Roundtable discussion took place under Chatham House Rules there was an understanding that individual contributions would not be attributed. Disclosure would be contrary to the wishes of the organisation that convened the meeting and therefore would be likely to make relations more difficult. The public authority has said that the third party who convened the seminar is a key stakeholder in its tobacco policy and so disclosure would harm the government's policies in regard to the potential for plain packaging as well as future policies on tobacco control.
32. The Commissioner accepts that disclosure of the information is not without its sensitivities. Disclosure would in all likelihood cause some damage to the public authority's relationship with the particular stakeholder. However, the Commissioner must also take into account the fact that it is evidently in the interests of this stakeholder to engage with the public authority in relation to policies on tobacco control. Whilst they may not welcome disclosure, in the Commissioner's view they would also not be easily discouraged from engaging with the public authority in future. As a result the Commissioner has given only limited weight to the public authority's arguments around protecting its relationship with the stakeholder concerned.
33. As regards the public authority's other arguments in favour of maintaining the exemption the Commissioner accepts that, generally speaking, there is a public interest in allowing public authorities a safe space in which to formulate and develop policy free from any outside interference. This is because premature disclosure acts as a distraction whilst the policy making process is ongoing and the timing of the request is an important factor here. The withheld information dates from June 2009 and the request was submitted in December 2009. Therefore at the time of the request the information was both recent and related to a 'live' policy insofar as the tobacco strategy was still being actively considered at that point and no final decisions had been made. However, the Commissioner is of the view that policy discussions or dialogue with lobbyists do not warrant the same safe space as purely internal discussions or policy thinking. Furthermore, the fact that the information relates to a live policy also weighs in favour of disclosure because there is a public interest in making the contribution of lobbyists or other stakeholders public at the time when

the policy debate is still ongoing, i.e. before policy decisions have been finalised, to allow counterbalancing views to be presented. The Commissioner finds support for this approach in the *BERR* case where the Tribunal commented:

*"In our view, there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy.... This means that there is a public interest in the disclosure of information in relation to such deliberations even at the early stages of policy formulation."*⁴

34. It went on to say:

*"The interest lies not only in being able, as a matter of historical analysis, to determine 'what went on', but in being able to participate meaningfully in the debate. That can sometimes only happen at a point in time where there is still an opportunity to influence the debate; that is to say before policy is finalised."*⁵

35. In light of this the Commissioner view is that any public interest in having a safe space in the public authority's dealings with third parties is at the very least counterbalanced by the public interest in increasing public participation in the debate on the issues being discussed.

36. The Commissioner accepts that there is a public interest in favour of maintaining the exemption and that there are risks that disclosure could make the public authority's relationships with certain stakeholders more difficult. However, the Commissioner feels that this is outweighed by the public interest in having a fully informed and open debate where widespread health issues are concerned, and in understanding the extent of the influence of lobby groups in formulating government policy. Mindful of the presumption in favour of disclosure the Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Other exemptions

37. During the course of the Commissioner's investigation the public authority suggested that the requested information was additionally exempt under section 27(1)(a) and (b), section 40 and section 42 but

⁴ *Ibid*, para. 117.

⁵ *Ibid*, para. 133.

did not provide any arguments to support the application of the exemptions. For section 27, the Commissioner has reviewed the withheld information and it is not otherwise evident to him why the exemption would apply. In any event the onus is on the public authority to justify why it is relying on an exemption and therefore the Commissioner's view is that section 27 has not been demonstrated to apply.

38. Whilst the public authority has not provided any arguments to support the application of section 40 the Commissioner, mindful of his duties under the Data Protection Act 1998, has decided to consider the application of this exemption.
39. As regards section 42, it is clear that some of the withheld information is legal advice. In light of this the Commissioner thinks it is appropriate to consider whether section 42 would apply as this provides for an exemption for information subject to legal professional privilege.

Section 40(2) – Personal information

40. Section 40(2) of the Act provides that information is exempt from disclosure if it constitutes the personal data of someone other than the applicant and disclosure would satisfy one of two conditions. In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles.

Is the information personal data?

41. In deciding whether the exemption applies it is first necessary to consider whether the withheld information constitutes personal data. Personal data is defined in the Data Protection Act 1998 ("DPA 1998") 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."

42. The public authority has not explicitly said where it believes section 40 applies, however, the Commissioner has reviewed the withheld information and found that the exemption could be applied to some of

the information which reveals the identity of some of the individuals attending and contributing to the roundtable discussion. In the Commissioner's view such information is clearly personal data as the information, given that it also includes their job titles and the organisations they represent, would identify living individuals if it was disclosed especially when combined with the other withheld information.

The first data protection principle

43. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the data protection principles. In the Commissioner's view it is the first data protection principle which is relevant in this case. The first principle provides that:

'1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.'

Fairness

44. In considering the fairness of disclosure the Commissioner has taken into account the following factors:

- The expectations of the individuals
- The possible consequences of disclosure
- Nature and content of the information

45. As regards the expectations of the individuals the Commissioner is mindful of the fact that the roundtable discussion took place under Chatham House rules and there was an understanding that the contributions of individuals attending the meeting would not be attributed. However, whilst the withheld information records the identities of people giving presentations it does not record the individual contributions of those who were participating in the discussions as opposed to addressing the meeting, such as the representatives of foreign governments. In the Commissioner's view those giving presentations would not have had the same expectation of privacy as those individuals who were in attendance such as the representatives of foreign governments whose contributions as policy makers rather than academics or external experts would be likely to be more sensitive.

46. The Commissioner has also taken into account the fact that individuals participating in the round table discussion did so in a professional rather than a personal capacity. When determining whether disclosure of personal data would be fair the Commissioner considers that a distinction can be drawn between someone's personal life and their professional life. Where information relates solely to an individual's professional life the Commissioner considers that disclosure is less likely to be unfair. Furthermore, in this case the speakers at the meeting appear to be experts in their field or relatively senior members of their respective organisations. The fact that they are involved in giving presentations at events of this kind would appear to suggest that they have public facing roles and so would have at least some expectation that the information would be disclosed. Indeed the Commissioner understands that whilst the contributions of individuals attending the meeting, such as the representatives of other governments, would have been covered by Chatham House rules, no similar restriction was placed on the presentation materials. In the Commissioner's view the policy experts and academics who are named in the withheld information would have had at least some expectation that information could be disclosed.
47. The Commissioner has also considered the consequences of disclosing the information and can see no obvious harm or adverse consequences to the individuals concerned if the information were to be released. Whilst it is possible that disclosure could bring some of the individuals to the attention of the tobacco industry it is difficult to see what prejudice this would cause given that such individuals appear to be prominent figures in their fields whose views are likely to be well known. It is more likely that the policy makers, i.e. the representatives of the governments considering plain packaging, would be the target of the tobacco lobby's attention but, as already noted, the identities of these individuals are not revealed in the withheld information.
48. The Commissioner considers that it is also appropriate to consider any legitimate interests in disclosure and to balance these against the data subjects' reasonable expectations and any damage or distress caused by disclosure. In the Commissioner's view disclosure may still be fair if there is a more compelling public interest in disclosure. In this case the Commissioner would suggest that the legitimate interest lies in providing greater transparency and accountability in the role played by external stakeholders on the policy process. The Commissioner has already indicated that the data subjects would have had only limited expectations that information would not be disclosed and any adverse consequences from disclosure to the individuals concerned would be insignificant. Therefore the Commissioner has decided that the legitimate interests in disclosure outweigh any other concerns.

A schedule 2 condition?

49. The Commissioner has now gone on to consider whether disclosure of any of the information which constitutes personal data would meet a condition in schedule 2 of the DPA 1998. The condition which is most likely to be relevant is the 6th condition. The 6th condition is that:

“The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or third 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.”

50. The Commissioner’s approach is to consider whether the 6th condition is met by way of the following 3 part test which must be satisfied:

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

51. As regards the legitimate interests in disclosure the Commissioner considers that this is met by the need for transparency and accountability in knowing more about the influence external stakeholders have on government policy. The Commissioner is not aware of any other alternative means by which this level of transparency and accountability could be achieved and therefore has concluded that disclosure is necessary for these legitimate interests.

52. The Commissioner has already indicated, when considering the issue of fairness, that disclosure would not cause unwarranted interference to the rights and freedoms of the data subjects. Therefore he is satisfied that disclosure would meet the 6th condition of schedule 2.

Lawfulness

53. Finally the Commissioner has considered whether disclosure would be lawful. The most obvious example of where disclosure is likely to be unlawful is if disclosure would contravene a statutory prohibition. However, the Commissioner is not aware of any statutory prohibition which would serve to prevent disclosure in a case like this. The Commissioner would also stress that given his previous findings on the

fairness of disclosure, he is satisfied that disclosure would not contravene any of the articles of the Human Rights Act 1998.

54. The Commissioner has concluded that disclosure of the information would not contravene the first data protection principle and therefore section 40(2) is not engaged.

Section 42(1) – Legal professional privilege

55. Section 42(1) provides that information in respect of which a claim for legal professional privilege could be maintained in legal proceedings is exempt from disclosure.
56. Information will be subject to legal professional privilege if it constitutes confidential legal advice given by a legal advisor to a client in a professional capacity. Privilege can be either litigation privilege, where litigation is in progress or anticipated, or advice privilege where no litigation is in prospect. In this case the Commissioner is satisfied that some of the withheld information is advice from a professional legal adviser given to a client, in this case the stakeholder who organised the roundtable discussion.
57. Information will only be privileged so long as it is held confidentially. The legal advice in this case was shared with a range of participants at the roundtable discussion. Whilst it was prepared for the stakeholder who organised the discussion it was passed freely to those attending the discussions which included, representatives of other governments, academics and other stakeholders. Information may still be privileged where it is disclosed on a restricted basis, that is to say the advice is shared with a limited number of other individuals or organisations in confidence. However in this case there does not appear to have been any restrictions placed on the use of this particular information.
58. The Commissioner has also found a number of references to the legal advice in question in the public domain. In particular, some of the findings of the legal advice were quoted during parliamentary debates on the issue of plain packaging.⁶ Whilst he has not been able to find copies of the full legal advice the nature of the references lead the Commissioner to conclude that the legal advice has been distributed more widely to the extent that it can no longer be said to be

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<http://www.publications.parliament.uk/pa/cm200809/cmpublic/health/090625/pm/90625s08.htm#end> and <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90311-gc0001.htm>

confidential. In light of this the Commissioner has decided that section 42(1) is not engaged.

Procedural matters

59. In its refusal notice and at the internal review stage the public authority relied on the exemption in section 35(1)(a) to refuse to disclose some of the information falling within the scope of the request. It was only during the course of the Commissioner's investigation that it said that sections 27(1)(a) and (b), section 40 and section 42(1) would also apply to some of the withheld information. By failing to cite these exemptions within 20 working days the public authority breached section 17(1) of the request which requires a public authority to provide an applicant with a notice explaining why any requested information is believed to be exempt.
60. The Commissioner has decided that the information withheld by the public authority should have been disclosed. Therefore the Commissioner must record the following breaches of the Act.
61. By failing to make the information available to the complainant the public authority breached section 1(1)(b) of the Act. By failing to make the information available within 20 working days the public authority breached section 10(1) of the Act.

The Decision

62. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the Act:
 - The public authority breached section 1(1)(b) of the Act by failing to disclose the withheld information.
 - The public authority breached section 10(1) of the Act by failing to disclose the withheld information within 20 working days of receiving the request.
 - The public authority breached section 17(1) of the Act by failing to inform the complainant of exemptions on which it was seeking to rely within 20 working days of receiving the request.

Steps Required

63. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - The public authority shall disclose to the complainant the withheld information falling within the scope of part (a) of the request.
64. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

65. The Commissioner notes that the public authority in this case separated its internal review into two parts to take account of the extra time needed to carry out a public interest test. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. The Commissioner's view is that unless there are exceptional circumstances internal reviews should be completed within 20 working days and in one response.

Right of Appeal

66. 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 26th day of April 2011

Signed

**Lisa Adshead
Group Manager FOI Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.”

Section 35(2) provides that –

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

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

Section 35(3) provides that –

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

Section 35(4) provides that –

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

Section 35(5) provides that –

“In this section-

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

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

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

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

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

Personal Information

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

(d) it constitutes personal data which do not fall within subsection (1), and

(e) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

(f) 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-

1. any of the data protection principles, or

2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(g) 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."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."