IN THE FIRST-TIER TRIBUNAL **EA/2010/0001**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50191595
Dated: 24 November 2009

Appellant: DEDALUS LIMITED

Respondent: THE INFORMATION COMMISSIONER

Additional Party: ARTS COUNCIL OF ENGLAND

On the papers

Date of hearing: 20 April 2010

Date of Decision: 21 May 2010

Before

Annabel Pilling (Judge)
Andrew Whetnall
and
David Wilkinson

Representation:

For the Appellant:	Eric Lane
For the Respondent:	Robin Hopkins, Michelle Voznick
For the Additional Party:	Aileen McColgan, Sarah Beech

Subject matter:

FOIA Whether information held s.1
FOIA Qualified exemptions – Inhibition of free and frank exchange of views for purposes of deliberation s.36(2)(b)(ii)
FOIA Public interest test s.2
FOIA Cost of compliance and appropriate limit s.12

Cases:
Berend v IC and London Borough of Richmond upon Thames (EA/2006/0049 and 0050)
King v IC and DWP (EA/2007/0085)
DBERR v IC and Friends of the Earth (EA/2007/0072)
McIntyre v IC and Ministry of Defence (EA/2007/0068)
Roberts v IC and DBERR (EA/2009/0035)
Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013*)*
*Department for Education and Skills v IC and Evening Standard (*EA/2006/0006)
Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030)
Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)
Department for Culture Media and Sport v Information Commissioner (EA/2008/0065)
CAAT v Information Commissioner and Ministry of Defence EA/2006/0040
Department of Trade and Industry v Information Commissioner (EA/2006/0007)
FCO v IC (EA/2007/0047)
ECGD v Friends of the Earth [2008] EWHC 638 (Admin)
Roberts v IC (EA/2008/0050)

DECISION OF THE FIRST -TIER TRIBUNAL

The Appeal is allowed in part.

For the reasons given below we find that

i) ACE does hold further information which falls within the scope of the Request for Information of 2 January 2008;

ii) In respect of the document identified as 2, the exemption in section 36(2)(b)(ii) of FOIA is engaged, however, in all the circumstances of the case the public interest in maintaining the exemption did not outweigh the public interest in favour of disclosure. ACE was not entitled to withhold this information;

iii) In respect of the document identified as 9, the exemption in section 36(2)(b)(ii) of FOIA is engaged, and in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in favour of disclosure. ACE was entitled to withhold this information;

iv) ACE was entitled to rely on section 12 (4) to refuse to comply with the Request for Information of 11, 16, 17, 22 and 25 January 2008 on the basis that the aggregated cost of complying with them exceeded the appropriate cost limit;

v) ACE was entitled to rely on section 12 (4) to refuse to comply with the Request for Information of 1 and 18 February 2008 on the basis that the aggregated cost of complying with them exceeded the appropriate cost limit.

As we have found that ACE does hold further information which falls within the scope of the Request for Information of 2 January 2008, we direct that information be disclosed unless ACE considers that it is exempt information under the provisions of FOIA.
If ACE considers that it is exempt, we direct that written submissions on that point must be made to the Tribunal by 17 May 2010.
We direct that the Commissioner and the Appellant provide any written Reply to those submissions by 1 June 2010.

The relevant documents are:

i) Closed bundle pages 122-124

ii) Closed bundle page 132;

iii) Closed bundle pages 133-136;

iv) Closed bundle pages 112-113, slides 18 and 19 of the Presentation on 5 December 2007.

Reasons for Decision

Introduction

1. This is an Appeal by Dedalus Limited ('Dedalus') against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 24 November 2009. The Decision Notice relates to a number of requests for information made by Dedalus to the Arts Council of England ('ACE') under the Freedom of Information Act 2000 (the 'FOIA'). The requests all concerned ACE's decision to disinvest in Dedalus, a publishing company that had been in receipt of ACE funding for many years.

Factual Background

2. ACE is the national development agency for the arts in England distributing public money from the Government and the National Lottery. Funding is distributed via a number of different mechanisms; for example, under its 'Regular Funding for Organisations" programme it provides funding for a period of one, two or three years whereas its "Grants for the Arts" programme ('GfA') provides funding for specific activities.

3. Dedalus is a publishing company that was founded in 1983. It is mainly a publisher of literary fiction and has translated works from many European languages, although it publishes for the public interest rather than commercial gain. It has won various literary prizes over the years and has received financial or other support from a number of European institutions. Dedalus operates with one full-time and one part-time member of staff and an unpaid board of directors.

4. From 1990 Dedalus was a Regularly Funded Organisation (an 'RFO') of the Eastern Arts Board which became ACE, East in 2004 when the bodies merged. From 1991 to 2003 Dedalus received translation grants from the Arts Council

Translation Fund and, when this was replaced in 2003 by the GfA, received two specific grants for translation funding between 2003 and 2007.

5. In 2007 ACE conducted an Investment Review of its entire portfolio of RFOs, of which there were around one thousand nationally, around 60 in the East region. One of the organisations in which it decided to disinvest was Dedalus.

6. ACE's Investment Review Strategy has come under much criticism and was the subject of an independent review by Baroness McIntosh in June 2008 in which she made a number of recommendations for the way forward.

7. Dedalus maintains that ACE has acted unlawfully in deciding to disinvest in it. It accuses several named individuals of unlawful conduct, including criminal conduct. These allegations have been investigated and have not been substantiated. In particular, the decision to disinvest has been the subject of an internal audit, a complaint on fifteen separate grounds to the Independent Complaints Reviewer and the subject of judicial review. It is understood that ACE has agreed to revisit the decision to disinvest in Dedalus.

The request for information

8. By e-mail on 2 January 2008 Dedalus requested information from ACE as follows:

> *"I am requesting from ACE under the provisions of the Freedom of Information Act the Dedalus Disinvestment File and all documentation, computer files and information, in whatever format, relating to disinvestment in Dedalus to be supplied to us.*
>
> *I would also like you to put on the record the date in which ACE, E decided to disinvest in Dedalus and produce the documentation which supports this."*

9. Before ACE responded to this request, Dedalus made a further request on 7 January 2008:

> *"Further to my request of 2 January 2008, please supply to Dedalus under the provisions of the Freedom of Information Act, the following information:*

1. *The time and date when The Procedural Guidance for Disinvestment from RFOs was taken off the Arts Council website.*

2. *The reason for removing The Procedural Guidance for Disinvestment from RFOs.*

Please supply all documentation in whatever format – computer files, emails, transcripts of telephone conversations-relating to this decision from all ACE offices."

10. A further request was made on 9 January 2008 for information relating to other RFOs. This request is not relevant to this Appeal.

11. ACE sent its substantive reply on 10 January 2008 and provided Dedalus with 137 pages of documents[1]. ACE withheld one section of one document on the basis that it was exempt from disclosure under section 36(2)(b)(ii) of FOIA. This has subsequently been disclosed and does not form part of this Appeal.

12. Dedalus requested an internal review on the same date. ACE responded on 15 January 2008 and explained that as its Chief Executive had been involved in the decision to apply section 36(2)(b)(ii) of FOIA, there was no-one more senior to review that decision. As a result, ACE advised Dedalus to make a complaint to the Commissioner.

13. Dedalus sent further e-mails to ACE (on 11, 16, 17, 22 and 25 January 2008) which effectively raised queries with regard to the amount of information provided in response to the request of 2 January 2008 by identifying and requesting various pieces of additional information or asking additional questions.

14. ACE responded on 25 January 2008 to the requests for information under FOIA of 11, 16, 17, 22 and 25 January 2008. Attached at Appendix A to that response was

[1] The fact that no distinct "Dedalus Disinvestment" file was made by ACE is not challenged in this Appeal.

an outline of the various requests[2]. ACE explained that under section 12 of FOIA public authorities do not need to comply with a request, or aggregated requests, where the cost of doing so would exceed the appropriate limit. In the case of ACE that limit is £450 and the cost of providing the information requested was likely to exceed that amount when added to the related requests already made.

15. Dedalus sought an internal review of that decision on 7 February 2008. ACE responded on 12 February 2008 and confirmed its decision.

16. In addition to this, Dedalus sent further requests on 1 and 18 February 2008[3] for information which Dedalus believed should have been disclosed in response to the request of 2 January 2008. ACE refused to comply with these requests, again relying on the provisions of section 12 of FOIA.

The complaint to the Information Commissioner

17. Dedalus contacted the Commissioner on 1 February 2008 to complain about ACE's handling of the information requests. Due to a backlog of complaints, no case officer was appointed until December 2008.

18. The Commissioner then investigated the substantive complaint, receiving additional arguments and material from Dedalus and ACE. A large part of his investigation involved clarifying the scope of the request of 2 January 2008. During the course of his investigation, the Commissioner identified a number of documents which he considered to be within the scope but which ACE had not considered to fall within the scope at the time of dealing with the request. ACE accepted the Commissioner's view on this point. ACE disclosed these documents to Dedalus apart from 2 documents (identified as 2 and 9) for which it relied on the exemption under section 36(2)(b)(ii) of FOIA, the opinion of the qualified person having been

[2] We do not repeat those here, the outline appears as an Annex to the Commissioner's Decision Notice and can be viewed there.
[3] Again, we do not repeat these requests which appear on the Annex to the Commissioner's Decision Notice referred to above.

sought and obtained after the Commissioner had informed ACE of his view that these documents fell within the scope of the request.

19. The Commissioner issued a Decision Notice on 24 November 2009. He concluded that:

    i) Some of the information provided by ACE during the investigation did fall within the scope of the request of 2 January 2008 and should be disclosed to Dedalus (identified as parts of documents 3, 4 and 5);

    ii) ACE was entitled to withhold documents 2 and 9 on the basis that they were exempt from disclosure under section 36(2)(b)(ii) of FOIA and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information;

    iii) ACE was entitled to rely on section 12 (4) to refuse to comply with the requests of 11, 16, 17, 22 and 25 January 2008 on the basis that the aggregated cost of complying with them exceeded the appropriate cost limit;

    iv) ACE was entitled to rely on section 12 (4) to refuse to comply with the requests of 1 and 18 February 2008 on the basis that the aggregated cost of complying with them exceeded the appropriate cost limit;

    v) ACE did not hold any further information which falls within the scope of the request of 2 January 2008 other than that which had been identified during his investigation.

20. The Commissioner also found that ACE had breached section 1(1)(b) and section 10 of FOIA in relation to its initial response with regard to documents 2, 4 and 9;

and had breached section 17(1) by failing to provide the refusal notice in respect of the 1 February 2008 request within 20 working days.

The Appeal to the Tribunal

21. Dedalus appealed to the Tribunal on 19 December 2009.

22. The Tribunal joined ACE as an Additional Party.

23. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents, including a number of witness statements from ACE.

24. In addition, the Tribunal was provided with a Closed bundle of documents. This bundle included the disputed information, that is, the documents identified as 2 and 9 in the Commissioner's Decision Notice. This Closed bundle was not made available to Dedalus as to disclose it would defeat the purpose of this Appeal. In order to preserve the confidentiality of the contents of the disputed information and other documents within the Closed bundle we have not referred to their contents in this Decision.

25. Although we may not refer to every document in this Decision, we have considered all the material placed before us, although we record that there was a large amount of duplication and inclusion of irrelevant material which was, in our opinion, avoidable. We have considered in detail the written submissions from the parties although we do not begin to rehearse every argument in this Decision.

The Powers of the Tribunal

26. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

27. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

28. The questions of whether ACE was entitled to refuse the later requests under section 12 of FOIA and whether the exemption in section 36(2)(b)(ii) of FOIA is engaged (and whether the consequential public interest test was applied properly) are questions of law based upon an analysis of the facts. The issue of whether the Commissioner should have allowed ACE to rely on the exemption in section 36(2)(b)(ii) of FOIA in relation to information identified as falling within the scope of

the request during the Commissioner's investigation required an exercise of discretion by the Commissioner.

The Issues for the Tribunal

29. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

30. Under section 12(1) of FOIA section 1 (1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit[4].

31. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Section 36 of FOIA is a qualified exemption.

32. The issues for determination in this Appeal are

i) whether the Commissioner was wrong to conclude that ACE did not hold any further information which falls within the scope of the request for information made on 2 January 2008.

ii) whether the Commissioner was wrong to conclude that ACE was correct in withholding documents 2 and 9 on the grounds that they were exempt from disclosure under section 36 of FOIA;

[4] The appropriate limit is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, and in the case of ACE is £450.

iii) whether the Commissioner was wrong to find that ACE was entitled to rely on section 12 of the FOIA to refuse to comply with the requests for information made by Dedalus on aggregated costs grounds.

Scope of request of 2 January 2008

33. Dedalus submits that all the documents that have been identified by it in the subsequent requests to ACE fall within the scope of the request of 2 January 2008. It submits that the Commissioner was wrong to "focus on establishing an objective understanding as to the information used by ACE to reach the decision to disinvest in Dedalus" and that by doing so, the Commissioner has allowed ACE to conceal documents. Further, it submits that there are other documents falling within the scope of the request that Dedalus only became aware of as a result of seeing draft report of the Independent Complaints Reviewer in May 2009.

34. In its submissions, Dedalus has explained why it believes these documents fall within the scope of the request on the basis that the information would help explain to Dedalus why ACE disinvested in it.

35. The Commissioner submits that he was correct to construe the request of 2 January 2008 objectively and draws our attention to the decision of this Tribunal in *Berend v IC and London Borough of Richmond upon Thames*[5]. In that case the Tribunal considered carefully the syntax of a lengthy request for information and, in particular, the use of the word "all". While we are not bound by previous decisions of the Tribunal and while the facts are different, we agree with the reasoning of the Tribunal that a subjective reading of a request for information, looking at the motivation and intention of the requestor, would be incorrect. To reject the objective reading of a request would not be in keeping with the "motive blind" approach the Tribunal is satisfied is the correct one.

[5] (EA/2006/0049 and 0050)

36. ACE submits that this is the only possible test which could be adopted and that it would be unworkable for the meaning of the request to turn on the requester's subjective intention. As there was ambiguity between what information Dedalus believed ACE had considered and what ACE asserted to have been used, the Commissioner properly obtained clarification from ACE as to the process used in reaching the final decision to disinvest in Dedalus. Information which the Appellant considers to have been relevant to ACE's decision to disinvest was found by the Commissioner not to have been so.

37. We agree with the Commissioner that the request must be construed objectively and in this case it follows that for information to fall within the scope of that request it must:

    i) relate to Dedalus; and

    ii) relate to the decision taken in December 2007 to disinvest in Dedalus.

38. Dedalus continues to assert that the decision to disinvest in 2007 was the culmination of a deliberate campaign by ACE to stop its funding that had commenced from, at least, the time of a controversial performance review in November 2003. As a result, it considers that material connected with that performance review falls within the scope of the request of 2 January 2008. It is not desirable for us to repeat the submissions that we received from the parties as to what happened at that performance review in 2003, save for the following material matters.

39. A performance review was held in November 2003. The reviewers comprised two external consultants and three members of ACE's staff. Towards the end of the review a discussion took place as to the future for Dedalus. What was said during that discussion has been a matter of dispute between the parties and has coloured their relationship subsequently. In particular, Dedalus submits that the performance review report did not reflect what was said during that discussion and disputes the

content of notes of that discussion that have been disclosed. Throughout this Appeal it has been asserted that the "laptop file" containing the original notes is the "single most important piece of evidence and the document that the Appellant wants above all else."

40. Dedalus insisted that ACE were either not disclosing the notes of the discussion or had edited them. An internal audit into Dedalus' complaint on this matter outlined the iterative drafting process of the performance review report and concluded that the substance had not changed from what had been recorded in the notes of the discussion. The audit did however identify a number of weaknesses, including the fact that the flipcharts used to take notes during the discussion had not been retained.

41. Irrespective of the dispute, ACE approved regular funding for Dedalus until the end of the 2007/08 financial year.

42. Although we consider that the Commissioner reached a reasonable conclusion in respect of the process used by ACE in reaching the decision to disinvest, we have been provided additionally with witness statements from individuals at ACE involved in the Investment Strategy Process and particularly in the decision to recommend disinvestment in Dedalus.

43. The contents of these witness statements have not been challenged save for the repeated assertion by Dedalus that ACE's decision was unlawful and that the decision to disinvest had been made in 2003.

44. From these witness statements, we accept the following facts:

    a) In January 2007 ACE's National Council approved a proposed Investment Strategy for reviewing the portfolio of RFOs based on three possible

scenarios depending on the level of Grant in Aid settlement from Government;

b) Each regional office was asked to put together scenario plans for their RFO portfolio, indicating which organisations they considered should continue to receive funding and the amount (indicating where it was felt funding should be reduced, should stay the same, or should be increased) and which organisations should not have their funding renewed;

c) The information used was based on each RFO's performance in the preceding 3 financial years – 2004/05, 2005/06 and 2006/07;

d) In the East region, initial planning was undertaken through meetings between officers and senior managers; these meetings were not minuted. The East region used a template called "the 4Ps" which had been developed by colleagues in the London region as a way of setting out initial thoughts about an organisation using monitoring information from 2004/05 onwards;

e) The Director of Regular Funding visited each regional office to formally present the Investment Strategy and also developed general guidance for officers;

f) In May 2007 portfolio proposals were submitted from each region comprising spreadsheets of each of the 3 scenarios accompanied by a supporting narrative setting;

g) The proposals were then subject to moderation by the Director, Regular Funding and the Acting Director, Literature Strategy and other colleagues at the National Office. The Director also undertook a data comparator exercise looking at the proposals. No information from the disputed 2003 Performance Review was used when undertaking moderation of the proposal not to renew Dedalus' funding[6];

h) In July and August 2007 feedback was provided from the National Office to the regions (Dedalus was not mentioned during the stage as no concern over the proposal not to renew funding had been identified);

[6] We consider that mere references to the 2003 performance review do not necessarily equate to the *results* of that review being taken into account in the subsequent assessment.

i) Following this moderation, proposals in each region changed but the proposal not to renew funding in Dedalus remained unchanged;

j) Each regional office produced final summary documents relating to each RFO called a "Rationale Document" (this has now been disclosed to Dedalus). These documents (without the section headed "Context") were put to the East Regional Council at a meeting on 5 December 2007.

k) The East Regional Council's preliminary decision was put to each RFO, including Dedalus, who had until 15 January 2008 to respond;

l) The East Regional Council then re-considered the rationales for investment or non-renewal for each RFO along with their submissions at a meeting on 23 January 2008. The Council decided not to renew Dedalus' funding;

45. It follows from this, that we do not accept Dedalus' submission that the decision to disinvest was made in 2003 but that we accept the evidence of the witnesses as to the process by which the decision to disinvest in January 2008 was made. There is, in our opinion, no evidential basis upon which to reject this evidence. We therefore do not consider that information relating to the 2003 performance review falls within the scope of the request of 2 January 2008.

46. One member of the Panel considered that it would have been difficult for ACE, East to put out of its collective memory entirely the fact that there had been this "breakdown in the relationship" between ACE and Dedalus in 2003 but accepted the evidence that it had not, in fact, played a part in the decision to disinvest following the 2007 Investment Strategy process.

47. We note that ACE has received extensive criticism for its failures to keep adequate notes and records. This means that there may have been a meeting at which the decision to disinvest in Dedalus was discussed, ACE does not in fact hold any information relating to such a meeting. While Dedalus has made numerous requests during this Appeal for various "explanations" to be provided, there is no

obligation under FOIA for a public authority to create information; the obligation is to communicate information if it is held.

48. Having reached our opinion as to what had formed the basis for the decision to disinvest in Dedalus, and therefore the scope of the request of 2 January 2008, we considered each of documents contained on the lists of documents submitted by Dedalus as falling within the scope of the request:

Category 1: Documents requested before seeing the Draft Report of the Independent Complaints Reviewer

Item number	Description	Within scope of request of 2 January 2008?
1	Transcript and floppy disc of laptop file of Performance Review Minutes of November 2003	For the reasons set out above, we are satisfied that the decision to disinvest in Dedalus did not use any of the information from 2003. This does not fall within the scope of the request[7].
2	End of year assessment form for 2003/04	For the reasons set out above, we are satisfied that the decision to disinvest in Dedalus did not use any of the information from 2003. This does not fall within the scope of the request. In any event, ACE has confirmed to the Tribunal and the Parties (by email dated 12 April 2010 timed at 1437) that no such document exists.
3	The internal documentation regarding why ACE allowed Dedalus to apply to GfA in May 2007 at the same time it was proposing the complainant should lose RFO funding. This documentation is referred to in an email dated 9 October 2007.	While we recognise the possibility of a perceived contradiction, the two processes were distinct. Having reached our conclusions on the process that was followed by ACE we do not consider that any such internal documentation would fall within the scope of the request. In May 2007 there was an initial recommendation to disinvest in Dedalus but that recommendation would not necessarily have been adopted by the Council. It would have been unfair for

[7] We note that Dedalus has been provided with the notes and that the Independent Complaints Reviewer carried out an analysis of any difference between versions, concluding that any alterations were confined to correcting grammatical errors and providing full names in place of initials.

		Dedalus, and any other RFO, to have been unable to apply for funding under GfA until the conclusion of the Investment Strategy.
4	The exchange of emails and views between the Acting Director, Literature Strategy and the then Head of Visual Arts and Literature for ACE, E in and around October 2007.	While Dedalus submits that there was an "extensive exchange of emails, documentation and transcripts of phone calls on file", there is no evidence of this. The only document that does fall within the scope of the request is that in respect of which section 36(2)(b)(ii) is claimed (see below for our decision regarding this).
5	ACE documentation which was used for national moderation in May 2007. (This is also item 9 under Category 2)	Again, Dedalus asserts that there "should be a lot of documentation about disinvestment in Dedalus being produced at this time". We accept the evidence of the witnesses that there were no concerns raised during this stage of the process about Dedalus and therefore Dedalus is incorrect in its assertion. (If there had been concerns and there had been documentation dealing with those concerns then the information would likely fall within the scope of the request.)
6	The exchange of emails in September/October 2007 between Sir Christopher Frayling's office and the Communication Director of ACE, E about a quote for Dedalus' 25th Anniversary Catalogue	This does not fall within the scope of the request because it has no relevance to the decision to disinvest in Dedalus. At the time the quote was written Sir Christopher Frayling was unaware of the recommendation to disinvest. In May 2007 there was an initial recommendation to disinvest in Dedalus but that recommendation would not necessarily have been adopted by the Council. It would not have been fair for Dedalus to have been deprived of the quote until the conclusion of the Investment Strategy.
7	All documents presented to the Regional Council and on which it reached its decision to disinvest from Dedalus on 5 December 2007. (This is also item 12 under Category 2)	The list of the information that the Regional Council received has been disclosed. Dedalus has been provided with some of these. i) Long term strategy paper: this relates to overall investment strategy, it does not fall within the scope of the request as we have objectively read it.

		ii) Next steps document: this is another general document with no specific relevance to Dedalus. It therefore does not fall within the scope of the request as we have objectively read it. iii) The presentation: two slides appear to us to relate to Dedalus and therefore fall within the scope of the request and should be disclosed. ACE will be given an opportunity to consider whether this is exempt under any provision of FOIA. iv) The Summary Spreadsheet is within the scope of the request insofar as it relates to Dedalus. If it has not been disclosed, the entry relating to Dedalus should be disclosed. v) Summary document with Rationales for each organisation: it would appear that this document in respect of Dedalus has already been disclosed. ACE should inform Dedalus when and in what format it was disclosed or, should ACE find it more convenient administratively, should send Dedalus a further copy of the document in question.
8	All internal ACE documents between 2003 and 2007 discussing disinvestment from Dedalus.	Other than those identified , we are satisfied that no other documents falling within the scope of the request exist. Once the decision was made to continue to invest in Dedalus in 2003 the issue of disinvestment was not considered again until the Investment Strategy Review in 2007.

Category 2: Documents requested after seeing the Draft Report of the Independent Complaints Reviewer

Item number	Description	Within scope of request of 2 January 2008?
1	Audit by the Team Leader, Finance and Operations, East of the steps leading up to the production of the review report in 2004 as a result of Dedalus' complaint.	For the reasons set out above, we are satisfied that the decision to disinvest in Dedalus did not use any of the information from 2003. This does not fall within the scope of the request.
2	The various drafts of the Performance Review report	For the reasons set out above, we are satisfied that the decision to disinvest in Dedalus did not use any of the information from 2003. This does not fall within the scope of the request.
3	General Guidance from the National Office Regular Investment Team and 4Ps template.	General Guidance: this would be another general document with no specific nce to to Dedalus. It therefore does not thin the the sc scope of the request as we objectively read it. The 4Ps template: ACE relying on section)(ii). See our findings below.
4	Notes from discussions between regional heads of units and their officers and management	There is no evidence that any such notes exist. If they were held by ACE and contained information concerning the decision to disinvest in Dedalus we agree with Dedalus' submissions that they would fall within the scope of the request. We note the criticisms made of ACE in relation to poor record keeping.
5	[Notes from the] Team meeting which discussed the shape of the portfolio	There is no evidence that any such notes exist. If they were held by ACE and contained information concerning the decision to disinvest in Dedalus we agree with Dedalus' submissions that they would fall within the scope of the request. We note the criticisms made of ACE in relation to poor record keeping.

6	Proposal submitted by the East region to the National Office in May 2007, including spreadsheet and supporting narrative.	The spreadsheet should have been disclosed and must be disclosed if not already done so. The supporting narrative was considered by the Commissioner (identified as document 6 in his list) and was provided to us in the Closed bundle. We are satisfied that it is concerned with the reasons for investment rather than disinvestment and contains no mention of Dedalus. It does not therefore fall within the scope of the request.
7	National Artform Director's analysis paper on reviewing the regional proposals.	This is a strategic national document and we are satisfied that this contains no mention of Dedalus. It does not therefore fall within the scope of the request.
8	The consideration for non-renewal of Dedalus' funding made by the Acting Director, Literature Strategy	The final version of this is at 7 v) in Category 1 above. It would appear that this document has already been disclosed. ACE should inform Dedalus when and in what format it was disclosed or, should ACE find it more convenient administratively, should send Dedalus a further copy of the document in question.
9	Feedback sent by the National Office to the East region about Dedalus	See item 5 under Category 1. Not within scope of request.
10	Notes of discussions in July and August between regions and National Office	We accept the evidence that no such notes exist. If there were such notes, depending on the contents, they may have fallen within the scope of the request. Again we note the criticisms of ACE's record keeping procedures at the time.
11	Updated East's spreadsheet and supporting documentation sent to National Office	It would appear that this spreadsheet has already been disclosed. ACE should inform Dedalus when and in what format it was disclosed or, should ACE find it more convenient administratively, should send Dedalus a further copy of the document in question.
12	All the documents given [on 5 December 2007] to the East Regional Council which mention	See item 7 under Category 1. Additionally, specific request for the

	Dedalus	"timeline for the Investment Strategy Review Process". We are unsure what Dedalus is referring to other than the "next steps" document referred to which we have concluded falls outside the scope of the request.
13	RFO Investment 2008/9 to 2010/11, also referred to as the Board Paper	We are satisfied that it is concerned with general matters and that it contains no mention of Dedalus or the decision to disinvest. It does not therefore fall within the scope of the request.
14	PowerPoint presentation to ACE staff, a copy of the Q and A sheet for staff and the Key Messages paper	Again, we are satisfied that these are concerned with general matters and that they do not contain any mention of Dedalus or the decision to disinvest in Dedalus. None of these items therefore fall within the scope of the request.
15	February 2007 Board Paper [if it is different from that at 13]	We are satisfied that this is the same Board Paper as referred to at item 13 above.
16	Notes made of October 2007 meeting with Dedalus	ACE has indicated that it is prepared to disclose these notes to Dedalus without conceding that they fall within the scope of the request. We have not seen these notes and therefore make no finding in relation to this item.
17	The document made for officer use only that was not, according to the officers, included in the papers presented to the Council	This is the "Context" page. It would appear that this document has already been disclosed. ACE should inform Dedalus when and in what format it was disclosed or, should ACE find it more convenient administratively, should send Dedalus a further copy of the document in question.
18	Summary document regarding Dedalus presented on 23 January 2008 to the Regional Council	This is the Rationale document which has already been disclosed to Dedalus. In any event, this post-dates the request of 2 January 2008 and therefore falls outside its scope. We reject the submissions of Dedalus that the request can be read to include information produced later; the relevant test is whether the public authority held the information at the time of the request. Any other construction would be unworkable.

19	RFO Investment Strategy 2008-2011 Next Steps	See item 7 under Category 1 and item 12 above.
20	Minutes of the full meeting of the Regional Council of 23 January 2008	These appear on ACE's website. In any event, this post-dates the request of 2 January 2008 and therefore falls outside its scope. We reject the submissions of Dedalus that the request can be read to include information produced later; the relevant test is whether the public authority held the information at the time of the request. Any other construction would be unworkable.
21	The "all-important" comparative analysis of organisations during the Investment Strategy Review	There is no such document. We have read the witness statement of John Treadway the Director, Regular Funding who carried out this analysis of statistical material none of which mentioned Dedalus apart from a single mention in the spreadsheet disclosed.

49. In addition to these documents, we also considered the content of other documents provided to us as part of Closed bundle. We have concluded the following documents do fall within the scope of the request; ACE has not had an opportunity to consider whether that information is exempt information under any provision of FOIA. For the reasons set out below under "Late claiming of exemptions" we consider that we must give ACE the opportunity to do so, having rejected its submissions that these documents do not fall within the scope of the request of 2 January 2008.

50. The relevant documents are:

    i) Closed bundle page 122-124

    ii) Closed bundle page 132;

    iii) Closed bundle pages 133-136;

    iv) Closed bundle pages 112-113, slides 18 and 19 of the Presentation on 5 December 2007.

Section 36

51. Insofar as is relevant to this Appeal, section 36 of FOIA provides as follows:

> *(1)This section applies to –*
>
> *…*
>
> *(b) information which is held by any other public authority.*
>
> *(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*
>
> *….*
>
> *(b) would, or would be likely to, inhibit-*
>
> *…*
>
> *(ii) the free and frank exchange of views for the purposes of deliberation, or …*

52. Dedalus submits that the use of section 36 should be confined to protecting the national interest in matters to do with security and economy and is not intended to be applied by public bodies such as ACE.

53. We are satisfied that the wording of section 36(2)(b) clearly allows for section 36 to apply to public authorities such as ACE.

54. In this Appeal, ACE relies on section 36(2)(b)(ii) in relation to 2 documents: identified as 2 (the "4Ps template"[8]) and as 9 (an email between ACE employees dates 30 October 2007 sent at 1339[9]).

[8] Item 3 under Category 2 above.
[9] Item 4 under Category 1 above.

55. These two documents were located during the Commissioner's investigation and determined by him to fall within the scope of the request of 2 January 2008. At that stage, in September 2009, ACE claimed the exemption under section 36(2)(b)(ii) of FOIA, seeking and obtaining the opinion of the qualified person on 29 September 2009.

Qualified person

56. The Appellant does not accept that Alan Davey, the Chief Executive of ACE is the "qualified person". He submits that the qualified person for ACE is or should be its Council because it is the primary decision-making organ. As the Council's opinion was not sought or obtained he submits that there is no opinion for the purposes of section 36 and the exemption cannot therefore be engaged.

57. The 'qualified person' is defined in section 36(5) of FOIA. In respect of ACE, this means any officer or employee who is authorised for the purposes of this section by a Minister of the Crown (section 36(5)(o)(iii)).

58. This was an issue raised by the Appellant in his written submissions exchanged a short time prior to the hearing of 20 April 2010. As a result, ACE provided us with a copy of the authorisation under section 36(5)(o)(iii) from the relevant Minister of State. This is dated 17 December 2004 and authorises the Chief Executive of ACE as the qualified person for the purposes of section 36.

59. We are therefore satisfied that Alan Davey, the Chief Executive of ACE, was the qualified person when he gave his opinion on 29 September 2009.

Late claiming of exemptions

60. The Commissioner specifically addressed the issue of whether to allow late reliance by ACE on the section 36 exemption. He relied on the decisions of this Tribunal in

King v IC and DWP[10] and *DBERR v IC and Friends of the Earth*[11] in holding that he had discretion to allow late reliance, but that the exercise of that discretion required reasonable justification. We agree with this; both the Commissioner and the Tribunal have the power to consider exemptions raised before them for the first time, whether they will depends on the facts of each case. The late reliance on an exemption by a public authority must be reasonably justified. It is not desirable, or perhaps even possible, to set out a definitive set of guidelines as to when the Commissioner, or the Tribunal, will allow late reliance on an exemption not previously relied upon. Each case must be decided upon its own facts.

61. We consider that it would be quite wrong for a public authority to be required to disclose information that would otherwise be exempt for the sole reason that it was not located until the Commissioner had commenced his investigation. We accept that in this case, the two relevant documents were not located until late in the investigation process and as soon as the Commissioner indicated that in his view they both fell within the scope of the request of 2 January 2008, ACE swiftly raised the exemption in section 36 of FOIA, seeking and obtaining the opinion of the qualified person. We consider that the Commissioner exercised his discretion in accordance with the case law and that this was a reasonable exercise of his discretion in the circumstances of this case. In our opinion, ACE was entitled to rely on the exemption in section 36(2)(b)(ii) of FOIA in respect of the two documents.

Was the opinion reasonably arrived at?

62. We accept that the relevant questions as to the applicability of section 36 of FOIA are well established and we do not need to rehearse the previous decisions of this Tribunal:

    i) Was Mr Davey's opinion reasonably arrived at?

    ii) Was Mr Davey's opinion reasonable in substance?

[10] (EA/2007/0085)
[11] (EA/2007/0072)

iii) If the answer to the above questions is yes, then the section 36 exemption is engaged and we must then consider the public interest balancing exercise.

63. Dedalus contends that section 36 does not apply to the disputed information in this Appeal because ACE only sought to rely on that exemption in September 2009. The Commissioner considered in his Decision Notice whether ACE's reliance on section 36 was fatally flawed by its failure to identify the disputed information (and thereby to obtain the requisite opinion) at the time of dealing with the request in January 2008.

64. The Commissioner relied on the decision of this Tribunal in *McIntyre v IC and Ministry of Defence*[12] in concluding that a flaw in the process of obtaining the opinion is not necessarily fatal. In that case the Tribunal explained (at paragraph 31) that:

> *"..where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way need not be fatal to a finding that it is a reasonable opinion."*

65. Reference has been made to the case of *Roberts v IC and DBERR*[13] which was promulgated around the time the Decision Notice in this case was issued. The Appellant relies on this case as authority for the proposition that ACE cannot rely on section 36 in this case because the qualified person's opinion was not formed at the time of the refusal of the request or, at the latest, at the time of the conclusion of any internal review.

66. We consider that reliance on this case is misplaced. The case of *Roberts* concerned a public authority's attempt – some years after its initial refusal to disclose information- to rely on section 36 in respect of the same information which was the subject of the initial refusal. ACE only relied upon section 36 in respect of these 2 documents on 29 September 2009, after the opinion had been obtained.

[12] (EA/2007/0068)
[13] (EA/009/0035)

67. We consider that in this case there was no flaw in the opinion, save for the fact that the opinion was not obtained at the time the request was dealt with. For the reasons given above, the opinion could never have been obtained at that stage because the 2 documents had not been located and had not been found to fall within the scope of the request. For the same reasoning behind the development of the discretion to allow late reliance on exemptions, we consider that it would be wrong to deprive a public authority of the right to rely on an exemption simply because the opinion of the qualified person was not, and could not have been, obtained at the time the original request was dealt with. We agree with the Commissioner's submission that he was correct to conclude that the opinion was reasonably arrived at and the challenges made by Dedalus on this point fail.

Was the opinion reasonable in substance?

68. Dedalus submits that because ACE's decision to disinvest was complete well before Mr Davey gave his opinion, disclosure of the disputed information would not have a "chilling effect" on decision-making.

69. The Commissioner submits that this is misconceived for two reasons. Firstly that Mr Davey's opinion focused on factors that were relevant to the time when ACE dealt with the request of 2 January 2008 and secondly, that ACE's decision-making process regarding disinvestments was ongoing in January 2008.

70. We agree with the Commissioner's assessment that central to ACE's functions is a decision making process which involves deciding at what level, if at all, organisations should continue to receive funding and moreover that central to this process being effective is ACE staff being able to exchange views freely and frankly on particular organisations. Disclosure of such information would inhibit the free flow and exchange of opinions as part of future deliberations undertaken by ACE concerning funding of organisations.

71. Having seen the opinion of Mr Davey, we are satisfied that the Commissioner was correct to conclude that it was reasonable in substance and the challenges made by Dedalus on this point also fail.

72. Therefore we are satisfied that the exemption in section 36(2)(b)(ii) of FOIA is engaged in respect of both documents.

The Public Interest Test: General Principles

73. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information. Dedalus has raised a number of objections in relation to the public interest that amount to a submission that the Commissioner wrongly concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure in respect of the disputed information.

74. We consider that the following principles, drawn from relevant case law, are material, both generally and in with particular reference to section 36 of FOIA, to the correct approach to the weighing of competing public interest factors. We note that the principles established by these cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but remind ourselves that each case must be decided on its own facts.

(i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld *(Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013) ('Brooke')* (at paragraph 82).

(ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (*DfES*) at paragraphs 64-65).

(iii) The balance of public interest factors must be assessed "in all the circumstances of the case" (section 2(2)(b) of FOIA). This will involve a consideration of both direct and indirect consequences of disclosure, including "secondary signals" such as loss of frankness and candour, and the damaging effect of disclosure on difficult policy decisions (see *DfES* at paragraphs 70 and 75).

(iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. Any policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information must be applied flexibly, giving genuine consideration to the particular request (*Brooke* at paragraph 87(2)).

(v) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect (*Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0030).

(vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. *"A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so."* (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).

(vii) Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would or would be likely to inhibit the free and frank provision of advice or exchange of views, weight must be given to that opinion *"as an important piece of evidence in [the] assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.* (*Brooke* at paragraph 91-92)

(viii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner* EA/2007/0090 (*'DCMS'*) at paragraph 28)

(ix) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the Appeal (see *CAAT v Information Commissioner and Ministry of Defence* EA/2006/0040 at paragraph 53). In this case, the relevant time is January 2008.

(x) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner* EA/2006/0007 at paragraph 50).

The Public Interest Test: Opinion of the qualified person

75. Differently constituted Panels of this Tribunal have considered the relevance of the opinion of the qualified person in assessing the public interest test. In *FCO v IC*[14], when rejecting a submission that when considering the balance of public interest the scales should be treated as already having some weight in favour of maintaining the exemption because of the existence of the opinion of the qualified person, the Tribunal said, at paragraph 25,

> *"Clearly a reasoned opinion from a Government Minister may help us to focus on the perceived importance of maintaining secrecy of specific information in a particular context. However, that is just one of a number of factors that we must evaluate and we believe that we would risk distorting our assessment of the overall balance to be achieved if we started from the premise that its very existence had particular inherent significance. The opinion, like any opinion, draws its authority from the reasoning that lies behind it."*

76. In *Brooke* the Tribunal addressed the application of the public interest test to the section 36(2) exemption as a "particular conundrum". It considered that it would be impossible to make the required judgment as to the balance of public interest without forming a view on the likelihood of inhibition or prejudice and concluded, at paragraph 92, that-

> *"In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which*

[14] *(EA/2007/0047)*

inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."

77. Having been provided with a copy of the document containing the reasoning behind the opinion of the qualified person, we are able to form our own view, taking into account the rest of the evidence, as to the "severity, extent and frequency" with which the inhibition of the free and frank provision of advice and/or exchange of views for the purposes of deliberation will, or may, occur.

The Public Interest Test: Factors in favour of maintaining the exemption

78. ACE's argument in favour of maintaining the exemption focuses on the concept of the "chilling effect", concerning the argued loss of frankness and candour in debate and advice which would flow from disclosure of the information. ACE reminds the Tribunal that the question is not whether the disclosure of this particular information itself would damage the public interest, rather whether the impact such disclosure would have by way of inhibiting the free and frank exchange of views for the purposes of deliberation would damage the public interest and to what extent. This could result in poorer quality advice and less well formulated policy and decision.

79. ACE has argued that there is a clear and strong public interest in ACE being able to undertake effective decision making and allocate public funds. In order to do so it is essential that employees are able to express their opinions in a free and frank manner so that the process of deliberation about funding for organisations is as effective as possible. It would not be in the public interest if the deliberations were less free and frank.

80. The disputed information in this case relates to a time when ACE was undertaking particularly sensitive and difficult discussions about disinvestment in a range of organisations and it was paramount ACE staff could be honest, confident and clear in expressing their views.

81. Dedalus submits that any arguments regarding the "chilling effect" of disclosure should be rejected and refers to a number of previous decisions of this Tribunal that refer to submissions made in those cases on this point.

82. The Commissioner relied upon what was said by Mitting J in *ECGD v Friends of the Earth*[15] at paragraph 38:

> *"Likewise, the reference to the principled statements to Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. .There is a legitimate public interest in maintaining confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is not part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."*

83. We consider that this present case is very different from that to which Mitting J referred; although the decision by ACE was important, it did not involve advice being exchanged within and between government departments and would not result in any ministerial decision. Noting the centrality and sensitivity of deliberations that contribute to the funding decisions of the national development agency for the arts in England, we have nevertheless given some weight to the considerations of the "chilling effect".

84. Dedalus argues that ACE has failed to follow its own Guidance as far as providing documents to an organisation that has had its funding removed. The jurisdiction of this Tribunal is limited by statute and we have no powers to require a public

authority to act in accordance with other schemes that may exist for the provision of information. However, when considering the balance of the public interest test, we do take into account ACE's own policies in respect of the openness that should characterise disinvestment decisions.

The Public Interest Test: Factors in favour of disclosure

85. The factors in favour of disclosure were identified by the Commissioner in his Decision Notice as follows:

> i) An inherent public interest in disclosure of information to ensure that public authorities are accountable for, and transparent about, decisions that they have taken.
>
> ii) Disclosure could improve the public's understanding of how ACE reached the decision to disinvest in Dedalus.
>
> iii) There is a public interest in disclosure of information which would assist in challenging decisions taken by public authorities.

86. Dedalus also argues that ACE's own disinvestment Guidelines suggest that any information gathered for the purposes of disinvestment should be shared with the organisation concerned.

The Public Interest Test: Where does the balance lie?

87. Although in his Decision Notice the Commissioner states that a public authority would have to provide convincing arguments and evidence as to how disclosure of the information in question would result in the effects suggested, unusually perhaps, we were provided with no evidence from ACE from any witness expressing concern over the effects of disclosure of the disputed information. It was therefore hard to come to our own view as to the "severity, extent and frequency" with which the inhibition of the free and frank exchange of views for the purposes of deliberation will, or may, occur.

[15] [2008] EWHC 638 (Admin)

88. This meant that an assessment of the "chilling effect" could be based only upon submissions made by the parties, against a background of previous decisions of this Tribunal rejecting many such claims, which were supported by evidence, on the grounds, inter alia, that it was the passing into law of FOIA that generated the chilling effect, no public authority (and this included senior civil servants giving frank advice on matters of significant sensitivity) could thereafter expect that information would automatically remain confidential, and that reliance could be placed on the robustness of those working for public authorities to continue to give robust advice even in the face of a risk of publicity.

89. The Commissioner considered that it was not just ACE's decision making process for RFO organisations that would be affected but the decision making process in respect of every application for funding it receives because every application, no matter which funding stream is being applied for, must be considered critically.

90. We consider that, as we understand it, the Investment Review Strategy involved the simultaneous consideration of every RFO funded by ACE. In our view such a comprehensive investment review can only take place effectively if officials are willing to express their views frankly on the relative merits of the many articulate competitors for the finite funds available. This lends weight to the importance of the exemption.

91. Against this, we must have special regard to the fact that ACE's own Guidance would be to encourage the provision of information that was used to reach a decision to disinvest in an RFO.

92. Looking first at the 4Ps template (item 3 under Category 2), we consider that this does not in fact contain anything that has not already been disclosed to Dedalus. The contents appear to be a summary of the yearly assessment reports that have already been disclosed, drawing the points together thereby providing a concise

explanation of the basis for the decision to disinvest. It appears to us to be the sort of information that would have been disclosed under ACE's own Guidelines if the disinvestment had been outside of the Investment Strategy Review.

93. We disagree with the Commissioner's conclusion that it is of a genuinely free and frank nature or amounts to a candid assessment. We are therefore not of the opinion that its disclosure would have the effects feared by ACE and conclude that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the document.

94. In relation to the email of 30 October 2007 (item 4 under Category 1) we consider that this does contain free and frank exchange of views and is not the type pf information that would ordinarily be disclosed. It has been written in such an informal way as to indicate to us that it was never contemplated that it would be read by anyone other than the recipient.

95. We do accept that in relation to this document, the effect of disclosure would be to cause such emails to be written in a less candid fashion and that ACE's decision making process would be likely to be disrupted. While this email does fall within the scope of the request as it contains information *relating* to the decision to disinvest in Dedalus, the contents would not, in our opinion, give any information as to *how* ACE made the decision to disinvest in Dedalus. We therefore conclude that the public interest in maintaining the exemption does outweigh the public interest in disclosure of this document.

96. In relation to the other documents which we have found to fall within the scope of the request of 2 January 2008, although ACE has not yet had the opportunity to indicate whether it considers that the information is exempt under any particular provision of FOIA, it appears to us that, subject to the opinion of the qualified person, they might fall within the exemption section 36. We have received no submissions on this but consider that it would be helpful to the parties to note that

we consider there to be a distinction between giving full reasons for decisions (in which case disclosure is appropriate) and internal discussions/preparations for the handling, presentation and defence of decisions (in which case some internal space is appropriate and papers may go undisclosed). It appears to us that the document at Closed bundle page 132 is in a similar category to the 4Ps document and the documents at Closed bundle pages 122-124, 133-136 and Closed bundle pages 112-113 (slides 18 and 19 of the Presentation on 5 December 2007) are in a similar category to the email of 30 October 2007.

Section 12 of FOIA

97. In its letter of 25 January 2008, ACE responded to Dedalus' requests of 11, 16, 17, 24 and 25 January 2008. It explained that these were being refused on section 12 grounds, because the cost of responding to those requests would – when taken together with the costs of responding to the Appellant's requests of 2 and 7 January 2008 –exceed the £450 limit.

98. Section 12 of FOIA does not provide an exemption as such; its effect is to render inapplicable the general obligation to provide information contained in section 1(1). Section 12(1) provides as follows:

> *Section 1 (1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

99. The appropriate limit is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations'). By Regulation 3(3), the appropriate limit for ACE (being a public authority not listed in Part 1 of Schedule 1 of FOIA) is £450. By Regulation 4(4) cost is to be calculated as a rate of £25 per hour spent; this equates to a limit of 18 hours.

100. Regulation 4(3) sets out the factors that may be taken into account in arriving as a cost estimate:

In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information,

(d) extracting the information from a document containing it.

101. Regulation 5 provides for the aggregation of multiple requests as follows:

(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority-

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which -

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

102. Dedalus submits that section 12 should not be an issue in this Appeal at all as there were no subsequent requests; it no longer pursues any request for new

information and the contents of the emails after the request 2 January 2008 were all clarifying for ACE what should have been disclosed pursuant to that request.

103. For the reasons we have given above dealing with the scope of the request of 2 January 2008 we disagree with Dedalus and consider that the requests of 11 January 2008 and following were new requests for information.

104. The test for aggregation under Regulation 5 is very wide; the requests need only relate *to any extent* to the same or similar information (our emphasis). The Commissioner submits that requests will be similar where there is an overarching theme or common thread running between them in terms of the nature of the information that has been requested.

105. Although the requests of 11, 16, 17, 24 and 25 January are, as the Commissioner described, "multipart, lengthy and covering a range of topics (albeit focused on the overarching issue of disinvestment)", we consider that they do relate to a significant extent to the same or similar information, and relate to similar information as requested on 2 January 2008. We are of the opinion that ACE was entitled to aggregate the requests in the way it did.

106. Dedalus further submits that the Commissioner erred in the following respects:

i) By failing to apply section 12(3) and prescribing a different appropriate limit in respect of Dedalus;

ii) By including in the aggregated total the 119 pages of documents that had been disclosed in response to the request of 2 January 2008 when these were copies of papers that Dedalus was already in possession of;

iii) By not considering ACE's duties under section 16 of FOIA and the Code of Conduct under section 45 of FOIA;

iv) By not taking account of Dedalus' offer to pay £1000 to the cost of providing the information;

v) By allowing ACE to rely on an unreasonable cost estimate.

107. In relation to the submissions on the applicability of section 12(3) this is misguided. The appropriate limit is set by the Regulations and the Commissioner has no power to prescribe other limits.

108. On 10 January 2008, ACE provided Dedalus with 137 pages of information that fell within the scope of the request of 2 January 2008. Some further disclosure has been made subsequently following the Commissioner's Decision Notice. Dedalus submits that as 119 pages were documents that Dedalus was already in possession of, ACE should have relied on section 21 of FOIA[16] in relation to this information and therefore should not have taken it into account when considered the costs of complying with the subsequent requests.

109. There does not appear to be any dispute that the information in those 119 pages fell within the scope of the request of 2 January 2008. Although these were documents already in the possession of Dedalus, there was nothing in the wording of the request to indicate that certain information falling within the scope of the request was not required.

110. Additionally, we agree with the Commissioner's submissions that there is no obligation on a public authority to rely on a particular exemption. A decision not to, or failure to consider whether to, rely on section 21 of FOIA does not affect the ability of a public authority to rely on section 12.

111. The Commissioner submits that there is nothing in the language of section 12 of FOIA to suggest that the estimate may be challenged for any reason other

than it fails to comply with the Regulations. He draws our attention to the case of *Roberts v IC*[17] in which a differently constituted Panel of the Tribunal, after reviewed previous decisions of the Tribunal, concluded that a failure to discuss the scope of the request in an attempt to adjust it so that complying with it would not exceed the appropriate limit did not render a section 12 costs estimate invalid.

112. We agree with that decision. We do however stress that this should not be regarded as undermining the importance of public authorities complying with the obligation under section 16 of FOIA to advise and assist. This is an important obligation under the FOIA, which is an Act to make provision for the disclosure of information held by public authorities and not for the withholding of information. In a case where it can be seen that a request for information might be adjusted to ensure that complying with it would not exceed the appropriate limit, we would hope that a public authority would comply with the obligation in section 16 to advise and assist in an effort to reach a position where information of value to the requestor could be disclosed without exposing the public authority to excessive costs.

113. Dedalus submits that ACE should not have refused its offer to pay £1000 towards the cost of providing the information. Under section 12 a public authority's obligation to comply with a request for information is removed if it estimates the cost of doing so would exceed the appropriate limit. We do not consider that ACE had an obligation to accept Dedalus' offer to contribute to the cost or even an obligation to consider whether to do so. We agree with the Commissioner that this point is irrelevant.

114. Dedalus has referred to the costs incurred by ACE in dealing with the judicial review of the disinvestment decision[18] and to the fact that the Independent Complaints Reviewer[19] had sight of various documents that had not been disclosed

[16] s21 of FOIA provides for an absolute exemption in respect of information which is reasonable accessible to the applicant by other means.
[17] (EA/2008/0050)
[18] This commenced September 2009
[19] Complaint made by Dedalus to the ICR May 2008, Final Report May 2009

previously. We consider that these matters are irrelevant to the decision taken by ACE to rely on section 12 of FOIA in January 2008.

115. Dedalus does not accept that ACE's estimate of the cost of complying with the request is reasonable in the circumstances of this case.

116. If a public authority relies on section 12, it is not required to make a precise calculation of the cost of complying. What is required is simply an estimate, although that estimate must be reasonable, only based on the activities described in Regulation 4(3) and should be sensible, realistic and supported by cogent evidence.

117. The Commissioner set out in his Decision Notice[20] the evidence provided by ACE in support of its estimate, in the form of ACE's internal email correspondence on the subject. We have been provided with this email correspondence, as well as ACE's letters to Dedalus and to the Commissioner concerning section 12.

118. Having considered this evidence, we are satisfied that ACE came to a reasonable estimate as to the cost of complying with Dedalus' requests and that it properly applied section 12 of FOIA.

Conclusion and remedy

119. For the reasons given above we find that:

i) ACE does hold further information which falls within the scope of the Request for Information of 2 January 2008;

ii) In respect of the document identified as 2, the 4Ps template, the exemption in section 36(2)(b)(ii) of FOIA is engaged, however, in all the circumstances of the case the public interest in maintaining the

exemption did not outweigh the public interest in favour of disclosure. ACE was not entitled to withhold this information;

iii) In respect of the document identified as 9, the email of 30 October 2007, the exemption in section 36(2)(b)(ii) of FOIA is engaged, and in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in favour of disclosure. ACE was entitled to withhold this information;

iv) ACE was entitled to rely on section 12 (4) to refuse to comply with the Request for Information of 11, 16, 17, 22 and 25 January 2008 on the basis that the aggregated cost of complying with them exceeded the appropriate limit;

v) ACE was entitled to rely on section 12 (4) to refuse to comply with the Request for Information of 1 and 18 February 2008 on the basis that the aggregated cost of complying with them exceeded the appropriate cost limit.

120. As we have found that ACE does hold further information which falls within the scope of the Request for Information of 2 January 2008, we have directed that information be disclosed unless ACE considers that it is exempt under FOIA. If ACE considers that it is exempt, we direct that written submissions on that point must be made to the Tribunal by 17 May 2010. We direct that the Commissioner or the Appellant provide their written Reply to those submissions by 1 June 2010.

121. Our decision is unanimous.

[20] Paragraphs 129-131

Other matters

Delay by the Commissioner

122. While not a matter that has any bearing on the issues we have to decide, we think it appropriate to comment on the inordinate delay by the Commissioner in this case. As detailed above, although Dedalus complained to the Commissioner on 1 February 2008, it appears that no case officer was allocated to this complaint until December 2008. It then took almost another year for the investigation to be concluded; the Decision Notice was not issued until 24 November 2009. There has been no explanation for the delay in taking steps to fulfil the Commissioner's statutory duty under section 50 of FOIA, although we did not seek any explanation as this was not a matter within our deliberations as to whether the Decision Notice was in accordance with the law.

123. Concerns have been raised by differently constituted Panels of this Tribunal that such inordinate delays seriously undermine the operation of FOIA. While we are not in a position to identify the cause, or causes, of the delay in this case, we consider that it was excessive and cannot properly be justified by the Commissioner. The delay has meant that this Appeal was not heard until almost two and a half years after the request for information was made. There do not appear to be any effective methods by which Dedalus, or any other Requestor, could challenge the delay by the Commissioner and force him to act in a timely manner. This completely and unacceptably undermines the spirit of FOIA and the general right of public access to information held by public authorities. This great delay also adds an artificiality to our task of considering the public interest as it was at the time of the request. This was particularly so in this case where Dedalus expected the Tribunal to have full regard to the reports of Baroness McIntosh and the Independent Complaints Reviewer.

Section 77 of FOIA

124. Dedalus has requested that the Tribunal consider whether ACE and persons employed by it should be prosecuted under section 77 of FOIA. Section 77 of FOIA makes it an offence, where a request for information has been made, to alter, deface, block, erase, destroy or conceal any record held by a public authority with the intention of preventing disclosure.

125. It is important to note that section 77 of FOIA specifies that proceedings shall not be instituted except by the Commissioner or by or with the consent of the DPP; it does not give power for an investigation to be ordered by the Tribunal if there is a suspicion or request for one. The offence cannot be committed by a government department but can be committed by (named) civil servants.

126. We have seen no evidence to support the suggestions made by Dedalus that there has been any dishonesty. In any event, we consider that we do not have the power regarding section 77 of FOIA as suggested by Dedalus. While we acknowledge that those involved in the running of Dedalus are dissatisfied with the decision taken to disinvest in it, we do not consider that there is any basis for making accusations of criminal and/or corrupt activity.

Section 14 of FOIA

127. ACE made reference to section 14 of FOIA in its submissions; this provides that a public authority is not obliged to comply with a request for information if the request is vexatious. Regardless of whether ACE would have been entitled to do so at that time, section 14 of FOIA was never relied upon by ACE when dealing with the requests from Dedalus in January 2008. It was not a matter dealt with by the Commissioner in the Decision Notice.

Appeal

128. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the

result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

Annabel Pilling Date 21 May 2010

Judge