

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 5 June 2007**

**Public Authority:** Ministry of Justice  
**Address:** Selborne House  
54 Victoria Street  
London  
SW1E 6QW

### Summary

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The Complainant requested information from the Department of Constitutional Affairs (DCA) in relation to a complaint he had made to the Lord Chancellor about a judge.

The DCA supplied some of the information it held in relation to the request in order to comply with the complainant's right of subject access under the Data Protection Act 1998, in addition to some other information. However, it withheld the remaining information, stating that it was exempt from disclosure under the Act. Different exemptions were applied to various aspects of the information depending upon its subject matter:

- Section 32 – Court Records
- Section 36 – Prejudice to Effective Conduct of Public Affairs
- Section 40 – Personal Information
- Section 41 – Information Provided in Confidence
- Section 42 – Legal Professional Privilege

However, the DCA informed the complainant that some of the withheld information had previously been supplied to him by virtue of him being a party to various court cases and him having made complaints to it about the conduct of a judge. It therefore additionally applied section 21 (Information accessible to applicant by other means) to this information.

The Commissioner has decided that the withheld information is exempt by virtue of sections 32, 36 and 42. He did not therefore consider the application of sections 40 and 41. The Commissioner is also satisfied that the DCA held no information in relation to the request other than that which he was supplied in order to conduct his investigation. However, he requires the Ministry of Justice (the DCA's successor body as of 9 May 2007) to supply the complainant with the schedule of documents to which section 21 applies.

## The Commissioner's Role

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

## The Request

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2. On 5 January 2005 the complainant requested the following information from the Department for Constitutional Affairs (the "DCA"):

"Full details of the way the Lord Chancellor's Department and then the DCA handled my complaint against HHJ Peter Goldstone, which was initiated on 15 November 1999. I require copies of all documentation, including but not limited to emails, notes, letters, minutes, drafts and other written material.

I am particularly interested in the full disclosure of information, emails and documents relating to:

1. What the DCA's own records say about Judge Viljoen's whereabouts on 9, 10 and 11 November 1999. If the judge was sitting as a judge, I require only his physical location – such as Watford County Court, or Milton Keynes Court. [...]
2. The fact that on 18 November 1999 the Listing Officer at Watford County Court [...] was unaware of a supposed 26 August 1999 booking for Judge Viljoen to attend a computer course. As of 18 October 1999, Judge Viljoen was scheduled to sit at Milton Keynes Court of [sic] the entire week of 8 November 1999. As of 18 October 1999, there was no booking for Judge Viljoen to attend a computer course on 9, 10 and 11 November 1999. [The listing officer] was most specific on 18 October 1999, after consulting his records and a colleague – Judge Viljoen would be at Milton Keynes County Court for the entire week of 8 November 1999. This being the case, Lord Irvine's account on 7 April 2000 must be false, in that he claimed that the course booking had been made on 26 August 1999. Under the FOI Act, I require full information and copies of all documents and emails that led to Lord Irvine misinforming me on 7 April 2000.
3. Lord Irvine's decision not to inform me of Judge Goldstone's 11 November 1999 meeting with MAB, the claimants' solicitors. Under the FOI Act, I now require full disclosure regarding this matter, including all LCD notes, drafts, letters, minutes and emails. [...]
4. Lord Irvine's decision to comment on matters that were then before the Court of Appeal. [...] Under the FOI Act, I require full disclosure as to why

Lord Irvine decided to violate judicial independence in dealing with my complaint [...].

5. The LCD's internal notes, letters, drafts, correspondence, minutes and emails regarding its handling of my complaint from 15 November 1999 and 7 April 2000 inclusive. [...]
  6. Lord Irvine's decision to send his letter of 7 April 2000 to the Court of Appeal, on or about 15 January 2001. [...]
  7. [Named official]'s reference in his letter of 20 August 2002 to me, especially the final paragraph:  
"I can say, however, that officials here would routinely make informal contact with their colleagues in the Court Service to establish what progress had been made in an appeal..."  
These contacts by LCD officials relate directly to my complaint to the LCD. Under the FOI Act, I require full disclosure of the details of these contacts by the LCD, including copies of all notes, minutes, letters, drafts and emails.
  8. An explanation as to why [named official] felt that the LCD could "on its own initiative" disclose to the Court of Appeal whatever it saw fit regarding a pending appeal. [...] Under the FOI Act, I require this information, including all documentation, minutes, letters, note [sic] and emails relating in any way to the LCD's decision to violate the independence of the judiciary when it came to my appeal.
  9. [Named official]'s 2003/2004 investigation into my request to know of Judge Viljoen's whereabouts on 9, 10 and 11 November 1999. Under the FOI Act, I demand full information, as well as LCD notes, letters, drafts and emails between Lord Falconer and [named official] that have any bearing whatsoever on my request regarding Judge Viljoen's whereabouts.
  10. The correspondence between Lord Irvine and Judge Peter Goldstone, regarding my November 1999 allegations against Judge Goldstone. Firstly, under the FOI Act, I wish to know whether there were other exchanges of letters besides those of 6 and 7 December 1999. I believe there were. Secondly, because they relate to my complaint to the LCD against Judge Goldstone, under the FOI Act I require copies of all correspondence between Lord Irvine and Judge Goldstone, including but not limited to the letters of 6 and 7 December 1999."
3. The DCA responded on 3 February 2005, acknowledging receipt of the request on 6 January 2005. It stated that it held the information requested by the complainant, but that some of the information was exempt under section 32 of the Act (court records, etc.), by virtue of the fact that the information constituted court records. It went on to say that this exemption was absolute and there is no duty to confirm or deny whether the information requested is held by the Department. It further stated that it had applied exemptions under section 36 (prejudice to the effective conduct of public affairs) and section 42 (legal professional privilege) to

other information which had been requested. The DCA informed the complainant that it was necessary to extend the time limit in which to respond to the request so that it could consider the balance of the public interest in responding to the request. It was estimated that a full response would be provided within 10 additional [working] days, namely by 17 February 2005.

4. On 17 March 2005, the DCA responded to the complainant again, firstly explaining the reason for the extra time taken in responding to the request. This was put down to the amount of exempt information to which the public interest test had to be applied. The DCA informed the complainant that it was disclosing some of the requested information to him in accordance with the Data Protection Act 1998 (the "DPA") and some other information was being disclosed to him under the Act. This was contained in an enclosed schedule of disclosures. However, it also withheld some information under the Act, citing the exemptions under section 40, 41, 36, 32 and 42. It also provided an explanation of this decision, as set out in the following paragraphs.

5. **Background Material**

The DCA stated that some of the background material contained in various email exchanges and submissions to Ministers constituted the personal data of third parties including HHJ Goldstone and HHJ Viljoen and that this information was exempt under section 40(3) (personal information) and section 41 (information provided in confidence). To disclose the information would breach the first data protection principle contained in the DPA in that it would be unfair to disclose the information and that disclosure would also constitute an actionable breach of confidence. Some of this information was also withheld under section 36(2)(b) on the basis that it would be likely to inhibit the free and frank provision of advice and also under section 36(2)(c) on the basis that it would prejudice the effective conduct of public affairs.

6. **Letters from HHJ Goldstone**

In relation to any letters from HHJ Goldstone, the information deemed "non-confidential" by the DCA had already been disclosed to the complainant in the past during the course of the complainant's dealings with the department. It stated that the disclosure of the information on the substance of the complaint had been on the understanding with the judge that the personal information would not be released and that this information was also exempt under section 40(3) and section 41 of the Act, in that disclosure would be unfair (thereby breaching the first data protection principle) and an actionable breach of confidence.

7. **Whereabouts of HHJ Viljoen**

On the subject of the whereabouts of HHJ Viljoen, the DCA asserted that the judge's notebook (which may reveal his whereabouts during the period of time in question) was not held by the department for the purposes of the Act. The Court Service, an executive agency of the DCA, holds the judge's notebook on his behalf. It stated that in all likelihood the judge had attended a computer course during the period in question and that the complainant had already been provided with a copy of the end of course form. However, it provided him with another copy.

8. **Remaining information**

The DCA also addressed the other information it held in relation to the complainant's request.

**Section 32**

It explained its application of the exemption under section 32(1)(c) of the Act on the basis that the information was created by a court for the purposes of proceedings in a particular cause or matter.

**Section 42**

The DCA also explained its application of the exemption under section 42 on the basis that some of the information requested constitutes confidential legal communications between legal adviser and client. It also stated that the public interest in protecting these communications was strong and outweighed the public interest in disclosure.

**Section 36**

Finally, it also stated that information relating to how to deal with the substance of the complainant's complaint had been exempted under section 36(2)(b) and 36(2)(c) of the Act as disclosure of the emails between officials and submissions from officials to Ministers would prejudice the ability of officials to provide free and frank advice and that it would prejudice the effective conduct of public affairs. The DCA stated that the public interest favoured withholding the information and the Secretary of State had acted as the qualified person when the exemption under section 36 of the Act had been applied.

9. On 18 March 2005 the complainant requested an internal review of the decision to withhold the information in its entirety as well as an internal review of the decision to only partially disclose some information.
10. On 26 April 2005, the DCA communicated the results of the internal review to the complainant. It reaffirmed its previous decision and stated that it saw no reason to alter it. However, it did apologise for the delay in providing the initial refusal and accepted that it could have done more to keep the complainant informed. It also stated that it was not prepared to undertake any further searches for information relating to the whereabouts of HHJ Viljoen as this was most unlikely to exist. Finally, it provided the details of the Information Commissioner should the complainant be dissatisfied with this response.

## The Investigation

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### Scope of the case

11. On 3 May 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DCA was correct to withhold the information and provided arguments as to why the information relevant to his request should have been disclosed.

12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

13. On 1 June 2005 the Commissioner contacted the DCA to request the following:
  - i. A copy of the requested information and a copy of the schedule of disclosures which was provided to the complainant on 17 March 2005.
  - ii. Fuller explanation of its reasoning behind the decision to apply the exemptions under sections 32, 36, 40, 41 and 42 of the Act.
14. The DCA responded on 5 July 2005, enclosing the schedule of disclosures to the complainant of 17 March 2005, while stating that it was arranging for the information to be provided to the Commissioner. (Following some correspondence and telephone calls, the withheld information was provided shortly afterwards.) The DCA clarified its understanding of the complainant's request, namely that it was worded in such a way that it was a request for all of the information held by the DCA.
15. **Whereabouts of HHJ Viljoen**  
In respect of information relating to the whereabouts of HHJ Viljoen, the DCA stated the following:
  - i. It did not hold any further information concerning the whereabouts of HHJ Viljoen other than that which had already been provided to the complainant.
  - ii. In 1999, manual diaries would have been kept by the court's listing officer of the judge's sittings. However, as these diaries are only kept for a short time, the information has now been destroyed (most likely in 2001). In view of this, the only remaining way to ascertain the whereabouts of the judge would be to look at either the judge's notebook or search each and every court record for that year.
  - iii. The notebook is actually held by the court and not the Court Service, though the notebook would eventually pass to the Court Service in the future.
  - iv. As regards searching the individual court records, the DCA stated that not only would this be prohibitively expensive, information held only by virtue of it being in a court record is exempt by virtue of section 32 of the Act.
16. The DCA provided further explanations of the information it held in relation to each of the ten strands of the FOI request:



1. Information as to the judge's whereabouts was exempt by virtue of section 36 where advice was exchanged by officials or options discussed in relation to the matters involving the complainant.
  2. Exempt by virtue of section 36.
  3. Exempt in relation to section 36 or section 40(3) and section 41.
  4. Exempt by either section 36 (advice provided to the Lord Chancellor) or 42 (communication with Treasury Solicitors in connection with a judicial review).
  5. Information was either personal in nature and exempt under section 40(3) and 41. Advice given to the Lord Chancellor is exempt under section 36 and or legal advice on the handling of the complainant's complaints made to the DCA is exempt under section 42.
  6. Information consists of legal advice/instructions relating to a judicial review and advice from officials and legal advisers on dealing with the complainants complaints, which were withheld under section 36 and 42 respectively.
  7. Information consisting of dealings with the Civil Appeal Office was withheld under section 32, while information relating to the handling of complaints was withheld under section 36.
  8. Information in relation to this part of the request had been created by an administrative member of staff of the Court of Appeal for the purpose of dealing with the judicial review / appeal proceedings instigated by the complainant to which the DCA had responded. The DCA felt that this was covered by section 32 of the Act. There are further exchanges between officials and lawyers which were deemed exempt under section 42 of the Act.
  9. This had already been dealt with under the DCA's response to point 1 of the information request.
  10. Information was either personal information withheld under section 40(3) and section 41 or simply section 41 alone.
17. The DCA went on to supply a further explanation as to why the exemptions applied:

**i. Section 32 (Court records, etc.)**

The information in question was held only by virtue of it being contained in a court record and it had been created by a court.

**ii. Section 36 (Prejudice to effective conduct of public affairs)**

The complaints handling system it operates could be adversely affected by the disclosure of information it generates. Disclosure would likely have an adverse affect on the candour of advice.

**iii. Section 40 (Personal information)**

The decision to apply an exemption based on section 40 of the Act relied on the expectations of the third parties whose personal data was contained in the requested information and the potentially distressing effect that disclosure would have. It was felt that disclosure would be unfair and therefore breach the first data protection principle.

**iv. Section 41 (Information provided in confidence)**

The DCA explained its decision behind the application of section 41 and why it felt that disclosure would result in an actionable breach of confidence. This was said to be in line with the DCA's current protocol for handling complaints against the judiciary.

**v. Section 42 (Legal professional privilege)**

Lawyer / client communications should remain confidential to protect the principle of legal professional privilege and much of the information was created when litigation was already ongoing or reasonably contemplated.

18. The Commissioner replied to the DCA on 14 September 2005. He asked the DCA to more clearly mark which information was considered exempt and which section of the Act was being applied. To this end, the Commissioner returned the bundle of documents to the DCA. The Commissioner also asked for further clarification of the exemption applied under section 32 and more details about the application of the exemptions under sections 36, 40, 41 and 42.
19. The DCA responded to the Commissioner on 20 October 2005. It returned the withheld information to the Commissioner in a format with the exemptions more clearly marked, highlighting parts which had already been disclosed to the complainant. Further, the DCA provided more details about the section 36 exemption and stated that the qualified person in this case was a DCA Minister. In an effort to provide more details about the judicial complaints protocol it has, a copy of this policy was enclosed. The DCA went on to say that the confidentiality of its dealings with the judiciary was well-recognised and that this was now reflected in section 139 of the Constitutional Reform Act 2005, which makes explicit provision for confidentiality in relation to judicial appointments and discipline.
20. The DCA also provided further details as to the whereabouts of HHJ Viljoen, by arguing that it would also be impossible to search each and every court record now, as many would have been destroyed in accordance with established records retention schedules. It stated that the court holds approximately 130 files for that year and if it were to take 15 minutes to read each file, then the appropriate limit would be exceeded in responding to that part of the complainant's request alone. It also provided further details about the section 42 exemption, confirming that privilege had not been waived; that the communication relates to a legal issue;



that the parties involved were involved in a lawyer / client relationship; and that the privilege was either advice privilege or litigation privilege depending on the circumstances in which the information was created.

21. On 6 February 2006 the Commissioner contacted the DCA again. He asked it to provide further information concerning the application of the section 36 exemption, namely some evidence that the Minister had acted as the qualified person.
22. On 27 February 2006 the Commissioner sent a further letter to the DCA, this time asking for more information about the exemptions applied under section 32 and section 42 of the Act. He pointed to specific documents that the DCA had provided and asked it to provide an explanation as to how these could be exempt under section 32. He also asked for the DCA to clarify a number of points relating to the exemption applied under section 42, such as the identity and position of people involved in the various pieces of withheld correspondence.
23. When responding on 3 May 2006, the DCA provided more details about the application of section 32 to some of the information requested. It maintained its reliance on this section (under section 32(1)(a), (b) or (c)), and argued that the information was not held independently of the court record. However, it did state that the complainant would already have access to some of the withheld information as a party to the proceedings and that the information was therefore readily accessible by other means (section 21 of the Act).
24. In relation to a particular judgement, the DCA decided that section 32 was no longer appropriate, but that the complainant would already have access to the judgement as a party to the proceedings and that the section 21 exemption also applied to this. However, it stated that a court order was still exempt under section 32 of the Act, but that an acknowledgment of service in judicial review proceedings would be exempt under section 21 because it is already accessible to the complainant.
25. In relation to section 42, the DCA provided a detailed response in relation to the points raised by the Commissioner, outlining the background to the information in an effort to demonstrate that the dominant purpose of the communications was to seek / provide legal advice. It also explained how privilege attached to certain documents which had not been immediately clear to the Commissioner from his review of the withheld information. However, the DCA did review its application of section 42 to some documents, accepting that it did not apply in certain circumstances.
26. In relation to some documents generated by dealing with the judicial review, the DCA felt that these were properly exempt under section 32 and also under section 21 as these were reasonably accessible to the complainant as he would have received copies of these documents at the time of the proceedings. It provided details of the positions of certain named officials to demonstrate the existence of a lawyer / client relationship and arguments as to why the information should be withheld under section 42 of the Act.

27. The DCA stressed that the qualified person's decision was that the information relating to the process of the investigation and the formulation of advice is also exempt under section 36 of the Act.
28. On 4 August 2006 (following further correspondence with the Commissioner), the DCA provided some further evidence that the qualified person had taken the decision that the section 36 exemption applied. The DCA submitted that the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer, had acted as the qualified person in this matter, and his decision was communicated on 16 March 2005. The DCA also provided some details as to the nature of the request put to the qualified person and that following his assessment of the facts in the case, the key issues he identified were that disclosure would have a prejudicial effect on the investigation process and the formulation of advice to the Secretary of State.

### Findings of fact

29. The Commissioner understands that that the withheld information largely relates to documentation created in response to appeal proceedings and an application for judicial review brought by the complainant against the DCA.

### Analysis

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30. The DCA provided the information held in relation to the complainant's request to the Commissioner in three bundles, each labelled by the DCA as follows:
31. **Bundle A – Material exchanged between the Department and the Treasury Solicitor's Department for the purposes of the judicial review.**
  - Section 42 had been applied to this information.
  - Bundle contains:
    - Instructions to lawyers
    - Advice from lawyers
    - Supporting documents which are available in the public domain but used in the context of advice provision
32. **Bundle B – Information generated by the Court of Appeal in connection with the judicial review / appeal proceedings and our responses to the Court for the purposes of the proceedings.**
  - Section 32 had been applied to this information.
  - Bundle contains:
    - Correspondence from the Civil Appeal Office
    - Court Judgments
    - Court Orders

- Correspondence from court files
- Documents previously supplied to the complainant

33. **Bundle C – Exchanges between officials, the advice put to ministers and our correspondence with the judiciary.**

- Extracts of some of the information contained within this file were supplied to the complainant in the 'schedule of disclosures' in accordance with his right of subject access under the Data Protection Act 1998.
- Section 36 had been applied to remaining information.
- Sections 40, 41, 42 had been additionally applied to some information contained within the bundle.
- Bundle contains:
  - Court reports
  - Internal DCA briefings and recommendations
  - Internal DCA emails
  - Correspondence between the DCA and a judge
  - Supporting documents which are available in the public domain but used in the context of advice / briefings
  - Internal file notes
  - Draft letters
  - Communications with the Court Service
  - Communications with Counsel

34. On the basis of the DCA's correspondence to both the complainant (in relation to his request) and himself, the Commissioner is satisfied that no other information is held by the DCA in relation to the complainant's request.

### **Procedural matters**

#### **Section 1(1)(a) – Duty to confirm / deny**

35. The DCA stated that Judge Viljoen's notebook is actually held by the court and not the Court Service, though the notebook would eventually pass to the Court Service in the future.
36. As a court is not a public authority for the purposes of the Act and the court does not hold this information on behalf of the DCA, the Commissioner accepts that this notebook is not held by the DCA for the purposes of the Act and there is consequently no obligation to disclose this information to the complainant.
37. However, the Commissioner wishes to point out that this position will change if the notebook is requested from the DCA once it has been passed to the Court Service which is an executive agency of the DCA and therefore falls within its jurisdiction for the purposes of the Act.

## Exemptions

38. The provisions of sections 17, 21, 32, 36, 40, 41 and 42 of the Act can be found in the legal annex.

## Section 32 - Court Records

39. The Commissioner notes the DCA's assertion that the complainant would already have access to some of the information withheld under section 32(1)(c) as a party to the proceedings and that if this is the case the information was therefore readily accessible by other means (section 21 of the Act). The Commissioner restricted his analysis to whether this information was correctly withheld from the complainant under section 32 but considers that if the DCA also wished to rely on section 21, it should have provided the complainant with specific details of the information to which it had been applied.
40. The DCA stated that information created by a court for the purposes of proceedings in a particular cause or matter is exempt from disclosure under section 32. In respect of the complainant's request, it stated that such information relates to information created by an administrative member of staff of the Court of Appeal for the purpose of dealing with the judicial review / appeal proceedings instigated by the complainant to which the DCA had responded. Significantly, the DCA argued that this information was not held independently of the court record.
41. The Commissioner accepts that all information created by a court for the purposes of court proceedings engages the exemption under section 32. The Commissioner is therefore satisfied that the DCA invoked section 32 appropriately in respect of the information requested to which this description in the previous paragraph applies. As this is an absolute exemption, there is no obligation to disclose this information under the Act. However, this also means that there was no obligation on the part of the DCA to invoke the cost limit to justify the withholding of this information.
42. The Commissioner accepts the DCA's view that (as set out in paragraph 24) court judgments held in relation to the request can no longer be exempt by virtue of section 32 but that section 21 applies to this documentation. The Commissioner is guided in his interpretation of section 32 in this context by the decision of the Information Tribunal in *Mitchell v Information Commissioner* (EA/2005/0002, paragraph 37).
43. The DCA further stated that information consisting of dealings with the Civil Appeals Office was withheld under section 32. The Commissioner considers that the Civil Appeals Office falls within the definition of "court" in section 32. This is because it is the body responsible for administering the Court of Appeal Civil Division and should therefore be treated as being part of the Court of Appeal. However, although the Civil Appeal Office is not a public authority for the purposes of the Act, information passed by it to the DCA would be caught by the Act. In this case the information was held by the DCA in its capacity as a party to the proceedings in the Court of Appeal brought by the complainant. Such information could therefore only be withheld by the DCA under section 32 if it

were held by it only by virtue of it being in the court records, i.e. a document created for the purposes of the legal proceedings.

44. The Commissioner notes that the following information, which he has studied, relating to dealings with the Civil Appeal Office was withheld under section 32:
- Letters and faxes – created in response to directions given by Lord Justice Gibson and for the purpose of the proceedings. The Commissioner is satisfied that the information is only held by the DCA by virtue of it being contained in documents created by a court for the purpose of proceedings.
  - Court Order and Acknowledgement of Service – The Commissioner is satisfied that s32(1)(b) and (c) apply to this information.
45. The Commissioner notes that the following information can be legitimately withheld under section 32:
- Information held by the DCA only by virtue of it being contained in a court record for the purposes of legal proceedings, or
  - Information created by a court for the purposes of legal proceedings
46. Taking the above into account, the Commissioner is satisfied that all the information supplied to him contained within bundle B was correctly withheld under section 32 of the Act (aside from court judgments). However, he recommends that for the purposes of clarity the DCA supplies to the complainant a schedule of all the documents contained within that bundle which had previously been supplied to the complainant (and therefore also exempt by virtue of section 21).

## Section 42 – Legal Professional Privilege

47. The Commissioner proceeded to analyse whether section 42 was correctly applied to the information contained within Bundle A.
48. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
49. There are two types of privilege – legal advice privilege and litigation privilege. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.

Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.

50. Taking the above analysis into account, the Commissioner undertook an assessment of whether:
- the documents were created for the purpose of seeking legal advice in the reasonable contemplation of litigation;
  - legal professional privilege attaches to supporting documents which are in the public domain but in this context attached to instructions to lawyers.
51. To the extent that the documents are correspondence with, instructions to and advice lawyers, the Commissioner considers it to be clear that section 42 applies. This is because it is clear that the exchanges of correspondence were for the purposes of providing legal advice on responding to the application for judicial review served on the department by the complainant. The evidence also leads the Commissioner to conclude that section 42 applies to other documents which were created so as to give background to counsel for the purposes of their provision of the advice.
52. Although the extent of the advice sought or given varies in the correspondence, the Commissioner is satisfied that it falls within the scope of section 42 as a whole on the basis that it forms part of the whole picture of legal advice. This is because information can be privileged to the extent that it forms a part of a more extensive dialogue in which advice is given on litigation contemplated.
53. The Commissioner also considers supporting documents contained within Bundle B to fall within the scope of section 42. This is because they either form part of the information on which advice was sought or given, and therefore forms part of the advice itself, or highlights the areas on which legal advice was sought or given. The fact that such information contained within the bundle may also be held elsewhere (including in the public domain) therefore has no bearing on whether section 42 applies.
54. However, section 42 is a qualified exemption and therefore subject to the public interest test. As such, the information may only be withheld from the complainant if, in all the circumstances, the public interest in disclosing this information is outweighed by that in the maintenance of the exemption. The Commissioner therefore proceeded to undertake an assessment of the public interest test in relation to the information contained within Bundle A.
55. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated that: "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." It concluded that "it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..." (paragraph 35).



In summary, legal professional privilege was referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. It also confirmed that when considering the public interest it is not relevant to consider the number of individuals affected by the issue. (paragraph 35) The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale. (paragraph 35)

56. Against the arguments for maintaining the exemption in this case (as set out in the previous paragraph and put forward by the DCA), the Commissioner considered a number of public interest arguments in favour of disclosure, namely:

- Informing debate on key issues, including allowing the public to feed into key policy decisions
- Promoting accountability for decisions
- Promoting probity
- Helping people understand and challenge decisions affecting them
- The time elapsed since the advice was given/requested
- The status of the complainant's litigation

57. The Commissioner considers all the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. However, when relating this to the circumstances under which he considers the section 42 exemption to hold, the Commissioner is not persuaded that the arguments for disclosure are sufficient to overcome the high threshold required for the disclosure of information to which section 42 is engaged.

58. On balance, the Commissioner concluded that in this case the public interest in disclosing this information was not sufficiently strong to outweigh the public interest in maintaining the exemption under section 42(1). He is therefore satisfied that section 42 was correctly applied to the information contained within Bundle A.

### **Section 36 – Prejudice to effective conduct of public affairs**

59. The Commissioner notes that the DCA applied section 36 to all the information contained within Bundle C not previously supplied to the complainant in the ‘schedule of disclosures’. It also applied sections 40, 41, 42 to some of the information contained therein. However, for the purposes of clarity, the Commissioner commenced his investigation of this bundle by assessing whether the application of section 36 to its entire contents that had been withheld from the complainant was made in accordance with the Act.

60. The Commissioner notes that the information contained within Bundle C was withheld under section 36(2)(b) on the basis that it would be likely to inhibit the

- free and frank provision of advice and also under section 36(2)(c) on the basis that it would prejudice the effective conduct of public affairs.
61. He also notes the DCA's view that that the further disclosure of correspondence between officials and submissions from officials to Ministers would prejudice the ability of officials to provide free and frank advice and the public interest favoured withholding the information. He also considered the DCA's assertion that the complaints handling system it operates could be adversely affected by the disclosure of information it generates.
62. A public authority may only apply section 36(2) where the reasonable opinion of a qualified person has been obtained. The Commissioner understands that the Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer, had acted as the qualified person in this matter and communicated his decision on 16 March 2005. He notes that the DCA stressed that the qualified person's decision was that the information relating to the process of the investigation and the formulation of advice in response to his complaints is exempt under section 36 of the Act.
63. The Commissioner is satisfied that the DCA provided him with sufficient evidence to demonstrate the application of the qualified person's opinion and his reasons for doing so. He took into account the DCA's summary of the key issues considered by the qualified person in relation to section 36(2), which were:
- the prejudicial effect of disclosure on the investigation process; and
  - the prejudicial effect of disclosure on the formulation of advice to the Secretary of State which in turn would prejudice the Secretary of State's ability to effectively carry out his disciplinary functions in relation to members of the judiciary and would therefore prejudice, or would be likely to prejudice, the effective conduct of public affairs.
64. On the basis of his review of the information contained within Bundle C (which led the Commissioner to accept that the prejudice outlined above would be likely to occur were the information to be disclosed), the Commissioner has decided that the opinion of the qualified person was reasonable. When doing so, he took into account the Information Tribunal decision of 8 January 2007 (*Guardian Newspapers Limited and Heather Brooke v Information Commissioner and British Broadcasting Corporation*), in which the Tribunal states that "if the opinion is reasonable, the Commissioner should not under section 36 substitute his own view for that of the qualified person. Nor should the Tribunal."
65. The Commissioner also considers the information contained within the bundle that had been supplied to the complainant in response to his request to be different in nature to that which had been withheld, particularly with regard to its sensitivity.
66. In comparing the information withheld under section 36 with the issues taken into account by the qualified person in reaching his decision, the Commissioner is also satisfied that the opinion was reasonably arrived at.

67. The Commissioner therefore accepts the application of section 36(2)(b) to the information contained within Bundle C. He also accepts that section 36(2)(c) is engaged, which contemplates that information can be withheld where disclosure would be likely to prejudice a public authority's ability to meet its wider objective or purpose (in this case, the ability to effectively handle complaints about the judiciary).
68. However, section 36 is a qualified exemption and therefore subject to the public interest test. In determining the public interest under section 36, the Commissioner considered the following arguments in favour and against the maintenance of the exemption, taking into account the circumstances of this particular request:
69. **In favour**
- The expectation of parties to the correspondence that their deliberations would remain private.
  - The importance of not undermining the process of proper deliberations and effective administration.
70. **Against**
- The passage of time since the creation of the information, particularly the fact that the information in question no longer remains the subject of deliberations.
  - The fact that some of the information contained within certain documents within this bundle had been disclosed to the complainant.
  - Transparency and accountability for decisions taken and departmental conduct.
  - Promoting probity.
  - Helping the public understand and challenge decisions affecting them.
71. Moreover, the Commissioner does not believe that the complainant's personal interest in accessing the correspondence in any way amounts to a wider public interest in its disclosure. Having considered all these arguments, the Commissioner concludes that in all the circumstances of the case, the public interest in maintaining the exemption in relation to the information contained within Bundle C that had been withheld from the complainant outweighs the public interest in disclosure.
72. As such, the Commissioner did not consider it necessary to assess the DCA's application of additional exemptions to some of the information contained within Bundle C, which consisted of:
- Sections 40 and 41 to correspondence between the DCA and a judge,

- Section 42 to correspondence with lawyers.

## The Decision

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73. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- Application of section 42 to the information contained within Bundle A,
  - Application of section 32 to the information contained within Bundle B (with the exception of the court judgments),
  - Application of section 36 to the information contained within Bundle C which had been withheld from the complainant.
74. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Insufficient detail provided to the complainant as to exactly what information it held that was also exempt by virtue of section 21 of the Act. This constitutes a breach of section 17(1)(c) of the Act (Refusal of Request).

## Steps Required

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75. The Commissioner requires the public authority to take the following step to ensure compliance with section 17(1)(c) of the Act:
- Supply the complainant with an accurate and comprehensive list of all documents it holds (by reference to its titles) in relation to his request to which section 21 is also applicable.
76. The public authority must take the step required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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77. Failure to comply with the step described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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78. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 5<sup>th</sup> day of June 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### Refusal of Request

**Section 17(1)** provides that -

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

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

**Section 17(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

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



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

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

**Section 17(4)** provides that -

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

**Section 17(5)** provides that –

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

### **Information Accessible by other Means**

**Section 21(1)** provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

**Section 21(2)** provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

**Section 21(3)** provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

## Court Records

**Section 32(1)** provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
  - (i) a court, or
  - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.”

**Section 32(2)** provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

**Section 32(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 this section.”

**Section 32(4)** provides that –

“In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

## Prejudice to effective conduct of public affairs

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“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-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 36(3)** provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

**Section 36(4)** provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

**Section 36(5)** provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

**Section 36(6)** provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

**Section 36(7)** provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or

- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

## Personal information

**Section 40(1)** provides that –

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

**Section 40(2)** provides that –

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

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

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

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

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-

- (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

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

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

## Information provided in confidence

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”



## 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.”

**Section 42(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”