

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 30 July 2007**

**Public Authority:** Department for Culture Media and Sport  
**Address:** 2-4 Cockspur Street  
London  
SW1Y 5DH

### Summary

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The complainant made several requests to the public authority for information relating to 'listed events', ie major sporting events subject to special rules on broadcasting coverage. The public authority provided some of the information but withheld other elements, citing the exemptions contained in section 35(1)(a) and (b) of the Freedom of Information Act 2000 ('the Act'). The Commissioner decided that the public interest in maintaining the exemption did not outweigh the public interest in disclosure, and therefore ordered the DCMS to disclose the withheld information.

### 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 6 January 2005 Baker & McKenzie, a law firm, requested the following information from the Department for Culture, Media and Sport (DCMS).

*'1. Information provided to the members of the Advisory Group on Listed Events, chaired by Lord Gordon of Strathblane, in connection with the preparation of the report and recommendations of the advisory group on listed events dated 2 March 1998;*

*2. Statistical and factual information from which the figures in the tables set out in Commons Hansard, 17 June 1998, columns 233-235 (television viewer figure data provided by Secretary of State, Mr Chris Smith, in*

*written answer to a question from Mr Nigel Jones) are derived. If the information is not all contained in the same file or documents so that it is onerous to provide all the data, then please provide only the information relating to football viewing figures;*

*3. Press lines (within the meaning of paragraph 2 of the Department of Constitutional Affairs Freedom of Information Guidance: Working Assumption: Press Releases and Handling Strategies) prepared in connection with press release 135/98 of 25 June 1998 headed "New Protection for Football on Television in Revision of Listed Sporting Events";*

*4. Statistical and factual information which formed the basis for the Secretary of State's decision referred to in the press release;*

*5. Press lines prepared in connection with press release 217/2000 of 22 August 2000 headed "Europe Backs UK list of Crown Jewel Sports Events";*

*6. Information provided to the European Commission in connection with the European Commission's decision referred to in the press release'.*

The complainant stated that he might be able to narrow down the request should the information in hard copy be substantial.

3. DCMS replied on 4 February 2005, giving the case the reference number '3048'. It provided a number of documents which it listed in the letter. It stated that it had redacted from the documents:

*'- Details of the values of contracts, on the grounds of the section 41 exemption – information provided in confidence.  
- Details of the consultation responses for events included in formal consultation process (as requested as part of question 1). Redacted on the grounds of the section 41 exemption – information provided in confidence.  
- Names of officials on the grounds of the section 40 exemption – Personal information.'*

4. It referred the complainant to his right to request a review of the decision.
5. In light of a discussion with DCMS, the complainant developed the request further on 10 February 2005. Amongst other things, he expressed an interest in receiving other consultation responses from government departments, and DCMS background briefing information. DCMS treated this as a new request with the reference '6160'.
6. DCMS replied under reference '6160' on 10 March 2005. It provided some further information. In relation to consultation responses from government bodies, it stated that it was 'seeking DCA clearance' regarding the exemptions under sections 35 and 36 of the Act, and estimated that it would take approximately twenty additional working days to consider the public interest test in this regard. It also redacted from the provided information some details of the values of

contracts and the names of officials, on the grounds of the sections 41 and 40 exemptions respectively. In relation to other elements of the information requested, it stated that it was not able to locate this or that it had already been provided.

7. On 24 March 2005 the complainant requested a review of the decision referenced '3048'. He expressed his view that DCMS' decision to redact representations which had been made to the Secretary of State, as falling under section 41 of the Act, was incorrect because generally the information did not have the necessary 'quality of confidence' (he pointed out that any specifically confidential information could be redacted) and the information had not been disclosed to DCMS in confidential circumstances. He considered that DCMS' decision to invoke section 35 of the Act was also wrong, since the information did not relate to government policy and the public interest favoured disclosure.
8. DCMS informed the complainant on 7 April 2005 that it was extending the deadline for responding to his request for information relating to consultation responses from other government bodies. It also provided him with a further item of information.
9. It wrote again on 14 April 2005 explaining that it was reviewing its decisions relating to the requests contained in the complainant's letters of both 6 January and 10 February 2005. It explained that it would be dealing with the new issues raised by him under a new reference '11101'; it also claimed that his request for the representations exceeded its fees limit because it was '*worded too broadly*', although it would '*be happy to respond to a narrower request*'.
10. DCMS wrote again on 4 May 2005 explaining its application of the public interest test in respect of the consultation responses under reference '6160'. It concluded that it was appropriate to disclose one document, a response received from the Office of Telecommunications dated 29 August 1997. It stated that a number of other documents were being withheld because they fell within the section 35 exemption. DCMS stated that, if section 35 were not relevant, it believed that the section 36 exemption would apply to this information, although it conceded that it had not referred the matter to a 'qualified person'. It referred the complainant to his right to ask for an internal review.
11. The complainant requested a review on 11 May 2005 of the decision under reference '11101'. This related to: representations/consultation responses to the Secretary of State (he considered that DCMS' invocation of section 12 of the Act was time-barred because it had not been raised within twenty days of the request); and DCMS submissions and briefings to the Secretary of State (he stated that he had no objection to the request being treated as a new one, and it was subsequently given the reference '14209').
12. The complainant sent another review request to DCMS on 16 May 2005 in respect of its decision on 4 May 2005 under reference '6160'. The complainant claimed that this information was not in fact exempt under section 35, and that in any event the public interest clearly favoured disclosure. DCMS indicated to the

complainant on 25 May 2005 that it would provide a decision regarding this request within thirty working days.

13. On 10 June 2005 it confirmed that it had information falling within the request for all representations made to the Secretary of State under reference '11101', and it enclosed copies of some documents. However, it stated that it had not yet been able to complete its consideration of the request but hoped to do so by 17 June. It explained that some material was being withheld under section 35(1)(b) and section 41 of the Act, and redactions had been made to withhold personal data (the names of officials) falling under section 40 of the Act. It was seeking consent from the relevant third parties to release the information falling under section 41. It also addressed the request for DCMS submissions or briefings to the Secretary of State which had now been given the reference '14209'. It stated that it considered that much of this information fell within the scope of section 35(1)(a) and that it required further time to consider the public interest test, which it hoped to complete by 24 June.
14. DCMS wrote again on 17 June 2005 regarding reference '11101'. It enclosed further information that fell under the request for consultation responses made to the Secretary of State. In respect of section 41 it stated that it was still seeking consent to disclose documents, and had also redacted details of the values of contracts.
15. DCMS sent a further letter to the complainant on 24 June 2005 dealing with the references '11101' and '14209'. It enclosed four documents relating to consultation responses for whose disclosure it had received consent, but stated that it was retaining another document as falling under section 43 of the Act (commercial interests). Regarding reference '14209', it stated that it had extended the deadline by a further twenty days so that it could consider the public interest test.
16. DCMS wrote to the complainant on 29 June 2005 stating that it had not yet been able to conclude the internal reviews relating to references '6160' and '13565', the latter being the reference number which it had now given to the complainant's request for the consultation responses to the Secretary of State.
17. On 13 July 2005 DCMS sent the complainant its review decision regarding the request under references '6160' and '13565'. It stated that it had now concluded that the balance of the public interest lay in release of these documents, which it attached.
18. DCMS wrote to the complainant on 21 July 2005 advising him that it had had to extend the deadline in relation to his request for DCMS submissions and briefings to the Secretary of State (reference '14209'), but expected to be able to respond by the week commencing 25 July.
19. On 28 July 2005 DCMS provided some of the information requested under reference '14209', but informed the complainant that it had decided to withhold the rest on the grounds that it fell under section 35(1)(a) and (b) of the Act. It explained its application of the public interest test and stated that it had not

released some information – statistical representations from MPs and other ministerial correspondence – in accordance with section 21 of the Act because this information had already been provided to the complainant as part of his previous requests or because it was otherwise available to him. It informed the complainant of his right to appeal against the decision.

20. The complainant submitted a request for an internal review on 15 August 2005 regarding: the representations to the Secretary of State which DCMS had claimed fell within section 35(1) of the Act (referred to in DCMS' letter of 10 June 2005); the one consultation response which was claimed to fall under section 43 of the Act (DCMS' letter of 24 June 2005); and the DCMS submissions or briefings, including documents dated 1 and 23 April 1998 and any other documents made between 2 March and 25 June 1998 (DCMS' letter of 28 July 2005).

21. DCMS sent its internal review decision to the complainant on 13 October 2005:

- it would not be in the public interest to release the information relating to representations to the Secretary of State which it had claimed fell within section 35(1) of the Act, and similarly regarding the complainant's request for *'any information...that would allow me to identify the nature of those documents, whether, consequently, the claimed exemption applied and, therefore, whether to seek an internal review of the refusal (12 July 2005)'*;
- DCMS was taking the view of the relevant third party regarding the consultation response and would contact the complainant once it had been obtained;
- the information relating to DCMS submissions or briefings fell within section 35(1)(a), but it was nevertheless prepared to release three documents – another five were being withheld on the grounds that the complainant had already received the information in two of them, and the public interest was better served by withholding the information in the remaining three.

22. Following a telephone enquiry from the complainant on 20 October 2005, DCMS provided further clarification on 27 October. It then informed him on 28 November that it had discussed the outstanding point with the third party and considered that the information still fell within the section 43 exemption; and that a redacted version could not be released *'because of the sensitivities involved'* but it was instead providing a written summary of the letter.

## The Investigation

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### Scope of the case

23. On 1 December 2005 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. He stated that

DCMS had only disclosed part of the information which was still in dispute. The complainant specifically asked the Commissioner to consider the following points:

- section 35(1)(a) did not apply because the Secretary of State's decision regarding listed events did not involve the formulation or development of policy but *'was purely a matter of applying published criteria to a defined list of events, not of establishing a new policy'*;
- since DCMS disclosed some representations to the Secretary of State made by government bodies and ministers, any other document falling under section 35(1)(b) should also be disclosed.
- the public interest in any event strongly favoured disclosure;
- DCMS should at least have disclosed partial information such as the identity of ministers and dates of communications.

24. The Commissioner has therefore considered the information which DCMS has not provided to the complainant. He believes that this comprises:

- two annexes to the submissions dated 1 April and 23 June, withheld under section 35(1)(a) and (b);
- three letters from Ministers to the Secretary of State for Culture, Media and Sport, withheld under section 35(1)(a) and (b);
- a submission dated 16 June 1998, withheld under section 35(1)(a);
- Annex B, titled 'Q&A', to a submission of 12 June 1998, mislaid rather than withheld.

## Chronology

25. In a telephone conversation on 6 November 2006 the Information Commissioner's Office sought clarification from the complainant as to what information he still required from DCMS. On 14 November 2006 it invited the complainant and DCMS to provide further information.

26. The complainant confirmed to the Commissioner in his letter of 21 November 2006 that he found acceptable the summary of the letter withheld under section 43 of the Act, provided to him by DCMS on 28 November 2005, and the other documents which had been provided. However, he expressed himself unclear as to what information DCMS was withholding. He identified a number of documents which might still to be outstanding.

27. The Commissioner wrote again to DCMS on 7 December 2006 putting further points arising from this response. The Commissioner also asked DCMS to provide him with the withheld information.

28. DCMS replied on 8 January 2007, identifying the withheld information, some of which it copied to the Commissioner. It explained why it had applied the exemption under section 35 of the Act, and addressed some of the doubts expressed by the complainant about what had been released. In particular, it pointed out that: a document entitled '*A tabular note of the existing list, the Gordon proposals and your revised list*' was released to the complainant on 4 February 2005; and it had been incorrect to tell the complainant that it had provided him with a draft press release, which was in fact being withheld under section 35; and a draft parliamentary question and attendant submission identified by the complainant was in fact the submission dated 23 June 1998 which was being withheld. It also advised that, following building work at its offices, DCMS was unable to locate a copy of the draft of the Q&A attached to a submission dated 12 June 1998 (although the complainant had already received the final version of the Q&A document). The Commissioner notes that this document has been lost and the issue of DCMS' records management policy has been referred to the Good Practice & Enforcement Unit in the Information Commissioner's Office.
29. On 7 March 2007 the complainant drew the attention of the Information Commissioner's Office to Information Tribunal decisions in two recent cases.
30. The Commissioner asked DCMS on 21 March 2007 to provide copies of the remaining information which it had withheld. On 4 April DCMS sent copies of some of the information, but stated that it was only providing summaries of some of the documents because of the sensitivity of the information.
31. The Information Commissioner's Office informed DCMS on 16 May 2007 that it was necessary for the Commissioner to view the full information. DCMS forwarded copies of the information on 1 June.

## Analysis

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32. DCMS provided the Commissioner with copies of the withheld information with its letters of 8 January and 1 June 2007. The Commissioner notes that this material includes a document dealing with the announcement of the Secretary of State's decision regarding listed events; this has Annexes, one of which contains information relating to completely separate matters which were to be raised with stakeholders. The Commissioner has taken the view that this additional material, which is identified in a separate Schedule provided to DCMS, does not fall within the scope of the complainant's request.

## Exemption – section 35

33. The complainant requested information relating to 'listed events', ie major sporting events subject to special rules on broadcasting coverage. The Commissioner understands that the system of 'listed events' operates on the following basis. Events are drawn up by the Secretary of State for Culture, Media and Sport, who may amend the list at any time after consultation with specified

parties. 'Group A' events are those which may not be covered live on an exclusive basis unless certain criteria are met. In June 1998 the Secretary of State added the category of 'Group B' events, which may not be broadcast live on an exclusive basis unless adequate provision has been made for secondary coverage.

34. DCMS withheld some of the information requested by the complainant citing section 35(1)(a) and (b) of the Act. Section 35(1) provides that:

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

*(a) the formulation or development of government policy,*

*(b) Ministerial communications...'*

#### *Engagement of the exemption*

35. In his letter to the Commissioner dated 1 December 2005 the complainant claimed that the Secretary of State's decision did not in fact involve the formulation or development of policy but *'was purely a matter of applying published criteria to a defined list of events, not of establishing a new policy'*, and that section 35 was therefore inapplicable. In its comments to the Commissioner on 8 January 2007 DCMS disagreed:

*'The creation of a new B list and the addition of new sporting events is a clear indication that this involved the formulation of new policy. As such, the Secretary of State was required to make new decisions and not simply to apply published criteria.'*

36. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action. It is unlikely to be about purely operational or administrative matters, or to a policy which has already been agreed or implemented. In this case the withheld information relates to consultation and decision-making pursuant to a review of included events which had been promised in a general election manifesto. One of the decisions was to create a new category of 'Group B' events. The Commissioner has obtained and considered the requested information, and notes that the review process went beyond merely applying a list of criteria to potential candidates for the lists. In his view it did indeed relate to the formulation and in particular the development of government policy. Furthermore, since the review process included input from Cabinet Ministers the Commissioner is satisfied that the information relates to 'government' rather than 'departmental' or any other type of policy. In all the

circumstances he considers that section 35(1)(a) is not disengaged in this case on the grounds suggested by the complainant, ie that the Secretary of State was merely applying published criteria rather than establishing new policy.

37. Having considered the information withheld by DCMS, the Commissioner takes the view that all of it engages section 35(1)(a). Although one of the documents deals with the arrangements for the announcement of the Secretary of State's decision, the Commissioner has concluded that this information too relates to the formulation and development of policy because it constitutes an explanation of the decision reached which is intimately bound up with the decision-making process, and also because the policy could still have been altered prior to the announcement being delivered.
38. DCMS also asserted that some of the information was covered by section 35(1)(b) of the Act, relating to Ministerial communications. Such communications are written correspondence in any form between Ministers of the Crown, between Northern Ireland Ministers, or between Assembly Secretaries. Communications between civil servants on behalf of their minister are also likely to be included. The Commissioner considers that, in addition to falling within section 35(1)(a), some of the withheld information is also covered by paragraph (b). This comprises three submissions to the Secretary of State for Culture, Media and Sport by other Ministers; and two draft letters from the Secretary of State to the Prime Minister.

*Public interest test - section 35(1)(a)*

39. Since section 35 is a qualified exemption it is subject to a public interest test under section 2(2)(b) of the Act. This favours disclosure unless,

*'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'.*

40. The complainant expressed his view that the public interest in understanding government decision making, accountability and transparency strongly favoured disclosure of the withheld information. He stated that in this case the Secretary of State's decision was contrary to the recommendations of the relevant Advisory Group and the advice of DCMS officials, and that the Secretary of State gave no reasons for the decision at the time. He claimed that, in these circumstances, *'the failure of transparency in decision making and absence of reasoning'* strongly favoured disclosure. The complainant also suggested that European Community law required the United Kingdom to act in a clear and transparent manner in drawing up lists of sporting events; in light of the *'lack of consultation, no reasoning and suspect decision making'* of DCMS procedure the requested information should therefore be disclosed. He further claimed that there was no public interest in withholding the information because *'There is no "thinking space" to protect in this case'* because the Secretary of State's role was merely to apply established criteria and policy to a defined list of events. He noted the age of the information and the fact that two general elections and a change of Secretary of State had intervened.

41. In its assessment of the public interest test DCMS identified *'the strong public interest in releasing responses to government consultations'* in order to *'explain the background against which policy decisions were taken, and the information on which decisions were based'*. However, it considered that this was outweighed by the factors in favour of maintaining the section 35 exemption, which were the strong public interest in allowing consultees to put their views across with frankness and candour, and the fact that:

*'the case for mutual recognition of the UK list from other member states remains current and this, in our view, strengthens the public interest for non-disclosure, despite the fact that the initial decision in question is eight years old.'*

The Commissioner does not accept this claim since, whatever further action may be taken in the context of the European Union, the policy-making process surrounding 'listed events' has been concluded.

42. The Commissioner takes the view that the main arguments in this case for maintaining the privacy of the information are to allow 'private thinking space', in order to facilitate frank advice and the free and frank exchange of views, and to reduce the temptation to keep inaccurate or incomplete records. On the other hand, the factors favouring disclosure are:

- encouraging good practice and increasing public confidence that decisions have been taken properly and on the basis of the best available information;
- promoting policy-makers' accountability to the public and facilitating public understanding of how government formulates policy;
- encouraging public debate and participation in the development and formulation of government policy;
- broadening policy input beyond individuals or groups with an unduly privileged position of influence in policy-making processes.
- the age of the information (seven years at the time of the request).

43. In weighing up these factors, the Commissioner has had regard to the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), in which the Information Tribunal laid down eleven principles guiding how to assess the public interest in cases involving the section 35 exemption. Some of these are relevant to this case. First, it stated that *'No information within s35(1) is exempt from...disclosure simply on account of its status'*. The fact that the information relates to the deliberations of very senior officials or government Ministers does not of itself dictate that the information is sensitive, and *'To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1) a class of absolutely exempt information'*.

44. Secondly, it declared that the public interest in maintaining the exemption provided by section 35(1)(a) is in protecting, from compromise or unjust public criticism, civil servants rather than ministers. The Tribunal asserted that it is not unfair to politicians to release information that allows the policy decisions they took to be challenged after the event. The Commissioner notes that most of the withheld information in this case relates to representations made and decisions taken by politicians, rather than advice or views provided by officials.
45. Thirdly, it indicated that it was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that *'we are entitled to expect of [civil servants] the courage and independence that...[is]...the hallmark of our civil service'*, since civil servants are *'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions'* and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make officials responsible for providing advice and recording information less likely to perform their duties properly. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including DCMS, to ensure that their officials continue to perform their duties according to the required standards.
46. Fourthly, the Tribunal stated that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy...will normally mark the end of the process of formulation'*. In this case, the Commissioner considers that the Secretary of State's announcement of his decision in June 1998 effectively ended the policy-making process, and that the information in this case was essentially 'historical' by the time that the complainant made his applications in 2005.
47. In summary, the Commissioner's view is that there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by disclosure under the Act. In this case there are very strong public interest factors favouring disclosure, involving public confidence, accountability, public debate and participation, and in particular the age of the information (seven years at the time of the request). The Information Tribunal has confirmed that the deliberations of government Ministers are not to be automatically treated as sensitive, it is civil servants rather than ministers that section 35(1)(a) is intended to protect from compromise or criticism, civil servants should not be easily discouraged by disclosure of information from doing their job properly, and after the end of the policy-making process it is likely that information will be merely 'historical'. The Commissioner considers that the factors against

disclosure of the information are considerably less significant, and he has therefore concluded that the information which was withheld by DCMS in this case should be disclosed on the grounds that the public interest in withholding it does not exceed the public interest in disclosure. (As noted earlier in this Decision Notice, the separate Schedule being provided to DCMS identifies some information which should be redacted from the information to be disclosed on the grounds that it does not fall within the scope of the complainant's request).

48. Finally, the Commissioner notes that some of the information comprises documents which were copied to a number of individuals whose names are recorded. It is clear that these were relatively senior personnel. The Commissioner accepts that there may be grounds for withholding the names of junior officials who would never expect their roles to be exposed to the public gaze. In the case mentioned above the Tribunal stated that there should be no blanket policy to withhold such names and whether such information should be disclosed has to be decided on the particular facts: *'A blanket policy on refusing to disclose the names of civil servants wherever they appear in departmental records cannot be justified'* and *'There must, however be a specific reason for omitting the name of an official where the document is otherwise disclosable'*. Since those named in this case were relatively senior officials, and could therefore expect to have their role in policy put under public scrutiny, the Commissioner does not consider that their names should be redacted when the information is disclosed.

*Public interest test - section 35(1)(b)*

49. The Commissioner considers that the assessment of the public interest test regarding section 35(1)(b) is likely in most cases to be very similar to that for section 35(1)(a). In this case the Commissioner notes that DCMS specifically stated in relation to section 35(1)(b) that:

*'The release of correspondence between ministers, by revealing the views of individual ministers, would tend to undermine the collective responsibility of ministers for Government policy, which falls to be defended by all ministers even where formal decisions are known to have been taken by a particular minister'*.

It also referred to a strong public interest in:

*'not undermining the principle of collective ministerial responsibility...or the ability of different ministers and departments to represent their views and departmental interests with frankness and candour'*.

50. Notwithstanding the points made by the DCMS, however, the Commissioner considers that in this case the public interest test regarding section 35(1)(b) remains similar to that made above in relation to section 35(1)(a). He has taken particular note of the points made by the Tribunal, in the case mentioned above, that the fact that information concerns the deliberations of government Ministers does not of itself dictate that that information is sensitive; that it is not unfair to elected politicians to release information that allows their policy decisions to be

challenged after the event; and that merely 'historical' information is likely to be disclosable. That last point is further strengthened by section 63(1) of the Act, which provides that information older than thirty years will not be exempt, and by the current practice of releasing cabinet papers after thirty years, which recognises that the sensitivity of information of this kind decreases over time. It is also possible to extrapolate from the Tribunal's conclusion that it can be expected that civil servants should not be easily discouraged from doing their job properly to make the same point about elected politicians, who should be expected to represent their own views and the interests of their departments with frankness and candour even where their views and decisions may be disclosable. In combination with the other strong public interest factors, including the significant interest in promoting accountability and transparency of elected politicians, these points have led the Commissioner to conclude that the public interest favours disclosure of that part of the withheld information to which section 35(1)(b) applies.

### **Exemption – section 36**

In relation to the information request with the reference '6160', DCMS informed the complainant on 4 May 2005 that, if section 35 were not relevant, it believed that the section 36 exemption would apply. However, section 36(1)(a) of the Act specifies 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.'*

Since section 36 does not apply to information which is exempt by virtue of section 35, and the Commissioner has decided that section 35 does in fact apply to the information in this case, the information cannot be exempt by virtue of section 36.

### **The Decision**

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51. The Commissioner's decision is that the DCMS failed to comply with its obligations under section 1(1) of the Act, in that it failed to communicate to the complainant information to which he was entitled, claiming that it was exempt from disclosure under section 35(1)(a) and (b).

### **Steps Required**

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52. The Commissioner requires the DCMS to take the following steps to ensure compliance with the Act:

- DCMS should provide the complainant with the information which it claimed was exempt under section 35(1)(a) and (b) of the Act, with the redactions specified in the Schedule which is being provided to it.

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

### **Failure to comply**

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

## Right of Appeal

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54. 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 30<sup>th</sup> day of July 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Appendix

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

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

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

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

**Section 1(2)** provides that -

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

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

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

**Section 35(1)** provides that –

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

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

**Section 35(2)** provides that –

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

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

**Section 35(3)** provides that –

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

**Section 35(4)** provides that –

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

**Section 35(5)** provides that –

“In this section-

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

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

"Ministerial communications" means any communications-

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

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

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

**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.