

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

22 December 2008

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

### Summary

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The complainant requested information relating to any meetings between Tessa Jowell, the secretary of state for culture, media and sport, and Lord Birt since August 1 2004, as well as any briefing material, letters, memos, emails, memorandums of conversations which were prepared for or connected with these meetings. The public authority confirmed that it held information of that description but sought to withhold it, citing the exemptions under sections 35(1)(a) and 36(2)(b) of the Act. The Commissioner's decision is that, although the information is exempt under section 35(1)(a), the public interest lies in disclosing the information. As the Commissioner has found that the information is exempt under section 35(1)(a), it is not exempt under section 36(2)(b) of the Act.

Accordingly, the Commissioner requires the public authority to disclose the withheld information within 35 days of the date of this Notice. The Commissioner also finds that the public authority breached section 10(1) in that it breached the time limit set out in the Act, and sections 17(1) and 17(3) in that it failed to provide an adequate refusal notice to the complainant.

### 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. The complainant has advised that on 11 May 2005 he requested the following information from the Department for Culture, Media and Sport ('DCMS'):

“Under the act, I would like to request complete copies of the minutes and agendas of any and all meetings between Tessa Jowell, the secretary of state for culture, media and sport, and Lord Birt since August 1 2004. I would also like to request complete copies of all and any documents (such as briefing material, letters, memos, emails, memorandums of conversations) which were prepared for or connected with these meetings, either before or after the event.

I would also like to ask the Department for Culture, Media and Sport, on answering the above request, to comply with a further request under the Freedom of Information act [sic]. This request is to provide a schedule of documents which may be refused. I believe that there should be a brief description of each document, and whether the document is being released or not. I believe that providing such a schedule would clarify what documents are being released and what is being withheld. This is a specific request for information to which I believe I am entitled under the Freedom of Information Act, and would also represent best practice in open government.”.

3. At the time of the complainant's request the government was undertaking a period of consultation on its Green Paper 'A strong BBC, independent of government', which was published on 2 March 2005. The consultation ran until 31 May 2005, and in March 2006 the government published a White Paper, "A public service for all: the BBC in the digital age".
4. DCMS responded to the complainant on 9 June 2005, advising him that it needed to consult with "external third parties some of whom are not subject to the Freedom of Information Act". DCMS advised the complainant that exemptions may apply to any information it held, and it may also need to consider the public interest test. DCMS estimated that it hoped to respond to the complainant within twenty working days, ie by 7 July 2005.
5. On 14 June 2005 the complainant asked DCMS to clarify what it meant by "external third parties". The complainant expressed dissatisfaction that DCMS had not provided a full response to his request within the original twenty day limit set out in section 10 of the Act.
6. DCMS responded to the complainant on 22 June 2005. It explained that by "external third parties", DCMS had actually meant "organisations external to DCMS, namely other Government Departments". DCMS also advised the complainant that it was considering the application of the public interest test in relation to the exemptions under sections 35 and 36 of the Act.
7. DCMS wrote to the complainant again on 7 July 2005 to advise that it was not yet in a position to provide a full response to his request, but that it hoped to do so by 21 July 2005.
8. DCMS provided the complainant with a refusal notice on 2 August 2005. This notice stated that, although DCMS held information relevant to his request, all of the information was considered exempt under sections 35(1)(a) and 36(2)(b) of the Act. DCMS advised that it had considered the public interest in relation to these exemptions, and had concluded that it lay in maintaining the exemptions.

9. The complainant requested an internal review of this refusal on 5 September 2005. As well as challenging the application of the exemptions, the complainant repeated his request for a schedule of information, as this had not been explicitly addressed in the refusal notice.
10. DCMS acknowledged the request for an internal review on 9 September 2005, and indicated to the complainant that it hoped to complete the review by 17 October 2005. However, DCMS wrote to the complainant on 14 October and provided a revised date of 11 November for completion of the review.
11. On 8 December 2005, DCMS wrote to the complainant, advising that the review was now complete. DCMS upheld its original decision to refuse the information in reliance on the exemptions under sections 35(1)(a) and 36(2)(b) of the Act. In addition, DCMS advised the complainant that it had not refused to provide him with a schedule of information, it did not hold such a schedule and was therefore unable to comply with this part of the request.

## **The Investigation**

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### **Scope of the case**

12. On 9 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to decide whether or not his request had been correctly refused, in relation to the information itself and the schedule of information.

### **Chronology**

13. The Commissioner contacted DCMS on 26 February 2007 to advise it of the complaint, and to request copies of the withheld information.
14. On 26 March 2007 DCMS provided the Commissioner with copies of the withheld information, and additional information in relation to its application of the exemptions under sections 35(1)(a) and 36(2)(b) of the Act.
15. DCMS did not provide the Commissioner with a schedule of the information as it maintained that it did not hold this information. DCMS explained its view that the provision of such a schedule would necessitate the creation of new information, rather than merely formatting of existing information, and that this was not a requirement of the Act.
16. In addition, DCMS argued to the Commissioner that a schedule of the information would in itself disclose details of the withheld information. Therefore DCMS was prepared to confirm that it held information of the description specified by the complainant, but was not prepared to disclose any further details of that information.

17. The Commissioner asked DCMS a number of questions about its handling of the complainant's request. The Commissioner noted that DCMS had provided a response to the complainant's request on 9 June 2005, within the twenty working day deadline for response as set out in section 10 of the Act. However, DCMS did not provide a refusal notice containing details of the information withheld and exemptions applied, until 2 August 2005. Therefore it appeared to the Commissioner that DCMS had breached section 17 of the Act in failing to provide a refusal notice to the complainant within the statutory time limit.
18. DCMS acknowledged that its letter of 9 June 2005 did not constitute an adequate refusal notice, but clarified that at this time DCMS was unsure whether or not it could confirm or deny that information was held. DCMS pointed out to the Commissioner that this was one of the earlier requests received following the introduction of FOI access rights in January 2005. DCMS assured the Commissioner that it had since had an opportunity to review and improve its procedures.
19. The Commissioner asked DCMS to clarify its statements in relation to "external third parties" as outlined in paragraphs 4-6 above, as the explanation of 22 June 2005 did not appear to correspond with that of 9 June 2005. It was not clear to the Commissioner how "external third parties, some of whom are not subject to the Freedom of Information Act" could be interpreted to mean government departments, since these are explicitly listed as public authorities in schedule 1 to the Act.
20. DCMS explained to the Commissioner that it had consulted with other government departments in relation to the complainant's request, and that it had intended to communicate this to the complainant. Given the passage of time since the request was initially dealt with, DCMS advised that it was unable to provide any more detail on this issue. DCMS did, however, confirm that a number of government departments had been consulted.
21. DCMS advised the Commissioner of its view that the withheld information was exempt by virtue of the exemption under section 35(1)(a) of the Act, and to the extent that section 35 might not apply, the withheld information was exempt by virtue of the exemption under section 36(2)(b) of the Act. This is because the Act states that information may be exempt under either, but not both, of these sections.
22. DCMS also provided the Commissioner with additional details of its application of the exemptions under sections 35 and 36 of the Act in relation to the withheld information. The Commissioner required this information as DCMS had not explained either in its refusal notice or internal review, how the exemptions were engaged in relation to the withheld information.

### **Section 35 exemption**

23. Although DCMS refused to provide the complainant with details of the information held, it did confirm to him that it held information of the description specified in his request. DCMS maintained to the Commissioner that, since the request was for information relating to government policy on the BBC, all the information was

exempt under section 35 of the Act. As section 35 is a class-based exemption it was not necessary for DCMS to demonstrate any prejudice in relation to disclosure of the information.

24. Section 35 is a qualified exemption, and DCMS provided the Commissioner details of the public interest test it had conducted. As DCMS was relying on the exemption under section 36 in relation to some of the information, it combined the public interest arguments and these are set out at paragraph 31 below.

### **Section 36 exemption**

25. DCMS argued to the Commissioner that the exemption under section 36(2)(b) of the Act could be applied to any information not exempt under section 35. The exemption under section 36 is engaged if, in the opinion of the “qualified person” as set out at section 36(5), disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
26. In considering whether or not this exemption was engaged, the Commissioner was mindful of the Information Tribunal’s view as set out in the case of *Guardian & Brooke v The ICO & The BBC*<sup>1</sup>. In particular, the Tribunal commented at paragraph 64 that, in relation to section 36:  
  
“... in order to satisfy the sub-section the opinion must both be reasonable in substance and reasonably arrived at”.
27. With this in mind the Commissioner asked DCMS for details of who acted as the qualified person in this particular case, details of the communication with the qualified person in relation to the request, and the application of the exemption, and details of the qualified person’s opinion and how it was reached.
28. DCMS confirmed to the Commissioner that the then Secretary of State for Culture, Media and Sport acted as the qualified person, and gave her opinion that the release of the information would prejudice the conduct of public affairs as set out in subsections 36(2)(b) and 36(2)(c) of the Act.
29. DCMS confirmed to the Commissioner that a submission had been prepared for the Minister in relation to the application of the exemption, in order to assist their deliberation in the matter, and the Commissioner requested sight of this. DCMS advised the Commissioner of its view that it was not obliged to provide him with any documentary evidence in relation to the qualified person’s opinion. DCMS maintained that it was sufficient for it to state that the qualified person had expressed the opinion, and that the Commissioner did not therefore need to see the submission. However, following further discussion, DCMS did provide the Commissioner with a copy of the submission to the Minister.
30. At this stage of the investigation, DCMS also advised the Commissioner that it had identified further information which fell within the scope of the complainant’s request. DCMS confirmed that it had considered whether this additional

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<sup>1</sup> Appeal references EA/2006/0011 and EA/2006/0013

information could be disclosed to the complainant, but had reached the conclusion that it was exempt for the same reasons as set out in relation to the other withheld information. DCMS provided the Commissioner with a copy of its submission to the qualified person (in relation to this newly-identified information, a different Minister of State than provided the original opinion). DCMS also provided details of the public interest arguments considered in relation to this information; these are included below with those relating to the original information.

### **Public interest test**

31. As indicated at paragraph 24 above, DCMS combined its arguments in relation to the exemptions under sections 35 and 36 of the Act. In summary, the arguments in favour of disclosure were as follows:

- There is a public interest in informed public participation in the development of government policy
- There is a public interest in understanding how Ministers interact with their advisers

32. DCMS also identified a number of arguments in favour of maintaining the exemption(s), which can be summarised as follows:

- Disclosure of the withheld information would inhibit future debate and exploration of the full range of policy options with a wide range of people.
- Ministers must be free to involve whoever they wish in policy development or related discussions, whether in a private or official capacity, without fearing the impact that disclosure might have. In particular, experts or other third parties might be deterred from providing advice, for fear that it might be disclosed and their views held up to public criticism”.
- “... disclosure of information relating to Ministers’ discussions with individuals might ultimately distort those discussions, as it might encourage the exploitation of differences of opinion for political or personal purposes, and this would certainly not be in the public interest”.
- Officials must be free to provide briefing and advice to Ministers without fear that this information could be disclosed.

33. The Commissioner expressed his view that these arguments were broad, and did not appear to take account of all the circumstances of the particular case, as required by section 2(2)(b) of the Act. In response, DCMS argued that it was appropriate to include wider public interest considerations, and in any event, the arguments put forward were relevant to the information in question.

34. The Commissioner was at this stage not satisfied that DCMS had provided sufficient detail of its public interest considerations in relation to the particular information requested by the complainant, and invited DCMS to make a further submission. The Commissioner was mindful of the Information Tribunal’s



decision in the case of *DfES v the ICO & the Evening Standard*<sup>2</sup>, in particular paragraph 75(i):

“The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.”

35. The Commissioner reminded DCMS that there is a presumption of openness running throughout the Act, and that and if the arguments for and against disclosure are evenly balanced, the information must be disclosed.
36. In its final submission to the Commissioner dated 5 October 2007, DCMS maintained that the disclosure of the content of possible Ministerial discussions with third parties could result in important stakeholders being unwilling to enter such discussions, which would in turn harm the quality of decision and policy making.
37. DCMS also maintained that disclosure of the record of any discussions of the type specified in the request, could inhibit frankness and proper record keeping, which would impede effective public administration.
38. The complainant also made submissions to the Commissioner, as part of his complaint in September 2005, and additionally during the investigation, in March 2007. He pointed out that Lord Birt was engaged to act as a “strategy adviser” to the then Prime Minister, and that broadcasting policy was excluded from this role. The complainant argued that there was significant media interest in Lord Birt and his remit as strategy adviser, and there had been considerable speculation as to whether or not Lord Birt had in fact spoken with the secretary of state for culture, media and sports about broadcasting policy.

## Analysis

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### Procedural matters

#### Section 10 – time for response and section 17 – refusal notice

39. The Commissioner notes that DCMS provided a response to the complainant’s request on 9 June 2005, within the twenty working day deadline for response as set out in section 10 of the Act. However, DCMS did not provide a refusal notice containing details of the information withheld and exemptions applied, until 2 August 2005. Therefore it appeared to the Commissioner that DCMS had breached section 17 of the Act in failing to provide a refusal notice to the complainant within the section 10 time limit.

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<sup>2</sup> Appeal reference EA/2006/0006

40. The Commissioner considered whether the refusal notice issued by DCMS complied with section 17 of the Act. Section 17(1) states that a public authority which is relying on an exemption in order to withhold information must give the applicant a notice which:
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if it would not otherwise be apparent) why the exemption applies.
41. The Act states that a refusal notice must be provided to the applicant within the statutory time limit, ie, no later than twenty working days following the date of receipt of the request. If an authority considers that a qualified exemption is engaged in relation to the requested information, it must consider whether the public interest favours disclosure of that information or maintenance of the exemption. Section 17(3) of the Act allows a public authority to extend the time limit in order to consider the public interest arguments in relation to the exemptions applied in accordance with section 17(1).
42. DCMS's letter of 9 June 2005 did not specify any exemptions, and in this respect the Commissioner is of the view that DCMS failed to provide an adequate refusal notice within the time limit set out in section 10. While DCMS's letter of 22 June did explain that it was considering the public interest in relation to the exemptions under sections 35 and 36, the letter did not explain DCMS's reasons for considering that these exemptions were engaged. The Commissioner notes that, at this stage DCMS had not yet made its submission to the Secretary of State in relation to the exemption under section 36.
43. The Commissioner is satisfied that DCMS's letter of 4 August 2005 did contain most of the elements required by section 17 of the Act. However, the Commissioner notes that it did not comply with section 17(1)(c) because it failed to state why the exemptions under sections 35 and 36 actually applied to the requested information. The Commissioner acknowledges that DCMS gave, albeit very briefly, an explanation of the public interest arguments identified, but this did not in itself explain why either of the exemptions cited were engaged.

### **Schedule of information**

44. The Commissioner notes that DCMS did confirm to the complainant that it held information of the description specified in his request. However, DCMS has argued that to provide such a schedule would necessitate the creation of new information. The Commissioner does not accept this argument, and is of the view that DCMS could, and should, have complied with the complainant's request for a schedule of the information that was withheld. The Commissioner is mindful of his decision relating to the Foreign and Commonwealth Office<sup>3</sup>, which stated that

*"...while producing a list of the documents in which the information is contained may be a new task, it is not creating new information; it is simply a re-*

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<sup>3</sup> Case reference FS50070854



*presentation of existing information as a by-product of responding to the information request”.*

That particular decision noted the difficulty in providing a schedule of information that has been withheld in response to a request, where producing a schedule of the withheld information would in effect disclose any of the information. In this particular case, the Commissioner is of the view that DCMS could have provided a schedule that described the nature of the information held without in itself disclosing any information which it may have considered exempt.

45. For the reasons set out above, the Commissioner is not persuaded by DCMS's arguments in relation to the production of a schedule of information to the complainant, and is therefore of the view that DCMS failed to comply with section 1(1) of the Act in relation to this information.

## **Exemptions claimed**

### **Section 35(1)(a)**

46. Section 35(1)(a) of the Act provides an exemption for information which is held by a government department and which relates to the formulation or development of government policy. Section 35 is a class-based exemption; this means for the exemption to be engaged there is no requirement to consider if disclosure of the information may have any 'harm' attached, merely that the information relates to the formulation or development of policy.
47. Therefore the Commissioner is required to decide the extent to which information held by DCMS which falls within the scope of the complainant's request, is covered by the exemption under section 35(1)(a). The complainant's request was for minutes and agendas of any meetings between the secretary of state for culture, media and sport, and Lord Birt between August 2004 and March 2005, along with any related advisory documents or notes of conversations, etc. The Commissioner is mindful of DCMS's view that to disclose any description of the withheld information in this case would in itself disclose exempt information. However, DCMS did confirm to the complainant that it holds information of the description specified in his request (see paragraph 8 above).
48. The Commissioner is assisted in his assessment by the Information Tribunal in the case of *DfES v the ICO & the Evening Standard* (see footnote on page 7 for reference). At paragraph 58 of the judgment, the Tribunal helpfully clarified the scope of section 35(1)(a) of the Act:
- “... when asking the question, whether the minutes of a particular meeting, or part of one, a memorandum to a superior or a minister or a note of advice fall within s.35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it was, as a whole, concerned with s.35(1)(a) activities, then everything that was said or done is covered.”
49. The Commissioner takes the view that the 'formulation' of 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 policy is about the development of options and priorities for ministers, who determine which options, should be translated into political action. The Commissioner has obtained and considered the requested information and is satisfied that the information in question does relate to the formulation and development of government policy regarding the BBC and broadcasting policy.

50. The exemption under section 35(1)(a) is qualified, and as the Commissioner is satisfied that the exemption is engaged in relation to all of the withheld information, he is then required to consider where the public interest lies.

### **Public Interest Test**

51. Under section 2(2)(b) of the Act, exempt information must still be disclosed unless, in all the circumstances of the particular case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner must therefore consider the arguments for and against disclosure of the information, and must decide how the public interest is best served in this case. In weighing up the public interest factors the Commissioner has again had regard to the case of *DfES v the Commissioner and the Evening Standard* in which the Information Tribunal laid down a number of principles to assess the public interest in cases involving the section 35 exemption<sup>4</sup>.
52. DCMS's arguments in relation to the public interest test are summarised at paragraphs 31-37 above. DCMS acknowledged the inherent public interest in ensuring that the public is informed about government policy, and in understanding how Ministers act with their advisers. However, DCMS put forward a number of arguments in favour of withholding this type of information from the public domain. DCMS concluded that the public interest lay in maintaining the exemption under section 35(1)(a).
53. The complainant also made a number of arguments to the Commissioner in relation to the withheld information, which are summarised at paragraph 38 above. The complainant was of the view that there was considerable interest in the activities of Lord Birt, especially in relation to broadcasting policy. The complainant felt that the public needed to be better informed than was the case, and that this could only happen if DCMS disclosed information which might clarify the extent to which Lord Birt was involved in this area.
54. The Commissioner is mindful of his obligation to consider the particular circumstances of the case, and notes the background to the complainant's request (see paragraph 3 above). He has also taken into account his own

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<sup>4</sup> Paragraph 75, Appeal reference EA/2006/0006

Decision<sup>5</sup> of 28 July 2008 and the Information Tribunal Decision<sup>6</sup> in relation to the Cabinet Office issued on 21 October 2008. Both cases involved requests for information relating to Lord Birt's activities. In both cases, the result was that the requested information was considered not to be disclosable. Both cases, however, involved various important considerations which distinguish them from the present case. In particular, those cases:

- related directly to Lord Birt's official role as adviser to the Prime Minister;
- impacted directly on the official and personal relationship between Lord Birt and the then Prime Minister;
- concerned substantive advice developed after a process of deliberation;
- included material which could be characterised as "blue sky thinking"; and
- (in the case before the Tribunal) "included a number of strong opinions and particularly contentious recommendations" (para 36c).

The Commissioner is mindful that the Tribunal described its own decision as "a finely balanced case with a number of factors distinguishing it from others in which advice to Ministers has been requested." (para 37). More generally the Tribunal stressed in that case that each decision must depend on the particular facts and circumstances and that its decision not to order disclosure should not lead to the disclosure or non-disclosure of other information being regarded in the future as 'routine'. (para 17)

55. In the current case DCMS argued – though without hard or causal evidence - to the Commissioner that disclosure of the withheld information would inhibit future debate, as individuals would be deterred from participation in policy development or related discussions, whether in a private or official capacity, if they believed this information may be made public.
56. However, adopting the reasoning of the Tribunal, the Commissioner is not satisfied that this consequence would follow from the disclosure of the withheld information in this case. More specifically, this request focuses on Lord Birt, an individual with a high-profile background in broadcasting, and whose role as strategy adviser to the Prime Minister specifically excluded broadcasting in order to avoid any potential conflicts of interest. Therefore it is important to distinguish Lord Birt from any other private individual who may approach a Minister with his or her personal view on a policy position.
57. In addition, the Commissioner notes that, following the complainant's request of 11 May 2005, further relevant information was disclosed by DCMS. Lord Hanningfield submitted a Parliamentary Question asking whether Lord Birt had given any advice in regard to the reform of the BBC. Lord Davies confirmed on 21 July 2005 that, whilst Lord Birt's role as strategy adviser excluded broadcasting policy, Lord Birt "occasionally expressed informal and personal views in conversation with the Secretary of State for Culture, Media and Sports,

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<sup>5</sup> FS50088745

<sup>6</sup> EA/2008/0030

having registered his interests"<sup>7</sup>. DCMS was of the view that Lord Birt was acting in a private capacity when expressing his views to the Secretary of State, rather than in his official capacity as strategy adviser.

58. The Commissioner is mindful that the information provided by Lord Davies was not in the public domain at the time of the complainant's request. However, the Commissioner notes that DCMS had not yet provided the complainant with a substantive response at 21 July 2005, and is therefore of the view that DCMS might properly have taken this disclosure into account when responding to the complainant on 2 August 2005. In any event, DCMS did confirm to the complainant that it held information of the description specified in the request, although it refused to provide any detail of the withheld information.
59. In light of the above, the Commissioner is not persuaded that disclosure of information relating to Lord Birt would necessarily deter other individuals from approaching government Ministers with their views. Rather, the Commissioner is of the view that the unique position of Lord Birt, who held a post which specifically excluded broadcasting policy, and who expressed "informal and personal views" to the Secretary of State on this particular subject, can be considered an exceptional case.
60. The Commissioner is mindful that what interests the public is not necessarily what is in the public interest. However - given the juxtaposition of Lord Birt's public and private roles - the Commissioner is of the view that in this particular case there was a legitimate public interest in the public being informed whether and/or how Lord Birt was able to use his somewhat privileged position to express views on broadcasting policy to the Secretary of State. The Commissioner further notes that DCMS did not at any stage seek Lord Birt's opinion on the complainant's request, and was therefore unable to indicate whether or not Lord Birt had any objections to this information being disclosed.
61. The Commissioner is also mindful of the Information Tribunal's view that the timing of a request is of paramount importance to the decision<sup>8</sup>. Although DCMS did not explicitly address this issue the Commissioner is aware that at the time of the complainant's request DCMS was in the process of consultation on a Green Paper it had produced on the future of the BBC (see paragraph 3). The Commissioner accepts that government policy was not decided at this time, as the government subsequently issued a White Paper for consultation before producing a final agreement between DCMS and the BBC in July 2006. The Commissioner also acknowledges the public interest in providing policy makers with the time and space to explore policy options and make informed decisions. It is this public interest which section 35(1)(a) seeks to protect. However, having inspected the withheld information in this particular case, the Commissioner is satisfied that disclosure of the withheld information would not have adversely affected government's ability to formulate policy.

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<sup>7</sup> Quoted from Lord Davies' answer to Lord Hanningfield's written Parliamentary Question, Hansard HL 21 July 2005, Column WA289

<sup>8</sup> Paragraph 75(iv), Appeal reference EA/2006/0006

62. Finally, the Commissioner notes DCMS's argument that officials must be free to provide briefing and advice to Ministers without fear that this information could be disclosed. In another case, the Tribunal did not accept the argument that the threat of disclosure of civil servants' advice would of itself 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'*<sup>9</sup> and should not be easily discouraged from doing their job properly. Applying that approach to this case, the Commissioner does not believe that disclosure of the withheld information would make officials responsible for providing advice and recording information less likely to perform their duties properly. As the Tribunal noted in the DfES case, 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 to ensure that their officials continue to perform their duties according to the required standards.
63. In light of the above, the Commissioner accepts that there are competing public interest arguments both for and against disclosure of the withheld information at the time of the complainant's request. However, the Commissioner has given careful attention to the particular circumstances of this case, and to the nature of the withheld information. The Commissioner is not satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information at the time of the complainant's request, as claimed by DCMS. Therefore the Commissioner finds that DCMS ought to have provided the requested information to the complainant at the time of his request.

### **Section 36(2)(b)**

64. The Commissioner notes that DCMS sought to rely on section 36(2)(b) in the event that the withheld information was not exempt under section 35(1)(a) of the Act. Section 36(1)(a) states that the exemption under this section applies to information which "is not exempt information by virtue of section 35". As the Commissioner is satisfied that all of the withheld information falls within the exemption under section 35(1)(a), it is therefore excluded from the exemption under section 36.
65. In relation to the public interest test, the Commissioner has considered all of the arguments put forward by DCMS at paragraphs 51-62 above. The Commissioner is satisfied that, even if the exemption under section 36(2)(b) was engaged, the balance of public interest would still lie in disclosing the information, rather than maintaining the exemption.

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<sup>9</sup> Paragraph 75(vii), Appeal reference EA/2006/0006

## The Decision

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66. The Commissioner's decision is that DCMS did not deal with the request for information in accordance with the Act in the following respects.

**Section 10(1)** - DCMS failed to comply with its obligations under section 10(1) of the Act since it failed to provide an adequate response to the complainant within the time limit set out in this section.

**Section 17(1)** – DCMS did not comply with its obligations under section 17(1) of the Act since it failed to explain why the exemptions cited applied to the withheld information.

**Section 17(3)** - DCMS did not comply with its obligations under section 17(3) of the Act since it failed to give adequate reasons as to why the public interest favoured the maintenance of the exemptions in this case .

**Section 35(1)(a)** – the information was incorrectly withheld by DCMS in reliance on sections 35(1)(a) and 36(2)(c) because all of it was exempt by virtue of section 35(1)(a) and the balance of the public interest favoured disclosure of it.

## Steps Required

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67. In accordance with its duty under section 1(1) of the Act the Commissioner requires DCMS to disclose the withheld information to the complainant.
68. DCMS 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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69. 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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70. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.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 22<sup>nd</sup> day of December 2008**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Annex: Relevant statutory obligations

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1. **Section 1(1)** provides that:

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

2. **Section 10(1)** provides that:

Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

3. **Section 17(1)** provides that:

A public authority which ... 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.

4. **Section 17(3)** provides that:

A public authority which ... is to any extent relying on a claim 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 public authority holds the information, or on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim 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 public 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.”

5. **Section 35(1)(a)** 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

6. **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.

7. **Section 36(2)(b)** 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-

...

- (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.

8. **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