

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 17 November 2008

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant wrote to the Cabinet Office to request the disclosure of all correspondence between the then Prime Minister and his former strategy adviser Lord Birt between 1 November 2004 and 1 April 2005 together with a schedule of any such documents held. The Cabinet Office refused to disclose this information relying initially upon the exemption under section 35 of the Freedom of Information Act (Formulation of government policy). Upon internal review, the Cabinet Office upheld its decision placing reliance additionally upon the exemption under section 36 of the Act (Prejudice to effective conduct of public affairs).

The Commissioner upheld the decision of the Cabinet Office on the basis of the exemptions cited under sections 35 and 36 of the Act. However, he has concluded that the Cabinet Office should have disclosed the existence (but not the details) of Lord Birt's informal role in senior staff appointments. The Commissioner has also found that the Cabinet Office breached section 17(1) of the Act (refusal notice) by not specifying its reliance upon section 36 in the original refusal notice issued to the complainant

The Commissioner's Role

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

The Request

2. By e-mail sent to the Cabinet Office on 7 April 2005 the complainant made a request for the following:

- i. Complete copies of correspondence between Lord Birt and the Prime Minister between November 1 2004 and April 1 2005; and
 - ii. A schedule of documents which are relevant to this request, consisting of a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not.
3. In this Decision Notice the information and schedule referred to in the above paragraph shall be referred to hereafter as “requested information” and the “requested schedule” respectively.
4. By letter dated 6 May 2005, the Cabinet Office informed the complainant that it holds information in relation to the request but that it is covered by the exemption under section 35(1)(a) of the Act (formulation or development of government policy), with the balance of the public interest favouring the maintenance of the exemption. It provided the complainant with the following public interest test factors for and against disclosure which it considered in this case:

For

- There is a general public interest in greater transparency in how Government operates.

Against

- There is a general public interest in the full and frank provision and discussion of advice within Government because that process makes for better quality decision-making.
 - Ministers, officials and their advisers need to be able to consider all available options, to debate their advantages and disadvantages, and to understand their possible implications.
 - Ministers must be able to develop ideas in private and consider the best options before they come under public scrutiny...Ministers and their advisers must know in circumstances such as these that their consideration of options will remain protected and private. To do otherwise would inhibit the free flow of opinion and debate on important matters, endangering good government and policy formulation.
5. On 9 May 2005 the complainant contacted the Cabinet Office to request an internal review of its decision. In his request, the complainant pointed out that the requested schedule had not been provided and, in relation to the requested correspondence, put forward the following views:
 - The Government has published very little information about the activities of Lord Birt, the Prime Minister's strategy adviser.
 - The Government has refused to answer a series of parliamentary questions about Lord Birt's role.
 - There have been a number of media reports indicating that Lord Birt has been proposing policies such as the expansion of nuclear power, the abolition of the Cabinet and the Department for Culture, Media and Sport, and the curtailing of the Treasury.

- It appears that Lord Birt is playing a significant role within the Government – as much as a Minister – and yet the public is being allowed to know virtually nothing of what he does.
 - The public interest is better served by greater transparency in this case.
6. The Cabinet Office communicated the outcome of its internal review to the complainant by a letter dated 15 September 2005. It upheld its application of section 35(1)(a) and also stated that “to the extent that section 35 does not apply, it is the reasonable opinion of our qualified person that section 36 of the Act would apply to this information”. Several justifications for its decision not included in its original refusal notice were also provided, which were as follows:
- When formulating policy advice, Ministers, advisers and officials must be allowed to consider all possible options without the risk of them coming under political or public pressure which might prejudice the quality of their decision-making.
 - There should also be a free space in which it is possible to ‘think the unthinkable’ and use imagination, without the fear that policy proposals would be held up to ridicule or public criticism.
 - It is in the public interest that the Prime Minister can properly represent himself before Parliament, robustly defend policy decisions, and protect collective responsibility. If he is to do this he must receive full advice and the candid views of his advisers and officials.
 - With respect to the schedule of documents relating to the request...such a schedule is not held by the Cabinet Office and there is no obligation under the Act to create or collect new information in response to requests.

The Investigation

Scope of the Case

7. On 12 October 2005 the complainant complained to the Commissioner about the way his request for information had been handled. He asked the Commissioner to investigate whether the decision to refuse disclosure of the requested information was correct.

Chronology

8. On 28 June 2006, the Commissioner contacted the Cabinet Office to request copies of the information requested by the complainant, in order for him to reach an informed decision on the matter.
9. On 24 July 2006 the Commissioner visited the Cabinet Office to inspect various unpublished documents which fell within the scope of this and a related request at its premises.

10. By letter of 20 September 2006 the Treasury Solicitors, acting on behalf of the Cabinet Office, confirmed that the Commissioner "saw all the information held by No. 10 (or the Cabinet Office) which falls within the scope of these requests". It also provided further clarification on the Cabinet Office's handling of the request, which was as follows:

"The Cabinet Office originally cited section 35 only. Upon reconsideration at the internal review stage the Cabinet Office recognised that some of the relevant information fell at the boundary of section 35 of the Act and the Minister's opinion was sought at that stage. The Minister (Jim Murphy MP) agreed with the assessment that the disclosure of the information which did not fall within section 35 would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and that section 36 should be claimed in the alternative. The applicant was informed of this by letter on 15 September 2005. The Minister gave his opinion on 13 September 2005."

Findings of fact

11. It is well-known that, for some six years starting with an initial project in 2000 and until December 2005, Lord Birt had served as the then Prime Minister's personally chosen Strategy Adviser. He was unpaid. Lord Birt estimated for the Public Administration Select Committee in April 2006 that he had seen the Prime Minister "probably....once a fortnight".

12. Various statements about Lord Birt's activities have been made, both by way of Parliamentary Answers and otherwise. In June 2005, the Cabinet Office website recorded that:

Lord Birt, the Prime Minister's Strategy Adviser, provides confidential advice to the Prime Minister and other Cabinet Ministers on a range of issues. His work has included reports on London, Drugs, Health, Education, Transport and Crime. The project teams for these reports included departmental officials and external advisers. All but the Crime report was produced in conjunction with the Prime Minister's Strategy Unit. Each report was produced in two phases. Phase One set out the evidence and analysis of the issues. Phase Two set out policy advice and recommendations. We are publishing the evidence and analytical phases of each of the reports (in the case of the London report, the analytical and final reports have already been published). These reports were intended to provoke discussion and contribute to debate across Government. They are not statements of Government policy.

13. There has been debate and some controversy about Lord Birt's role, contribution and influence. This mirrored commentary on the relationships between previous Prime Ministers and their close advisers. In this case, apart from the substance of his advice, discussion focused on the circumstances of Lord Birt's appointment, his background as former Director General of the BBC, his association with a firm of consultants, his status as neither civil servant, nor conventional special adviser and his subsequent activities in the private sector.

14. There have been Questions and Answers in Parliament about Lord Birt's role and contribution. The Public Administration Select Committee published a special Report in November 2005 expressing dissatisfaction at the non-attendance of Lord Birt as a witness before the Committee -

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubadm/690/690.pdf#search=%22birt%20strategy%20prime%22>.

However, in April 2006, after he had stood down, Lord Birt did give oral evidence to the Committee and answered a range of questions exploring his role and the nature of the strategic contribution -

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmpubadm/c756-iii/c75602.htm>

15. The Commissioner made the following observations about the information withheld from the complainant:
- i. There were relatively few documents;
 - ii. The information largely relates to advice from Lord Birt to the Prime Minister on a range of sensitive current and prospective issues. These included developing policies and matters relating to the internal processes and organisation of government;
 - iii. The material includes correspondence, e-mails, memoranda, briefing documents and minutes. Some are addressed to the Prime Minister, others to his senior advisers and officials;
 - iv. Some of the material relates to preparation for meetings with the Prime Minister and follow up to such meetings; and
 - v. The style is generally of an informal nature, and much of the substance could be described as "blue sky thinking".
16. The Cabinet Office has confirmed to the Commissioner that it has no objection to disclosure within this Decision Notice that the subject matter of the withheld information included Lord Birt's views about the senior staffing of government departments, including the Cabinet Secretary. The Cabinet Office has pointed out that the process for appointing the Cabinet Secretary was made in accordance with civil service rules governing such appointments overseen by the independent Civil Service Commissioners. The Cabinet Office also pointed out that in making the appointment the then Prime Minister took the advice of the then First Civil Service Commissioner and informally sounded out the views of others – including ministerial colleagues and Lord Birt – on individual candidates and how best to deploy the available talent.

Analysis

Procedural Matters

Section 17 – Refusal Notice

17. The Commissioner notes that the Cabinet Office did not apply section 36 until the internal review stage and no reference to section 36 was included in the original refusal notice. Therefore the original refusal notice was deficient in that it did not specify the exemptions relied on, as required by section 17(1)(b) of the Act (Refusal notice). Even though the Cabinet Office did subsequently advise the complainant of its reliance upon section 36, it still constitutes late compliance with the refusal notice provisions which equates to a breach of section 17(1). The provisions of section 17 can be found in the legal annex.

Exemptions

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

Section 36(2)(b) – Free and frank provision of advice or free and frank exchange of views for the purposes of deliberation

18. The full provisions of sections 35 and 36 of the Act can be found in the legal annex.
19. The Commissioner is satisfied from his inspection that – although not in itself government policy – the subject-matter of some of the requested information related to the formulation or development of government policy. Such material therefore falls within the exemption set out in section 35(1)(a) of the Act.
20. In relation to the opinion of the qualified person under section 36, the Commissioner took into consideration TSol's letter of 20 September 2006. It informed him that the Minister for the Cabinet Office (Jim Murphy MP) had on 13 September 2005 expressed the opinion that, to the extent the correspondence passing between Lord Birt and the Prime Minister did not fall within section 35, its disclosure would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
21. The Commissioner wishes to highlight 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.” In addition, in the Tribunal decision of 11 February 2008 (Ian Edward McIntyre v Information Commissioner and The Ministry of Defence), it stated that where the opinion is “overridingly reasonable in substance” any flaws in how the opinion was arrived does not invalidate the opinion.

22. Taking these decisions of the Tribunal into consideration, and informed by his own inspection of the withheld information in this case, the Commissioner concluded that he has no grounds for questioning the reasonableness of the Minister's opinion. The Commissioner also believes that the opinion was overwhelmingly reasonable in substance and, as such, he did not consider whether there were any flaws in the process followed by the qualified person in arriving at his decision. The Commissioner is therefore satisfied that the remainder of the requested information falls within the exemption set out in section 36(2)(b) of the Act.
23. The Commissioner does not consider that the requested information could be split into smaller components or redacted in any meaningful way to avoid the application of any of the exemptions.

Public Interest test

24. Both sets of exemptions which, between them apply to the totality of the requested information in this case, are subject to the public interest test which is set out in section 2(2)(b). This states that a public authority may only withhold exempted information where "in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".
25. The Commissioner has reviewed the circumstances of this particular case, and considers that – aside from what is stated in paragraph 26 below - the public interest arguments, as set out below, apply to all the exemptions in respect of the requested information as a whole.
26. Various public interest arguments in favour of disclosing the requested information can be identified. Some of these were put (at the Commissioner's invitation) in an e-mail sent by the complainant on 31 August 2006 in relation to the related request referred to at paragraph 9 above. They include:
 - In a mature democracy, it is in the public interest that the public should – to the maximum extent possible – be able to understand, debate and challenge the background to governmental decision-making and processes.
 - The role of special advisers generally has been the subject of considerable and on-going debate. Disclosure of the requested information may provide some insight to inform that debate.
 - Disclosure of the requested information may provide some insight into the interactions between the Prime Minister and his Strategy Adviser and between the Strategy Adviser and the Strategy Unit.
 - There has been particular debate about Lord Birt's role, contribution and influence. Some information about his activities, and about reports that he has overseen, has been made public. Disclosure of the unpublished requested information may provide further insight as to the nature and

extent of Lord Birt's role and influence at the highest level of government as neither civil servant nor conventional special adviser.

- Disclosure may inform debate about the extent to which individuals working for the government can, or should be able to, exploit knowledge and contacts on their move to the private sector.
27. The Commissioner accepts that the role and activities of special advisers is a matter in which the public has a legitimate public interest. He also accepts that because of the controversy surrounding Lord Birt's role, disclosure of the information would serve the public interest by creating transparency with regard to the role of special advisers and therefore serve to build public confidence. In addition, it is the case that Lord Birt is recognised as a particularly influential special adviser, which strengthens the public interest in understanding the role he has played in Government.
28. The Commissioner also considers, however, that the relatively small amount of documentation withheld from the complainant means that the insights mentioned above would in fact be very limited, and may give only a very partial account of Lord Birt's role, contribution and influence. Nor does debate and controversy about the role of a particular individual, by itself, generate a strong public interest for disclosure. This Decision Notice (paragraph 16) has confirmed that Lord Birt played an informal role in relation to senior staff appointments, including that of the Cabinet Secretary. There is a public interest – satisfied by what is said in this Decision Notice - in disclosing the existence of that role and the Commissioner is satisfied that public interest considerations mean that fact should have been disclosed in response to the request. Beyond that, the specific subject-matters covered by the documents inspected by the Commissioner do not give rise to any strong public interest driven by concerns about accountability or public expenditure.
29. The public interest arguments in maintaining the exemptions in this case are more concerned with principles of Prime Ministerial power, judgment and decision-making. They are powerful and include:
- A Prime Minister needs space in which to seek and receive advice in confidence and must be free to consult anyone he/she chooses to consult on any given matter. It is important that ideas, opinions and options come from those with wide expertise, experience or knowledge.
 - On some issues it is to be expected that only a very small number of senior officials and high level advisers will be involved on the understanding that their deliberations will be kept private. A Prime Minister must be free to discuss issues with such key advisers without fear that every detail may be disclosed. Disclosure of such exchanges would be detrimental to the trust which must exist between a Prime Minister and those involved in such discussions.

- It would make the processes of strategic decision-making extremely difficult if, on especially sensitive matters, a Prime Minister could not seek or receive written advice in confidence.
 - Disclosure of internal deliberations about policies and issues that remain topical, and are likely to remain topical for some years, could be especially damaging. Neither the fact that Lord Birt has now left this post, nor the passage of time since the requested information was written, materially change this aspect of the public interest in this case.
30. The requested information in this case goes to the heart of the confidential relationship between a Prime Minister and a key adviser. The Commissioner has carefully considered the arguments for and against its disclosure. Given what has been said above, his conclusion is that the public interest arguments for maintaining the exemptions are strong and outweigh the public interest in disclosure.

Section 40 – Personal Information

31. The Commissioner is also of the view that, in addition to section 35 and 36 of the Act, section 40(2) also justifies the non-disclosure of personal data which comprises a significant part of the requested information. This includes the *details* of the subject matter referred to in paragraph 16. In respect of this information, the Commissioner is satisfied that section 40(2) applies because disclosure would manifestly contravene the first Data Protection Principle.
32. The full provisions of section 40 of the Act and the relevant provisions of the Data Protection Act 1998 can be found in the legal annex.
33. In relation to section 40(2)(a), the Commissioner is satisfied that the information relating to the individuals detailed is personal data as defined in the Data Protection Act 1998. That Act defines personal data as:
- ...data which relate to a living individual who can be identified-*
- a) from those data, or*
 - b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...*

34. Furthermore, the Commissioner considers section 40(2)(b) to be engaged by virtue of satisfying section 40(3)(a)(i). This is because he is of the view that that disclosure of this information would contravene the first data protection principle, which requires that:

“Personal data shall be processed fairly and lawfully, and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”*

35. Schedule 2 is the relevant provision in this case. The Commissioner considers Condition 6(1) to be the most relevant provision of Schedule 2 in respect of this material. This provides that information can only be disclosed where:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of the legitimate interest of the data subject.”

36. However, the Commissioner is strongly of the view that this Condition does not legitimise the disclosure of this information. The Commissioner's reasons for this match those in respect of his justification regarding the public interest under sections 35 and 36. Although there are some legitimate interests that would be served by the disclosure of this information (as set out in paragraph 27 above), the Commissioner's decision in respect of section 35 and 36 is such that the disclosure of this information is not *necessary* for these purposes (as set out in paragraphs 28-30).

The requested schedule

37. In respect of section 1(1) of the Act (General right of access to information held by public authorities), the Commissioner has no reason to question the claim that the actual requested schedule did not exist at the time that the request was made. However the documents that would comprise the requested schedule, in terms of their titles and dates, are held and would simply require extracting from the body of other material in order to fulfill the request. As such, this specific information requested by the complainant in respect of the schedule was in fact held, even though it may not have existed in the form of a schedule. The creation of this schedule to fulfill the complainant's request would therefore require the extraction of existing information rather than the creation of any new information.
38. In respect of section 11(1)(c) of the Act (Means by which communication to be made), the Commissioner has concluded that the Cabinet Office would be obliged to fulfill the complainant's request for a brief description each document, its nature and whether the document is being released or not.
39. However, in relation of all the information requested by the complainant regarding the schedule, it is almost certain that the same considerations as are set out above in relation to sections 35 and 36 would determine the engagement of the Act's exemptions and the application of the public interest test to this information. As such, the Commissioner has determined that under sections 35 and 36 of the Act, this schedule need not be provided to the complainant.

The Decision

40. The Commissioner's decision is that the Cabinet Office dealt with the bulk of the request in accordance with the requirements of the Act.
41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - i. Conformity of the refusal notice of 6 May 2005 with section 17(1) in not referring to the application of section 36.
 - ii. Withholding the existence of the informal role in senior staff appointments;
 - iii. The handling of the request for the 'schedule of documents' which, due to a public authority's obligations under section 1(1) and section 11(1)(c), should have instead been refused under sections 35(1)(a) and 36(2)(c).

Steps Required

42. The Commissioner does not require any steps to be taken by the public authority.

Right of Appeal

43. 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

44. 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 17th day of November 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

General Right of Access

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”.”

Means by which communication can be made

Section 11(1) provides that –

“Where, on making his request for information, the applicant expresses a preference for communication by one or more of the following means, namely

–

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant.

The public shall so far as is reasonably practicable give effect to that preference.”

Section 11(2) provides that –

“In determining for the purposes of this section whether it is reasonably practicable to communicate information by a particular means, the public authority may have regard to all the circumstances, including the cost of doing so”

Section 11(3) provides that –

“Where a public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination

Section 11(4) provides that –

“Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.”

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.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Formulation of Government Policy

Section 35(1) provides that –

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

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

Section 35(2) provides that –

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

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

Section 35(3) provides that –

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

Section 35(4) provides that –

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

Section 35(5) provides that –

“In this section-

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

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

"Ministerial communications" means any communications-

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

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

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

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.

Data Protection Act 1998 – Schedule 2

Conditions relevant for purposes of the First Principle: Processing of any personal data

- 1 The data subject has given his consent to the processing.
- 2 The processing is necessary—
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.