

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 1<sup>st</sup> September 2008

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

### Summary

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The complainant asked the public authority for details, including the identities and/or Departments, of those who had commented on the drafting of the dossier on *'Iraq's Programme for Weapons of Mass Destruction'* between 11 and 16 September, other than those already in the public domain or submitted by the Defence Intelligence Staff. The public authority withheld the information, citing the exemptions contained in section 36(2) of the Freedom of Information Act 2000 ('the Act'). During the Commissioner's investigation it applied a further exemption, section 24(1). The Commissioner decided that, because the complainant had made another freedom of information request to the public authority for any comments made on the dossier, this subsumed the request in the current case, and it was not therefore necessary to decide whether the exemptions had been properly applied in this case. However, the Commissioner decided that the public authority had delayed in issuing its refusal notice and therefore failed to comply with its duty under section 10(1) to confirm or deny within 20 working days whether it held the requested information, and also breached section 17(1) by failing to provide the details required by that section within 20 working days.

### 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 29 December 2005 the complainant made the following request to the Cabinet Office:

*'Does the Cabinet Office hold any comments on the drafting of the September dossier between 11 and 16 September other than those submitted by the DIS [Defence Intelligence Staff] and other than those already in the public domain?'*

*'If so, please provide details, including the identities and/or Departments of those offering the comments.'*

The Cabinet Office acknowledged the email on the same day.

3. It sent a refusal notice to the complainant on 7 February 2006 apologising for the delay. It stated that the requested information was being withheld as exempt under section 36(2) of the Act. It informed the complainant of its internal review process and the role of the Information Commissioner's Office.
4. On 24 February 2006 the complainant requested an internal review of the decision. He also objected that the Cabinet Office's refusal notice had not been issued within the statutory period of twenty working days.
5. The complainant emailed further comments to the Cabinet Office on 3 March 2006.
6. The Cabinet Office issued its internal review decision on 21 August 2006. It upheld the original decision and informed the complainant of his right to approach the Commissioner.

## The Investigation

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### Scope of the case

7. On 12 September 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the Cabinet Office's failure to issue its refusal notice within the statutory timescale of twenty working days, and its 'severe delay' in providing a decision in its internal review. He also objected to the Cabinet Office's decision, expressing his view that it had failed to address his specific points.

### Chronology

8. The Commissioner wrote to the complainant and the Cabinet Office on 18 December 2006, asking the Cabinet Office to clarify certain matters and forward the information which had been requested by the complainant.
9. The Cabinet Office replied on 19 February 2007 with its comments. It stated that, following further consideration of the matter, it was now also withholding the information under the exemption granted by section 24(3) of the Act. It did not provide the requested information.

10. The Commissioner asked the Cabinet Office on 17 May 2007 to provide further details about its application of section 24(3). He also requested the withheld information.
11. The Cabinet Office replied in a letter dated 25 June 2007. It stated that, due to the sensitivity of the information, it wished it to be viewed at its own offices. It also explained that its previous citation of section 24(3) had been an administrative error and that it was actually applying section 24(1), so a Ministerial certificate was not relevant.
12. There was some further correspondence between the Commissioner and the Cabinet Office. On 11 October 2007 a representative of the Commissioner considered the withheld information at the offices of the Cabinet Office.
13. A further visit was made on 26 February 2008.
14. The Cabinet Office subsequently provided the Commissioner with further comments.

## Analysis

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### Procedural matters

15. The complainant objected that the Cabinet Office had failed to issue its original refusal notice within the statutory timescale of twenty working days. The Commissioner notes that the complainant made his request by email on 29 December 2005, and the Cabinet Office provided its decision on 7 February 2006. Beginning with the day after receipt of the request, the Cabinet Office therefore took 27 working days to deal with the request. It apologised to the complainant for the delay.

16. Section 10(1) of the Act 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.'*

Section 1(1) states:

*'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.'*

Furthermore, 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.'*

17. The Commissioner recognises that the Cabinet Office's refusal notice in this case was conducted prior to the issuing of his *'Good Practice Guidance No 4'* in February 2007, in which he provided advice to public authorities on relevant timescales. However, he notes that the 27 working days which the Cabinet Office took to issue its refusal notice was clearly in breach of the statutory timescale. Accordingly, the Commissioner finds that the Cabinet Office failed to comply with its duty under section 10(1) to confirm or deny within 20 working days whether it held the requested information. The Cabinet Office also breached section 17(1) by failing to provide the details required by that section within 20 working days.

#### **Exemptions – section 36(2)(b)(ii) and section 24(1)**

18. The complainant requested information about the identities and/or Departments of those who had provided comments on the drafting of the dossier – other than the Defence Intelligence Staff and contributions already in the public domain – between 11 and 16 September 2002. The Cabinet Office has expressed its view to the Commissioner that it is *'relevant to our consideration of [the complainant's] request that we do not hold a ready made list'* containing these details, which would have to be created. However, the Commissioner notes that information about the identities of those commenting is contained within the information held by the Cabinet Office, and could be isolated simply through redaction of the extraneous information. Since the requested information already exists, the Commissioner's view is that the Cabinet Office cannot be said to be creating it by so isolating it; while production of a list might amount to a new task, it is not the creation of new information. For this reason the Commissioner has decided that, for the purposes of the Act, the *'details'* requested by the complainant of those offering the comments do indeed constitute information held by the Cabinet Office.
19. However, the Commissioner notes that the complainant has made another freedom of information request to the Cabinet Office, part of which was for *'a copy of any comments made by the DIS [Defence Intelligence Staff] or anyone else on the dossier draft of 15 September 2002'*. The complainant subsequently made a complaint to the Commissioner about the Cabinet Office's handling of that case,

which has been addressed in a Decision Notice referenced 'FS50098388'. The Cabinet Office has confirmed to the Commissioner that it has processed this other request as including comments on all incarnations of the draft between 11 and 16 September 2002, and not just on a draft from 15 September 2002. The information requested in that other case would, if subject to a process of redaction, generate the information constituting '*details*' of those offering the comments (ie the information requested in this case). The Commissioner has therefore decided that the request in this case is in fact 'subsumed' by that other request. Accordingly, insofar as the Commissioner has concluded that the information at issue is disclosable, he has required it to be disclosed in response to that other complaint. He therefore does not consider it necessary to assess the applicability of the section 36(2)(b)(ii) and 24(1) exemptions in this case.

20. For the avoidance of doubt, although the complainant has asked for the identities and/or Departments of those providing comments, the Commissioner wishes to make it clear that he would consider the Cabinet Office to have complied with both this and the other request in accordance with the Act if it disclosed the relevant information in the form of the 'raw data'. He does not consider that the Cabinet Office is obliged to conduct the separate task of processing the information to isolate the identities and/or Departments by redaction, provided that it sends to the complainant all information which it holds which is not exempt.

## The Decision

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21. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, since it delayed in issuing its refusal notice and therefore failed to comply with its duty under section 10(1) to confirm or deny within 20 working days whether it held the requested information. The Cabinet Office also breached section 17(1) by failing to provide the details required by that section within 20 working days. The Commissioner has decided that it is not necessary to determine whether the exemptions were properly applied in this case because the request is subsumed by another freedom of information request which the complainant made to the Cabinet Office.

## Steps Required

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22. The Commissioner requires no steps to be taken.

## Other matters

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23. The complainant also complained about the way in which the Cabinet Office conducted its internal review. The Act does not lay down obligations in relation to internal reviews so these complaints do not form part of this Decision Notice. However, the Commissioner wishes to highlight the following matters of concern.

24. The complainant claimed that the Cabinet Office had delayed severely in providing its internal review decision. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a public authority to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.
25. In this case the complainant submitted his request for internal review on 24 February 2006, but the Cabinet Office did not provide its decision until 21 August 2006, six months later. The Commissioner recognises that the Cabinet Office's internal review in this case was conducted prior to the issuing of the *'Good Practice Guidance No 5'* in February 2007. However, he considers that the six months which the Cabinet Office took to complete this internal review does not constitute a reasonable timescale. The Commissioner therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice in failing to conclude its internal review within anything like a reasonable timeframe. He considers that this inadequacy was compounded by the fact that, when the decision was finally provided to the complainant, it amounted to the following sentence: *'Having carefully considered your request, I uphold the original decision'*.
26. In addition, the Commissioner notes that, in its letter to his office dated 19 February 2007, the Cabinet Office claimed that it had *'a limited resource for dealing with requests of such a specific and sensitive nature'* as this one. It also stated that it had *'carried out research work which has taken us beyond the statutory cost limit'*. It is not clear whether this work was conducted as part of the internal review or in response to the original request or, indeed, during the course of the Commissioner's investigation. Whatever the case, the Commissioner is concerned by the Cabinet Office's explanation. First, he takes the view that it is the responsibility of the Cabinet Office to ensure that it has sufficient resources to discharge its statutory obligations under the Act. Secondly, having regard to the lack of substance in the internal review decision – *'Having carefully considered your request, I uphold the original decision'* – the Commissioner has difficulty understanding what the Cabinet Office did in the six months it took to deal with the internal review. Thirdly, if the Cabinet Office considered that the value of the work it had done exceeded the statutory limit then it had the option of either withholding the information on those grounds or else charging for it – since it did neither the Commissioner does not consider that the cost has any relevance to his investigation.

## Right of Appeal

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27. 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).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 1st day of September 2008**

**Signed .....**

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

## Legal Annex

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**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 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.”

**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 24(1)** provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

**Section 24(3)** provides that –

“A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.”

**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.