Freedom of Information Act 2000 (Section 50)

Decision Notice

22 December 2008

Public Authority: The Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant made a request to the Department of Health (the "DoH") for copies of the minutes of the "MMR sub-committee" from the period January 1986 to December 1992. The DoH provided a redacted copy of these minutes and informed the complainant that information had been withheld under sections 40 and 43. At the internal review the DoH also cited sections 36 and 41. During the course of the investigation the DoH informed the Commissioner that it was also relying upon section 38. After investigating the case the Commissioner decided that although section 36 was engaged, the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He also decided that sections 38, 41 and 43 were not engaged. He also decided that section 40 did not provide an exemption from disclosure. Finally, he also found that the DoH had not complied with the requirements of sections 17(1), 17(1)(b) and 17(1)(c).

The Commissioner's Role

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

2. In an email dated 21 March 2006 the complainant requested the following information from the DoH,

> "…copies of the minutes of the meetings of the MMR sub-committee from January 1986 until December 1992."

By way of background, the 'MMR sub-committee' is a reference to a working party of the Joint Committee on Vaccination and Immunisation (the "JCVI"). The full title of the working party was the 'Working Party to discuss the introduction of Measles, Mumps and Rubella vaccine'. For ease of reference the working party will be referred to as the "MMR sub-committee" throughout this Notice.

3. The complainant also made requests to the DoH for copies of minutes of meetings of the JCVI and the Adverse Reactions Committee, and has complained to the Commissioner about the DoH's responses to all of these requests. The Commissioner has investigated these complaints and they are dealt with in separate Decision Notices, under the case reference numbers FS50149373 and FS50149375.

4. In an undated email the DoH provided the complainant with a redacted version of the minutes for meetings of the MMR sub-committee between January 1987 and May 1988, and informed the complainant that no other minutes existed. It explained that these minutes had been redacted, as it believed that some of the information in the minutes was exempt from disclosure under sections 40 and 43(2) of the Act.

5. In applying section 40 the DoH informed the complainant that it had redacted the names and positions of individuals in order to ensure that the comments in the minutes were un-attributable. It stated that the disclosure of the names and positions would be unfair and in breach of the first principle of the Data Protection Act 1998 (the "DPA"), as,

> "It was never the expectation of the attendees that their specific comments would be released to the public. At the start of each meeting for this period, all CSM/DH members were told that the minutes and papers were confidential and would not be released to the public attributing their names to their comments…It is therefore considered that the information exempt under s.40 could not reasonably have been expected to be released to the general public, and as attendees agreed to participate on this basis, disclosure would consequently be unfair."

6. The DoH also informed the complainant that it believed that some of the information in the minutes was exempt under section 43(2) as disclosure would prejudice the commercial interests of both pharmaceutical companies referred to in the minutes and the DoH. It explained that,

> "As you will be aware, references are made in the MMR sub-committee minutes to pharmaceutical companies, their research and products; disclosure of such comments would be likely to prejudice the position of the companies discussed in a competitive environment by revealing market-sensitive information or information of potential usefulness to their competitors. As you may be aware, pharmaceutical products take several years to develop and often have a long market life. As a consequence, the work carried out by companies, and the products identified in the minutes are still relevant to today's pharmaceutical market."

The DoH provided public interest arguments in regard to this exemption. Finally it informed the complainant of his right to request an internal review and his right to complain to the Commissioner.

7. In an email dated 11 July 2006 the complainant requested an internal review of this decision.

8. The DoH conducted an internal review and, in a letter dated 25 October 2006, upheld its use of sections 40 and 43(2). In relation to section 40 the DoH stated that it believed that the exemption applied to, "the names and positions of attendees who were not government officials or official members of the group," and clarified that it was relying upon section 40(2). In relation to section 43 it argued that,

> "…disclosure would make it less likely that companies or individuals would provide the public body with commercially sensitive information in the future, consequently undermining the ability of that public body to fulfil its role; there is clearly no public interest in such an outcome. Competing pharmaceutical companies would have been able to criticize the companies stated in these minutes if any comments had been made to their detriment. They might also have the opportunity to secure other commercial advantages."

9. In addition to this, the DoH also informed the complainant that it now believed that sections 36 and 41 also applied to some of the redacted information. In relation to section 36 it stated that,

> "Section 36, concerned ensuring the members of the JCVI would not be inhibited in having free and frank exchange of view for purposes of deliberation, which would allow free and frank provision of advice. The JCVI member would have not taken part in these meetings if the comments were made public.
>
> However, there are also important factors in favour of withholding such information, such as academic opinions of current or future vaccines that are currently on the market that may change according to future research that would inhibit a frank discussion if the comments were attributed to individuals. The disclosure would make it less likely that external members or individuals would provide the public body with their frank and inhibited views in the future, consequently undermining the ability of that public body to fulfil its role, there is clearly no public interest in such an outcome."

10. In respect of section 41 the DoH informed the complainant that it had now decided that this provided a further exemption to the information which it had initially withheld under section 40. It stated that,

> "The redacted information was given under a legally enforceable obligation of confidence: it was never the expectation of the attendees that their specific comments would be released to the public. The disclosure of the

> information that was obtained from the members of JCVI under the obligation of confidence would constitute a breach of confidence actionable by the person who provided the information. At the start of each meeting during the period to which your request relates, all JCVI members were told that the minutes and papers were confidential and would not be released to the public in a way which would attribute their names to their comments and factual references. The members of JCVI were medical or scientific experts in their field and releasing confidential information would entitle them to sue the Department for breach of the confidentiality undertaking."

It also informed the complainant that,

> "The information we are withholding under section 41…does not include the names of public servants. It is information which links independent JCVI members to their contributions at meetings in circumstances where their contributions are required to be kept confidential under legally enforceable obligations…"

Finally, the DoH informed the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

11. The complainant wrote to the Commissioner on 22 December 2006 in order to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DoH was correct to withhold the information in question.

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

12. Although not raised by the complainant the Commissioner has also considered whether the DoH complied with the requirements of section 17.

13. During the course of the investigation of this case the DoH responded to questions about all 3 of the complainant's cases (see paragraph 3 above). The Commissioner is satisfied that its responses – which at times referred only to the JCVI committee – were in relation to all 3 requests. Therefore any references, in quotes from the DoH's responses to the Commissioner, to the 'JCVI' or the 'Committee' should be read as the MMR sub-committee. It should be noted that the DoH did not provide any specific arguments which related to the MMR sub-committee alone.

Chronology

14. The Commissioner wrote to the DoH on 29 January 2008 and asked it to provide him with a copy of the withheld information, together with its submissions as to the use of the exemptions. In relation to the withheld information he asked the DoH to clarify which exemption had been applied to which redaction. He also asked the DoH to confirm whether there had been any meetings of the MMR sub-committee after May 1988.

15. In relation to section 36 he asked the DoH to confirm which part of the exemption it was citing, and also asked it to provide further evidence of how the qualified person reached their opinion.

16. In relation to section 40 the Commissioner asked the DoH to clarify which part of the exemption it was relying upon. He noted the DoH's arguments that attendees at the MMR sub-committee meetings were told that the minutes and papers were confidential and would not be released to the public attributing their names to their comments. He asked it to provide further details of this promise of confidentiality. He noted that following the introduction of the Act the DoH had decided that previous minutes of the JCVI and the Adverse Reaction Committee should be released in a redacted form, and asked whether any of the attendees had complained following the publication of the minutes of the meetings (albeit in a redacted form). He noted the DoH's comment in the internal review that it believed that section 40 applied to, "the names and positions of attendees who were not government officials or official members of the group," and asked it to confirm the status of those individuals whose names had been redacted from the minutes. Specifically he asked whether any of them were government officials or official members of the group.

17. In relation to section 41 the Commissioner asked the DoH to provide further arguments as to why it believed that this exemption was engaged. He also asked it to confirm whether the individuals whose names had been redacted under this exemption were, or were not, DoH employees.

18. Finally, in relation to section 43 he asked the DoH to provide further submissions to support its use of this exemption. In particular he asked it to clarify whose commercial interests it believed would be prejudiced, and how this prejudice would (or would be likely to) occur. He noted the DoH's comments in the internal review that some of the vaccines mentioned in the minutes were still in use, and asked it to identify them. He also asked the DoH to provide further public interest arguments. He asked for a response within twenty working days.

19. The DoH contacted the Commissioner by way of a telephone call on 28 February 2008 and informed him that there was a delay in providing him a response. It was agreed that it would contact the Commissioner on 12 March 2008 and inform him of its progress in providing a substantive response.

20. The DoH contacted the Commissioner on 12 March 2008 and informed him that it was still not in a position to provide a response. It asked for an extension to the deadline, and it was agreed that it would respond by 31 March 2008. It was also

agreed that it would send him a copy of the withheld information (this was subsequently received by the Commissioner on 14 March 2008).

21. On 26 March 2008 the DoH contacted the Commissioner again, and asked for a further extension to the deadline. It was agreed that it would respond by 7 April 2008.

22. The DoH rang the Commissioner on 7 April 2008 and informed him that it was unable to meet the extended deadline. It was agreed that it would ring him again on 10 April 2008 and provide him with an update as to its progress.

23. The DoH rang the Commissioner on 14 April 2008 and stated that it was still not in a position to respond. It asked for a further extension to the deadline until the end of that month and this was agreed to. However, the Commissioner stated that he would not grant any further extensions to this deadline, and he drew the DoH's attention to his powers to issue an Information Notice under section 51 of the Act.

24. The DoH provided a response in a letter dated 30 April 2008. By way of background it informed him that the JCVI is an independent expert advisory committee which was first set up in 1963, in order to advise the Secretaries of State for Health, Scotland, Wales and Northern Ireland on matters relating to communicable diseases, preventable and potentially preventable through immunisation. It explained that the JCVI advises on all aspects of immunisation, and in the course of its work it considered commercially sensitive information, patient specific information and unpublished research. It stated that,

> "The absolute discretion of members in observing the confidentiality of the information is presumed and members were traditionally reminded of the confidentiality of their work. Members are chosen through open competition; they are selected from the top echelons of their respective sections of the relevant disciplines and membership of the JCVI is seen as recognition of their contributions. In addition to their work on the Committee, members may be called upon by the Secretariat to give advice when matters arise on which the members' particular expertise may be of assistance to the public service. Members may also from time to time be requested to attend and contribute to the deliberations of one or other of the Panels of the JCVI.
>
> The original JCVI was set up as a restricted committee and minutes and papers […] were confidential. At each meeting, the Chairman stated "Members are reminded that the papers before the Committee were confidential". This is recorded in some of the JCVI minutes and in all the minutes of the Committee on Adverse Reactions to Vaccines and Immunisations."

Finally, it confirmed that there were no further meetings of the MMR sub-committee after May 1988.

25. In response to the Commissioner's request that it clarify which exemption had been applied to which redacted piece of information the DoH stated,

> "The redactions were applied consistently throughout the minutes to remove identification of individuals whose comments had been made on the understanding that they were made in confidence. When the minutes were written, there was no expectation of disclosure at all – there was neither the 1997 code of practice on open government nor FOIA and everyone would have expected to remain anonymous. We have also redacted material that we considered had been provided at the meetings with a legitimate expectation of confidentiality, and where commercial interests would have been prejudiced by release.
>
> There are over 2,300 redactions across 24 sets of minutes, totalling 263 pages. Each redaction would have to be examined against the different grounds under which it was originally redacted. In our view, this assessment can only be made by [named individual], as […] is the only person who is fully aware of the complexity of the issues…We estimate that it would take [named individual] 160 hours to do this work. It could not be undertaken by any other individual. [Named individual]'s time is heavily committed and we hope you will agree that this would constitute a disproportionate use of […] time."

26. In relation to its use of section 36 the DoH confirmed that it was relying upon section 36(2)(b)(i) and (ii), and section 36(2)(c). It provided arguments in support of its use of this exemption, and how it had sought the opinion of the qualified person. It also provided arguments as to why it believed that the public interest in maintaining this exemption outweighed the public interest in disclosing the information.

27. In relation to section 40 the DoH informed the Commissioner that all names in the body of the text had been redacted in order that comments recorded in the minutes were un-attributable. It stated that it was relying upon section 40(2) and section 40(3)(a)(i).

28. In answer to the Commissioner's request to be provided with further details of the promise of confidentiality it informed him that, "the promise of confidentiality was made at the beginning of each meeting with an implication that the comments of members would not be released into the public domain. The minutes clearly state that they were 'not for publication'."

29. In relation to the Commissioner's query as to whether any of the attendees had complained following the publication of the minutes of the JCVI meetings the DoH stated:

> "You rightly point out that the Committee's comments have been already published on our website and ask whether we have received any complaints from Committee members, considering the pledge of confidentiality. You cite a segment from one of our initial replies to the complainant. Allow me to clarify, be reiterating the citation in full, that:

> 'JCVI members were told that the minutes and papers were confidential and would not be released to the public **attributing their names to their comments**'." [DoH's emphasis]

The Commissioner notes that the minutes of the MMR sub-committee were not published on the DoH website, in the same manner as the minutes of the JCVI and Adverse Reaction Committee meetings for this period. However he believes that the disclosure of these other sets of minutes on the DoH website, and the issue of whether any of the participants had complained about this to the DoH, are valid issues to consider in the investigation of the current case. This is because of the close connections between the JCVI and the MMR sub-committee; the common nature of the DoH's arguments (especially those regarding potential prejudice to the health and safety of participants, and data protection fairness issues); and the generic arguments put forward by the DoH, which applied to all sets of minutes without distinction.

30. The DoH also stated that it had withheld other information under section 40 as on occasions,

> "…members' comments related to specific children who could be identifiable or to unpublished scientific work. In each case it could be detrimental to the JCVI member, the patient or the researcher for the details to be released."

31. The DoH went on to provide arguments as to why it believed that the disclosure of the information withheld under this exemption would be in breach of the first data protection principle.

32. Further to this the DoH provided arguments as to why it believed that the disclosure of civil servants names would be unfair, and stated that,

> "Looking beyond civil servants, we argue that all attendees, regardless of whether they were DH officials, JCVI members or invitees, participated in the meetings on an understanding of confidentiality…we insist that attributing this substance to named individuals would be unfair (and therefore exempt under section 40(3)(a)(i))."

33. In respect of section 41 the DoH noted the Commissioner's questions as listed at paragraph 17 above and provided further arguments as to why it believed that the exemption was engaged. In regard to the Commissioner's question as to whether the individuals whose names had been redacted were or were not DoH employees, it stated, "I confirm that individuals whose names were redacted included both Committee members and [DoH] officials."

34. The DoH went on to provide further details as to the specific promise of confidentiality given to attendees at meetings of the Committee, and stated that it was made clear at each meeting that comments concerning members and information relating to third parties or their patients or groups would be kept confidential. It informed the Commissioner that this undertaking of confidentiality

was verbally repeated at each meeting, and is recorded in some of the minutes of some of the meetings (see paragraph 24 above).

35. Additionally, the DoH stated that it had applied section 41 as it, "had in mind the risks posed by the release of manufacturers' confidential information or material through which a patient could be identified."

36. In relation to section 43 the DoH informed the Commissioner that the disclosure of certain information in the minutes would, or would be likely to, prejudice the commercial interests of the pharmaceutical companies that manufactured some of the drugs discussed at the meetings, and also its own commercial interests. It also provided the Commissioner with the names of two of the pharmaceutical companies whose commercial interests it believed would, or would be likely to, be prejudiced by disclosure.

37. The DoH went on to state that in some cases the pharmaceutical companies had supplied it with information that was strictly confidential, and had requested that this was not released – although it did not go on to identify this information. It stated that,

> "We always consult with third parties, such as pharmaceutical companies, before disclosing information relevant to them which may be sensitive. In this case, as I have already indicated, there were occasions where the third parties insisted on the confidentiality of the information they provided. This could include commercial prices of the vaccines and trade secrets such as the manufacturing process. We are in contact with pharmaceutical companies regularly through our procurement and vaccine supply process and it is in both parties' interests not to disclose this information at this time."

38. The DoH argued that even though a comment may have been made at the MMR sub-committee concerning a pharmaceutical company or its product 20 years ago the age of this information did not matter as,

> "…we need to be able to demonstrate trustworthiness over confidential information so as not to prejudice current procurement arrangements.
>
> The consequences of such breach of confidence could significantly and adversely affect the relationship between the [DoH] and suppliers. It could adversely affect manufacturers' competitiveness and indeed their market share and company price."

39. The DoH provided the Commissioner with details of vaccines referred to in the minutes which are still in use. It also provided further arguments as to why it believed that the public interest in maintaining this exemption outweighed the public interest in disclosing the information.

40. Finally the DoH informed the Commissioner that it now also considered that section 38(1)(a) and (b) of the Act also applied, as disclosure of the withheld information would, or would be likely to, endanger the physical or mental health or

safety of individual(s). It provided further arguments to support its use of this exemption. The DoH also provided arguments as to why it believed that the public interest in maintaining this exemption outweighed the public interest in disclosing the information.

41. The Commissioner emailed the DoH on 6 June 2008 with further questions relating to this case. In relation to the complainant's request for minutes of the Adverse Reactions Committee (see FS50149375) he asked the DoH to clarify whether it was seeking to rely upon section 36(2)(b)(i) and (ii), and 36(2)(c).

42. In relation to the DoH's use of section 38(1)(a) and (b) he pointed out that this was a prejudice based exemption, and asked it for further submissions to support its use of this exemption.

43. In relation to its use of section 40 he asked the DoH to confirm whether it had asked the attendees of the meetings for consent to disclose their names. Further to this he noted its reference to 'specific children' and 'unpublished scientific work' (see paragraph 30 above) and asked it to expand upon this argument. He also asked it to provide any further submissions it wished to make, and in particular:

- In relation to the statement about 'specific children' – could the DoH provide further arguments and evidence to show how these children could be identifiable?
- Was the DoH arguing that comments relating to unpublished scientific work were the personal data of the researcher? Was it arguing that the researcher was identifiable from those comments? If so, how was this detrimental, and how would disclosure be in breach of the data protection principles?
- How would the disclosure of this information be in breach of the first principle in regard to the JCVI member?

44. In relation to section 41 the Commissioner informed the DoH that he was unsure of the grounds upon which it was relying upon this exemption and the type of information it was applying this exemption to.

45. The Commissioner noted that in the internal review the DoH had informed the complainant that it was applying this exemption to information which it had originally redacted under section 40 and that the information it was withholding under section 41 did not include the names of 'public servants'. Instead it was, "…information which links independent JCVI members to their contributions at meetings in circumstances where their contributions are required to be kept confidential under legally enforceable obligations…"

46. However, the Commissioner also noted that in its letter to him dated 30 April 2008, it seemed to have advanced somewhat different arguments, and had stated that the names of individuals had been redacted under this exemption where those names attributed comments to those individual. Additionally it had stated that, "…individuals whose names were redacted included both Committee members and DH officials."

47. Therefore he asked the DoH to clarify whether it was seeking to rely upon this exemption to withhold all names, where those names attributed a comment made to that individual, or whether it was only seeking to rely upon this exemption in relation to some of those names.

48. Furthermore he also noted that the DoH had stated that information had been redacted under this exemption where issues had been discussed by the MMR sub-committee which related to information provided to it by third parties. He asked the DoH to make any further submissions it wished to make to support this argument.

49. He noted the DoH's reference to, "the risks posed by release of manufacturers' confidential information or material through which a patient could be identified," and asked it to confirm whether it was seeking to rely upon section 41 to withhold information which it believed was confidential information of pharmaceutical manufacturers which had been provided to the DoH by a third party and/or information from which an individual patient could be identified which was provided to the DoH by a third party. He also asked it to provide further submissions to support this argument.

50. Finally, in relation to section 43(2) he summarised the DoH's arguments and stated that he believed its position was:

- Some information in the minutes, if disclosed, would, or would be likely to, prejudice the commercial interests of the pharmaceutical companies who manufacture some of the drugs discussed at the meetings. At times some of the MMR sub-committee members may have been critical about certain pharmaceutical companies or their vaccines, some of which are still in use. This may lead to the reputation of those companies and their products being unfairly prejudiced. Furthermore, some of the companies provided sensitive information, the disclosure of which may be of use to their competitors, and might affect their competitiveness and their market share and company market price.
- Some information in the minutes, if disclosed, would or would be likely to prejudice the commercial interests of the DoH, as it might affect the relationship between the DoH and suppliers, which in turn might prejudice procurement arrangements.

He asked the DoH to confirm whether he had correctly summarised its arguments. He also invited it to make any further submissions it wished to make in support of its use of this exemption.

51. The Commissioner asked for a response from the DoH by no later than 23 June 2008.

52. The DoH contacted the Commissioner on 25 June 2008 and asked for an extension to the deadline for a response. It was agreed that it would respond by 18 July 2008. However, the Commissioner stated that he would not grant any further extensions to this deadline, and he drew the DoH's attention to his powers to issue an Information Notice under section 51 of the Act.

53. The DoH provided a partial response in a letter dated 21 July 2008. It confirmed that it was also relying upon section 36(2)(b)(i) and (ii), and 36(2)(c) in relation to the complainant's request for minutes of the Adverse Reactions Committee (see FS50149375).

54. In regard to its use of section 38(2)(a) and (b) the DoH provided further arguments to support its use of this exemption.

55. In regard to its use of section 40, the DoH informed the Commissioner that it had only consulted with one named individual about the potential disclosure of their personal data, and that that individual had refused consent. It had not contacted any of the other attendees.

56. The DoH informed the Commissioner that it intended to respond to his other questions by 15 August 2008.

57. The DoH provided the Commissioner with a further response in a letter dated 18 August 2008. It firstly responded to the Commissioner's further questions about its use of section 40 (see paragraph 43 above).

58. In relation to its comment about 'specific children' the DoH informed the Commissioner that although it had initially sought to apply section 40 to withhold patient-specific information in the minutes it now believed that this was incorrect, as these children were deceased, and therefore information about them would not be personal data (as defined by the DPA). However, it informed the Commissioner that it instead sought to rely upon section 41 to withhold this information as, "duties of confidence can outlast the life of a person." In support of this argument it also referred the Commissioner to the Tribunal's decision in *Bluck V ICO & Epsom and St Helier University NHS Trust* [EA/2006/0090]. It provided the Commissioner with two examples of information which had been redacted under this reasoning.

59. In relation to its comment about 'unpublished scientific research' it provided the Commissioner with two examples of information redacted under this reasoning. It informed the Commissioner that it did not consider that the titles of the research was the personal data of the researchers – but that the names of the researchers involved and any subjective comments on the research made by a JCVI member would be exempt from disclosure under section 40(2).

60. The DoH went on to state that it believed that the titles of the 'unpublished scientific research' were exempt under section 41, as the information was provided in confidence and had not been published at the time the JCVI saw it. It stressed that this material had been provided to the JCVI in confidence, as it had not been submitted and accepted for publication by a scientific journal at that time. It argued that,

> "Acceptance for publication by scientific journals can be compromised by early release, especially of the results: for this reason, the JCVI reassures researchers that their chances of acceptance for publication will not be

> compromised by reporting in the JCVI minutes. If researchers thought that their results might be released…then they would not give the JCVI sight of their work before publication."

61. The DoH went on to inform the Commissioner that it was no longer seeking to rely upon section 41 to withhold the names of officials – but pointed out that it still sought to rely upon sections 36, 38 and 40 to withhold this information. It also clarified that it was relying upon section 41 to withhold information where issues were discussed by attendees which related to information provided to them by third parties, and where the information contained commercial pharmaceutical information. In support of the latter argument it stated,

> "Vaccines are bought by [the DoH] by competitive tendering and manufacturers clearly seek any opportunities for advantage. Thus, material that may reveal commercially sensitive or scientifically sensitive information should not be disclosed – or certainly not without agreement of the companies in question."

62. Finally, the DoH confirmed that the Commissioner's summary of its arguments in relation to section 43(2) listed at paragraph 50 above was correct. It also provided further submissions to support its use of this exemption.

Analysis

Section 17

63. The Commissioner has initially considered whether the DoH has complied with its obligations under section 17(1) of the Act.

64. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within the time for complying with section 1(1) (e.g. within twenty working days of receipt of the request), 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.

The full text of section 17 can be found in the Legal Annex at the end of this Notice.

65. In its refusal notice the DoH informed the complainant that it was relying upon 'section 40' to withhold some of the requested information. Furthermore, in the internal review it informed him that it was relying upon 'section 36' and 'section 41'. However, it did not refer to the specific sub-section number of the exemptions claimed. For this reason the Commissioner believes that the DoH did not comply with section 17(1)(b). Additionally, as the DoH did not inform the complainant that

it was seeking to rely upon sections 36(2)(b)(i) and (ii), 36(2)(c) and 41(1) until the internal review, the Commissioner is of the view that it did not meet the requirements of section 17(1) in that it did not inform the complainant of this within twenty working days of receipt of the request.

66. Further to this, during the course of the investigation the DoH informed the Commissioner that it believed that some of the withheld information was also exempt from disclosure under section 38(2)(a) and (b). This had not been previously referred to by the DoH to the complainant. In doing this the Commissioner believes that the DoH did not comply with section 17(1)(b) and (c).

The Commissioner has now gone on to consider the DoH's application of each of the exemptions cited.

Exemptions

Section 36

67. The DoH has argued that it is relying upon section 36(2)(b)(i) and (ii), and section 36(2)(c) to withhold some of the information.

68. Section 36(2)(b) states that information is exempt from disclosure if in the reasonable opinion of the qualified person disclosure of the information 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.

69. Section 36(2)(c) states that information is exempt from disclosure if in the reasonable opinion of the qualified person disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

70. This exemption is qualified and is therefore subject to a public interest test.

71. The full text of section 36 can be found in the Legal Annex at the end of this Notice.

72. When investigating cases involving the application of section 36, in order to establish whether the exemption has been correctly applied the Commissioner has to:

- ascertain who is the qualified person or persons for the public authority in question;
- establish that an opinion was given;
- ascertain when the opinion was given; and
- consider whether the opinion given is reasonable.

73. With regard to the fourth bullet point, in deciding whether the opinion was 'reasonable' the Commissioner has been guided by the Tribunal's decision in *Guardian Newspapers & Brooke V ICO & BBC* in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that, "in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at." In relation to the issue of reasonable substance the Tribunal indicated that, "the opinion must be objectively reasonable."[1]

74. The Commissioner has also been guided by this Tribunal's findings where it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, "does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant". Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.

Engagement of the exemption

75. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown. In this case the Commissioner has established that the reasonable opinion was given by a Minister of the DoH. He is therefore satisfied that the Minister was a qualified person for the purposes of section 36.

76. In its submissions to support its use of section 36 the DoH has explained that the Minister's opinion was given on 16 October 2006.

77. The DoH has confirmed that, "the test applied by the qualified person was whether disclosure would or would be likely to inhibit the free and frank provision of advice; the free and frank exchange of views for the purposes of deliberation; or would otherwise prejudice the effective conduct of public affairs."

78. The DoH also provided the Commissioner with a summary of the factors the Minister took into account in reaching her opinion on the application of section 36(2)(b)(i) and (ii), and 36(2)(c). These were:

- "The members of the JCVI committee were assured when taking up their appointments, and at each meeting, that their comments were confidential. Without such arrangement, officials are concerned that the Committee would not be able to recruit the calibre of member required to provide the high level of advice required, thereby prejudicing the conduct of this facet of public affairs."
- "Disclosure would make it less likely that both JCVI members and officials would provide frank and uninhibited views in the future, consequently

[1] EA/2006/0011 & EA/2006/0013, para's 60 and 64.

undermining the ability of that public body to fulfil its role. Quite simply, JCVI members would have not taken part in these meetings or contributed as they did if they had believed that their comments would be publicly attributable."

- "Members could be put into a position of being vulnerable to litigation if comments that they made in confidence were released under FOI."

79. The DoH went on to provide the Commissioner with an explanation as to why it considered the information to be exempt on the basis of section 36(2)(b)(i) and (ii), and section 36(2)(c) stating that,

> "In summary, and with particular reference to the public interest test considered in the application of this exemption, the Minister concluded that while there was significant public interest in disclosing the contents of the minutes, attributing these contents to named individuals would both inhibit the provision of advice by, and exchange of views within the JCVI thus prejudicing the effective conduct of this facet of public affairs. The [DoH] considers that there is little public interest in such an outcome."

80. The Commissioner notes that the DoH has been unable to inform him which redaction in the minutes has been made under which exemption (see paragraph 25 above). He also notes the lack of detailed evidence as to the information presented to the qualified person in order to enable them to reach their reasonable opinion, and also the lack of detailed evidence as to the views of the qualified person in making this decision. However, on the basis of the DoH's argument as referenced in the preceding paragraph the Commissioner has proceeded on the basis that it is the DoH's position that the disclosure of any names in the minutes, where a comment could be attributed to that name, would have the inhibitory or prejudicial effects detailed at paragraphs 78 and 79 above. However, the Commissioner wishes to note his concern about the lack of detailed evidence, and the inability to identify specific redactions on the part of the DoH. This is referred to further in the 'other matters' section of this Notice.

81. Given the nature of the area which falls within the scope of the activities of the JCVI and the MMR sub-committee, the Commissioner accepts that its activities call for a free and frank exchange of views by attendees, and in which committee members and DoH officials would be required to provide free and frank advice. The Commissioner accepts that it is reasonable to argue that at times issues of a highly sensitive nature would be discussed, and that the disclosure of information relating to these discussions – which attributed specific comments to specific individuals – would potentially inhibit these activities. Furthermore, the Commissioner accepts that if the disclosure of information (meaning that these sensitive discussions were attributable) were to have serious repercussions on MMR sub-committee members (and by extension, JCVI members), this may damage the recruitment process for the JCVI (and its sub-committees), which would be likely to in turn prejudice the effective conduct of public affairs.

82. On this basis the Commissioner is of the view that in this case the Minister's opinion appears to be reasonable in substance and reasonably arrived at.

Therefore he is satisfied that section 36(2)(b)(i) and (ii), and section 36(2)(c) is engaged.

83. Before moving on to consider the public interest test, the Commissioner also notes that none of the DoH's submissions clearly identify whether it considers the likelihood of the inhibition occurring as one that 'would be likely to' occur, or whether the likelihood meets the higher test of 'would occur'. On this matter the Commissioner has noted the comments of the Tribunal in *McIntyre V ICO & the Ministry of Defence*, in which the Tribunal explained,

> "We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."[2]

84. The Commissioner has therefore proceeded on the basis that the DoH's position is that should the information be disclosed the likelihood of inhibition is one that is simply likely to occur, rather than one which would occur.

85. The Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Considering the public interest test

86. In considering the public interest test in this case the Commissioner is mindful of the Tribunal's views in *Guardian Newspapers & Brooke V ICO & BBC*. In that case the Tribunal considered and refined an earlier judgement where they provided some principles about the application of the public interest test in section 36 cases. The Tribunal provided the following factors for consideration:[3]

a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.

b) Since the public interest in maintaining the exemption must be assessed in all the circumstance of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.

c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.

[2] EA/2007/0068, para 45.
[3] EA/2006/0011 & 0013, para 87.

d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank provision of advice and the free and frank exchange of views by public officials for the purposes of deliberation.

e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

87. In the same case the Tribunal went on to discuss the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

> "The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice." [4]

88. Therefore in the Commissioner's opinion, whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition to the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation.[5]

Public interest in maintaining the exemption

89. In considering the public interest arguments in favour of maintaining the exemption the Commissioner has looked at the public interest in favour of maintaining section 36(2)(b)(i) and (ii), and section 36(2)(c) separately.

90. In relation to section 36(2)(b)(i) and (ii) the DoH has argued that the disclosure of the minutes in a way which made comments attributable to individuals would inhibit the free and frank provision of advice, and the free and frank exchange of views in future meetings of the JCVI (and its sub-committees). The loss of candid

[4] EA/2006/0011 and 0013, para 88.
[5] EA/2006/0011 and 0013, para 91.

advice and discussion, whilst discussing sensitive issues regarding public health, would not be in the public interest as,

> "The Government depends on the unfettered advice on immunisation coming from highly respected members of the medical and nursing professions (and the public, as JCVI has lay membership). If…their preparedness to give advice were affected by fear of personal identification, then it would be to the detriment of an essential public good. We believe strongly that routine discussion of the details of individual contributions to the discussion, which would be a very likely consequence of the full disclosure of these minutes, would inhibit the freedom and frankness of discussion. Committee members would find it difficult to focus exclusively on the discussion as they would need to consider the likely public impact of every contribution. Whilst we agree that the development and discussion of science and scientific policy is of great interest to the public, the consideration of expert advice must include discussion. "

91. The Commissioner accepts that there is a public interest in the free and frank provision of advice and the exchange of views for the purposes of deliberation. However, in reaching a view on the severity, extent and frequency of inhibition, he notes the generic nature of the DoH's arguments, and in particular the lack of any specific argument in relation to any specific piece of information where any specific issues of particular sensitivity were discussed.

92. The Commissioner has also noted the DoH's comments that, "…routine discussion of the details of individual contributions to the discussion, which would be a very likely consequence of the full disclosure of these minutes, would inhibit the freedom and frankness of discussion." In reaching a view on this argument the Commissioner has been mindful of the Tribunal's comments as set out in paragraph 86 above. In particular he has noted the comments regarding a 'blanket refusal', as set out in section (b) of that paragraph. Bearing the Tribunal's comments in mind, the Commissioner is concerned about the apparent generic arguments presented by the DoH. He believes that the DoH has not provided him with any persuasive evidence that it has considered the individual circumstances of this particular request.

93. The Commissioner has also noted the DoH's argument, as set out in paragraph 78 above, that the attendees might find themselves open to litigation should the withheld information be disclosed. However, the DoH has not provided any further evidence to support this argument. In addition he again notes that the DoH has not identified any specific information which would lead to this being likely to occur. In reaching a view on this he has again referred to the Tribunal's comments as set out in section (b) of paragraph 86.

94. The Commissioner has also noted that many of the attendees at the MMR sub-committee were senior figures and experts in their field. He believes that it is reasonable to assume that at least some of the views ascribed to these individuals in these minutes would also be ascribed to them in other sources, such as articles in scientific journals, conference presentations, etc…

95. The Commissioner also believes that the public would expect that a DoH committee, dealing with issues relating to public health, would discuss these topics in a full and frank manner. Therefore the Commissioner believes that, on a general level, the disclosure of information recording such a full and frank discussion would not necessarily have the level of negative impact argued by the DoH. The Commissioner accepts that at times such a committee might be asked to discuss issues of a highly sensitive or controversial nature. However he would expect the public authority to identify these issues. In this case the DoH has not done so, and has instead relied upon a blanket approach to the application of this exemption.

96. Finally, in reaching a view on the severity, extent and frequency of inhibition, the Commissioner has noted the age of this information, which relates to the period January 1987 to May 1988.

97. In the light of these factors, and given the generic nature of the DoH's arguments, the Commissioner is not persuaded that the disclosure of the withheld information would have the severe inhibitory effect on the free and frank provision of advice, and the free and frank exchange of views, as argued by the DoH.

98. In relation to section 36(2)(c) the DoH has argued that the disclosure of the withheld information would potentially make individual's reticent to join the JCVI or any of its subcommittees. This, it has argued, would mean that the JCVI, "would not be able to recruit the calibre of member required to provide the high level of advice required, thereby prejudicing the conduct of this facet of public affairs." This would in turn prejudice, or be likely to prejudice, the effective conduct of public affairs, which would not be in the public interest.

99. The Commissioner accepts that it is in the public interest for the JCVI, and its subcommittees, to be able to recruit suitable individuals to contribute to its deliberations. However, in reaching a view on the severity, extent and frequency of inhibition, he has again noted the generic nature of the DoH's arguments, and in particular the lack of any specific argument in relation to any specific piece of information. He has also noted the age of the information subject to this request.

100. Further to this the Commissioner has noted the DoH's comments that appointment to the JCVI (and its sub-committees) is a high profile one, and that many of the individuals who are recruited are senior figures and experts in their field (see paragraph 24 above). Given the seniority of many of these figures, and in the absence of specific arguments from the DoH about any particularly sensitive issue discussed by the MMR sub-committee, the Commissioner is not persuaded that the disclosure of this information would mean that such individuals would not want to take part in such a committee, shaping government policy on issues of national importance.

101. After considering these factors the Commissioner is not persuaded that the disclosure of the withheld information would have the severe inhibitory effect on the recruitment to the MMR sub-committee, as argued by the DoH.

Public interest in favour of disclosing the information

102. In considering the public interest factors in favour of disclosure, the Commissioner recognises that there is a public interest in openness and accountability. He also believes that that there is a strong public interest in the disclosure of information which would further the public's understanding and participation in debates on issues of public importance – especially in matters regarding public health.

103. In this case he believes that issues regarding vaccination are particularly in the public eye, especially regarding the use of the combined MMR vaccine, which was introduced in 1988 and has generated a significant amount of public debate and some controversy since it was introduced. Therefore the Commissioner believes that this topic is an ongoing significant issue of public debate, and that the disclosure of this information would go towards increasing the public understanding of the development of the Government's policy on this issue, and would allow a more informed debate on that policy. He believes that some of the controversy surrounding national immunisation policy has been fed by a perceived lack of transparency in the decision making process which fed into the policy, and he believes that there is a public interest in countering this perception. Whilst the Commissioner accepts that the DoH has gone some way towards meeting these public interest factors by the disclosure of the redacted minutes of the MMR sub-committee, he believes that knowing who said what, and whose opinions were taken into account is also an important factor towards openness, accountability and transparency.

104. The Commissioner also believes that there is a public interest in gaining a better understanding of the actions taken by an expert group, whose actions help shape Government policy in areas where that policy still affects the public in a fundamental way – i.e. through the health of the nation. He also believes that the disclosure of this information, which would increase the transparency of such an expert group, would also increase public confidence in the actions of the expert group, and allow the public to gain an appreciation of whether their advice and actions were appropriate and effective.

Balance of public interest arguments

105. After considering the public interest arguments in this case, and noting the generic nature of the arguments advanced by the DoH, the Commissioner has determined that although section 36(2)(b)(i) and (ii), and 36(2)(c) is engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.

Section 38

106. Section 38(1) provides an exemption for information if its disclosure would, or would be likely to,

(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of an individual.

This is a qualified exemption, and is therefore subject to a public interest test.

107. In applying this exemption the DoH argued that,

> "Given the vehement views on vaccination held by some members of the community and the candid comments on this issue by some members of the Committee and other attendees, we consider that Committee members' personal safety (and therefore both their physical and mental health) could be jeopardised by disclosure of comments in an attributable form. Some individuals involved in the Committee meetings have already experienced threats to their personal safety over their views on immunisation."

108. Following a request from the Commissioner for further information to support its use of this exemption the DoH responded in a letter dated 21 July 2008. It stated that the topic of vaccine safety aroused fiercely held views, and confirmed that it had spoken to one individual who was involved with the JCVI during the period relating to the request. That individual had previously received threatening material both at work and at home because of their work in the field of vaccines. The DoH stated that the, "danger here is clearly not fanciful: we think that there is a real risk that the prejudice will occur."

109. In response to the Commissioner's comments that this was a prejudice based exemption and as such required a consideration of the likelihood of prejudice (see paragraph 40 above) the DoH argued,

> "We cannot give a certain answer to the degree of likelihood of this prejudice occurring, but we do not in any event think this is a material consideration. Even if the chance of someone being attacked might be relatively small, the ensuing damage to that individual is severe and it is this latter point which is of most relevance to the consideration of the public interest."

110. The Commissioner does not agree with the reasoning of the DoH on this point. Whilst he accepts that, if the exemption is engaged the potential damage to the individual(s) concerned would be a weighty factor in balancing the public interest test, he believes that in order to consider whether the exemption is in the first place engaged it is necessary to consider the likelihood of prejudice. In reaching this view he has referred to his awareness guidance on section 38, which states,

> "The Information Commissioner takes the view that the phrase 'would or would be likely' to prejudice or endanger means that there should be evidence of a significant risk to the physical or mental health or the safety of any individual."[6]

111. This is in line with the views of the Tribunal in *Ministry of Defence V ICO & R Evans* which stated, whilst considering whether section 38 was engaged, that,

[6] Freedom of Information Act – Awareness Guidance no. 19, page 2.

> "Section 38 is a prejudice based exemption […] the question whether disclosure would prejudice the subject matter of the exemption entails a consideration of whether the prejudice is more likely than not: that in turn involves a consideration of whether there is a significant and weighty chance of prejudice."[7]

Therefore the Commissioner has first considered the likelihood of prejudice.

112. In reaching a decision on the question of prejudice the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073,* and followed by the Tribunal in the case of *John Connor Press Associates Limited V ICO,* where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that the chance of prejudice being suffered should be more than hypothetical or a remote possibility, that there must have been a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such that there 'may very well' be prejudice.[8]

113. Other than the points referred to at paragraphs 107 to 109, the Commissioner notes that the DoH has not provided him with any further arguments as to the likelihood of endangerment occurring in this case.

114. In considering the DoH's arguments the Commissioner has noted that the comments at paragraph 107 relate to one individual who was involved in the JCVI and its sub-committees, and is a senior figure in the field. The Commissioner notes that during its correspondence with him on this case the DoH has stated that it believes there were almost 100 individuals involved in the three committees subject to the complainant's requests. The DoH has not provided any evidence of threats towards any other of these individuals.

115. The Commissioner also notes the somewhat generic nature of the DoH's arguments in relation to section 38(1)(a) and (b) – which suggest a blanket approach to the use of the exemption. The DoH has not identified any particular piece of information within the minutes in question, nor has it provided any specific argument in relation to any specific topic of discussion which took place at any of these meetings. Instead it appears to have redacted the names of every individual, wherever a comment recorded in the minutes would be attributable to that name. The Commissioner has some concerns about this blanket approach.

116. Further to this, the Commissioner is mindful of the age of this information. The minutes in question relate to the period January 1987 to May 1988. He also notes that many of the attendees to the MMR sub-committee were senior figures, well known in their field. The Commissioner believes it is reasonable to assume that at least some of the views ascribed to the attendees in these minutes would also be ascribed to them in other sources, such as scientific journals, conference

[7] EA/2006/0027, para 75.
[8] EA/2005/0005.

presentations, etc… The Commissioner also notes that the minutes of the MMR sub-committee which were disclosed (see paragraph 4 above) do contain a list of those that attended the meetings. They also show most of the details of the discussions which took place at these meetings (subject to the redactions considered throughout this Notice). Further to this, the minutes of the JCVI and the Adverse Reactions Committee were made available on the DoH website, following the introduction of the Act (in the same redacted form). The DoH has not provided any evidence that there has been an increase in the levels of threats or attacks on the attendees of any of these committees since the disclosure / publication of these minutes.

117. Therefore, although the Commissioner recognises that the field of vaccination is at times a controversial field which can stir up strong feelings, he has not been provided with any compelling evidence by the DoH that the disclosure of the withheld information would, or would be likely to, endanger the physical or mental health, or safety, of any individual. Although the DoH has referred to the experiences of one individual (see paragraph 108), the Commissioner notes that that individual is senior in their field. Whilst the Commissioner is not underestimating how upsetting such threats could be, given the generic arguments advanced by the DoH, he has not been provided with any evidence that the disclosure of the information withheld from the minutes would be likely to lead to an increase in the likelihood of such endangerment occurring. Therefore, the Commissioner is of the view that section 38(2)(a) and (b) is not engaged.

118. As he has reached the view that this exemption is not engaged, the Commissioner has not gone on to consider the application of the public interest test to this exemption.

119. The full text of section 38 can be found in the Legal Annex at the end of this Notice.

Section 40

120. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.

121. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

122. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

123. In this case the DoH is seeking to rely upon section 40(2) and 40(3)(a)(i) to withhold the following information:

- the names of attendees where comments are attributable to them in the minutes.

The DoH has argued that the disclosure of this information would be in breach of the first data protection principle. The Commissioner notes that during the investigation of the case the DoH also argued that section 40 applied to information regarding unpublished scientific work, which was discussed at the JCVI. After considering the withheld information in this case, the Commissioner notes that there is no information of this nature withheld from the minutes of the MMR sub-committee, and therefore he has not considered this argument any further.

124. In order to reach a view on the DoH's arguments the Commissioner has first considered whether the withheld information is the personal data of third parties.

125. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- from that data, or
- from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

126. The Commissioner notes that the withheld information includes the individual's name, where it is attributable to the comments they made at a meeting at a particular time and date. The minutes also sometimes include their job titles and/or details of their employers

127. The Commissioner believes that the individuals are identifiable from this information. He also believes that the information is biographical in nature in relation to the individuals concerned. Therefore he is satisfied that it is the personal data of the individuals concerned.

128. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. This requires that personal data is:

- processed fairly and lawfully, and
- that at least one of the conditions in schedule 2 is met.

The Commissioner has first considered whether the disclosure of names of attendees would be fair.

129. The DoH has argued that, "…all attendees, regardless of whether they were DH officials, JCVI members or invitees, participated in the meetings on an understanding of confidentiality." It has stated that it therefore believes that disclosure would neither be fair nor meet a condition of schedule 2 of the DPA. In the internal review it informed the complainant that,

> "The concept of fairness depends on a consideration of not only the circumstances surrounding the disclosure of information, but also the circumstances in which the information was obtained. It was never the expectation of the attendees that personal information about them or their views would be released to the public. At the start of each meeting for this

> period, all JCVI members were told that the minutes and papers were confidential and would not be released to the public attributing their names to their comments. In addition, members were also told that they could not share their papers with colleagues. It is therefore considered that the information exempt under s.40 could not reasonably have been expected to be released to the general public, and as attendees agreed to participate on this basis, disclosure would consequently be unfair."

130. In relation to the names of civil servants which had been redacted from the minutes, the DoH has provided the Commissioner with an additional argument. It has stated that,

> "…as part of the constitutional necessity of an independent and politically neutral Civil Service, such employees are entitled neither to defend publicly their actions, nor to comment on the policies that they are obliged to implement…To release their names into the public domain and therefore expose them to potential criticism of their opinions would result in a degree of exposure that they are in no position to counter without breaching the terms of their employment. It is for this reason that they have a reasonable expectation of their identities being protected: to breach this expectation is neither 'fair'…nor 'necessary'… for the legitimate interest in accountability."

The Commissioner has considered each of these arguments in turn.

131. During the course of his investigation the Commissioner asked the DoH to provide further evidence of the promise of confidentiality. In response the DoH informed the Commissioner that at each meeting the Chairman stated, "Members are reminded that the papers before the Committee were confidential." Furthermore, the Commissioner notes that the minutes of the MMR sub-committee in February 1988, record that:

> "The Chairman reminded those present that the proceedings of the working party were confidential."

The DoH has also stated that many of the minutes were marked as 'Not for publication'. The Commissioner notes, however, that the DoH has not provided any evidence that the attendees at the MMR sub-committee meetings in 1987 and 1988 were specifically told that their comments would not be disclosed in a manner which was attributable to them – a point that it has argued throughout this case.

132. After considering the circumstances of the case the Commissioner is satisfied that the attendees of the MMR sub-committee were given a promise of confidentiality, or certainly attended the meetings at the time with the reasonable expectation that the meetings were confidential. From the evidence shown in the minutes of the meetings it is clear that at the beginning of each meeting attendees were informed of the confidentiality of the meeting. Therefore he believes that they would have had a reasonable expectation that, at the time of the meetings, their identities and comments would not have been put into the public domain.

133. However, the Commissioner considers that he has to consider the reasonable expectations of the attendees at the time of the request in March 2006.

134. In reaching a view on this the Commissioner has noted the following:

- the significant age of the information at the time of the request in March 2006 – broadly between 13 and 18 years,
- the seniority of many of the attendees,
- the fact that the meetings were discussing issues of national importance, shaping government policy on matters relating to the health of the nation,
- the disclosures already made by the DoH to the complainant regarding the MMR sub-committee meetings during this period,
- the lack of any specific arguments by the DoH identifying any particular areas of sensitivity (instead it has adopted a blanket approach), and
- the fact that by the time of the request the Act had been in force for over 12 months.

After considering these factors the Commissioner believes that any reasonable expectation of confidentiality by the attendees would have been very much less than at the time of each meeting and for the immediately following years.

135. In reaching this view the Commissioner has also noted the amount of information which has already been disclosed by the DoH to the complainant. It has disclosed the main body of the minutes for the MMR sub-committee meetings, albeit with some redactions, showing the majority of the comments made at these meetings. The disclosed minutes also include the list of attendees at each of these meetings. The Commissioner also notes that following the introduction of the Act the DoH made the minutes of the JCVI and the Adverse Reactions Committee available on its website, in the same redacted form.

136. The Commissioner has also noted that the disclosed information does, at times, contain the names of individuals, where comments can be attributed to those individuals. For example:

- JCVI meeting November 1992, items 7.1 and 7.3.[9]
- MMR Sub Committee October 1987, items 4 and 13.
- MMR Sub Committee January 1987, item 2.

137. Despite the promises of confidentiality given to the attendees at the time of the meetings, the DoH has not been able to provide the Commissioner with any evidence that any of the numerous attendees at these meetings had complained after the publication of the minutes (albeit in a redacted format). During the investigation of the case the DoH argued that this was because, "JCVI members were told that the minutes and papers were confidential and would not be released to the public attributing their names to their comments." Whilst the Commissioner accepts that attendees were informed that the meetings were confidential, he has not been provided with any evidence that this promise had

[9] http://www.advisorybodies.doh.gov.uk/JCVI/foi-2007-minutes-nov1992.pdf

the proviso that their comments would not be reported in any way that was attributable to them. The Commissioner has noted the comment by the DoH in its letter to him dated 30 April 2008 that, "the promise of confidentiality was made at the beginning of each meeting with an implication that the personal comments of members would not be released into the public domain." The Commissioner finds the lack of any complaints to the DoH following the publication of the redacted JCVI minutes (or the disclosure of the redacted minutes of the MMR sub-committee) a persuasive factor in reaching a view that any reasonable expectation of confidence would have somewhat waned by the time the request was made.

138. The Commissioner has gone on to consider the DoH's arguments in favour of withholding the names of civil servants. In reaching a view on this the Commissioner has noted the comments of the Tribunal in *DBERR v ICO & Friends of the Earth*, which discussed the publication of the identities of civil servants and lobbyists, and the application of section 40(2). In considering this the Tribunal noted, amongst other things, that:

a. Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;

b. The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.

c. Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.

d. In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;

e. The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.[10]

139. In this case the DoH has not made any argument that the civil servants whose names have been redacted from the minutes were of a junior rank. Instead it has applied a blanket approach to the names of all civil servants in the minutes. Therefore the Commissioner has proceeded on the basis that the civil servants whose names have been redacted were of different ranks. In reaching a view on whether the disclosure of this information would be fair the Commissioner has considered the following points:

[10] EA/2007/0072, para 101.

- Information has only been redacted under this reasoning where the individual concerned participated in the meeting, and was not simply observing – as names have only been redacted where a comment is attributable to them.
- Civil servants were participating in meetings of the MMR sub-committee, which was shaping national policy on public health matters.
- It is reasonable to assume that civil servants who took part in these meetings took part on behalf of their respective departments.
- The list of attendees, which contains some details of the departments that some of the attendees were from, is included in the information already disclosed by the DoH.

On the basis of these considerations, and in the absence of any compelling arguments by the DoH, the Commissioner is not persuaded by its arguments that the disclosure of civil servants names in these minutes would be unfair.

140. The Commissioner has gone on to consider, on a more general level, whether the disclosure of the names of individuals who took part in the meetings of the MMR sub-committee would be fair.

141. In reaching a view on this he has noted that many of the attendees were senior individuals and experts in their field. He has also noted that the attendees were participating in a committee which shaped national policy on major public health matters – and whilst he accepts that at the time of the meetings in question the attendees reasonably expected that the meetings were confidential, given the factors discussed at paragraphs 134 to 137 above, he believes that any reasonable expectation of confidentiality would have waned, and that attendees of these meetings would now expect a certain degree of accountability and transparency in regard to this role. In particular he has noted the age of the information, and the fact that the DoH has not identified any specific parts of the minutes where issues of a particular sensitive or controversial nature were discussed.

142. In addition to this he notes that the DoH has already disclosed to the complainant the majority of the minutes, which includes the list of attendees, together with (at times) details of their job titles/employers (as well as publishing the majority of the minutes from the JCVI and the Adverse Reactions Committee). Given this, and after considering the disclosed information, he believes that at times it would not be difficult for an informed reader to be able to ascertain the identity of the person making certain comments. Further to this, given the prominence of many of the attendees in their respective fields he does not think that it is inconceivable that at times some of their views expressed in these minutes would also have been put into the public domain through such medium as scientific journals and conference presentations. He has again noted that the DoH was unable to provide him with any evidence that any of the many attendees at the meetings had complained following the disclosure of the (albeit amended) minutes of the MMR sub-committee or, on a wider scope, the publication of the redacted minutes of the JCVI and the Adverse Reactions Committee following the introduction of the Act.

143. After considering these points the Commissioner does not believe that the disclosure of the names of attendees at the meetings where those names have comments attributable to them would be unfair.

144. As the first principle requires that the processing of personal data is fair and lawful, the Commissioner has considered whether the disclosure of the information described at paragraph 123 would be lawful. After considering the circumstances of the case the Commissioner does not believe that disclosure of this information would be unlawful. The Commissioner further notes that the DoH did not argue that the disclosure of this information would be unlawful.

Is there a DPA Schedule 2 condition?

145. The Commissioner has gone on to consider whether any of the conditions in Schedule 2 of the DPA can be met.

146. The Commissioner considers that the most applicable condition in this case is likely to be schedule 2(6)(1) of the DPA which gives a condition for processing personal data 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 or legitimate interests of the data subject.

147. In considering the applicability of this condition the Commissioner has first sought to identify the legitimate interests pursued by the parties to whom the data are disclosed, i.e. the public at large. The Commissioner considers that the arguments in favour of the public interest for disclosure, as set out at paragraphs 102 to 104 set out clearly the legitimate interests of the public at large, e.g.

- Furthering the public's understanding and participation in debates of the day on issues of public importance such as, in this case, matters regarding public health. Given the ongoing debate over the use of the combined MMR vaccine, the Commissioner believes that despite the minutes being several years old, they refer (at least in part) to matters which are still being debated.
- Increasing the public's understanding of the development of Government policy on issues regarding public vaccination especially regarding the use of the combined MMR vaccine which was introduced in 1988 and has generated a significant amount of public debate and some controversy since it was introduced.
- The public gaining a better understanding of the actions taken by an expert group, whose actions have helped shape Government policy in areas where that policy still affects the public in a fundamental way, i.e. through the health of the nation.
- Increasing the transparency of the actions of this expert group.

- Increasing public confidence in the actions of this expert group, and allowing the public to gain an appreciation of whether their advice was whether their actions were appropriate and effective.
- Increasing public confidence in decisions taken by the Government in matters regarding public health.

148. The Commissioner has gone on to consider whether the disclosure of the information withheld under section 40 is necessary for these interests.

149. The DoH has stated that,

> "…whilst we accept that there are circumstances when there is a legitimate interest in knowing the names of officials…we do not accept that this extends to attributing names to individual opinions on sensitive matters of policy."

The Commissioner is not persuaded by this argument. Given that the MMR sub-committee is an expert group, made up of senior individuals who are experts in their field, he believes that knowing which of these individuals said what is important for the above interests. Many of the attendees at these meetings were highly qualified and experienced individuals, whose opinions carried weight in shaping government policy. The Commissioner believes that it is also an important element in furthering public confidence in the Government's decision making in this area for the public to gain an understanding of who the people were whose opinions shaped its policies, and to whom the Government was listening to.

150. In relation to the civil servants who attended the meetings, the Commissioner believes that these individuals attended on behalf of their departments, and given the nature of the redactions (where names were only redacted when a comment was attainable to it), were acting as spokespeople. As such he also believes that knowing which of these individuals said what is wholly compatible with the above interests.

151. The Commissioner has gone on to consider whether the disclosure of this information would be unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects – in this case the MMR sub-committee attendees.

152. The DoH has informed the Commissioner that even if there is a legitimate interest in the release of the names of attendees, where comments are attributable to them, this processing would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the attendees, as:

- the attendees took place with a, "reasonable and clear expectation of anonymity";
- civil servants are not entitled to publicly defend themselves, nor to comment on the policies that they are obliged to implement, and disclosure of this information would expose them to potential criticism; and

- "As we have explained…in our discussion of section 38, we are concerned that disclosure of the names of participants could put their physical and mental health in jeopardy. We interpret this as an unwarranted prejudice to both their rights and interests…"

153. In reaching a view on this the Commissioner has again noted the generic nature of the DoH's arguments, and the fact that it has not identified any particularly sensitive or controversial part of the information. Furthermore he also notes that many of the attendees were senior figures in their field, called upon to contribute to policy development in matters of significance to the public, or were civil servants acting on behalf of their respective departments. Whilst he acknowledges its arguments about the expectation of anonymity, he does not accept that this, in itself, would lead to prejudice to the rights and freedoms or legitimate interests of the attendees. In relation to the DoH's arguments about the physical or mental health of the attendees he has referred to his comments regarding its application of section 38(1)(a) and (b) – as listed at paragraphs 115 to 118 above. Given these factors, and also the age of this information, the Commissioner is not persuaded that the disclosure of this information would cause prejudice to the rights and freedoms or legitimate interests of the attendees. In reaching this view, the Commissioner again notes that the DoH has not provided any evidence that any of the attendees complained about the publication of the redacted JCVI minutes following the introduction of the Act, or the disclosure of the redacted MMR sub-committee minutes to the complainant.

154. Although he is not persuaded, on the basis of the DoH's arguments, that disclosure of this information would prejudice the rights, freedoms or legitimate interests of the attendees, the Commissioner has gone on to consider, were such prejudice to occur, would that prejudice be unwarranted. In reaching a view on this he has considered the following factors:

- again, the Commissioner has noted the seniority of many of the attendees, who were leading figures in their field, who had been called upon to help shape national policy potentially affecting the health of the nation,
- given this, the Commissioner believes that it is reasonable to assume that the attendees would expect some degree of accountability for the advice they gave, and
- the weight of the legitimate interests as listed at paragraph 147 above.

Given these factors, and noting the generic nature of the DoH's arguments, and the fact that it has not identified any particularly sensitive or controversial part of the information, the Commissioner is not persuaded that any prejudice that would occur would be unwarranted.

155. After considering the above factors the Commissioner believes that the disclosure of this information would not be in breach of the first principle of the DPA. Therefore he is of the view that section 40 does not provide an exemption from disclosure for the withheld information.

Section 41

156. Section 41(1) provides that information is exempt from disclosure if:

(a) it was obtained by the public authority from another person; and
(b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

157. The Commissioner's view is that disclosure would constitute an actionable breach of confidence if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider (although it may not always be necessary to demonstrate detriment, particularly where the information relates to an individual's personal or private life).

If these parts of the test are satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information

158. In this case the DoH has cited section 41(1) for commercial information provided by pharmaceutical companies. During the course of the investigation the DoH also sought to rely upon section 41(1) to withhold information from which a deceased person could be identified, and the titles of unpublished scientific work. However, having considered the withheld information in this case, the Commissioner notes that there is no information of this nature redacted from the MMR sub-committee minutes. Therefore he has only considered the DoH's arguments in relation to commercial information.

159. The Commissioner has first considered whether this information was obtained by the DoH from a third party.

Was the information obtained from a third party?

160. During the course of his investigation the Commissioner asked the DoH for further information as to how the information withheld under this exemption was obtained from a third party.

161. In relation to the commercial information withheld under this exemption, the DoH has not provided any specific evidence of the specific circumstances under which each specific piece of information was provided to it by third parties (i.e. pharmaceutical companies). However, in its letter to the Commissioner dated 18 August 2008 it stated that,

> "[Named individual] has stressed that manufacturers give the JCVI and the other committees commercially sensitive information, for example about possible costs of their products or their product development plans…"

The Commissioner notes that this comment was made in support of its use of section 43. However, he believes that it is also applicable to the DoH's use of section 41.

162. The Commissioner finds these arguments somewhat vague and has some concerns about the quality of the evidence provided by the DoH to show that all of the information it has withheld under this exemption was obtained from a third party, especially as it has not been able to identify to him specifically which information in the minutes has been withheld under this exemption. However, he has gone on to consider whether the disclosure of this information would constitute an actionable breach of confidence.

Does the information have the necessary quality of confidence?

163. In considering whether the information withheld under this exemption has the necessary quality of confidence the Commissioner has considered whether it is otherwise accessible, and whether it is more than trivial.

164. The Commissioner notes the generic nature of the DoH's arguments in support of the application of this exemption. He also notes that it has not provided any specific arguments relating to specific pieces of information, and has instead relied upon generic arguments.

165. Whilst the DoH has stated that at times pharmaceutical companies provide it with, "commercially sensitive information, for example about possible costs of their products or their product development plans," it has not referred to any specific piece of information withheld under this exemption, and has instead relied upon a blanket approach to redaction. Whilst the Commissioner accepts that information of commercial sensitivity may not be otherwise accessible, he has not been provided with any specific evidence in relation to any specific piece of information as to how that information is not otherwise accessible. Given the lack of any specific arguments, the lack of compelling evidence about specific pieces of information and their potential sensitivity, and given the age of the information, the Commissioner is not convinced that this information is not otherwise accessible. In reaching this view the Commissioner has also noted that the DoH has not provided any specific evidence that the pharmaceutical companies concerned have objected to the possible disclosure of information relating to their products which is contained in the minutes.

166. On the basis of the arguments provided by the DoH the Commissioner is not persuaded that the information has the necessary nature of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

167. In considering whether any of this information was imparted in circumstances importing an obligation of confidence the Commissioner again notes the generic nature of the DoH's arguments in support of the application of this exemption, and that it has not provided any specific arguments relating to specific pieces of information. He notes the DoH's statement that, "…there were occasions where the third parties [e.g. pharmaceutical companies] insisted on the confidentiality of the information they provided." However, he also notes that the DoH has not identified these occasions, or which piece of redacted information relates to these occasions. It has instead relied upon a blanket approach to the use of this information.

168. Further to this he has also noted his comments at paragraphs 160 to 162 above, which discuss whether this information was obtained from a third party. He again notes his concerns about the paucity of the DoH's arguments as to the circumstances under which each of these pieces of information was obtained.

169. Whilst the Commissioner acknowledges the DoH's arguments as to how attendees at the JCVI and its sub-committees were informed that its proceedings were confidential, he also notes that it has provided no details of the circumstances under which any of this information was obtained by the DoH / MMR sub-committee attendee, and no evidence of any promise of confidentiality to the confider.

170. Therefore, on the basis of the arguments provided by the DoH the Commissioner is not persuaded that the information was imparted in circumstances importing an obligation of confidence.

Would disclosure of the information have been unauthorised and have had a detrimental impact on the confider?

171. In considering this the Commissioner has again noted the generic nature of the DoH's arguments, and the blanket approach to the application of the exemption. The DoH has not identified any specific piece of information which is particularly sensitive, the disclosure of which would have a detrimental impact on the confider.

172. Given the lack of any compelling evidence provided by the DoH, and the age of the information, the Commissioner is not persuaded that the information would have a detrimental impact on the confider.

173. Therefore, given the above factors the Commissioner is not persuaded that disclosure of the information withheld under this exemption would constitute an actionable breach of confidence. Therefore he does not believe that this exemption is engaged.

Section 43

174. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

175. The full text of section 43 can be found in the Legal Annex at the end of this Notice.

176. The DoH has argued that it believes that section 43(2) applies to some of the withheld information as disclosure would, or would be likely to, prejudice the commercial interests of the DoH and also the pharmaceutical companies that manufactured some of the drugs discussed at meetings of the MMR sub-committee. In support of its use of this exemption the DoH has stated:

- Some information in the minutes, if disclosed, would or would be likely to prejudice the commercial interests of the DoH, as it might affect the relationship between the DoH and suppliers, which in turn might prejudice procurement arrangements.
- Some information in the minutes, if disclosed, would, or would be likely to, prejudice the commercial interests of the pharmaceutical companies who manufacture some of the drugs discussed at the meetings.
- Furthermore, some of the companies provided sensitive information which, "…could include commercial process of the vaccines and trade secrets such as the manufacturing process."
- Disclosure might affect the pharmaceutical companies' competitiveness, their market share and company market price.

177. During the course of the investigation the Commissioner asked the DoH whether it wished to provide any further evidence to support its arguments. In response it informed him that,

> "[Named individual] has stressed that manufacturers give the JCVI and other committees commercially sensitive information, for example about possible costs of their products or their product development plans and revealing these, when we have been asked not to do so, undermines our trustworthiness and diminishes the chances of having access to such material in the future. This puts public policy development at risk and is not in the public interest."

178. The DoH has not provided any further evidence to support its use of this exemption.

179. The Commissioner has considered the DoH's arguments that disclosure of the withheld information would, or would be likely to, prejudice the commercial interests of itself and certain pharmaceutical companies in turn.

Commercial interests of the DoH

180. As stated above, the DoH has argued that the disclosure of the withheld information would, or would be likely to, prejudice its own commercial interest as this information had been provided to it in confidence and disclosure would, "adversely affect the relationship between [the DoH] and suppliers," which in turn might affect its procurement arrangements.

181. In addition to this, in the initial refusal notice the DoH informed the complainant that it was its understanding that, "…legal action would be likely to be taken should any of the section 43 material be released." However, it has not provided any further information to support this argument, or how this would impact on its commercial interests.

182. In reaching a decision on the question of prejudice the Commissioner has considered the test of 'likely to prejudice' as set out in paragraph 112 above.

183. The Commissioner has noted the generic nature of the DoH's arguments, and the fact that it has not identified any specific part of the minutes where commercially sensitive information was discussed. It appears that it has instead relied upon a blanket approach to the application of this exemption – redacting the names of all pharmaceutical companies or their products, wherever they are mentioned in the minutes.

184. Further to this, the DoH has not provided the Commissioner with any compelling evidence as to how the disclosure of some information recorded in the minutes of the MMR sub-committee would be likely to lead to the likely prejudice of the DoH's procurement processes, or how this would, in turn, be likely to prejudice its commercial interests.

185. Additionally, the Commissioner has also noted the age of the information. Given its age, the Commissioner believes that it would be arguable that information in the minutes which had commercial sensitivity is likely to have lost some of its commercial sensitivity.

186. After considering the above factors the Commissioner is not persuaded that the disclosure of this information would, or would be likely to, prejudice the commercial interests of the DoH.

Commercial interests of the pharmaceutical companies

187. As stated above, the DoH has argued that the disclosure of the withheld information would, or would be likely to, prejudice certain pharmaceutical companies' commercial interests as:

- "In some instances JCVI members may have been critical about certain pharmaceutical companies or their vaccines. Some of these vaccines continue to be used in and outside the UK and adverse UK comments could have negative implications." This may lead to the reputation of those

companies and their products being unfairly prejudiced. This might lead to their share of the market being affected.

- At times, pharmaceutical companies provided commercially sensitive information, which might include information about manufacturing processes and trade secrets.
- "…references are made in the JCVI minutes to pharmaceutical companies, their research and products; disclosure of such comments would be likely to prejudice the position of the companies discussed in a competitive environment by revealing market-sensitive information or information of potential usefulness to their competitors."

188. As referred to above, in reaching a decision on the question of prejudice the Commissioner has considered the test of 'likely to prejudice' as set out in paragraph 112 above.

189. The Commissioner accepts that if information which was truly commercially sensitive was discussed – such as details of the manufacturing process or potential criticisms of a currently used drug – disclosure of this kind of information would have the potential to prejudice the commercial interests of the company which produce that drug. However, the DoH has not provided any specific arguments relating to specific pieces of information, and has instead relied upon a blanket approach to the use of this exemption.

190. Despite the reference to 'trade secrets' the DoH has not advanced any further arguments to support this statement, or identified where in the minutes trade secrets are discussed. Furthermore it has not sought to rely upon section 43(1) – which provides an exemption from disclosure for information which constitutes a trade secret. Therefore the Commissioner has not considered the application of section 43(1).

191. Again the Commissioner is mindful of the age of this information. Whilst he accepts that information has the potential to retain commercial sensitivity – especially if it relates to a product which is still on the market – he also believes that any sensitivity which other information would have had would be likely to have waned over time.

192. After considering the generic arguments provided by the DoH, and the lack of compelling evidence, the Commissioner is not persuaded that the disclosure of the withheld information would, or would be likely to, prejudice the commercial interests of the pharmaceutical companies concerned.

193. Therefore the Commissioner does not believe that section 43(2) is engaged.

The Decision

194. The Commissioner's decision is that the DoH did not deal with the request for information in accordance with section 1(1)(b) of the Act, in that it inappropriately relied upon sections 36, 38, 40, 41 and 43 to withhold the requested information.

In failing to comply with the requirements of section 1(1)(b) within twenty working days it also breached section 10.

195. The DoH also acted in breach of section 17(1)(b) and (c) in that it did not fully quote to the complainant the exemptions it was seeking to rely upon, and that it sought to rely upon an exemption not cited in its refusal notice. It also failed to meet the requirements of section 17(1) in that it did not inform the complainant, within twenty working days of receipt of the request, of all the exemptions it was seeking to rely upon.

Steps Required

196. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:

The requested information should be disclosed to the complainant, in an un-redacted format, within 35 calendar days of the date of this Notice.

Other matters

197. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

198. In March 2008, the Commissioner issued the DoH with a practice recommendation which identified various problems with the Department's handling of requests and with subsequent appeals to his office. The recommendation included a reference to the timeliness with which the authority responded to his case officer's enquiries. The Commissioner is concerned to note that in this case some of the delays in obtaining the Department's reasons for applying particular exemptions postdate his practice recommendation.

199. The Commissioner is also concerned to note that the Department sought to rely on rather generic arguments to withhold information, and could not easily identify which exemption applied to the pieces of information it had sought to redact. The application of exemptions in this way is consistent with the poor practice highlighted in the Commissioner's practice recommendation of March 2008.

200. As he has noted in a previous Decision Notice (FS50175121), the Commissioner accepts that implementation of the actions outlined in his practice recommendation will take some time. He will continue to monitor the Department's progress in this regard and hopes that it will demonstrate an improvement in relation to both current and future requests and to subsequent investigations carried out by his office.

Failure to comply

201. 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

202. 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.

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 22nd day of December 2008

Signed ……..

Richard Thomas
Information Commissioner

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

Legal Annex

Section 17

(1) 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.

(2) 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 t 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

Section 36

(1) 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.

(2) 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.

(3) 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).

(4) 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".

(5) 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."

(6) 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."

(7) 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.

Section 38

(1) Information is exempt information if its disclosure under this Act would, or would be likely to-

(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Section 40

(1) 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.

(2) 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.

(3) 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.

(4) 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).

(5) 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).

(6) 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.

(7) 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.

Section 41

(1) Information is exempt information if-

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

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

Section 43

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).