

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 29 July 2008

Public Authority: The Department for Work and Pensions (DWP)
Address: The Adelphi
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London
WC2N 6HT

Summary

The complainant submitted six requests to the Department for Work and Pensions (DWP) for information about the benefits payable to those in polygamous marriages, including information used for the preparation of parliamentary questions on the this subject. The DWP provided some information in response to these requests but withheld further documents on the basis of sections 35(1)(a), 35(1)(d), 36(2)(b), 36(2)(c) and 42(1). Having reviewed the withheld information, the Commissioner accepts that this information falls within the scope of the various exemptions cited by the DWP. The Commissioner accepts that for the application of all of these exemptions the public interest favours withholding the requested information. The only exception is a small piece of information which falls within the scope of section 35(1)(a) for which the Commissioner has concluded that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

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. On 5 March 2007 the complainant submitted 6 related requests to the DWP which focused on the issue of polygamy, and in particular a number of Parliamentary Questions (PQ's) which had been submitted on the issue of benefits paid to those in polygamous marriages. These requests are listed in Annex A which is attached to this notice.

3. The DWP contacted the complainant on 29 March 2007 and informed him that the information he had requested fell under the scope of exemptions contained within the Act which were subject to the public interest test. It was therefore extending the time limit for replying to these requests as it needed more time to consider the public interest test.
4. On 30 April 2007 the DWP contacted the complainant with a substantive response to his request. With regard to requests 1 and 2 the DWP explained that such information was not recorded centrally and could only be provided at disproportionate cost. With regard to request 3 the DWP explained that there was no financial advantage to those in polygamous marriages as opposed to monogamous marriages.
5. With regard to requests 4, 5 and 6, the DWP provided the complainant with some information that fell within the scope of these requests. However, it also explained to the complainant that further documents were being withheld because they were exempt from disclosure on the basis of sections 42(1), 36(2)(b) and 36(2)(c).
6. On 4 May 2007 the complainant asked for an internal review to be conducted.
7. The complainant was informed of the outcome of the internal review on 5 June 2007. The DWP informed the complainant that it had already provided him with all of the information falling within the scope of request 5. Therefore, the internal review only focussed on the information falling within the scope of requests 4 and 6 which had previously been withheld. The internal review concluded that the DWP's initial decision to refuse to disclose these documents was correct. The internal review explained that the DWP's position was that the various pieces of information were exempt on the basis of the following exemptions: section 42(1), sections 35(1)(a) and (d), sections 36(2)(b)(i) and (ii) and section 36(2)(c).

The Investigation

Scope of the case

8. On 6 June 2007 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complaint explained that he only wished the Commissioner to consider the DWP's decision to withhold information in response to requests 4 and 6.

Chronology

9. The Commissioner wrote to the DWP on 12 March 2008 and asked it to provide him with copies of the information that had not been disclosed to the complainant. The Commissioner also asked the DWP to provide detailed arguments to support its position that this information was exempt on the basis of the exemptions contained at sections 35, 36 and 42 of the Act.

10. On 14 April 2008 the Commissioner received a response from the DWP. This response included copies of the information withheld by the DWP along with detailed submissions explaining why it considered the various exemptions cited in the previous paragraph to apply to this information. (The Commissioner has not summarised these arguments here as they are considered in detail in the 'Analysis' section below).
11. On 30 April 2008 the Commissioner contacted the DWP and asked it to clarify a number of issues in relation to which exemptions the DWP was seeking to rely on for a number of documents. In particular the Commissioner noted that the DWP appeared to be relying on exemptions contained at both sections 35 and 36 despite the fact that these exemptions are mutually exclusive.
12. The Commissioner received the necessary clarification from the DWP on 19 May 2008 in which the DWP confirmed that in relation to a number of documents in which it was seeking to rely on section 35, should the Commissioner conclude that section 35 did not apply, it would seek to rely on section 36 in the alternative.

Findings of fact

13. With regard to request 4, the DWP provided the Commissioner with a schedule of 16 documents which it considered to fall within the scope of the request. Some of these documents simply contained one piece of information, e.g. one draft version of the response to the PQ or one email. However, some of these documents contained numerous pieces of information, e.g. email strings containing various documents. The Commissioner has replicated a summary of this schedule in a table contained in annex B. Where there is more than one piece of information falling within the scope of each the documents, the Commissioner has numbered these documents also, and for ease has adopted this reference system throughout the remainder of this notice.
14. With regard to request 6, the DWP provided the Commissioner with a schedule of 3 documents which it considered to fall within the scope of this request. Again the Commissioner has summarised this schedule (and numbered the various documents) in a further table contained in annex C.
15. The Commissioner has also indicated in these tables the various exemptions the DWP applied to each of these documents and summarised the Commissioner's findings in respect of each individual item.

Analysis

Exemptions

Section 42

16. Section 42 provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
17. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
18. The category of privilege which the DWP is relying on to withhold some information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege.
19. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and answer which can usually be found by inspecting the documents themselves.

The DWP's position

20. As the tables in annex B indicate, the DWP has argued that a number of documents falling within the scope of request 6 are exempt from disclosure on the basis of section 42 because they attract advice privilege. The DWP has described these documents as relating to internal legal advice from the DWP's own lawyers and requests for such advice from policy officials.

The Commissioner's position

21. The Commissioner accepts that the majority of the documents which the DWP has claimed are exempt on the basis of section 42 do fall within the scope of this exemption. This because the dominant purpose of these communications is either DWP officials seeking legal advice from DWP lawyers or these DWP lawyers providing such advice. The documents which the Commissioner accepts are covered by section 42(1) are:
 - Documents 2(a) – 2(c) because email 2(c) was sent to a DWP lawyer asking for advice on the drafting of the response to the PQ and the earlier emails of

2(a) and 2(b) were forwarded to the lawyer in order to assist in the preparation of the advice.

- Documents 3(a) – 3(d) because they consist of four separate pieces of legal advice provided by a DWP lawyer to a non-legal colleague.
 - Document 4(a) because it consists of an email sent to a DWP lawyer, and others, by the Ministers Private Office. As the email was sent to a number of recipients, some legal advisors and some not, the Commissioner believes that the email was sent for a number of purposes. However, he is satisfied that the dominant purpose for which this email was sent was that of seeking legal advice. Therefore the email and the attachments fall within the scope of section 42(1).
 - Document 7(a) because it consists on an email from a DWP lawyer to a colleague with legal advice on issues contained in a draft answer to the PQ.
 - Document 8(a) because it consists of communications between a DWP lawyer and colleagues, the dominant purpose of which is providing legal advice on issues related to the PQ.
 - Document 9(a) because it consists of communications between two DWP lawyers commenting on legal issues related to the substance of a draft response to the PQ.
 - Document 10(a) because it consists of a DWP official asking a DWP lawyer for advice on legal issues relating to the PQ.
 - Document 11(c) because it consists of legal advice from a DWP lawyer on issues relating to the PQ.
 - Document 12(a) because it consists of an email from the Minister's Private Office attaching a draft version of the PQ response. Although the email was sent to a variety of people, including only one lawyer, the Commissioner accepts that the dominant purpose for which this email was sent was that of seeking legal advice. This is because the email specifically asks the lawyer in question to comment on the legal accuracy of the draft, whereas the other recipients of the email are not asked to provide any comments or feedback.
 - Documents 13(a) - 13(c); 13(e) – 13(g) and 13(i) because these documents consist of communications between DWP lawyers and colleagues, the dominant purpose of which is asking for, and provision of, legal advice on issues related to the PQ.
 - Document 15(a) because it contains legal advice from a DWP lawyer to a colleague on issues related to the PQ response.
22. However, there are a number of documents which the Commissioner understands the DWP considers to be covered by section 42(1), but which the

Commissioner does not accept fall within the scope of this exemption. The Commissioner has explained below for each of these documents why he has come to this conclusion that they do not fall within the scope of section 42(1):

- Document 14(a) – although this document is similar to 12(a) in that it is an email from the Minister's Private Office attaching a draft response sent a number of people, including a lawyer, the email itself does not request the lawyer to provide any general or indeed specific advice. Rather this email would appear to have been sent to the recipients essentially for their information and not for the dominant purpose of asking for legal advice.
- Documents 11(a) and 11(b) because although these emails included a DWP lawyer on the cc list, neither email actually asks for advice from that lawyer or includes legal advice previously provided. As with document 14(a), in the Commissioner's opinion this email was simply sent to the lawyer, and the various recipients for their information rather than for the purpose of dominant purpose of seeking legal advice.

23. Although the Commissioner has concluded that these documents are not exempt by virtue of section 42(1), he has gone on to consider below whether any of these documents are exempt on the basis of the other exemptions cited by the DWP, i.e. section 35 or section 36.

Public interest test

24. Section 42(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments for withholding information in relation to section 42(1)

25. In arguing that the public interest favoured withholding this information, the DWP has highlighted the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. Furthermore, the DWP highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1):

26. Government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments as a consequence legal advice may well set out the perceived weaknesses of the Department's position. Without such comprehensive advice, the Government's

decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.

27. Disclosure of legal advice has a significant prejudice to the Government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.
28. There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record. This too would not be in the public interest. If this scenario was taken to its logical extreme, it is possible that there may even be a reluctance to seek legal advice.
29. This could lead to decisions being taken that are legally unsound. Not only would this undermine the Government's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided.
30. The DWP concluded that although section 42 is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professionally privileged material, it is likely to only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. The DWP suggested that in this case there was no 'clear case' that suggests that the strong public interest in maintaining legal professional privilege.
31. The Commissioner acknowledges the strength of the arguments advanced by the DWP. Indeed, as the DWP noted in its submissions to the Commissioner, there is a significant body of case law to support the view that there is a strong element of withholding the public interest built into section 42(1). The *Information Tribunal in Bellamy v The Information Commissioner (EA/2005/0023)* noted that:

'there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.' (Paragraph 35)

Public interest for disclosure of information in relation section 42(1)

32. However, it is important to remember that these factors are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information; Parliament did not intend the exemption contained at section 42 of the Act to be used absolutely. Indeed the Tribunal's recent decision in the case *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel (EA/2007/0052)* underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by

Mersey Travel, in particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice related to the issues which affected a substantial number of people.

33. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities, or in this case the reasoning behind the Government's position as outlined by the response to the PQ. Disclosure of the legal advice may assist the public's understanding of how the benefit system deals with the issue of polygamous marriages.
34. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the Government's position as outlined in response to the PQ.
35. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the understanding of, and participation in, the public debate of issues of the day. The Commissioner notes that there has been a reasonable level of discussion in the media in relation to the Government's position on polygamy and the benefit system.¹ Disclosure of the various pieces of legal advice could allow a more informed debate on these issues, particularly given the complexity of the issues surrounding this particular aspect of the benefit system.
36. The Commissioner also has some reservations about the full force of some of the points advanced by the DWP: The Commissioner does not fully accept the argument that public officials would be less willingly to fully document their requests for legal advice. This position is in line with the Tribunal's findings in the *Mersey Travel* decision at para 42: 'Nor can we see that any professional lawyer would temper their advice for fear of later publication: that would again be self defeating, to both client and lawyer, to say nothing of the lawyer's professional obligations'.

Balance of public interest arguments

37. In the Commissioner's opinion, in line with the Tribunal's findings in the Mersey Tunnel case, it is not necessary to identify 'exceptional' public interest factors in order to outweigh any inherent public interest in maintaining the exemption contained at section 42. Furthermore, in the Commissioner's opinion given the fact that there is identifiable public concern as to how the benefit system deals with those in polygamous marriages, there is a clear public interest, in addition to that of general accountability and transparency, in disclosure of this information.
38. However, the Commissioner does accept that the established public interest arguments in protecting legal professional privilege must be given due weight.

¹ See article in The Daily Mail entitled 'Polygamous husbands can claim cash for their harems' (<http://www.dailymail.co.uk/news/article-449221/Polygamous-husbands-claim-cash-harems.html>) and an article in The Daily Telegraph entitled 'Multiple wives will mean multiple benefits' (<http://www.telegraph.co.uk/news/newstoppers/politics/1577395/Multiple-wives-will-mean-multiple-benefits.html>)

Moreover, in this case the Commissioner notes that the advice could not be said to be stale; the legal advice provided remains relevant to how the benefit system deals with polygamous marriages.

39. On balance, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 35

40. The DWP has argued that some of the information covered by both requests is exempt by virtue of sections 35(1)(a) or 35(1)(d).

41. Section 35(1) states that:

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

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

42. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

43. The documents which the DWP has argued fall within the scope of section 35(1)(d) are: 5(a), 6(b), 13(d), 13(h), 14(a) and 18(a).

44. In the Commissioner’s opinion the term ‘relates to’ in the context of section 35(1)(d) should be interpreted narrowly, thereby limiting the scope of exemption to only include practical matters such as routine emails, procedures for handling ministerial papers, travel expenses, staffing, logistical issues etc. The example quoted in the Commissioner’s guidance on section 35(1)(d) suggests that while the management of a minister’s diary (i.e. the process of its handling) may be caught by the exemption, entries within the diary itself are unlikely to be.² The effect of this limited interpretation of the exemption means that just because information has originated in a private office or has passed through it, it will not necessarily fall within the scope of section 35(1)(d).

45. Of the documents listed above, the Commissioner accepts that the following documents fall within the scope of section 35(1)(d):

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/ag_no_24_formulation_of_government_policy.pdf

- 5(a) because it is a brief, routine email simply confirming the Minister's view on the latest version of a draft response to the PQ.
 - 13(h) because it is simply a routine email requesting that a background note be prepared on a certain topic.
46. However, the Commissioner is not satisfied that the following documents fall within the scope of section 35(1)(d):
- 6(b) because although it is a brief email similar to 5(a) commenting on the latest draft, having considered the contents and tone of the email the Commissioner is satisfied that it cannot be classified as a routine discussion relating to procedural issues.
 - 13(d) - because it includes a draft version of the PQ response and therefore the Commissioner is satisfied that the email focuses on more substantive issues than ones that are merely procedural or practical.
 - 14(a) because it is an email which includes a draft version of the PQ response and explanation as to who has made further revisions to this draft and therefore cannot be said to refer to simply procedural or practical issues.
 - 18(a) again the Commissioner considers this email to focus on substantive issues and not one which could be said to focus simply on procedural matters.
47. Although the Commissioner has concluded that the four documents listed above do not fall within the scope of section 35(1)(d) he recognises that the DWP has argued, that should the Commissioner conclude that section 35 is not engaged, it would seek to rely on one of the various subsections contained within section 36. The Commissioner has considered the application of section 36 below. Moreover, the Commissioner notes that the DWP has argued that document 13(d), as well as falling within the scope of section 35(1)(d), also falls within the scope of section 35(1)(a).
48. Section 35(1)(a) states that information is exempt if it relates to the formulation or development of government policy.
49. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Section 35(1)(a) cannot apply to a finished product or policy which has been agreed, in operation or already implemented. Once a decision has been taken on a policy line, then it is no longer in the formulation or development stage.

50. In consideration of this case the Commissioner has been guided by the Information Tribunal decision in the case *DFES v Information Commissioner & the Evening Standard [EA/2006/0006]* in which the Tribunal commented on the terms 'relates to' and 'formulation and development of policy' contained in section 35(1)(a). The Tribunal suggested that these terms could be interpreted broadly, and although this approach has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which caused no significant harm to the public interest. The Tribunal's approach also demonstrates that where the majority of the information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be considered as relating to section 35(1)(a).
51. The DWP has argued that the document 13(d) falls within the scope of section 35(1)(a) because it relates to potential changes to policies concerning the payments of benefits to those in polygamous marriages..
52. Having considered the content of document 13(d) in detail, the Commissioner has concluded that only part of this document falls within the scope of section 35(1)(a). The part which falls within this exemption is the first part of the document that clearly relates directly to potential policy changes. However, the Commissioner is not satisfied that the attachments to the email which are the draft PQ response and the part of the email that discusses these drafts, can be described as information relating to the formulation or development of government policy. Rather these parts of the document focus on the draft response to the PQ and focus is on current and established government policy, not the formulation or development of new policies.
53. The Commissioner is conscious of the Tribunal's suggestion that the term 'relates to' in the context of section 35(1)(a) should be interpreted broadly and information which is associated or incidental to the material which is covered by section 35(1)(a) can also be brought within the scope of the exemption. However, this approach should be taken where the **majority** of the information relates to the formulation or development of government policy. In this case, as suggested above, the Commissioner believes that the information contained in document 13(d) can be spilt into two different classes: firstly, information focusing on a draft response to the PQ and secondly, information focusing on potential changes to policy in this area. In the Commissioner's opinion the two types of information form an equal part of document 13(d) and therefore neither part can be said to form the majority of the document. Therefore, although the Commissioner accepts that the second type of information falls within the scope of section 35(1)(a), he does not consider it appropriate to conclude that the first type of information falls within the scope of section 35(1)(a). He has formed this view because it cannot be said that the majority of information contained within the document relates to the formulation or development of government policy. (The Commissioner will however consider whether the information contained in document 13(d) that does not fall within the scope of section 35(1)(a) is exempt by virtue of section 36).

Public interest test

54. The DWP has advanced a number of arguments in relation to the public interest in relation to section 35. For the arguments against disclosure the Commissioner has attempted to separate out these arguments in order to establish which apply to the exemption contained at section 35(1)(a) and which apply to the exemption contained at section 35(1)(d).

Public interest arguments against disclosing the information in relation to section 35(1)(a)

55. It is in the public interest that policy advice should be broadly based, including the canvassing of the views and opinions of relevant stakeholders. If policy advice and opinions were disclosed this may have a deterrent effect on stakeholders who may be reluctant to provide advice and opinions because they may be disclosed in the future. This would undermine the clear public interest in ensuring that the development of policy is made on the best advice available including a full consideration of all of the options and circumstances.
56. In creating policy there needs to be a free space in which it is possible to 'think the unthinkable' and use imagination without fear that policy proposals and discussions will be held up to ridicule or public criticism.
57. The DWP suggested that it is in the public interest to ensure that the collective responsibility of Government is not undermined by disclosure of interdepartmental considerations and views of other Ministers or officials which may reveal disagreements or a divergence of opinion.
58. The DWP has also highlighted the fact that the information in question relates to the formulation of answers to a PQ. In the DWP's opinion disclosure of this information so soon after its compilation would hamper future frank discussion about PQs.
59. Ultimately the DWP argued that for the public interest arguments outlined above disclosure would result in poorer decision making and such decisions will be recorded inadequately.

Public interest arguments against disclosing the information in relation to section 35(1)(d)

60. The DWP has argued that disclosure of the information would reveal the methods by which Ministers and their Private Offices respond to PQs. To do so may dissuade Ministers and their officials from experimenting with more effective ways of answering PQs; they may shy away from thinking broadly or approaching the matter radically for fear of these new mechanisms being exposed to the public gaze and subsequent criticism.

61. As above, the DWP has highlighted the fact that operation of Private Offices also depends on the free and frank exchange of views and the effective and efficient operation of these officers would be undermined if information revealing the nature of these candid discussions were disclosed because officials would be inhibited from being sufficiently candid in the future.

Public interest arguments in favour of disclosing the information in relation to sections 35(1)(a) and 35(1)(d)

62. The DWP explained that it had taken into account the following arguments in favour of disclosing the information which falls within the scope of section 35(1):
63. As the knowledge of the ways in which government works increases, and the information on which decisions have been based are disclose, the public contribution to the public policy making process could become more effective and broadly based.
64. Disclosure would allow more informed debated and give a wider number of people the opportunity to contribute to that debate and increase trust in the quality of decision making.
65. Disclosure would ensure that Minister's Private Offices operate efficiently and may ensure that the resource of such offices are used appropriately.
66. Releasing the material promotes transparency of government policy which allows the public to judge the quality of decisions made in an area, namely the benefits system, which impacts financially on thousands of citizens.

Balance of public interest arguments

Section 35(1)(a)

67. In considering the balance of the public interest arguments in relation to the formulation or development of government policy, the Commissioner has taken into account the comments of the Tribunal in the *DFES* decision along with the more recent comments contained in judgments High Court judgments in which this the *DFES* decision was referenced.³
68. In particular the Commissioner has considered key two principles outlined in the *DFES* decision. The first was that the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

‘Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to

³ *Export Credit Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/638.html> and *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/737.html>

hammer out policy without the "...threat of lurid headlines depicting that which has been merely broached as agreed policy."

69. The second being:

'The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.' (Para 75(i)).

70. With regard to the timing of the request, the information being withheld under section 35(1)(a), part of document 13(d), dates from November 2006. The Commissioner understands that at this times the Government was beginning to consider a review of policy in this area. The Commissioner understands that this review was completed in December 2007. The complainant's request dates from March 2007 and therefore the Commissioner accepts that at the time of the request the policy review was ongoing and remained active.

71. Clearly the Commissioner cannot comment in great detail on the content of the information itself because to do so would reveal the content of the withheld information. However, the Commissioner believes that he can reveal that he is somewhat sceptical that all of the public interest arguments advanced by the DWP in favour of withholding this information are indeed applicable to this particular application of section 35(1)(a). While the Commissioner does not doubt the link between disclosure of candid policy discussions and advice and the consequences outlined by the DWP, he is not sure that disclosure of this particular piece of information will result in such affects. For example, in the Commissioner's opinion, the withheld information does not record policy discussions that could be said to record discussions where ideas that are 'unthinkable' are outlined.

72. As the Tribunal indicated in the *DFES* decision at paragraph 24 although section 35 is a class based exemption in carrying out the public interest test 'it is relevant to consider what specific harm would follow from the disclosure of the particular information in question'. (Emphasis not in original.) This approach was commended by Mitting J in the recent EGCD High Court case at para 28.

73. In the Commissioner's opinion the harmful consequences that the DWP anticipate occurring following disclosure of this information are unlikely to occur and thus the public interest arguments outlined above in favour of withholding this information have to be given less weight.

74. In summary, the Commissioner is very mindful of the strong words of the Tribunal in relation to the disclosure of information falling within the scope of 35(1)(a) before a policy formulation or development has been completed. Nevertheless, the Commissioner is also conscious the fact that as the Tribunal has also indicated every case must be considered on its merits. In the circumstances of this case, and in particular because of the nature of the information being

withheld, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 35(1)(d)

75. The Commissioner notes that there is significantly less case law on the exemption contained at section 35(1)(d) than the exemption contained at section 35(1)(a). In considering where the balance of the public interest lies under section 35(1)(d) he has therefore been guided by some of principles outlined in the DFES Tribunal decision.
76. In particular the Commissioner has focused on the Tribunal's suggestion that the focus has to remain on the nature of the information itself and the potential harmful affects of disclosure. To this end the Commissioner is again slightly sceptical that disclosure of the documents covered by section 35(1)(d) would result in the consequences outlined in the paragraphs 60 and 61. In the Commissioner's opinion, for such prejudice to occur on the basis suggested by the DWP, the information which is disclosed must contain candid discussions or radical approaches to dealing with PQs. However, the Commissioner does not believe that the documents contain such information.
77. Nevertheless, the Commissioner does acknowledge that given his narrow interpretation of the scope of section 35(1)(d), any information which falls within section 35(1)(d) is very unlikely to contain discussions which are particularly candid or radical.
78. Moreover, the Commissioner does accept that disclosure of the information falling within section 35(1)(d) would reveal some of the methods and processes used by Minister's offices to answer PQ and that to disclose this information may distract from the operation of the Office. The Commissioner accepts that it is not in the public interest that the operation of such Offices are disrupted.
79. Although the Commissioner accepts that there is some public interest in disclosure of this information because it may lead to a greater understanding of key role PQs play in the democratic process, disclosure will also undermine the efficiency of this process. The Commissioner is therefore satisfied that documents 5(a) and 13(h) are exempt from disclosure on the basis section 35(1)(d) and that the public interest in maintaining the exemption outweighs the public interest in the disclosing the information.

Section 36

80. In submissions to the Commissioner the DWP argued that the following information was exempt on the basis of section 36(2)(b)(i) and (ii):
 - 1(a), 6(a), 6(c), 6(d), 16(a), 17(a) and 19(a).
81. Furthermore, as noted above, the DWP argued that for documents where the Commissioner concluded that section 35 was not engaged, it wished to rely, in

the alternative, on the exemption contained at section 36, be it section 36(2)(b) or section 36(2)(c). The documents which fall within this scenario are:

82. For the exemption contained at 36(2)(b(i) and (ii)):
- 5(a), 11(a), 11(b), the part of document 13(d) not falling within the scope of section 35(1)(a) and 14(a).

83. And for the exemption contained at 36(2)(c):

- 6(b) and 18(a).

84. Section 36 states that:

'This section applies to-

*36- (1) (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.'*

85. As the quoted legislation above indicates, section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to inhibit, the free and frank exchange of views or would, or would be likely to prejudice the effective conduct of public affairs.

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

- Ascertained who is the qualified person or persons for public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
87. With regard to the fourth criterion, in deciding whether the opinion was 'reasonable' the Commissioner has been led by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] 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' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).
88. The Commissioner has also been guided by the Tribunal's findings in which 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 focussing on the likelihood on that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.

The engagement of section 36

89. 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 James Plaskitt MP, who at the time of this request was Parliamentary Under Secretary of State at the DWP. The Commissioner is therefore satisfied that Mr Plaskitt was a qualified person for the purposes of section 36 of the Act.
90. In its submissions to support the application of section 36, the DWP has explained that the process by which this opinion was provided was as follows: Mr Plaskitt's opinion was sought on 19 April 2007, before a substantive response was sent to the complainant in this case. The DWP also explained that Mr Plaskitt approved the use of section 36, including the form of words to be used in the reply applying section 36 to the various pieces of information. The DWP also provided the Commissioner with a summary of the factors Mr Plaskitt took into account in reaching his opinion that certain documents were exempt on the basis of section 36(2)(b) or 36(2)(c). In addition to this the DWP provided the Commissioner with a detailed explanation as to why it considered the information to be exempt on the basis of section 36(2)(b) and 36(2)(c).

91. The Commissioner notes that the document which outlines the factors which Mr Plaskitt took into account does **not** specifically explain the factors he considered in forming the view that disclosure would lead to either free or frank discussion being inhibited or why disclosure would, or would be likely to, lead to the prejudice of effective public affairs. Instead, this document simply includes a brief summary of the public interest factors in this case and why disclosure of the information is not in the public interest. Although there is clearly some connection between why the public interest may favour withholding the information and any inhibition or prejudice that may occur, the DWP's submissions do not clearly identify *why* Mr Plaskitt arrived at the position that he did. However, the document which the DWP supplied to the Commissioner in which it elaborates on why the exemptions contained at section 36 were engaged does include more detailed reasoning as to why the information in question is exempt on the basis of section 36(2)(b) and 36(2)(c).
92. This leaves the Commissioner in a somewhat difficult position; although the DWP's submissions hint or suggest at why the Minister reached the opinion he did, it is not explicitly clear that he considered the exemptions contained at sections 36(2)(b) and 36(2)(c) to apply on the basis of the more detailed reasoning also provided by the DWP to the Commissioner. In respect of this point the Commissioner has been guided by the Tribunal's comments in the case *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)* in which the Tribunal explained that:
- 'where the opinion is overridingly reasonable in substance then even though method or process by which that opinion is arrived at is flawed in some way need not be fatal to a finding that it is a reasonable opinion'
(para 31)
93. Despite not being provided with evidence that explicitly explains why the qualified person considered the information in question to be exempt (as opposed to why the DWP considered the information to be exempt), the Commissioner is satisfied that the opinion appears to be overridingly reasonable in substance for the following reasons:
94. With regard to sections 36(2)(b)(i) and (ii) the Commissioner accepts that that it is reasonable to conclude that disclosure would reveal examples of free and frank discussions which could lead to civil servants and special advisors being less willing to discuss issues in a free and frank nature in the future when dealing PQs because they would be concerned that such discussions may be placed in the public domain.
95. With regard to the section 36(2)(c) the Commissioner accepts that it is reasonable to conclude that disclosure of background information used in the completion of responses to PQs, including draft responses themselves, may result in a focus on these deliberations rather than on the final response to the PQ. A consequence of this could be speculation over the integrity of the PQ response and distraction away from the content of the PQ response, something which the DWP argue is not conducive to the effective conduct of effective government.

96. Therefore, despite not being provided with details of the explicit evidence which led the Minister to reach the conclusion that the information was exempt on the basis of section 36, the Commissioner is of the view that the opinion appears to be overwhelmingly reasonable in substance. He is therefore satisfied that sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged in relation to the information that has been withheld.
97. However, before moving on to consider the public interest test, the Commissioner also notes that none of the DWP's submissions clearly identify whether it considers the likelihood of the inhibition (in the case of section 36(2)(b)) or prejudice (in the case of section 36(2)(c)) 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 again noted the comments of the Information Tribunal in the case of *McIntyre* in which the Tribunal explained that:
- “...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.” (para 45)
98. The Commissioner has therefore assumed that it is the DWP's position that should the information be disclosed the likelihood of inhibition or prejudice occurring is one that is simply, likely to occur, rather than one that would occur.

Public interest test

99. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated 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:
- '88. 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.'*
100. As noted above, at para 91 the Tribunal 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 whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

101. For the purposes of this case, the Commissioner has separated the public interest considerations into section 36(2)(b) and section 36(2)(c).

Public interest arguments against disclosing the information in relation to section 36(2)(b)(i) and (ii)

102. The Commissioner accepts that there is a public interest in providing a private space for free and frank provision of advice, and deliberations of such advice, with regard to the preparation of PQs. This private space allows for the discussion of various issues relevant to each PQ and allows for various different approaches to answering the PQs to be considered. Moreover, by provision of candid advice, including where necessary advice which may be critical of Government policy or previous decisions, Ministers are able to see the PQ in the political context it was asked, the political motivation behind the PQ and a full overview of any policy issues. Furthermore, the Commissioner also acknowledges that preparation of PQ responses can involve the consideration of complicated issues which need to be answered quickly; this time limit for preparing responses can mean that officials need have candid discussions so that the response to PQs can be quickly and efficiently agreed upon.
103. In relation to criteria outlined by the Tribunal, (i.e. the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs that may occur) the Commissioner would make the following comments: The Commissioner notes the centrality of PQs to the business of the Houses of Parliament; PQs are can be submitted in both the Commons and the Lords and the Commissioner understands that around 80,000 questions are asked each year.⁴ Therefore, if information used in the preparation of PQs was disclosed, free and frank provision or discussion of views was the result of such a disclosure, given the significant number of PQs submitted each year, it will be on a relatively frequent basis that such inhibition may occur (albeit preparation of not every PQ will require free and frank discussion). The Commissioner also notes that as a PQ can be submitted on virtually any topic on which the government has responsibility, there are a significant number of officials across many government departments who may be asked to assist in the preparation of a PQs and thus the potential for inhibition to the free and frank discussion of views may be correctly considered to be widespread.

Public interest arguments against disclosing the information in relation to section 36(2)(c)

104. It is not in the public interest that the answers provided in response to PQs are distracted from; disclosure of the deliberations and background information used to formulate the answer may lead to more time and resource having to be used to defend or re-examine answers provided in response to PQs. As a consequence Ministers may be held to account not only for the answer provided to Parliament, but also for any comments made in the preparations for the answer.

⁴ Source <http://www.parliament.uk/documents/upload/p01.pdf>

105. Again, the Commissioner accepts that the comments made in the paragraph above in relation to the severity, extent and frequency of any inhibition to free and frank discussion could be said to apply equally to prejudice to the effective conduct of public affairs that may occur if the information was disclosed.

Public interest arguments in disclosing the information in relation to sections 36(2)(b)(i) and (ii) and section 36(2)(c).

106. The DWP suggested that there is a public interest in transparency to allow scrutiny of the internal information held on polygamous marriages to aid understanding of the policy behind the way in polygamous marriages are treated in the social security benefits system. The Commissioner believes that this greater understanding could very informative to the public debate surrounding the issue of how those in polygamous marriages should be treated under the benefits system.
107. The Commissioner also believes that disclosure of the information could inform the public about how a key mechanism within Parliament, namely PQs, operates. It could be argued that it is in the public interest that the public have a sound understanding of the processes and procedures by which are vital to the democracy of the UK.
108. Moreover, disclosure of the information could re-assure the public that the steps taken in preparation of the responses to the PQs were thorough and detailed. As a consequence public confidence in the integrity of the PQ system could be increased. Furthermore the Commissioner believes that disclosure of the full information behind a decision, or in this case a response to a PQ, would remove any suspicion of the answer being 'spun'.

Balance of public interest arguments

109. In considering where the balance of the public interest lies, the Commissioner notes that the arguments for non-disclosure outlined above rely on the fact that the content of the information requested is in fact free and frank and thus disclosure would inhibit similar discussions in the future. If information is not of a sufficiently candid and frank nature, the Commissioner believes that the severity of harm that may occur would be low and thus the public interest in withholding may not outweigh the public interest in disclosure. Such an approach is equally true for the information being withheld on the basis of section 36(2)(c).
110. Having reviewed the various documents which the DWP has applied sections 36(2)(b) and 36(2)(c) to, the Commissioner accepts that they all contain examples of free and frank debate and deliberations, and information of the nature which may potentially distract from the answers provided in response to PQs.
111. The Commissioner acknowledges that disclosure could provide the public with further information as to the Government's position on a contentious issue, and inform the public as to the process of PQs operates when dealing with politically sensitive issues. However, in weighing the public interest arguments, the Commissioner has placed considerable weight on the central role PQs play in the

operation of Houses of Parliament and in particular the role free and frank discussion plays in the preparation of the response to the 80,000 or so PQs submitted each year. On balance the Commissioner has concluded that the public interest in maintaining the exemptions contained at sections 36(2)(b) and 36(2)(c) outweigh the public interest in disclosing this information.

The Decision

112. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
113. The DWP was correct to withhold the following documents on the basis of section 42(1):
- 2(a)-2(c); 3(a)-3(d); 4(a); 7(a); 8(a); 9(a); 10(a); 11(c); 12(a); 13(a)-13(c),13(e)-13(g), 13(i); 15(a).
114. The DWP was correct to withhold the following documents on the basis of section 35(1)(d):
- 5(a) and 13(h).
115. The DWP was correct to withhold the following documents on the basis of sections 36(2)(b)(i) and (ii):
- 1(a); 5(a); 6(a), 6(c), 6(d); 11(a), 11(b); the part of document 13(d) not falling within the scope of section 35(1)(a); 14(a); 16(a); 17(a) and 19(a).
116. The DWP was correct to withhold the following documents on the basis of section 36(2)(c):
- 6(b) and 18(a).
117. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
118. The DWP was incorrect to withhold the following document on the basis of section 35(1)(a) because although it falls within the scope of the exemption, the public interest in maintaining the exemption does not outweigh the public interest in disclosure:
- The part of document 13(d) which the Commissioner considers to relate to the formulation or development of government policy.

Steps Required

119. The Commissioner requires the DWP to provide the complainant with the part of document 13(d) which the Commissioner considers to fall within the scope of the exemption contained at section 35(1)(a) with 35 calendar days of the date of this notice.
120. The Commissioner has provided the DWP with a confidential annex which identifies which part of document 13(d) which he has ordered to be disclosed.

Failure to comply

121. 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

122. 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.
Website: www.informationtribunal.gov.uk

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

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of July 2008

Signed

**Richard Thomas
Information Commissioner**

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

Annex A

Request 1

The number of polygamous wives claiming benefit in the United Kingdom per husband.

Request 2

Since 1997, information concerning the annual amount of money paid in benefits to wives in polygamous marriages, and the number of such wives claiming benefits.

Request 3

Information concerning financial advantages experienced by those in polygamous marriages as opposed to monogamous marriages.

Request 4

Information including documents and emails used in the preparation of the response to House of Lords question HL6862 from Baroness Cox to Lord Hunt of Kings Heath about Benefits and Polygamy, answered on November 7 2006

Request 5

Information including documents and emails used in the preparation of the response to House of Commons question 118803 from Philip Hammond to the Secretary of State for Work and Pensions about Polygamous Marriages, answered on February 19 2007.

Request 6

Information including documents and emails used in the preparation of the response to House of Commons question 51206 from Mr Letwin to the Secretary of State for Work and Pensions about Polygamy, answered on May 14 2002.

Annex B

Request 4

Document number	Summary of DWP description	ICO numbering/description of pieces of information	DWP exemption(s) claimed	ICO position on application of exemption(s)	Public interest favour disclosure?
1	Draft PQ response (background note and Annex A already released bar one para - see doc 16).	1(a) draft response to PQ	1(a) - s36(2)(b)	1(a) – s36(2)(b) engaged.	1(a) – No.
2	Series of emails between Minister's Private Office and policy officials and lawyers.	2(a) email dated 30.10.06 at 15:58 2(b) email dated 30.10.06 at 17:16 2(c) email dated 30.10.06 at 17:56	2(a) to 2(c) all - s36(2)(b); s42; s35(1)(d)	2(a)-2(c) within scope of s42(1).	2(a) – 2(c) – No.
3	4 pieces of legal advice provided by DWP lawyer.	3(a) – 3(d) four separate pieces of legal advice	3(a)–3(d) s42	3(a)-3(d) within scope of s42(1)	3(a) – 3(d) – No
4	Internal emails from DWP including correspondence with lawyers.	4(a) email dated 31.10.06 and attachments including legal advice forming docs 3(a)-3(d) and draft version of PQ.	4(a) - s36(2)(b); s42; s35(1)(d)	4(a) and attachments fall within scope of s42(1).	4(a) – No.

5	Email from Minister's Private Office.	5(a) email dated 01.11.06 at 08:37.	5(a) - s35(1)(d) or in the alternative, s36(2)(c).	5(a) within scope of s35(1)(d).	5(a) – No.
6	Internal emails regarding draft PQ reply.	6(a) email dated 01.11.06 at 09:54 6(b) email dated 01.11.06 at 12:34 6(c) email dated 01.11.06 at 12:51 6(d) email dated 01.11.06 at 14:00.	6(a) - 36(2)(b)(i) & (ii) 6(b) - s35(1)(d), or in the alternative s36(2)(c). 6(c) - s36(2)(b) 6(d) - s36(2)(b)	6(a), 6(c), 6(d) – s36(2)(b) engaged. 6(b) – s36(2)(c) engaged.	6(a), 6(c) & 6(d) – No. 6(b) – No.
7	Comments on draft response from a DWP lawyer.	7(a) email dated 01.11.06 at 14:27 containing legal advice	7(a) - s42	7(a) within scope of s42(1)	7(a) – No.
8	DWP lawyer comments on draft response to officials and a legal colleague.	8(a) email dated 01.11.06 at 14:53 containing legal advice	8(a) - s42(1)	8(a) within scope of s42(1)	8(a) – No.
9	Comments from one DWP lawyer to another DWP lawyer on draft response.	9(a) email dated 01.11.06 at 16:45 containing legal advice.	9(a) - s42(1)	9(a) within scope of s42(1)	9(a) – No.
10	Email string between a DWP lawyer and	10(a) email dated 01.11.06 at 17:59 containing request for	10(a) - s42(1)	10(a) within scope of s42(1)	10(a) – No.



	officials with further legal advice and comments.	legal advice			
11	Email string with further comments and legal advice.	<p>11(a) email dated 01.11.06 at 15:55 attaching draft of PQ response.</p> <p>11(b) email dated 01.11.06 at 16:00 forwarding on draft.</p> <p>11(c) email dated 01.11.06 at 17:52 attaching legal advice</p>	11(a) – 11(c) both s36(2)(b) and s42	11(c) within scope of s42(1); 11(a) and 11(b) not within scope of 42(1) but s36(2)(b) is engaged.	<p>11(c) – No</p> <p>11(a) and 11(b) – No.</p>
12	Internal email	<p>12(a) email dated 02.11.06 at 10:26 attaching latest version of draft response to PQ, sent to various including lawyer</p>	12(a) covered by s36(2)(b);s36(2)(c);s35(1)(d);s42	12(a) within scope of s42(1)	12(a) – No.
13	Email string between lawyers and officials commenting on draft response and wider policy issues.	<p>13(a) email dated 02.11.06 at 10:41 including latest draft of response.</p> <p>13(b) email dated 02.11.06 at 11:09 including latest draft.</p> <p>13(c) email dated 02.11.06 at 12:44</p> <p>13(d) email dated</p>	<p>13(a), (b), (c): s42 applies.</p> <p>13(d) from Secretary of State to officials commissioning comments on potential changes and comes under s35(1)(d) and 35(1)(a)</p> <p>13(e),(f) & (g): s42</p>	<p>13(a) – 13(c); 13(e) – 13(g) and 13(i) within scope of s42(1).</p> <p>13(d) – none of document is s35(1)(d), but part is s35(1)(a). The remainder is</p>	<p>13(a) – 13(c); 13(e) – 13(g) and 13(i) – No.</p> <p>13(d) – part of document which is 35(1)(a) – Yes. Part of document that is 36(2)(b) – No.</p>

		02.11.06 at 15:14 13(e) email dated 02.11.06 at 17:21 13(f) email dated 02.11.06 at 17:50 including draft response 13(g) email dated 02.11.06 at 17:56 13(h) email dated 03.11.06 at 10:15 13(i) email dated 03.11.06 at 14:00	applies 13(h): this is SoS to officials and s35(1)(d) applies - If Commissioner does not agree, DWP would wish to fall back on s36(2) (c) in the alternative 13(i): s42. Note: a number of the emails are from/to a Senior Principle Legal Officer for DWP.	s36(2)(b). 13(h) within scope of s35(1)(d).	13(h) – No.
14	Internal email,	14(a) email dated 06.11.06 at 10:05 attaching further revised version of PQ	14(a) s35(1)(d) or in the alternative s36(2)(b).	14(a) not within scope of s35(1)(d) but s36(2)(b) is engaged.	14(a) – No.
15	Comments from lawyer	15(a) email dated 06.11.06 at 17:28 containing legal advice	15(a) - s42	15(a) within scope of s42(1).	15(a) – No.
16	Extract from background note accompanying final PQ response.	16(a) extract from background note.	16(a) - s36(2)(b)	16(a) - s36(2)(b) engaged.	16(a) – No.

Annex C**Request 6**

Document number	Summary of DWP description	ICO numbering/description of pieces of information	DWP exemptions claimed	ICO position on application of exemption	Public interest favour disclosure?
17	First versions of response to the PQ.	17(a)	17(a) – s36(2)(b)	17(a) – s36(2)(b) engaged.	17(a) – No.
18	Comments on draft response.	18(a)	18(a) – s35(1)(d), or in the alternative s36(2)(c).	18(a) not within scope of s35(1)(d) but s36(2)(c) is engaged.	18(a) – No.
19	Extract from background note.	19(a)	19(a) – s36(2)(b)	19(a) - s36(2)(b) engaged.	19(a) – No.

Legal Annex

Section 1(1) provides that -

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

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

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

Section 1(2) provides that -

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

Section 1(3) provides that –

“Where a public authority –

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

(b) has informed the applicant of that requirement,

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

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 35(1) provides that –

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

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

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.