

Freedom of Information Act 2000 (Section 50)

Decision Notice

15 December 2008

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

Summary

The complainant wrote to the Department for Culture, Media and Sport (DCMS) to request various categories of information relating to the Rooswijk shipwreck. The DCMS informed the complainant that the only information it held in relation to his request were the minutes of a meeting between officials from the Department, the Dutch Ministry of Education, Culture and Science (OCW) and other parties, and extracts from the minutes of three meetings of the Advisory Council on Historic Wreck Sites. Much of this information was supplied to the complainant, but certain aspects of the information were withheld under the following exemptions under the Act: section 27(1)(a) (International relations) and section 36(2)(b) (Prejudice to effective conduct of public affairs). The complainant appealed to the Commissioner about the withholding of this information.

The Commissioner decided that some of the information withheld from the complainant was exempt from disclosure under section 40(2) of the Act (personal information). In relation to the remaining information, he decided that the information withheld under section 27(1)(a) should be disclosed; and that of the information withheld under section 36(2)(b), the balance of the public interest test favours the maintenance of the exemption in respect of some of the information but the disclosure of the remainder. The Commissioner also found that there were some procedural breaches of the Act in the department's handling of the complainant's request.

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 17 March 2007, the complainant wrote to the Department for Culture, Media and Sport (DCMS) to request a "list of documents and other information" relating to the following:
 1. Minutes of the meetings of the Advisory Committee on Historic Wreck Sites where the matters arising out of the discovery of the Rooswijk Shipwreck were discussed and/or voted upon. Only extracts relating to the Rooswijk are required.
 2. Logs of the divers employed by Wessex Archaeology to carry out the site assessment on the Rooswijk Site in June 2006. If the logs of the Dutch divers are available copies of these as well.
 3. The draft report of the contracted divers on which the report of Wessex Archaeology was prepared.
 4. All letters, emails or notes of telephone conversations or telephone logs between [named individual] (including those received by him) and third parties relating to the Rooswijk (except those made between him and others in the DCMS, Wessex Archaeology or English Heritage in the course of his duties) during the period November 2005 and June 2006 and in particular the email to any individuals during December 2006 and any to [named individual] and any received by him.
 5. Minutes of a meeting held between [named individual] and others from the above organisations with Dutch Government representations on or around 9 May 2007.
 6. The costings of the site assessment carried out in June 2006."

DCMS response

3. The DCMS responded to the complainant on 18 April 2007. It provided him with the following information:
 - Copies of the minutes of the Advisory Council on Historic Wreck Sites (ACHWS) at which designation of the Rooswijk was discussed (those dated 28/2/2006, 5/7/2006 and 6/12/2006). The complainant was informed that text which is not relevant to the request for information relating to the designation of the Rooswijk was redacted. Exempt information was also redacted (see paragraph 4 below)
 - A redacted copy of the minutes of a meeting that was held on 9 May 2006 between officials from the Department, the Dutch Ministry of Education, Culture and Science (OCW) and other parties, including English Heritage.
4. DCMS informed the complainant that it cannot provide him with some of the information contained in the minutes (details of the minutes and relevant

paragraphs provided) “because it is exempt from disclosure under section 27 (prejudice to international relations) or section 36 (prejudice to effective conduct of public affairs) of the Act”. It provided the following justification for this decision (the following bullet points are direct quotations):

- Section 36 of the Act requires the reasonable opinion of a qualified person that the provisions of section 36 apply. In this case the ‘qualified person’ is a Minister of the Crown and the appropriate person has given their opinion that release of this information would cause prejudice as defined by section 36. It was considered that section 36 applied because the disclosure of the information requested would inhibit (i) the free and frank provision of advice of (ii) the free and frank exchange of views for the purposes of deliberation (s36(2)(b)).
- In both the use of section 27 and section 36 of the Act, we have concluded that the balance [of the public interest] lay in withholding this information. This is because the public interest in understanding the decision making process relating to the designation of the Rooswijk would be outweighed by the likelihood that the release of this information would, or would be likely to, prejudice the relations between the UK and the Dutch Government or would, or would be likely to, inhibit the candid discussion between the Department’s officials and its advisory bodies which are vital to the provision of balanced advice to DCMS Ministers.

5. DCMS also provided the complainant with the following public interest factors it considered in respect of both section 27 and section 36 (the following bullet points are direct quotations):

In favour of disclosure

- There is a public interest in understanding the way in which UK Government works and how Ministers interact with their advisory bodies and officials....(including those of overseas Governments and their specialist agencies).
- Open policy making may lead to more accountability and increased trust and engagement between citizens and government.

In favour of maintaining the exemption

Section 36

- The importance of Government advisory bodies having the free space to conduct rigorous and candid risk assessments...They must be able to do so in an environment that allows a free and frank exchange of views, as such discussions make for better decision-making....This includes officials being free to report back in documents relating to advisory meetings without concerns that this information would be disclosed.

Section 27

- Disclosure would, or would be likely to, undermine the willingness in future of the Dutch Government and its specialist agencies to supply other advice and assistance or enter into free and frank discussions on the designation of the Rooswijk, or on any other wreck sites or on any other UK policy subject.

- If the disclosure of this information was to become known...it would, or would be likely to, prejudice other states' willingness to provide information of this kind to the UK. To release the information would undermine the basis of confidence underpinning these discussions and the reporting of these in a free and factual way, and therefore impede good and effective administration.
6. Finally, DCMS informed the complainant that no information was held in respect of points 2, 3, 4 and 6 of his request.

Internal review

7. On 27 April 2007 the complainant requested an internal review of the Department's decision and, on 4 May 2007, he suggested to it that the following views be taken into consideration in the review:
1. Candid discussions should not be protected in circumstances such as this where matters of peripheral public interest are concerned and where such discussions could lead to a misapplication of common or statute law. This is a matter not involving in any way any high level of Government security or the congress of an advisory body such as to justify the draconian censorship here exercised.
 2. No matters of such diplomatic importance or embarrassment were involved to justify such a lack of transparency. The Dutch Government (Minister of Finance) were and are my contract partners and had approved my project. They had supplied me with a copy of the letter from the government Inter Departmental Committee on Historic Shipwrecks outside Holland objecting to designation and it is imperative for me to know whether this matter came before the committee at any time and any debate thereon.
 3. In addition to the Wessex report two experts...addressed the Committee. Any discussion exempted from disclosure is a relevant matter in view of the stated specific instruction from [named individual] that no comments on his (Wessex) report were expected.
8. On 1 August 2007 the DCMS notified the complainant of the outcome of its internal review. It informed him of its conclusion that "the information withheld under sections 27 and 36 of the Act properly falls within those sections". However, it stated that it now considers the public interest lies in the disclosure of some of the information initially withheld. This information was provided to the complainant and consisted of further extracts from minutes of three of the meetings detailed in paragraph 3 of this Notice. However, it concluded that the balance of the public interest falls in favour of withholding the remaining information to which sections 27 and 36 apply. Its reasoning largely matched that in the initial response to the request. However, it also advised the complainant that: "the public interest in transparency has already been met by the disclosure of some information in the DCMS response of 18 April 2007, and by the earlier disclosure by English Heritage of the undesignated site assessment report of the Rooswijk wreck site undertaken by Wessex Archaeology".

9. In response to the complainant's letter of 4 May 2007, the DCMS also provided the following confirmation, but stated that this was not within the scope of its internal review:
- The role of the ACHWS in the designation process is to advise the Secretary of State whether a site nominated for protection complies with the terms of the Protection of Wrecks Act 1973 and the non-statutory selection criteria. This advice is informed by archaeological investigation undertaken by the Government's contractor in support of the Protection of Wrecks Act 1973.
 - Only if the ACHWS recommends a site for designation on this basis does English Heritage consult stakeholders on behalf of the Department. The outcomes of consultation are intended to inform decisions taken by Ministers, not the advice provided to them by the Committee.
 - In the case of the Rooswijk, consultees included the Dutch state and a response was received on behalf of the Dutch Historic Shipwrecks outside the Netherlands. This was taken into account by the Secretary of State when considering whether to proceed with designation.
 - The Interministerial Committee on Dutch Historic Shipwrecks outside the Netherlands was also consulted in relation to the request for information, and again in relation to the review. Their views have been taken into account in the response of 18 April, and in reaching the conclusions outlined in the internal review.

The Investigation

Scope of the case

10. On 20 September 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
11. Having reviewed the complainant's representations, the Commissioner has focused his investigation on whether the DCMS had appropriately withheld the information to which exemptions were applied, and whether the information redacted from the documents supplied to the complainant did in fact fall outside the scope of the request.

Chronology

12. On 25 April 2008, the Commissioner wrote to the DCMS in which he requested the following information:
- i. Copies of all information withheld from the complainant to which one or more exemptions were applied, with each aspect of the information marked to identify the exemption relied upon.

- ii. Copies of the text blanked out in documents sent to the complainant which were not considered to fall within the scope of his request.
 - iii. In relation to the application of the section 36 exemption, details of the following:
 - the date the request was put to the qualified person and the identity of the qualified person;
 - the nature of the request made to the qualified person; and
 - any evidence demonstrating the agreement of the qualified person.
 - iv. Any further representations which DCMS wishes to make on this case.
13. DCMS responded to the Commissioner on 4 June 2008. It provided copies of the information withheld from the complainant, identifying where each exemption was used, and the information that was redacted because it was not considered to fall within the scope of the request. In relation to the application of section 36, the DCMS provided a copy of an email from the Minister's Private Secretary, dated 16 April 2007, confirming the agreement of the qualified person on the use of section 36. It also provided the Commissioner with the following explanation:
- i. A request for consideration on the use of section 36 was made to David Lammy (the then Minister for Culture) on 12 April 2007.
 - ii. The request was in terms of a formal ministerial submission. This set down the issues the Minister would need to consider as a 'qualified person' under section 36 of the Act plus a summary of the information in question. The Minister was also provided with copies of the ACHWS meeting minutes for 28/2/2006, 5/7/2006, 6/12/2006, with the proposed redacts indicated. The submission also included a short background on the effective delivery of the Government's duties under the Protection of Wrecks Act 1973, along with a copy of the rationale for designating the Rooswijk wreck site.
14. On 12 June 2008, DCMS provided the Commissioner with background information about this case (see 'Findings of Fact' section) and confidential representations to further explain its application of sections 27 and 36. The information provided in confidence referred to the specific contents of the exempt information and the reasons why exemptions were applied to it.

Findings of fact

15. The Rooswijk was a 'retourschip', an armed merchant vessel built by and for the Dutch East India Company and designed for repeat trading missions between Holland and Asia. She was wrecked in a storm on the Goodwin Sands on her second voyage in December 1739 with the loss of all hands. The wreck was discovered in 2004, although DCMS and English Heritage were not informed until 2005. An assessment of the wreck site was undertaken by the Department's contractor (Wessex Archaeology) in June 2006. This concluded that it was a strong candidate for designation under the Protection of Wrecks Act 1973. Wessex Archaeology's report was considered by the Advisory Committee on Historic Wreck Sites in July 2006, together with objections made in writing.

16. The Secretary of State designated an area of 150 metres around the site of Rooswijk wreck as a restricted area under the Protection of Wrecks Act 1973 on 17 January 2007 on the grounds of its historic and archaeological value. Once designated, it is a criminal offence for a person to carry on certain activities within the restricted area unless a licence has been granted by the Secretary of State authorising the activity.

Analysis

17. The provisions of sections 1, 17, 27 and 36 of the Act can be found in the Legal Annex.

Procedural matters

Section 1 – General right of access to information held by public authorities

18. The Commissioner viewed the information redacted from the documents sent to the complainant on the grounds that it did not fall within the scope of his request (as it does not relate to the Rooswijk). This information consisted of large extracts from the minutes of the Advisory Committee on Historic Wreck Sites meetings of 28/2/06, 5/7/06 and 6/12/06.
19. The Commissioner has concluded that, within that redacted information, the following relates to the Rooswijk:

ACHWS meeting 6/12/06 – Paragraph 14.3
20. By neither supplying this information to the complainant, nor applying an exemption to withhold it, DCMS breached section 1(1)(b) of the Act. However, he is satisfied that in respect of all the remaining information considered to fall outside the scope of the request, this was the case.

Section 17 – Refusal of request

21. In respect of section 27, the Commissioner notes that in the refusal notice the complainant was not informed of the specific subsection of this exemption being relied upon. This constitutes a breach of section 17(1)(b).

Exemptions

Section 27 – International relations

22. The Commissioner notes from the DCMS letter to him of 12 June 2008 that the following extracts were withheld from the complainant under section 27:

ACHWS meeting 5/7/06 – Paragraph 13.8

ACHWS meeting 6/12/06 – Paragraph 4.6 (first sentence)

DCMS/OCW meeting 9/5/06 – Paragraphs 11 (last sentence), 17, 25-27, 30-31, 32 (first six words).

23. The Commissioner studied the content of these paragraphs together with the DCMS reasoning for withholding it, particularly the explanation given in confidence in its letter to him of 12 June 2008. He concluded that the Department's reasoning for withholding the information relates to section 27(1)(a), in that disclosure would, or would be likely to, prejudice relations between the UK and other states.
24. For section 27(1)(a) to apply, it must be the case that disclosure of the information would, or would be likely to, prejudice the UK's international relations. In the case of *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005] the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (para 15). This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that: "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests".
25. The Commissioner also notes the decision of the Information Tribunal in *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* [EA/2006/0040]. In this case the Tribunal focused upon the foreign state's reaction to any disclosure of the information withheld under section 27. It suggested that an assessment of prejudice can be subjective, based on the sensitivity of the information as assessed by the foreign state. The MoD had sought the views of the foreign state and it was very clear that the foreign state concerned would be displeased if any information were released. At paragraph 81 the Tribunal stated:

"... we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage."
26. In the DCMS submission to the Commissioner of 12 June 2008, it states that in relation to the OCW meeting "officials from OCW concur" that "relations between DCMS and OCW would be damaged if confidential discussions on these matters were to be disclosed in full to third parties". The Commissioner was also informed of the express concerns of the Dutch in respect of this information and he took this into account in assessing the sensitivity of the information. However, the Commissioner was not informed of any express concerns of the Dutch in respect of the ACHWS meetings. Nevertheless, based on the content and context of this information, the Commissioner considers British and Dutch sensitivities in respect of this information to be similar.
27. However, the Commissioner proceeded to conclude that the following information does not engage the exemption under section 27 and should therefore be disclosed. This is on the grounds that he believes that release of the information

would neither prejudice nor be likely to prejudice the UK's relations with the Dutch Government (or any other state):

ACHWS meeting 5/7/06 – Paragraph 13.8

ACHWS meeting 6/12/06 – Paragraph 4.6 (first sentence)

DCMS/OCW meeting 9/5/06 – Paragraphs 11 (last sentence), 17.

28. Of the information withheld under section 27, the release of these specific aspects of information would not constitute “disclosure of the discussions in full”, nor would it disclose much of the remaining information to any significant extent. Moreover, the Commissioner considers that the information is not of a sufficient sensitivity or significance for the Information Tribunal's test of likelihood of prejudice to have been met, either in relation to the Tribunal's general test of prejudice or even, in relation to the OCW meeting, the test in the CAAT case. Instead, the Commissioner reached the view that OCW could not reasonably consider that release of these aspects of the withheld information would prejudice or would be likely to prejudice relations with the UK. In terms of context, the Commissioner was also guided in reaching his conclusion as to the sensitivity of this specific information by his view that the UK enjoys good, robust relations with the Netherlands.
29. However, the Commissioner is satisfied that the section 27 exemption is engaged in respect of the following information:
- DCMS/OCW meeting 9/5/06 – Paragraphs 25-27, 30-31, 32
30. In its submission to the Commissioner, DCMS argued that disclosure of this information ‘would’ prejudice the UK's relations with the Dutch Government. The Commissioner does not consider this higher threshold of prejudice to be met by this second category of information, as he does not believe that the information and DCMS reasoning provides sufficient evidence for him to accept this degree of certainty. However, the Commissioner is of the view that the information meets the lower threshold of “would be likely to prejudice” the UK's international relations, taking into account the Information Tribunal's view on prejudice. The Commissioner reached this conclusion on the basis of the sensitivity of specific matters discussed in these extracts and the circumstances in which the information was discussed.
31. Section 27 is a qualified exemption and therefore subject to section 2(2)(b) of the Act, which states that this exemption can only be maintained in respect of information where “in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information”. The Commissioner therefore proceeded to decide whether the balance of the public interest test under section 27(1)(a) favours the disclosure of the information to which he accepts that the exemption is engaged.
32. In respect of this information, the Commissioner considered the following factors to be of relevance in determining the balance of the public interest:

Public interest factors in favour of disclosing the information:

- i. Understanding the way in which Government operates, particularly in relation to dealings with overseas Governments, regarding issues and decisions affecting the UK and its citizens.
- ii. Providing further information to enable greater understanding of the decision made and matters considered regarding the designation of the Rooswijk wreck as a restricted area under the Protection of Wrecks Act 1973.
- iii. Transparency in decision-making, in relation to the process by which designation was implemented under the Protection of Wrecks Act 1973 in this case.
- iv. Promotion of debate about the process of designation, and enabling the public to challenge decisions made in this respect.
- v. Promoting the accountability of Government for decisions taken.
- vi. Promoting public participation in decision making in matters relating to the designation of the Rooswijk wreck as a restricted area under the Protection of Wrecks Act 1973.
- vii. For the public to see the “full picture” of the information used in the decision making process.

Public interest factors in favour of the maintenance of the exemption

- i. Undermining the willingness in future of the Dutch Government and its specialist agencies to supply other advice and assistance or enter into free and frank discussions on the designation of the Rooswijk, or on any other wreck sites or on any other UK policy subject.
 - ii. Prejudice to other states' willingness to provide information of this kind to the UK.
33. Having undertaken this analysis, the Commissioner did not consider the withheld information to be of a sufficient sensitivity for the arguments in favour of the maintenance of the exemption to outweigh those in favour of the disclosure of the information. Specifically, the Commissioner considers each of the public interest factors in favour of disclosure to strongly carry weight in this case, whereas he believes that there is only a possibility that each of negative consequences of disclosure, as set out in the factors in favour of the maintenance of the exemption, would occur.
34. The Commissioner further believes that, without the release of the information withheld under section 27, there would be an information gap in respect of fully understanding the decision to designate the Rooswijk and in how the designation was made in accordance with the Protection of Wrecks Act 1973. When

compared to the weaker opposing arguments favouring the maintenance of the exemption, the Commissioner therefore considers that the importance of fully understanding the Government's decision, and that of accountability for this decision (particularly the controversy surrounding the decision in this case), is such that the balance of the public interest strongly favours the disclosure of this information. He therefore requires this information to be provided to the complainant.

35. However, the Commissioner considers that the name of an official contained within paragraph 31 of the DCMS/OCW meeting 9/5/06, is exempt from disclosure under section 40 of the Act (Personal Information). He therefore considers that this information may be withheld under section 40 rather than section 27. The Commissioner's reasoning for this matches that in relation to the names of officials considered in the proceeding paragraphs.

Section 40 – Personal information

36. The Commissioner proceeded to analyse the information withheld under section 36 of the Act (Prejudice to effective conduct of public affairs). In doing so he noted that the following redactions consisted *solely* of the names of officials:

ACHWS meeting 28/2/2006 - paragraphs 7.9 and 7.10

37. The Commissioner did not consider whether section 36 was engaged in respect of this information. This is because he is satisfied that it constitutes personal information and that the exemption under section 40(2) applies to these references.

38. The relevant subsections of section 40 provide that:

(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).....*

39. In relation to section 40(2)(a), the Commissioner is satisfied that the names of the individuals detailed is personal data as defined in the Data Protection Act 1998. That Act defines personal data as:

...data which relate to a living individual who can be identified-

- a) from those data, or*
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...*

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

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

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

41. The Commissioner's decision is based upon the following analysis of this information, which led him to conclude that disclosure would be unfair:

- i. Details of the membership of the Advisory Committee on Historic Wreck sites (ACHWS) are a matter of public knowledge and the Commissioner understands that these two officials are members of that committee. However attributing the contributions made in these paragraphs (which have been disclosed) to the officials who made them would go way beyond disclosing the names in the context of a membership list of the committee.
- ii. This committee did not take the decision to designate the Rooswijk; rather this was taken at Ministerial level. The Commissioner therefore believes that accountability for this decision more properly rests at Ministerial level. While the Commissioner considers that disclosure of the minutes of the ACHWS meetings would serve to promote Government accountability, by highlighting evidence, analysis and recommendations taken into account in the formulation of the decision, he does not believe that the disclosure of these officials' names in this context would serve this aim.
- iii. The Commissioner does not consider there to have been a reasonable expectation on the part of these officials that their names would be likely to be released under FOI in the context of the contributions made in this part of the meeting. This is also the case because disclosure of these names would not, in itself, increase the public's understanding of the matter in question; otherwise it would be less likely to be the case that these officials could reasonably expect their names to not be disclosed in connection with these contributions.

42. The Commissioner therefore concluded that, as the names of these individuals are personal data and that their disclosure in this case would be unfair, the information is exempt from disclosure under section 40(2) of the Act.

Section 36 – Prejudice to effective conduct of public affairs

43. The Commissioner notes from the DCMS letter to him of 12 June 2008 that the following extracts were withheld from the complainant under section 36 (excluding that which he considers to be exempt under section 40):

ACHWS meeting 28/2/2006 – Paragraphs 7.12 - 7.14, 7.15 (fourth bullet point)

ACHWS meeting 5/7/2006 – Paragraph 13.9

ACHWS meeting 6/12/06 – Paragraph 4.6 (first part of second sentence)

44. In respect of this information, the Commissioner understands that section 36(2)(b) is the specific provision being relied upon. The Commissioner also notes the copy of the internal DCMS email of 16 April 2007 from the Minister's Private Secretary, provided to him, which stated the following:

“David [Lammy] has seen your submission of 12 April and has agreed to give as his opinion that disclosure of the information requested would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. He has noted official advice that public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

45. However, in order for the Commissioner to accept that section 36 applies, he must be satisfied that the relevant qualified person has provided his reasonable opinion and the Commissioner must agree that this opinion was reasonable. In this case, the Commissioner is satisfied that David Lammy (Minister of State at DCMS) was the appropriate qualified person and that he had considered the information to which section 36 was applied. In addition, the Commissioner considers that the DCMS letters to him of 4 June 2008 and 12 June 2008 provide sufficient detail as to the submission on which the qualified person based his opinion.
46. In terms of the reasonableness of the opinion, the Commissioner considered Information Tribunal case in *Guardian & Brooke v The Information Commissioner and the BBC*, in which the Tribunal considered the sense in which the reasonable person's opinion under s36 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” (para 64). Regarding the first point, the Tribunal stated that, “we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable” but acknowledged that, “on such matters there may (depending on the facts) be room for conflicting opinions, both of which are reasonable” (para 60). In addition, the Tribunal did not accept that the reasonable opinion had to be verified by evidence; in the sense that it is not possible to *prove* that something might happen in the future.

47. The Commissioner assessed the information withheld under section 36; the confidential reasoning as to the application of the exemption in the letter of 12 June 2008; and the DCMS explanation as to how section 36 was applied (as set out in paragraph 13 of this Notice), each with regard to the Information Tribunal's analysis as set out above. He concluded that the qualified person's opinion was both reasonable and reasonably arrived at. Specifically, the Commissioner concluded that he has no grounds for questioning the reasonableness of the Minister's opinion and did not consider there to have been any flaws in the process followed by the qualified person in arriving at his decision. The Commissioner is therefore satisfied that this information falls within the exemption set out in section 36(2)(b).
48. However, section 36 is subject to the public interest test. In determining the balance of the public interest in this case, the Commissioner considered the following factors to be of relevance:

Public interest factors in favour of disclosing the information:

- i. The decision to designate the Rooswijk had already been taken by the time of the complainant's request. Release of this information would therefore provide greater accountability and transparency for a decision taken rather than hampering the formulation of that decision.
- ii. The decision to designate the Rooswijk was considered to be controversial. The Commissioner believes that this stems, in part, from a lack of understanding behind the full reasons for the decision. Release of this information would serve to address this controversy. It would also promote debate about the process of designation, and enable the public to challenge decisions made in this respect.
- iii. Release of this information would serve the public interest in understanding the way in which the Government works and of how Ministers interact with their advisory bodies and officials, and with those with key experience or responsibility for the subject in question.
- iv. The promotion of trust and engagement between citizens, particularly by assisting the public in seeing the "full picture" of the information used in the decision making process.

Public interest factors in favour of the maintenance of the exemption:

- i. The importance of Government advisory bodies having the free space to conduct rigorous and candid risk assessments of the issues at hand, including consideration of the advantages and disadvantages of different approaches. Such discussions make for better decision-making. Disclosing this information may prejudice the ability of advisory bodies such as the ACHWS to conduct their work in this manner.
- ii. The effective delivery of the Government's duties under the Protection of Wrecks Act 1973 depends upon decision-making that is informed by the

best advice available. Disclosure of this information may inhibit the willingness of ACHWS members to speak freely about contentious issues in future, or may cause their advice to be presented differently than would otherwise be the case. This would affect the quality of advice given to Ministers.

49. The Commissioner concluded that, in respect of the following information, the public interest in the maintenance of section 36 outweighs that in the disclosure of the information.

ACHWS meeting 28/2/2006 – Paragraph 7.12, 7.14, 7.15 (fourth bullet point)
ACHWS meeting 5/7/2006 – Paragraph 13.9

50. The Commissioner therefore accepts that this information is exempt from disclosure. He considered that, in respect of the nature and context of this information, all the arguments favouring the disclosure of the information carry weight. However, the Commissioner considered the arguments for the maintenance of the exemption to be more persuasive, to the extent that the negative implications for the public interest set out above are likely to occur from the disclosure of the information. In addition, the Commissioner believes that these implications in this case are such that the public interest in the disclosure of the information is outweighed.

51. However, with regard to the following information, the Commissioner believes that the public interest in the disclosure of the information outweighs that in the maintenance of the exemption:

ACHWS meeting 28/2/2006 – Paragraph 7.13
ACHWS meeting 6/12/06 – Paragraph 4.6 (first part of second sentence)

52. In respect of this category of information, the Commissioner reached his decision for the following reasons:

- i. The Commissioner considers that release of this information would greatly assist in accounting for the decision to designate the Rooswijk by disclosing a significant matter considered by the ACHWS in support of its designation. It would also account for the DCMS position in respect of the conformity of the complainant's contract with the Dutch Government (regarding the excavation of the Rooswijk) with the UK Government's decision to designate the site. Disclosure would therefore assist in explaining and furthering understanding of the reasoning behind the decision. In doing so, the Commissioner also believes that it would assist in addressing the controversy arising out of the decision. In contrast, the Commissioner does not believe that disclosure of the information referred to in paragraph 49 would serve these purposes to such an extent.
- ii. The Commissioner believes that this information is more relevant to the actual decision to designate the Rooswijk than the information referred to in paragraph 49, which relates to slightly wider matters in respect of the Rooswijk's designation.

- iii. The Commissioner also considers that the content of this information is less sensitive and candid, and less free and frank in nature, than the information referred to in paragraph 49. The Commissioner believes that this is so to the extent that the negative consequences for the public interest, identified in paragraph 49, are not sufficient in respect of this information to outweigh the arguments in favour of disclosure.
53. The Commissioner therefore considered the arguments in favour of the maintenance of the exemption in respect of information referred to in paragraph 48 to be less persuasive when compared with the public interest in its disclosure. The Commissioner therefore concluded that this information should be released.

The Decision

54. 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:
- i. The application of section 36(2)(b) (Prejudice to effective conduct of public affairs) to withhold four items of information.
55. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Breach of section 1(1)(b) (General right of access to information held by public authorities) in not disclosing to the complainant paragraph 14.3 of the ACHWS meeting 6/12/06.
 - ii. Breach of section 17(1)(b) (Refusal of request) in respect of the refusal notice. This is because the complainant was not informed of the subsection of section 27 being relied upon.
 - iii. The application of section 27(1)(a) (International relations) to four items of information withheld.
 - iv. In respect of six items of information withheld under section 27(1)(a) (International relations), incorrectly concluding that the public interest in the maintenance of the exemption outweighs that in the disclosure of the information.
 - v. In respect of two items of information withheld under section 36(2)(b) (Prejudice to effective conduct of public affairs), incorrectly concluding that the public interest in the maintenance of the exemption outweighs that in the disclosure of the information.
56. In addition, the Commissioner has decided that three references to officials withheld from the complainant are exempt from disclosure under section 40(2) (Personal information).

Steps Required

57. The Commissioner requires the public authority to take disclosure the following information to the complainant in order to ensure compliance with the Act:
- i. ACHWS meeting 28/2/06 – Paragraph 7.13.
 - ii. DCMS/OCW meeting 9/5/06 – Paragraphs 11 (last sentence), 17, 25-27, 30, 31 (excluding name of official) and 32 (first six words).
 - iii. ACHWS meeting 5/7/06 – Paragraph 13.8.
 - iv. ACHWS meeting 6/12/06 – Paragraphs 4.6 (first sentence and first part of second sentence) and 14.3.
58. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

59. 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

60. 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 15th day of December 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

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

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

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

International Relations

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

Section 27(4) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(5) provides that –

“In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides that –

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

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

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or

- (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.