Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 March 2009

Public Authority: Home Office Border & Immigration Agency
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information concerning changes in the implementation of immigration rules. The public authority refused to provide this information under section 12 (the appropriate limit) and it invited the complainant to narrow his request. His refined request was partly refused under section 36(2)(b)(i) & (ii) (prejudice to the conduct of public affairs), the majority again being refused under section 12.

The Commissioner has investigated and found that to process the full request would have exceeded the appropriate limit. He further finds that section 36 is engaged in respect of the information which was considered within the appropriate limit but that the public interest in favour of maintaining the exemption does not outweigh the public interest in disclosure.

The Commissioner requires the public authority to disclose the information which has been withheld under section 36(2)(b)(i) & (ii) unless it is exempt by virtue of section 40(1) or 40(2). In failing to release information the Commissioner finds that the public authority breached sections 1(1)(b) and 10(1). The complaint is therefore partially upheld.

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 Act. This Notice sets out his decision.

Background

2. The complainant used to work for the Home Office Immigration and Nationality Directorate (IND). He was suspended as a result of disclosures he made to The Sunday Times on 7 March 2004, pending an investigation. (The IND is now known as the Border & Immigration Agency (BIA)).

3. The following are cited extracts from the article, the full article being available online at: http://www.timesonline.co.uk/tol/news/uk/article1039432.ece

- *[The complainant] had been led to believe he would be carefully assessing the detailed applications of non-European Union nationals who wanted to settle in Britain as economic migrants. He thought he would be acting as a "gatekeeper" to decide on a case-by-case basis whether would-be migrants and their families were properly entitled to settle in the country.*
- *[The complainant] claims he and his colleagues are routinely pressured … to grant entry or "leave to remain" in Britain to thousands of migrants who should not really be here. He says his department routinely ignores its own rules on what checks should be made.*
- *To back this up, [the complainant] testifies that he has personally processed applications from would-be migrants which he suspected might be fraudulent. But he says he was told that it was "not his business" to raise such concerns.*
- *Last Christmas [the complainant] tried to alert Beverley Hughes, Blunkett's deputy and minister of state for immigration, when she visited [the offices] to answer questions from staff. But, fearful of embarrassing their minister, [the complainant]'s bosses did not invite him.*
- *The Sunday Times has seen a copy of the questions [the complainant] subsequently e-mailed to her [Beverley Hughes]. They appear to have been a genuine effort to raise the matters internally before going public.*

4. Following on from this newspaper article, on 8 March 2004, Beverley Hughes, the Minister for Citizenship and Immigration, announced that she had ordered a full investigation into guidance which had been issued to Home Office staff in the Immigration and Nationality Directorate (IND).

5. This inquiry was carried out by Ken Sutton - who also undertook a second inquiry into related issues. The first report dealt with the allegations which followed the disclosures made by the complainant that there had been a deliberate policy to relax the checks on applicants in the run up to European Union accession on 1 May 2004. Both reports are available on the Border & Immigration Agency website at http://www.ind.homeoffice.gov.uk/aboutus/reports/ecaa_applications

6. According to the executive summary of Ken Sutton's first inquiry:

- The senior management of the Sheffield group, none of whom were Senior Civil Servants, decided to issue new guidance. This took the form of the Flexibility Guidance, issued in September/October 2003, and a second phase of guidance, introduced in January/February 2004.

- Neither set of guidance was authorised by Ministers or by the senior officials in IND, Croydon.

- The senior management in Sheffield believed that what they were doing was in line with guidance previously authorised by the IND covering periods of backlog clearance.

7. The Flexibility Guidance mentioned above, as issued in September/October 2003, was 'leaked' and discussed in Parliament on 8 March 2004. This can be found via the following link: http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmhansrd/vo040308/debtext/40308-06.htm

8. Various acronyms have been used for the reduction exercises. The procedure for 'speeding up' the backlog of applications known as BRACE is commonly considered to be an acronym for 'backlog reduction accelerated clearance exercises'.

9. Beverley Hughes resigned her post on 01 April 2004. The following BBC link provides more information: http://news.bbc.co.uk/1/hi/uk_politics/3589131.stm

The request

10. On 3 January 2005, having previously made an application to the public authority under the 'subject access' provisions of the Data Protection Act

1998 (the "DPA"), the complainant emailed the public authority with the following request:

"… I also now require, under the Freedom of Information Act, all internal policy documents and communications traffic (e-mails and other documents) concerning changes in the implementation of immigration rules - those specifically regarding the BRACE exercises and any other backlog reduction or clearance exercises, the ECAA caseload, and student and marriage workstreams (all these from 2002 onwards) – and those between officials and between officials and ministers discussing presentation to the media from March 7 up to the present."*
(*2004)

11. This correspondence from the complainant also included a complaint about a previous 'subject access' request. This complaint has not been considered in this notice as it is outside the terms of Part I of the Act. However this complaint was dealt with separately by the public authority under the terms of the DPA.

12. This request was acknowledged on 17 January 2005. The public authority advised that it was breaking down the request into the following three areas:

- *"A complaint about the handling of your previous subject access request suggesting that you were not sent all information held by the department to which you were entitled."*
- *"A new subject access request covering material that did not fall within the scope of the Data Protection Act before the changes brought about by that Act being amended by the Freedom of Information Act (FOIA) on 1 January."*
- *"A Freedom of Information request asking for information relating to various immigration policy issues."*

13. The public authority further advised that it would aim to respond to the latter information request within 20 working days.

14. However, having no further response from the public authority the complainant contacted the Commissioner's Office on 27 April 2005.

15. On 4 May 2005 the complainant was advised that his complaint was awaiting allocation by the Commissioner's Office. This was reiterated in further 'holding' letters sent on 28 June 2005 and 17 August 2005.

16. On 19 August 2005 the Commissioner wrote to the public authority to ascertain why they had not complied with the complainant's request. The

public authority responded to this request on 16 September 2005 and stated that a full response would be sent to the complainant on 19 September 2005. They further elaborated that:

"[The complainant's] case was a complex request which required input from various parts of the Home Office. In addition, the request was the first cross cutting Freedom of Information and Data Protection case we received. As such it raised a number of difficult issues which required legal and other expert advice before they could be resolved. The issue of how to apply the differing cost limit regimes under Data Protection and Freedom of Information legislation was one such issue. The complaint into [the complainant's] subject access request also took some time to investigate."

"Whilst these reasons go some way to explaining the causes of the delay experienced by [the complainant], I accept that they do not provide an adequate explanation for the eight months taken to produce a response. I also accept that we failed to keep [the complainant] fully informed of the progress of his case and to advise him when he would be likely to receive a response. I acknowledge that these failings are unacceptable and I apologise for them."

17. In its response dated 19 September 2005 the public authority confirmed that it held relevant information but that it was unable to comply with the request as to do so would exceed the appropriate limit. It further stated:

"If you were able to refine it so that it fell below the £600 cost limit we would be pleased to consider it further. You have requested a wide range of information on a number of separate immigration issues over a considerable time-scale. If you were to ask for information on just one particular issue and specify a shorter time period then we may be able to consider your request further as it could fall beneath the £600 limit."

18. The complainant was unhappy with this response and its apparent lack of reason for the *"incredible delay"* of eight months. He contacted the Commissioner again on 21 September 2005 when he also raised the following concerns:

"Some documents were enclosed but all of these are copies of documents I had already been sent and none of them pertain to any of my requests."

"The only 'excuse' offered … is the totally untenable one that responding to my disclosure requests would cost the Home Office more than six hundred pounds. This is transparently nothing but a delaying tactic, and for the following reasons:

- *It could not possibly take more than 20 days to come to this conclusion, so I should have been informed in January;*

- *One of the requests that this applied to was merely that the small number of documents that came from not management but ministerial offices should be contextualised so that their origin would be clear; it is inconceivable that this would incur high costs or take much time;*

- *I had clearly requested disclosure of documents from different areas of ministerial involvement in specific areas of the workings of Managed Migration, a sub-division of the Immigration & Nationality Directorate. Given the pressure on ministerial time, and in particular the breadth of responsibility of David Blunkett, it is inconceivable that the volume of material would be such as to rise above the six hundred pounds ceiling. In any case, the Home Office could have disclosed in one or more of these areas, or proposed to do this, to keep within the six hundred pounds ceiling."*

19. The complainant sought the Commissioner's advice regarding what steps he should now take. He was advised to request that an Internal Review be undertaken by the public authority in respect of his dissatisfaction with the lack of information supplied and also his belief that the information could be provided without the fees limit being exceeded.

20. The complainant contacted the public authority on 27 September 2005 to request an Internal Review. As part of this he refined his request as follows:

"My principal interest is in ministerial correspondence -- that is correspondence from/to David Blunkett and Beverley Hughes, either personally or their offices -- concerning 'BRACE': the 'backlog reduction accelerated clearance exercises': variously termed 'BRACE', 'ultra BRACE', 'ultra ultra BRACE', 'BRACE I' and 'BRACE II' ('BRACE' may be in lower case). This does not include a copy of the Sutton report, which is already in the public domain; nor of course anything else already in the public domain. I am especially interested in any correspondence with, or that refers to, Sheffield and/or senior IND managers, and/or to myself. It is inconceivable that this request could exceed the cost threshold. I do not stipulate date parameters given the short period in office of the two ministers, but in any case BRACE did not come into existence prior to 2002. I wish you to consider this request first and foremost."

"Subject to the cost threshold, I then wish you to consider correspondence from/to the offices of David Blunkett and Beverley Hughes concerning marriage applications; that is, on the policy and practice of how marriage

applications are dealt with: I am not interested in the work of either ex-minister on behalf of individual constituents."
"If the cost threshold has not been exceeded then ditto re student applications."

"If the cost threshold has still not been exceeded, then ditto re 'BRACE' between senior managers with the Home Office's Immigration & Nationality Directorate and/or its Managed Migration sub-division, and Sheffield managers."

"Please ignore any other aspect of my initial request other than the above."

21. The public authority wrote back to the complainant on 30 September 2005 to acknowledge his request for an Internal Review. It also advised that it would be treating his refined request as a new request and would respond within twenty working days unless it found that it needed to consider any public interest issues around disclosure if the information was subject to a qualified exemption.

22. The complainant was unhappy with this response as he did not believe that it should have been treated as "a new request" and advised the Commissioner accordingly on 30 September 2005.

23. On 4 October 2005 the Commissioner wrote to the public authority in respect of its duties to give advice and assistance under section 16 of the Act. He further advised that he:

"… would … expect [the complainant] to be provided with the information he requests by 26th October, or a refusal notice issued in line with section 17 of the Act, particularly in light of the ten months that have already passed since the request was made, where it is assumed that due consideration to the potential exemptions would have been given. If his request, despite having been 'refined' remains above the £600 cost limit, I would expect further advice and assistance, as detailed above, to be given to enable his request to be met."

24. On 14 October 2005 the public authority responded to the Commissioner and stated that it disagreed with the Commissioner's approach. It further advised that it did not believe that it could reach a conclusion on the balance of the public interest within 20 working days and that it was reasonable to extend the date by which the complainant could expect to receive a full response to 14 December 2005.

25. On 14 October 2005 the public authority also wrote two letters to the complainant, one each in respect of his request for an internal review and his refined request.

26. The letter dealing with his internal review advised him of the following:

"As I explained in my letter to you of 29th September 2005, the scope of this internal review is limited to the decision to apply the £600 cost limit to [your original] request"

"I have now completed my review of the decision to apply the cost limit to the part of your request for information outlined above and I am satisfied that the decision should be upheld.

"Your request was very wide ranging and the evidence produced to me demonstrates that, taking the most conservative estimate, the time taken to locate and retrieve the information relevant to your request would exceed 110 hours. At a rate of £25 per hour this would take the cost of responding to your request for information to over £2750 and would therefore be well in excess of the £600 limit."

27. The letter in respect of the complainant's 'refined request' stated the following:

"I would like to inform you at this stage that your principal area of interest regarding correspondence from/to David Blunkett and Beverley Hughes or their offices concerning BRACE etc did not exceed the £600 cost limit. We are currently considering this part of your request and I have explained in more detail further on in this letter why the Department has extended the time for replying to this beyond 20 working days in line with the statutory provisions of the Freedom of Information Act 2000."

"Having taken into account the cost of complying with your principal request on BRACE etc. the remaining parts of your request (on marriage, students and BRACE information between senior managers) exceeded the £600 cost limit by some considerable amount and we are therefore unable to process these aspects of your request.

28. It gave a further explanation regarding its citing of costs and also advised that it was also considering the application of sections 31(1)(e), 35(1) and 36(2)(b)(i) and (ii) and, as these were all qualified exemptions, that it needed to extend the 20 working day response period to consider the public interest tests in relation to these exemptions. Instead of replying by 26 October 2005 it aimed to respond by 14 December 2005.

29. On 2 November 2005 the Commissioner issued a decision notice in respect of a breach of section 10 of the Act in relation to its late response to the complainant's first unrefined request for information which was not provided within the statutory twenty working days.

30. On 13 December 2005 the public authority issued its response to the complainant's refined request. Whilst this was outside the statutory time for compliance it was within the extended time limit that the public authority had given to the complainant in order for it to perform its public interest tests. It made a disclosure of some documents related to the briefing material produced for the publication of the first Sutton Report, but cited the exemption at section 36(2)(b)(i) and (ii) for the remaining information.

31. On 19 December 2005 the complainant requested an internal review of this response. The Commissioner also wrote to the public authority requesting a swift response in view of the time elapsed and advised that he would expect the complainant to be advised of the outcome no later than 3 February 2006. This date was agreed by the public authority.

32. On 8 February 2006 the public authority sent its internal review to the complainant. It pointed out that it was still relying on the cost limit, as explained in its earlier correspondence from 14 October 2005, and it upheld its earlier decision in respect of section 36(2)(b)(i) and (ii).

33. On 14 February 2006 the complainant advised the Commissioner that he would like to raise a complaint in respect of the withheld information. The substance of this complaint was confirmed by the complainant as being:

"I contest principally the claimed exemption under Section 36(2)(b)(i) and (ii), but I also contest the Home Office's obstruction re supposed cost of compliance. I had refined my request specifically to ministerial communication only, and re policy only; apart from item … which pertains to communication re BRACE policy between Home Office senior management and the IND (and IND and Sheffield managers). Given the specificity of my request, then it would not be expected that a cost ceiling would be breached."

The Investigation

Scope of the case

34. As the Commissioner has already issued a Decision Notice in respect of the excessive time taken by the public authority to respond to the complainant's original request this will not be further considered. The previous Decision Notice (reference: FS50073711) can be found on the Information Commissioner's website at: http://www.ico.gov.uk/

35. The present Decision Notice relates to the complainant's refined request of 27 September 2005 (see paragraph 20 above). It also covers the following issues:

- Would the refined request exceed the appropriate limit*?
- Was section 36 appropriately applied to the withheld information?
- Some information which was later provided to the Commissioner was not considered to be part of the request, was this correct?
- Does section 40(1) and (2) apply to any of the information (this has been added by the Commissioner and an explanation is provided in the relevant section below)?

(*A table which demonstrates how the public authority reached its conclusions about the appropriate limit was prepared by the public authority when calculating the costs. This is appended in the annex to this notice. This table was not provided to the complainant at the time but was passed to him during this investigation.)

Chronology

36. On 6 February 2007 the Commissioner wrote to the public authority to advise that he had commenced his investigation of the complaint. He raised various questions.

37. Having had no response from the public authority the Commissioner wrote to them again on 28 February 2007.

38. On the 5 March 2007 the public authority wrote to the Commissioner and apologised for its lack of response. It advised that it was actively preparing a response but that a reply would not be done within the agreed time limit of 20 working days. A date of 30 March 2007 was suggested. The Commissioner agreed a further week.

39. On 23 March 2007 the public authority wrote to the Commissioner and advised that it required a further extension to 20 April 2007.

40. On 13 April 2007 the public authority made a partial response. This was followed up by the Commissioner who clarified his requirements in an email; this was readily acknowledged.

41. A substantive reply was received by the Commissioner, along with copies of the information withheld under section 36, on 18 April 2007. This consisted of 67 pages of information which the public authority had partially redacted without explanation.

42. On 22 June 2007 the Commissioner sought further clarification from the public authority. He requested further details about the qualified person's opinion as it was unclear from the information received. He also requested unredacted copies of the information supplied and further detail as to how the 67 pages supplied had been or could be collated within the appropriate limit constraints.

43. Having had no reply, the Commissioner chased a response on 12 July 2007. He further requested a copy of any actual BRACE guidance as his previous request had been ignored. This was acknowledged on the same day and an answer was said to be forthcoming in the following few days.

44. A response was again requested on 20 July 2007. The Commissioner advised that if no response was received within the next 10 days he would issue an Information Notice.

45. On 25 July 2007 the public authority replied. It provided unredacted copies of the information withheld under section 36 and advised the Commissioner that: *"The material in question was redacted because it did not relate to the request from [the complainant] and in fact is personal data in relation to an immigration applicant"*. It also provided a table showing a breakdown of costs in respect of the appropriate limit (see annex to this notice) and comments in respect of the qualified person's opinion. There was no copy of any BRACE guidance.

46. On 26 July 2007 the Commissioner was sent a document about managing backlogs. The public authority advised that this would answer his queries concerning BRACE.

47. On 01 August 2007 the Commissioner again wrote to the public authority. Along with various queries he specifically enquired as to why the public authority had seized its efforts to comply with the complainant's request part-way through applying the appropriate limit, i.e. only after considering the first part of his refined request.

48. On 10 August 2007 the public authority confirmed the source of the qualified person's opinion and also advised that the queries regarding costs had been referred elsewhere for a separate reply which would be sent shortly.

49. On 10 September 2007 the Commissioner chased a response regarding the citing of costs. A brief response was sent on 11 September 2007. This included the comment:

"With regard to halting compliance with [the complainant]'s refined request after assessing the first part of it, we made it quite clear in our reply (attached) of 12 October 2005 to [the complainant] that should he wish to ask one part of the request in isolation, for example regarding "BRACE between senior managers with the Home Office's Immigration and Nationality Directorate and /or its Managed Migration sub-division, and Sheffield Managers" then we would be able to deal with this within the cost limit."

50. On 12 September 2007 the Commissioner advised the public authority that he had noted that the information supplied on 26 July 2007 did not actually answer his queries regarding BRACE, although it had been useful. He clarified that what he wanted was referred to in the first Sutton Report:

"The items I require are the two items of guidance referred to in paragraph 27 of the first Sutton Report. Namely, the Flexibility Guidance issued in September / October 2003 and then the 'further guidance' from January / February 2004. According to paragraph 44, point 5, the former guidance was in line with BRACE. Is there anything which explains what the BRACE exercise actually consisted of? Similarly, for the ACE exercise?"

51. Some further information was sent to the Commissioner on 2 October 2007. However this was again not what he required and he advised the public authority accordingly on the same day. Having received no further reply he sent another letter on 29 October 2007 chasing the outstanding response. More information was sent to him on 31 October 2007 and a further explanation was included as follows:

"To put this in perspective I have in the region of 40 box files full of information on this [the Sutton enquiry]. It is already in a rudimentary filing system but requires a lot more sorting and arrangements are in hand for this to happen. However, I have to look through it each time you request further information."

52. On 15 January 2008 the Commissioner updated the complainant about his case and apologised for the length of time it was taking to resolve. On the same date he asked the public authority further questions and also asked whether it had ever disclosed the fees table, referred to in paragraph 40 above, to the complainant.

53. In its response of 29 January 2008 the public authority advised the Commissioner that it had not supplied the fees table but was happy for the Commissioner to disclose it on its behalf. It also suggested that the Commissioner visit its offices to view the information.

54. On 4 March 2008 the Commissioner advised the complainant that he was intending to visit the public authority and view the withheld information. The Commissioner also provided him with a copy of the table which the public authority had produced to demonstrate its citing of fees.

55. On 19 June 2008 the Commissioner visited the public authority to view the information held.

Analysis

Procedural matters

56. Section 17 of the Act sets out the obligations on public authorities when refusing information requests. The relevant text of the legislation can be found in the legal annex to this notice.

57. The complainant's refined request of 27 September 2005 was responded to by the public authority on 14 October 2005. In this letter it pointed out that it was only considering the first part of this request within the appropriate limit as the remainder exceeded it. It further contended that it was now also considering the application of three exemptions in relation to this part of the request. The exemptions under consideration were cited as 31(1)(e), 35(1) and 36(2)(b)(i) and (ii). It advised the complainant that all three of these were qualified exemptions which required public interest tests and, in view if this, it wished to delay its response until the 14 December 2005. Its refusal was sent on 13 December 2005 and the Commissioner finds no breach in this regard.

58. The Commissioner finds that the withheld information should have been disclosed, except where indicated in relation to section 40(1) and 40(2) below, which is a breach of section 1(1)(b). As this disclosure was not

made within the statutory 20 day time limit this he finds a further breach of section 10(1).

Exemptions

Section 12 – cost of compliance exceeds the appropriate limit

59. Section 12 of the Act removes the obligation on public authorities to comply with section 1 of the Act if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

60. Although it has not specifically stipulated the fact, the Commissioner has assumed that the public authority is relying on subsection (1)(b) for the purposes of this request as it has never claimed that it would exceed the appropriate limit to either confirm of deny that information is held that would answer the request.

61. The appropriate limit, as prescribed by the Freedom of information and Data Protection (Appropriate Limit and Fees) Regulations (the "Regulations"), is £600 for Central Government and £450 for other public authorities, with staff time calculated at a rate of £25 per hour. When calculating whether the appropriate limit is exceeded, an authority can take account of the costs of determining whether the information is held, locating and retrieving the information, and extracting the information from other documents. It cannot take account of the costs involved with considering whether information is exempt under the Act. (See legal annex for a full copy of the Regulations).

62. Section 4 (4) of these Regulations provides that where costs are attributable to the time a person spends undertaking any of the activities mentioned above, those costs should be estimated at £25 per hour. The Home Office is classed as Central Government and for it to legitimately cite section 12 it therefore needs to demonstrate that the time needed to comply with the request exceeds 24 hours.

63. In this case the public authority has said that after dealing with the first part of the complainant's refined request*, "the remainder of information requested was held in disparate systems across several directorates and that to interrogate them all would overall cost more than £600, calculated at an hourly flat rate of £25 for staff costs in locating and retrieving the information and preparing a response."* The Commissioner accepts that in this case the activities of locating and retrieving the information are reasonable for the public authority to take into account; however, "preparing a response" is not listed in the Regulations and cannot therefore be cited.

64. Having viewed the information *in situ* the Commissioner wishes to make the following observations. For ease, he has split the information held into electronic and paper systems, then further into each main subject area:

Electronic data

65. There is a 'shared drive' at the top level of the electronic file structure for the relevant Department within the public authority. This shared drive had no sub-folder titled with key words relevant to the first part of the refined request, i.e. BRACE or Ministerial correspondence. It did have sub-folders relating to marriages and students, i.e. the second and third parts of the request.

Marriages

66. In relation to Marriages, there were three sub-folders, one of which was created after the request so was not therefore relevant.

67. Sub-folder 1 contained a further 187 folders with a total of 2716 files. There was no taxonomy in use. The Commissioner undertook relevant searches in relation to the first request and only retrieved 3 relevant documents.

68. Sub-folder 2 contained a further 136 folders with a total of 2345 files. The Commissioner undertook relevant searches in relation to the first request and only retrieved 1 relevant document.

Students

69. In relation to students there was one sub-folder. This contained a further 404 folders with a total of 7404 files. The Commissioner undertook relevant searches in relation to the first request and only readily retrieved 1 document (plus attachment).

Manual data

70. There was no filing system specifically relating to Ministerial Correspondence or BRACE. There were systems for Marriages and Students.

Sutton Inquiries

71. The files relating to both Sutton inquiries have been restructured and indexed into 70 paper files whilst this complaint was under investigation, towards the end of 2007. It is believed that the current structure closely follows how the information had been previously held in ring binders as

the filing work was undertaken by temporary staff who would not have been expert enough to restructure the contents. The Commissioner can confirm that there are 70 files listed and that these have a total of 2079 items in their indexes. (Of these, 16 files / 423 items appertain to the first Sutton inquiry; the remainder to the second Sutton inquiry.)

72. The totals were manually calculated by the Commissioner as there is no numbering system or master filing index. Unfortunately, despite the restructuring having been a recent task, there is no electronic version of the contents. So, even if a request were made in relation to the files today, a search for keywords could not be undertaken.

73. A full copy of all the file frontispieces along with the contents was photocopied and provided to the Commissioner.

74. Different styles have been used when typing up the contents. Some items do refer to matters which are the subject of the first part pf the refined request though this will largely depend on how the member of staff chose to describe the document when typing the index. In any event, unfortunately the index cannot be considered in relation to the request as it was not in existence at the time of the request and a full manual search of all 2079 items would have been the only option at that time.

Marriages

75. Marriage-related paper files were contained within 3 filing cabinets. The folder titles were labelled on the outside of each drawer. Each folder had its own contents sheet, either manually written or typed, to describe its content. No files specifically referred to information relevant to the first part of the refined request. The indexes were not descriptive enough to locate information relevant to the request without actually looking at the document referred to. A list of all file titles was electronically available and was provided to the Commissioner. However, electronic copies of the content indexes were not available.

76. There were 207 files concerning marriage, although some could be discounted based on their titles or date of commencement.

77. Seven of these 207 files had been identified as those originally considered relevant to part 2 of the refined request - there is an audit trail to clarify that these had been specifically chosen though why is not known. Of these seven files only six could be located and the Commissioner inspected all of them. Data was identified as being relevant to the request but this was only ascertained by looking at specific documents as the indexes were not worded in a way to directly assist with the request. The

indexes themselves were not electronically available so could not be readily searched for key words.

Students

78. These files were held in four filing cabinets. The folder titles were labelled on the outside of each drawer. Some folders had a contents sheet, either manually written or typed, to describe its contents, but not all of the selection looked at had an index. No folders had titles which were specifically relevant to the first part of the refined request. The indexes available were not descriptive enough to locate relevant without actually looking at each of the documents.

79. It was not possible to equate these folders to the table originally supplied by the public authority, as per paragraph 44 above. It is assumed that whoever supplied the original figure (not known) had specific personal knowledge to be able to identify those most likely to be relevant. Additionally, many of the files appeared to relate to individual cases though there could have been relevant information on any of them.

80. No electronic index was available so photocopies of all the file titles was provided to the Commissioner. He can confirm that there are 129 files of varying thicknesses. These numbers were manually calculated by the Commissioner as there was no electronic version. A list of the individual contents was not requested as a selection of files had been previously looked at and not all had content sheets so any list would have been incomplete. In any event, those looked at did not demonstrate a consistent or useful structure.

81. Unfortunately, the way that the complainant's information request was refined does not correspond with how the related information is structured. As such, the refined request becomes even more restrictive than the more generally worded original request. If the complainant had been apprised of how the information was held at that time it is likely he could have rephrased his request in order to maximise the possibility of locating information within the costs threshold. For example, concentrating on only those papers which had been collated for the first Sutton inquiries.

82. The Commissioner also notes that the public authority's starting point has been the information collated for the Sutton inquiries. The table supplied indicates that 10 x 1½" thick files from these have been looked through to try and locate information relevant to the first part of the refined request. There is no record as to which 10 files were looked at or why they were selected. There is also no record as to how the files were kept by the public authority at the time of the request - although, as mentioned above,

it is believed they are roughly in the same order as at the time of the request.

83. The public authority has further estimated that it would take an hour to read through each of the ten files it originally identified to try and locate relevant information which would therefore cost £250. It has performed this part of the request but then gone no further. This is because it estimates that to comply with the second part of the request would take it a further 27¼ hours to read through associated paper and electronic files at a cost of a further £725 which would exceed the appropriate limit of £600. It has not offered to start the search and go up to the limit or indeed offer any alternatives to the complainant. The third part of the request has been estimated at a further cost of £200, the fourth at a further cost of £100.

84. The Commissioner accepts the public authority's assertion that it would exceed the appropriate limit to deal with the full information request based on the sheer volumes of unstructured information which could potentially relate to the request. He also notes that even though the public authority has since restructured the papers collated for the Sutton inquiries these remain virtually useless for dealing with information requests as no electronic index has been maintained and the indexes are not standardised or based on any simple taxonomy.

85. The Commissioner is therefore satisfied that to deal with the refined request as it was worded by the complainant would have exceeded the appropriate limit, and, indeed, still would today. He accordingly finds that to provide the complainant with all the information sought would exceed the appropriate limit.

Section 36 – prejudice to effective conduct of public affairs

86. The public authority has claimed that the exemption at section 36(2)(b)(i) and (ii) applies in respect of the first part of the refined request. Section 36(2)(b) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would or would be likely to inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation.

87. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to lead to the above adverse consequences. In order to establish whether the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;

- Ascertain who the qualified person(s) was(were);
- Ascertain when the opinion was given; and,
- Consider whether the opinion was objectively reasonable and reasonably arrived at.

88. During the course of the investigation the Commissioner asked the public authority for details of the decision taken by the qualified person, in order to allow him to ascertain that an opinion was given and also that is was given by an appropriate person at an appropriate time.

89. The public authority clarified to the Commissioner that it submitted its arguments to two Ministers on 1 December 2005. It further clarified that qualified opinions were subsequently given by both the then Secretary of State for Immigration (Tony McNulty) on 1 December 2005 and the then Home Secretary (Charles Clarke) on 7 December 2005. It stated that this had been reiterated by the Home Secretary on 7 February 2006 when an internal review of the request was put to him. The Commissioner is satisfied that either party could have been an appropriate 'qualified person' as laid down in section 36(5) of the Act.

90. Although this exemption was cited by the public authority as being under consideration on 14 October 2005, which was prior to it having obtaining the qualified person's opinion, the Commissioner notes that the opinion was actually obtained prior to the eventual refusal on the 13 December 2005. The Commissioner's view is that if a reasonable opinion has been given by the qualified person, by the time of completion of the internal review, then section 36 will be taken to be engaged. He will therefore take it into consideration on this occasion.

91. In correspondence to the Commissioner dated 13 April 2007 the public authority stated:

"We advised the Ministers that it was important to consider the full arguments as to why release of the information would so significantly inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation. We identified three key areas which we believed provided strong grounds for applying the exemption under section 36 to the information concerned."

92. These areas were further qualified as follows:

"IND has extensive operational functions which Ministers are ultimately accountable to Parliament for, and officials from IND provide written advice to the Department's Ministers in response to major operational or policy issues which attract significant public attention. It is noted that it is

crucial, therefore, that when IND officials provide advice to Ministers on matters of significant public importance such as BRACE that their assessments are robust, candid and timely and not inhibited by any fear of disclosure. It is our assessment that were we to disclose information in respect of BRACE, this would be likely to lead in future similar circumstances to IND officials limiting the frankness of their advice if requested by Ministers or even failing to put advice to Ministers in writing due to the fear of immediate public disclosure."

"Disclosing the information might also be likely in future to prevent Ministers from requesting similar written advice from IND officials on issues of significant public concern such as BRACE. It is crucial that Ministers, who are accountable to Parliament for the work of IND, are able to request the best possible written advice from IND officials when seeking to account to Parliament and the wider public on issues of significant importance such as BRACE. It is likely that were we to disclose the advice provided to Ministers on BRACE, they would not commission similar frank advice in the future which could ultimately lead to them not receiving the best advice on key issues."

"In respect of the draft briefing and media lines prepared for Ministers on BRACE, disclosing this could hamper the free and frank advice by making officials afraid that anything they put in briefing will be revealed, and make them over cautious to the detriment of the quality of that briefing."

93. Although the Commissioner has seen evidence that a written submission was passed to the appropriate persons for their consideration the public authority refused to provide the Commissioner with a copy of the actual submission stating:

"The Act does not require any written "proof" of Ministers views to be recorded such as the documentary evidence you request… It is clearly in a public authority's own interest to document this opinion but the Act does not require this nor does it establish a need to present such documentation as proof. It is for officials to provide evidence as to the basis of the decision making to the ICO and ultimately the Tribunal in much the same way as they would provide evidence to the High Court in the context of a judicial review proceeding. With this in mind, I trust that … you will be able to accept my assurance that not only was authority sought to use section 36 but that this was sought from and given by Ministers."

94. In view of the background detail which was supplied the Commissioner decided not to pursue this response. However, it is important to note that a subsequent Information Tribunal *(McIntyre v The Information Commissioner & MOD)*(EA/2007/0068), found, at paragraph 47, that:

"We would recommend to the Commissioner that in future investigations of complaints where a s.36(2) exemption has been claimed that he should require to see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses."

In view of this the Commissioner may require the provision of further information from the public authority in the future. It is important that wherever possible the Commissioner can view the information that the qualified person had in front of them as part of his assessment of whether or not the opinion given is reasonable. By viewing the information he can check that only relevant factors were taken into consideration and that the substance of the requested information is not such that the qualified person could not reach a reasonable opinion that the exemption was engaged. He would emphasise to all public authorities that reluctance to provide him with evidence to support the reasonableness of the opinion, may increase the likelihood of a conclusion that the opinion is not reasonable, or of the Commissioner exercising his discretion not to consider a late claim of section 36.

95. Based on the information supplied the Commissioner is satisfied that an opinion was given by an appropriate person on a specific date. He must therefore now consider whether the opinion could be considered to be reasonable.

96. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*) (EA/2006/0011 and EA 2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply *'an opinion within a range of reasonable opinions'*. However, it also accepted that *'there may (depending on the facts) be room for conflicting opinions, both of which are reasonable'.* In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

97. As shown above, the public authority's comments to support this exemption can be summarised as follows. That, in the opinion of the qualified person, disclosure of this information:

- Would be likely to inhibit the advice given by the public authority's officers to Ministers on matters of significant public importance for fear of immediate public disclosure

- Might be likely to prevent Ministers from requesting such advice in future – which is important in ensuring that Ministers are able to request and receive the best possible written advice without fear of disclosure

- Could hamper the free and frank advice given by officials, to the detriment of the quality of their advice, by making them afraid and over cautious that anything they put in a briefing will be revealed

98. Furthermore, the Commissioner has been provided with evidence that the qualified person took the views of several key members of staff into consideration by way of the emailed submission. This submission also included annexes of documents which were under consideration. The Commissioner acknowledges that this does provide some evidence that there was proper consideration to the formation of the opinion and the qualified person took into account relevant matters and did not base the opinion on irrelevant matters.

99. Some of the withheld information refers to a specific case about which advice was sought and provided prior to these allegations. This information includes a candid assessment of wider management problems at the time and demonstrates discussions of a free and frank nature.

100. Further withheld information immediately follows on from the 'whistle-blowing' event. Given the background to this request the Commissioner believes that it is reasonable to assume that the public authority would have liaised with Government Ministers regarding what actions to take, and to question whether any of the allegations were substantiated. This information would reveal examples of free and frank exchanges of advice and information from advisers to Ministers explaining the background issues surrounding this request. The sensitivity of these issues and the ultimate resignation of a Minister because of the issues raised, gives weight to the reasonableness of the qualified person's opinion. It is therefore on the basis of the specific information and question and circumstances of the issues surrounding it that the Commissioner can accept the qualified person's opinion is reasonable, that it is a reasonable opinion that the 'chilling effects' described in paragraph 97 would be likely to have the prejudicial effects specified in section 36(2)(b)(i) and (ii).

101. The Commissioner is therefore of the view that in this case the Minister's opinion was both reasonable in substance and reasonably arrived at.

Therefore he is satisfied that section 36(2)(b)(i) and (ii) is engaged. However, that is not to say that the Commissioner agrees with the weight that the public authority attaches to the extent and severity of the prejudice identified albeit that the weight is sufficient to engage the exemption.

102. Given this, the Commissioner has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.

Considering the public interest test

103. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in *Guardian Newspapers Limited and Heather Brooke vs. Information Commissioner and BBC*, where the Tribunal considered the law relating to the balance of public interest in cases where section 36 applied. The Commissioner has followed the interpretation of the law relating to the public interest test, as set out in this Tribunal, and notes and adopts in particular its conclusions that:

104. Unless there is any relevant exemption under the Act then the section 1 duties will operate. The "default setting" in the Act is in favour of compliance – requested information held by a public authority must be disclosed except where the Act provides otherwise.

105. The public interest in maintaining the exemption must outweigh the public interest in disclosure as the 'presumption' of disclosure in the Act will operate where the respective public interests are equally balanced.

106. There is an assumption built in to the Act that the disclosure of information by public authorities on request is in itself of value and in the public interest so as to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest, and the strength of the competing interest in maintaining any relevant exclusion or exemption, must be assessed on a case by case basis. The High Court has also considered this issue in *OGC v The Information Commissioner* (paragraphs 68 to 71) and endorsed the approach followed in the DWP Tribunal decision: Stanley Burnton J found that:

" In my judgement , it is both implicit and explicit in FOIA that, in the absence of a public interest in preserving confidentiality, there is a public interest in the disclosure of information held by public authorities. That public interest is implicitly recognised in section1, which confers, subject to specified exceptions, a general right of access to information held by public authorities……The public interest in disclosure is explicitly recognised and affirmed in section 19)(3) . Section 19(1) imposes on

every public authority a duty to adopt and to maintain a scheme for the publication of information by it…….Thus I agree with the statement of the Tribunal in Secretary of State for Work and Pensions v The information Commissioner Appeal no. EA/2006/0040 [para 29] "

107. When it comes to weighing the balance of public interest, it is impossible to make the required judgement without forming a view on the severity, frequency and extent of any prejudice.

108. It is important to note the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would have (or would be likely to have) the stated detrimental effect. That means that the qualified person has made a judgement about the degree of *likelihood* that the detrimental effect would occur and does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.

109. The right approach, consistent with the language of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which the detrimental effect will or may occur.

110. Whilst considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner recognises that there are competing public interest arguments. He has gone on to consider these arguments in turn.

Public Interest – in favour of maintaining the exemption

111. The Commissioner gives due weight to the qualified person's reasonable opinion that disclosure would be likely to inhibit the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation.

112. The Commissioner notes that the focus of the public authority's arguments has been that disclosure would not be in the public interest. In its correspondence the public authority has attempted to illustrate how this prejudice would occur and take effect. In considering these arguments, the Commissioner has been mindful of the public interest in a public authority having effective processes which allows it to openly debate issues of significant public interest without undue inhibition.

113. According to the public authority, "*Disclosure at this stage of the information into the public domain would significantly inhibit the free and frank provision of advice in respect of the information which IND holds on BRACE. This is because IND has extensive operational functions and Home Office officials are regularly required to provide written advice to Ministers in response to major issues, such as BRACE, which attract significant public attention. It is crucial, therefore, that when IND officials provide written advice to Ministers on matters of significant public importance such as BRACE that their assessments are as candid as possible and not inhibited by any fear of immediate public disclosure."*

114. The Commissioner does not accept that this statement carries significant weight in relation to BRACE as it was no longer in operation at the time of the request and has not been since. In fact, according to Hansard, on 30 March 2004 David Blunkett announced that: " *… the Government … has reached the point where the Backlog Reduction Accelerated Clearance Exercise (BRACE) is no longer necessary.*" The Commissioner therefore considers it is unlikely that provision of any further advice about BRACE will be necessary to any extent and that any direct detriment is therefore very limited in this respect.

115. The Commissioner also finds that the fact that the matter in question was no longer operational at the time of the request is significant in relation to wider effects to other similar scenarios. He believes that the likely prejudicial effects would not be as widespread or damaging as Home Office contend as the issue was not "live" at the time was request was made.

116. The public authority has also argued above that *immediate public disclosure* would result in the inhibition of its officials. However, the Commissioner notes that the withheld information all predates the request, the most recent documents by some eighteen months. He does not therefore consider that any of the information withheld under section 36 had been produced 'immediately' before the receipt of the request and the severity of the prejudice in this respect is also therefore curtailed.

117. The public authority has said that, if it were to disclose such information, "*this would lead in future similar circumstances to the Department's officials limiting the frankness of their advice to Ministers, or even failing to put this advice into writing at all due to the fear of public disclosure*." And that disclosure would not be in the public interest as it believed that "*It is crucial that Ministers, who are accountable to Parliament and the wider public for the work of IND, are able to request the best written advice from IND officials as ultimately it is Ministers who are held accountable for the work of IND*".

118. Against further disclosure it also stated that, "*We have also taken into account that this issue has already been subject to a significant level of parliamentary and wider public scrutiny. The Department has already provided, in the form of Ministerial statements and written submissions to Parliament, an extensive and detailed explanation of the issues surrounding the operation of BRACE.*"

119. The Commissioner accepts that there would be some prejudice to the frankness of officials when giving advice to Ministers in the future. He has given this some weight, particularly in light of the issues involved and the content of the information but he has limited the weight in light of the following Information Tribunal decisions:

Department for Education and Skills v the Information Commissioner (paragraph 75) :

In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil services since the Northcote – Trevelyan reforms."

In O'Brien v the Information Commissioner and BERR, Mr Hilton, a witness for the public authority conceded in cross-examination that:

"he could not identify any actual instance of a disclosure made under the freedom of information Act having affected the quality of any advice given or the way they performed their duties in general …..He accepted that since the freedom of information regime was obligatory disclosures made under it would not damage the necessary trust between ministers and civil servants and that there was no reason to be concerned that ministers would be led to disengage from their officials as a consequence of it. He accepted that his concerns about the risk to the quality of government decision-making resulting from cumulative disclosures under the Act were speculative" (paragraph 35).

Public interest – in favour of disclosing the information

120. In considering this case, the Commissioner has been mindful of the strong generic public interests in openness, transparency, public understanding and accountability, in relation to the activities of public authorities.

121. He has gone on to consider these public interest issues in the light of the individual circumstances of this case.

122. The public authority has stated that there "*is a strong public interest in disclosing information which ensures that there is transparency in the way*

in which Government operates. In relation to the fact that the information relates to IND, there is also an additional public interest in ensuring that there is public confidence in the Department's handling of BRACE which was a matter of significant public interest, and one way of ensuring this is keeping the public informed of exactly what advice was produced to Ministers on this matter."

123. Additionally, it has advised the complainant that it fully agrees that "*in sensitive and complex areas such as immigration policy, it is important for public authorities to be as transparent and accountable as possible*" and that "*there is clear public interest in these matters which have a perceived substantial and lasting social and financial impact*".

124. In the case of *Lord Baker v the Commissioner and the Dept for Communities and Local Government* (EA/2006/0043), the Tribunal commented that transparent provision of the full information behind a decision removes any suspicion of 'spin' and therefore promotes confidence in public authorities: *'by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point'.*

125. The Sutton Inquiry was ordered by the then Minister for Citizenship and Immigration, Beverley Hughes. The terms of reference for the Inquiry stipulated that it was to look into the issuing and authorisation of BRACE guidance. It was conducted by Ken Sutton in his position as a Senior Director within the IND rather than by an independent external party. The Commissioner considers that some of the information which the public authority collated when looking at the first part of the refined request is also likely to have been collated and considered during the Sutton Inquiry (although some of the information was created whilst the Inquiry was on-going). Whilst this may put forward an argument against the necessity to reveal any information which had already been considered as part of the Inquiry it also provides a counter argument for releasing the information to demonstrate that the Inquiry was fair and unbiased. As the Inquiry was conducted internally the Commissioner believes that disclosure of information which may have been relied on is of significant public interest in demonstrating openness and integrity.

126. The question is whether the information in question will add to and enhance the issues raised by the Sutton Inquiry and the information already in the public domain from the Inquiry. The Commissioner finds that at the time the request was made there was still a significantly high level of public interest in being provided a fuller picture. Disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting other means of scrutiny. In this case the Commissioner finds that the public scrutiny that had occurred had not

placed sufficient information into the public domain to enable the public to fully understand the process and decisions made, related to the BRACE guidance.

Conclusions

127. The Commissioner fully accepts that there is a public interest in ensuring the free and frank exchange of ideas, the effective running of the process of deliberation within public authorities, and the accountability of public authorities.

128. The public authority has argued that disclosure might be likely to prevent Ministers from requesting advice in future which could have the consequence of them not being given the best advice for fear of future disclosure. It has also said that the provision of free and frank advice could be hampered by fear that information provided for briefings could be revealed.

129. The Commissioner does not consider that the public authority has provided any compelling arguments to support its position that disclosure would have an extensive "chilling effect" on the openness of staff when providing guidance and advice to Ministers in this case. He understands the necessity for free and frank advice and the particular significance of this whilst the subject matter is 'active' and being relied on by Ministers. However, he considers it likely that any "chilling effect" is likely to gradually diminish after the event, particularly in a case such as this where the procedure which was being debated is no longer being used. Whilst the Commissioner is open to the idea that such a disclosure may not be presumed as being routinely expected, he believes that staff must be aware that, on occasion, the public interest in a topic may be of sufficient weight to provide for disclosure.

130. The Commissioner understands the public authority's position that "*there has to be some private space within which Government is able to think without having an eye to the immediate need to defend and explain every thought that is set down*" and that "*this is a long established principle observed by all Government departments*". However, he is of the opinion that information provided to a Minister for them to rely on should have a sound basis. Indeed, information supplied in advance of parliamentary questions will be often revealed in any event when relied on by the Minister during question time. Such information needs to be demonstrably reliable and truthful or else the Minister could be seen as misrepresenting the facts or misleading whoever they are speaking to.

131. The Commissioner also notes that the public authority itself comments that disclosure may be possible with the passage of time, although it has

not indicated what length of time. It therefore can be assumed that it believes that such disclosure is possible and the '*long established principle*' of non-disclosure referred to above is not set in stone.

132. The Commissioner is not persuaded by the public authority's arguments regarding the severity and extent of the prejudicial effects that the disclosure could cause, especially given the particular circumstances of this case. Considering the extent and severity of the prejudice in this case, against the interests of openness and accountability, the Commissioner believes that disclosure in this specific case is of particular importance. In considering this issue the Commissioner believes that there is a substantial public interest in the public understanding the issues surrounding the history of BRACE and a substantial public interest in the effective running of the BIA, given the fact that it has such a fundamental role in the life of the population of the country as a whole.

133. The fact that a Minister instigated an internal Inquiry illustrates the significance of the issues raised. Debates were held in Parliament and there was much controversy over the BRACE procedures aired in the media at the time.

134. According to the BBC (see paragraph 9 above), on resigning from her post Beverley Hughes *"… said she had not set out to 'intentionally mislead anyone', but she could not 'in conscience continue to serve as immigration minister'."* The Commissioner believes that the significance of this action again demonstrates the significance of the public interest in revealing the requested information which, in part, covers events leading up to this resignation.

135. In conclusion the Commissioner has considered the competing public interest arguments, as set out above. He has considered all the arguments the public authority has stated in favour of maintaining the exemption and has decided that, although the exemption at section 36(2) was properly engaged, the public interest in maintaining the exemption does not outweigh that of disclosure.

Section 40 – personal information

136. In its case EA2005/0006 *(Dr P Bowbrick v The Information Commissioner and Nottingham City Council)*, the Information Tribunal found that it *"… is not the scheme of the Act that the Commissioner should have a general duty to consider the application of any possible exemption, even if not raised by the public authority"* (paragraph 48) but also stated that the Commissioner *"… would be entitled to look for an appropriate exemption in some exceptional cases"* (paragraph 49). It went on to clarify that such a case may be one where section 40 is involved because: *"The IC is in the*

position of being the guardian of both the rights of data subjects under the Data Protection Act 1998 (DPA) and of the rights of people seeking information under FOIA. If the Commissioner considered that there was a s.40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects." (paragraph 51).

137. In line with this the Commissioner notes that the public authority has referred to 'personal data' in respect of redactions it made to the withheld information it supplied to him (see paragraph 45 above). However, it decided that this was exempt as it fell outside the scope of the request rather than it being exempt by virtue of section 40(2). He further notes that some of the withheld information, although it is only a small amount, is the applicant's "personal data". Whilst the public authority failed to make any comment in this regard the Commissioner finds that section 40 (in this particular case) should be considered either because it is the applicant's personal data or because it is a third party's personal data and he has not upheld the public authority's reliance on section 36 to withhold it.

Section 40(1)

138. Section 40(1) states that :
"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

139. The Commissioner has examined the information covered under the first part of the refined request. He is of the opinion that a small amount of it is the complainant's 'personal data'. In reaching this decision the Commissioner has taken into account his guidance about what constitutes 'personal data'. This can be viewed on his website at the following link: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

140. The complainant made an earlier 'subject access request' under the terms of the DPA which has been dealt with separately to this decision notice. However, the later refined request under the Act, which is covered by this notice, also refers to the applicant's 'personal data' in the first part of the request.

141. Following enquiries, the Commissioner has been advised by the public authority that the information he has identified has not been previously released. However, it is not known whether or not it was ever considered

for release under the terms of the DPA as no record has been retained by the public authority to this effect.

142. This information is absolutely exempt under the Act and should not therefore be disclosed. However, the Commissioner will make a assessment under the terms of the DPA and write to the complainant under separate cover.

Section 40(2)

143. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

144. The first principle of the DPA requires that the processing of personal data is fair and lawful and,

- at least one of the conditions in schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

145. The second principle of the DPA requires that:

- personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or purposes.

146. The Commissioner notes that this exemption has not been relied on by the public authority. However, this is because it believed the information to be exempt under section 36. As the Commissioner does not agree with this conclusion he has gone on to consider whether disclosure of the requested information would involve the disclosure of personal data.

Is the requested information personal data?

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

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

148. The information clearly identifies third parties by name and, as such, it is their personal data.

149. The Commissioner's guidance on section 40, as mentioned in paragraph 134 above, suggests a number of issues that should be considered when assessing whether disclosure of information would be fair, namely:

- The individual's reasonable expectations of what would happen to their personal data;
- The seniority of any staff;
- Whether the individuals specifically refused to consent to the disclosure of their personal data;
- Whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
- The legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.

150. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. The guidance suggests that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

151. Having reviewed the documents which the public authority has provided, the Commissioner believes that the named parties can be grouped into two broad categories:

(i) Ministers, ministerial staff or public authority staff
(ii) A third party who was subject to a case investigation (this was the party whose details were redacted in the evidence initially provided to the Commissioner, see paragraph 45 above)

152. In the absence of any arguments advanced by the public authority in relation to the expectations of these two groups of individuals the Commissioner has established whether disclosure of their personal data would breach any data protection principles.

Category (i) - Ministers, ministerial staff or public authority staff

153. The first data protection principle states that information should be processed fairly and lawfully. The Commissioner has therefore considered whether or not the disclosure of personal information about ministers, ministerial staff or public authority staff would be fair and lawful. In doing so he has considered the expectations of the persons and the degree to which the release of the information would infringe on their privacy.

154. When assessing the expectations of the data subjects the Commissioner considers it appropriate to take into account the type of information that is already in the public domain about the parties. He also believes that the level of detriment to the privacy of the persons if the requested information were released to be important.

155. The Commissioner notes that persons named in the withheld documentation are done so purely in their professional capacity and there are no 'private' considerations regarding any of these parties. Many of those parties mentioned were already known in the 'public domain' because of the nature of their jobs. Other parties are only identified by their name as they have had emails and attachments circulated to them, however, in these latter instances their name is the only information which relates directly to them.

156. Where more detailed information is attributed to a party this is only in an official capacity as opposed to a private one. Additionally, such information has only been provided by more senior staff. The Commissioner believes that senior staff should anticipate that such information is likely to be discloseable and that they should also expect to be accountable for decisions and views they have expressed which have informed important procedures or public statements, in this case on immigration issues.

157. As the Commissioner considers that this information relates to individuals in a professional capacity rather than a private one he does not believe that disclosure would result in any significant detriment to the privacy of those individuals. Consequently he does not consider that it is unfair to release staff names in these circumstances.

158. However, in order for disclosure to be fair and lawful and therefore in accordance with the first data protection principle, one of the conditions in schedule 2 of the DPA must be satisfied. In this case the Commissioner considers that the most relevant condition is six. This states that:

'the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any

particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

159. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in the *House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*. In that case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests in disclosing the information
- the disclosure must be necessary for a legitimate interest of the public
- even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject

The Commissioner will therefore go on to consider each of these tests.

Legitimate Interests

160. The Commissioner notes that the withheld information has been collated in respect of the first part of the complainant's request. This specifically asks for *"correspondence from/to David Blunkett and Beverley Hughes, either personally or their offices"* and also states that he is *"especially interested in any correspondence with, or that refers to, Sheffield and/or senior IND managers, and/or to myself."* As such the Commissioner considers that the names of the parties is of significance and it is of particular importance to the complainant that the parties concerned are identified as this is a central part of his request.

161. The terms of reference for the Sutton Inquiry stipulated that it was to look into the issuing and authorisation of BRACE guidance. Who authorised what and who was aware of what are both of paramount importance to the Inquiry and also to the requester. As such, the names of those parties who were directly involved with BRACE, and therefore mentioned in the withheld information, is of particular importance.

162. The Commissioner therefore believes that the legitimate interests of the requester, and therefore of the public in general, is served by disclosure.

Necessity

163. As referred to in paragraph 5 above, the Sutton Inquiry was undertaken internally by a Senior Director from within a different section of the public authority. As such, it may not therefore be considered by some to have been conducted by an independent party. The Inquiry found that the

senior management of the Sheffield group, none of whom were Senior Civil Servants, decided to issue new local guidance without authorisation by Ministers or senior officials at the IND in Croydon. The Commissioner therefore considers that the identity of those parties who have been historically involved in any way with BRACE is of significant interest as the identity of any parties involved can substantiate Sutton's findings. The Commissioner believes that there is a legitimate interest in knowing that the investigation was indeed fair and unbiased and, as such, he finds that revealing those parties is of fundamental importance to the published outcome of that inquiry.

164. The Commissioner also notes that some of the withheld information relates to events immediately after the complainant 'whistle-blowing' to the press, but whilst the Inquiry was on-going. These parties were not all referred to in the earlier information which focussed on the use of BRACE. However, the names of the parties involved reveal the breadth of those consulted when considering advice which was required as a result of the whistle-blowing. It clarifies who knew what and would therefore inform the public regarding the steps taken as a result of the action.

165. The Commissioner again notes that the actual request specifies any correspondence which involves *Sheffield and/or senior IND managers.* Consequently, the Commissioner finds that disclosure of those parties involved is necessary for the legitimate interests of the complainant

Unwarranted Interference

166. The Commissioner notes that many of the parties within the withheld information are only identified as the recipient of an email and are not referred to in any capacity other than by name. Nevertheless, these are mostly senior staff who are caught within the scope of the complainant's request by virtue of their position. As such the Commissioner considers there is a legitimate expectation that their involvement in both BRACE and the Inquiry, and their provision of ministerial advice where appropriate, is likely to be discloseable.

167. As the information only relates to the working lives of those parties, and usually only in a very limited manner, the Commissioner does not consider that disclosure would interfere with either their personal lives or that of their families. He therefore does not consider that disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the parties.

168. The Commissioner does however make four exceptions to this finding. It has not been possible to identify one party, who is mentioned within the text of one document along with a mobile phone number, and three other

parties have only been involved as they have circulated emails on behalf of others, i.e. they were not the intended recipient of any of the withheld information. As such, the Commissioner does not believe that there is a legitimate interest in releasing the personal data of these parties and he finds that it is not necessary and warranted to do so. These parties are named in a separate confidential annex to this notice.

169. In view of all of the above, the Commissioner does not consider that disclosure would cause an unwarranted intrusion. Schedule 2 condition 6 of the DPA is met in light of the above finding on intrusion and the legitimate public interests identified and the finding that disclosure can be regarded as necessary to meet those interests. In this case it would not be unfair to release the names of Ministers, ministerial staff or public authority staff with the exception of the four parties referred to in the paragraph above. (This finding also includes the names of those parties which were redacted, without any explanation, in the withheld information which was originally provided to him). Disclosure would therefore not contravene the data protection principles and s.40(2), read in accordance with section 40(3)(a)(i), is not engaged.

Category (ii) - a third party who was subject to a case investigation

170. Some of the third party data relates to an individual in their private capacity. In line with his guidance the Commissioner would like to stress that there is a distinction between disclosing information which relates to an individual in their private capacity rather than in an official one. Private information is likely to deserve protection unless there are extenuating circumstances. In this particular instance the Commissioner can find no such circumstances and finds that there a reasonable, strong expectation of privacy and he therefore finds that the individual's personal data should therefore be withheld as disclosure would be unfair and breach the first principle of the DPA. For this information section 40(2) read in accordance with section 40(3)(a)(i) applies.

171. In order to avoid any confusion the Commissioner has provided the public authority with a copy of the withheld information which includes any redactions that he considers are appropriate in line with the terms of the DPA.

The decision

172. The Commissioner's decision is that the public authority has not dealt with the request for information in accordance with the Act in that:

173. The public authority incorrectly withheld the requested information under section 36(2)(b). This is therefore in breach of section 1(1)(b).

174. As the public authority therefore failed to disclose the requested information within the statutory time limit it also breached section 10(1).

175. Section 12 was appropriately applied when considering all four parts of the refined request as prioritised by the complainant.

176. Section 40(1) applies to the personal data of the requestor and this should therefore have been considered under the terms of the DPA.

177. Section 40(2) applies to a five individuals and their personal data should be redacted from the disclosed information as per the separate confidential annex supplied with this Notice.

Steps

178. With the exception of the information which the Commissioner has identified as being exempt under either section 40(1) or 40(2) of the Act, the Commissioner requires the public authority to disclose the remaining information which it has withheld under section 36.

179. The Commissioner has provided a separate confidential annex which indicates which information should be withheld.

Other matters

Time for compliance

180. The date for statutory compliance is 20 working days after receipt of the request. However, where a public authority claims and explains the application of an exemption and seeks a further reasonable period of time to consider the public interest test, the Commissioner's guidance indicates that this should take no more than a further 20 working days. Therefore,

the statutory time for compliance will usually be set at a maximum of 40 working days unless the Commissioner is persuaded that any further time taken is reasonable given any exceptional circumstances which should be highlighted by the public authority.

181. The initial refusal notice itself was issued within 20 working days. In this the public authority stated that it was considering applying three qualified exemptions all of which required public interest tests. In view of this it proposed an extended response time of 14 December 2005. The further refusal citing the identified information was being withheld under section 36(2)(b)(i) and (ii) was sent on 13 December 2005, which was within the proposed time extension given by the public authority.

182. The Commissioner notes that the further time extension was greater than his recommended 40 day maximum. However, this request was processed prior to his guidance being updated. In view of this he will monitor the situation to ensure that future cases are dealt with more promptly.

Engagement with the ICO

183. In investigating complaints received under section 50(1) of the Act, the Commissioner is, in the majority of cases, reliant upon substantive submissions from public authorities. When public authorities do not respond to the ICO's enquiries within a reasonable timescale, the outcome is that an investigation is unnecessarily prolonged whilst the Commissioner attempts to secure a response.

184. The Commissioner notes that, during the course of this investigation, the public authority consistently failed to meet the deadlines set by his complaints officers. This Decision Notice finds that formerly withheld elements of the requested information should be disclosed to the complainant. The outcome of the public authority's failure to engage with the Commissioner's investigation has, therefore, delayed the complainant's access to information to which they are entitled. The Commissioner would hope that, in future, the public authority will undertake to respond to his enquiries within the timescales set by his complaints officers.

Applicant's personal data

185. This notice does not deal with issues regarding the applicant's personal data as the DPA is a separate access regime not covered by provisions of Part I of the Act. The Commissioner will therefore make a separate assessment under section 42 of the DPA in respect of the complainant's

right of subject access under section 7 of the DPA and communicate his findings to the complainant.

Section 16 - advice and assistance

186. Section 16 provides:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

187. Although the complainant did not raise the provision of advice and assistance as an issue the Commissioner believes it is appropriate for him to consider it in this case. Unfortunately, the complainant's refined request of 27 September 2005 did not make provision of a response any easier in this particular case because of how the information is held. In light of this the Commissioner will consider whether the public authority should have provided further help in order that the complainant could achieve the maximum success with his request.

188. In earlier correspondence dated 19 September 2005, when the first unrefined request was refused on costs, the public authority suggested to the complainant that he might refine his request to keep it under the appropriate limit. It suggested to him : *"If you were to ask for information on just one particular issue and specify a shorter time period then we may be able to consider your request further as it could fall beneath the £600 limit."* It further qualified that even if it were able to identify this information that an exemption may still apply to it.

189. The complainant's subsequent refined request of 27 September 2005, which is the basis of this notice, does prioritise what he is seeking access to. However, the way that the public authority retains its information does not allow the retrieval of the information which is pertinent to is request to be undertaken any more readily. In fact, the Commissioner believes that the refined request further inhibits the complainant's likelihood of having the maximum amount of information considered / disclosed within the appropriate limit.

190. In its response of 14 October 2005, subsequent to receiving the refined request, the public authority again tried to assist the complainant stating:

"Although your request would at present be too costly to answer, if you were to submit a newly refined request it [sic] so that it falls under the cost limit we would be happy to consider this further. You may for example wish to specify in a newly refined request a shorter time period in question where you require information, or if you were to ask only for the last part of your request regarding 'BRACE between senior managers with the Home Office's Immigration & Nationality Directorate and/or its Managed Migration sub-division, and Sheffield managers.' then we would be able to consider this below the cost limit as well."

191. In the Information Tribunal's ("the Tribunal") case of *Ian Fitzsimmons v The Information Commissioner and DCMS (EA/2007/0124)* the Tribunal found, at paragraph 46, that: *"Section 12 of FOIA does not require a public authority to provide a costs estimate to a requestor. Paragraph 14 of the Second Edition of the Code of Practice issued in November 2004 by the Secretary of State pursuant to section 45 of FOIA (the 'Code') states:*

"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit"... the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be applied to be supplied for a lower, or no, fee.""

192. Accordingly, the Tribunal concluded at paragraph 47 that: *"A public authority that complies with the Code will be taken to have complied with its obligation to provide advice and assistance for the purposes of section 16 of FOIA. However, failure to comply with the Code does not necessarily mean that there has been a breach of section 16 of FOIA."* The Tribunal further clarified that by expressly suggesting to the complainant that he narrow his request that it had complied with its statutory duties.

193. In view of this, the Commissioner finds that the public authority did try to provide advice and assistance to the complainant by making the suggestion that he should narrow his requests to keep it within the cost ceiling of the appropriate limit. Unfortunately, the way that the request was subsequently refined was not in such a manner which made the information any more readily retrievable by the public authority. Earlier provision of the table which was compiled to show how the appropriate limit had been reached, along with a more detailed explanation of what was actually held and how it was held would have allowed the complainant to appropriately refine his request in order to maximise the chances of his success. Unfortunately this was not done by the public authority however, as it did invite a further refined request, the Commissioner does not find that it was in breach of section 16.

Records management

194. In the absence of further evidence to the contrary, the Commissioner does not think this isolated example of the public authority being unable to answer a request within the appropriate limit warrants further action although it will be monitored. If future complaints provide evidence that the manner in which information is recorded by the public authority is consistently preventing its capacity to comply with requests, he will explore matters further.

Failure to comply

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195. 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

196. 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 5th day of March 2009

Signed ……..

Steve Wood
Assistant Commissioner

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

BREAKDOWN OF COST ESTIMATE OF COMPLYING WITH xxxxxx'S FOI REQUEST						
Request: xxxxxx asks for	**Unit/ Section in HO**	**Volume of material Number of files/ amount of papers** **E-Files** **Papers**	**Research time per file /papers (hours)**	**Cost per hour (£25)**	**Total cost**
1) My principal interest is in ministerial correspondence -- that is correspondence from/to David Blunkett and Beverley Hughes, either personally or their offices -- concerning 'BRACE': the 'backlog reduction accelerated clearance exercises': variously termed 'BRACE', 'ultra BRACE', 'BRACE I' and 'BRACE II' ('BRACE' may be in lower case). This does not include a copy of the Sutton report, which is already in the public domain; nor of course anything else already in the public domain. I am especially interested in any correspondence with, or that refers to, Sheffield and/or senior IND managers, and/or to myself. It is inconceivable that this request could exceed the cost threshold. I do not stipulate date parameters given the short period in office of the two ministers, but in any case BRACE did not come into existence prior to 2002.	***Ken Sutton Enquiry**	10 files average of 1 ½ inches thick	1 hour per file	250	**£250**
	***MM South and North**	All information likely to have been given to Sutton enquiry-		0	
2) Subject to the cost threshold, I then wish you to consider correspondence from/to the offices of David Blunkett and Beverley Hughes concerning marriage applications; that is, on the policy and practice of how marriage applications are dealt with: I am not interested in the work of either ex-minister on behalf of individual constituents.	***MMSR**	7 paper files Total of 180 papers	15 minutes average for 65 files on F drive: 16 hours 25 minutes	£400	**£725**
		65 files on F Drive	9 hours at 1 hour per 20 papers	£225	
	*MM South and North	Number of e-files	2 hours	£100	
3)If the cost threshold has not been exceeded then ditto re student applications.	*MMSR	5 1 ½ thick paper files	1 hour per file	£125	**£200**
		Number of e files	3 hours for electronic search	£75	
	*MM South and North				
4)If the cost threshold has still not been exceeded, then ditto re 'BRACE' between senior managers with the Home Office's Immigration & Nationality Directorate and/or its Managed Migration sub-division, and Sheffield managers	*Ken Sutton enquiry	4 1 ½ inches thick	1 hour per file	£100	**£100**

Legal Annex

Section (1) provides that –
Any person making a request for information to the 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 the information communicated to him.

Section 10(1) provides that –
Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 12(1) provides that –
Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

Section 16(1) provides that -
It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

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 40(1) provides that –
Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

Section 40(2) provides that –
Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.

Section 40(3) provides that –
The first condition is-
(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  (i) any of the data protection principles, or
  (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Statutory Instrument 2004 No. 3244 - The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

Citation and commencement
1. These Regulations may be cited as the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and come into force on 1st January 2005.
Interpretation
2. In these Regulations -
"the 2000 Act" means the Freedom of Information Act 2000;
"the 1998 Act" means the Data Protection Act 1998; and
"the appropriate limit" is to be construed in accordance with the provision made in regulation 3.
The appropriate limit
3. (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.
(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.
(3) In the case of any other public authority, the appropriate limit is £450.
Estimating the cost of complying with a request - general
4. (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.
(2) A relevant request is any request to the extent that it is a request-
  (a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

Estimating the cost of complying with a request - aggregation of related requests

5. (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority -

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971[4] in any part of the United Kingdom.

Maximum fee for complying with section 1(1) of the 2000 Act

6. (1) Any fee to be charged under section 9 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by the public authority in accordance with this regulation.

(2) Subject to paragraph (4), the maximum fee is a sum equivalent to the total costs the public authority reasonably expects to incur in relation to the request in-

(a) informing the person making the request whether it holds the information, and

(b) communicating the information to the person making the request.

(3) Costs which may be taken into account by a public authority for the purposes of this regulation include, but are not limited to, the costs of-

(a) complying with any obligation under section 11(1) of the 2000 Act as to the means or form of communicating the information,

(b) reproducing any document containing the information, and

(c) postage and other forms of transmitting the information.

(4) But a public authority may not take into account for the purposes of this regulation any costs which are attributable to the time which persons undertaking activities mentioned in paragraph (2) on behalf of the authority are expected to spend on those activities.

Maximum fee for communication of information under section 13 of the 2000 Act

7. (1) Any fee to be charged under section 13 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by a public authority in accordance with this regulation.

(2) The maximum fee is a sum equivalent to the total of -

(a) the costs which the public authority may take into account under regulation 4 in relation to that request, and

(b) the costs it reasonably expects to incur in relation to the request in -

(i) informing the person making the request whether it holds the information, and

(ii) communicating the information to the person making the request.

(3) But a public authority is to disregard, for the purposes of paragraph(2)(a), any costs which it may take into account under regulation 4 solely by virtue of the provision made by regulation 5.

(4) Costs which may be taken into account by a public authority for the purposes of paragraph (2)(b) include, but are not limited to, the costs of-

(a) giving effect to any preference expressed by the person making the request as to the means or form of communicating the information,

(b) reproducing any document containing the information, and

(c) postage and other forms of transmitting the information.

(5) For the purposes of this regulation, the provision for the estimation of costs made by regulation 4(4) is to be taken to apply to the costs mentioned in paragraph (2)(b) as it does to the costs mentioned in regulation 4(3).