

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 December 2009

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

Summary

The complainant had made a number of requests to the public authority prior to this case. The first request dealt with in this Decision Notice (the 'original request') was for all information which had been redacted from documents released as a result of one of the previous requests on the basis that it was not relevant to that request. In response to the original request the public authority provided some information but withheld the remainder by reference to section 36(2)(b) of the Freedom of Information Act 2000 ('the Act'). The complainant made a supplementary request for a copy of the qualified person's reasonable opinion in respect of the application of section 36 to the original request, and the date on which the opinion had been made. The public authority withheld that information on the grounds that it too was exempt, under section 36(2)(b) and (c). During the course of the Commissioner's investigation the public authority disclosed the information relating to the original request. The Commissioner required the public authority to disclose part of the withheld information in the supplementary request. In relation to both the original and supplementary requests the Commissioner decided that the public authority had failed to comply with the procedural requirements of sections 1(1)(b), 10(1), 17(1) and 17(2).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

2. The complainant made a number of requests to the Department for Culture, Media and Sport (DCMS). One request was made on 11 May 2006. In responding

- DCMS redacted some information on the grounds that it was not relevant to the request.
3. The complainant then made a freedom of information request on 13 June 2006 (the 'original request') for *'all information redacted...on the basis of relevancy'*.
 4. DCMS replied on 12 July 2006 providing some information. It stated that it was *'still considering the application of section 36'* to the remainder but could not give a specific date when that was likely to be concluded.
 5. The complainant wrote back on 24 July 2006 asking DCMS for *'the date on which the qualified person gave the reasonable opinion'* and for *'a copy of that reasonable opinion'* (the 'supplementary request').
 6. On 8 August 2006 DCMS informed the complainant that the withheld information in the original request was exempt by virtue of section 36(2)(b) of the Act. It provided its assessment of the public interest test, which it concluded favoured maintaining the exemption. It informed the complainant of his right to request an internal review and to complain to the Commissioner.
 7. The complainant requested an internal review on 31 August 2006, citing DCMS' failure to identify any prejudice to public affairs and its apparently mechanical application of generic public interest factors without conducting a proper assessment. He indicated that he considered his letter of 24 July 2006 asking for information about the qualified person to be a separate freedom of information request, and he asked for a review of DCMS' failure to respond to that (supplementary) request.
 8. DCMS provided its internal review decision of the original request on 31 October 2006, upholding the decision. In relation to the issue of the qualified person's opinion, it did not address this as a supplementary request, but stated that the Act did not require it to disclose the opinion or the date on which it had been obtained. It acknowledged that at the time of its letter dated 12 July 2006 it had *'yet to seek'* the opinion of a Minister, but it claimed that it had not been relying on section 36 at that time but *'in the spirit of helpfulness we indicated that we were considering whether section 36 was applicable'*. However, it accepted that the opinion should have been provided within 20 working days of the request. It finished by reminding the complainant of his right to complain to the Commissioner.
 9. The complainant wrote to the Secretary of State at DCMS on 10 November 2006 to complain about the way in which the request had been handled. He claimed that no *'proper or lawful'* internal review of the supplementary request had taken place that would enable him to refer the matter to the Commissioner and invited the Secretary of State to make a fresh decision.
 10. DCMS acknowledged this letter on 21 November 2006 and sent a substantive response on 12 December 2006. It stated that a qualified person had given their opinion by the time that DCMS provided its decision in the letter dated 8 August 2006. It reiterated its view that information about the qualified person's opinion

concerned the way in which DCMS had handled the original request and that scrutiny of the response was therefore properly to be obtained by way of the Commissioner; however, in light of the complainant's letter of 10 November 2006 DCMS was treating the matter as a further request for information under the Act which was being addressed in a separate letter.

11. That letter, which was also dated 12 December 2006, confirmed that DCMS held the requested information but that a qualified person had formed the opinion that it was exempt under section 36(2)(b) and (c) of the Act.

The Investigation

Scope of the case

12. On 19 January 2007 the complainant wrote to the Commissioner complaining about the way in which DCMS had dealt with both requests. He indicated that he wanted to receive the information contained within the second postscript to the letter dated 28 April 2006, together with the information about the qualified person identified in his supplementary request. He expressed his view that DCMS had used section 36 of the Act *'in a highly irregular way'* by applying it without obtaining a qualified person's opinion within 20 working days of the request, that it had extended the time limit for responding merely on the basis that it was considering whether section 36 applied, and that it had failed to explain why the exemption was engaged or to make a proper assessment of the public interest test. He also asserted that DCMS had deliberately delayed in dealing with the request.
13. In this investigation the Commissioner has therefore assessed whether DCMS correctly withheld the information identified by the complainant; whether it complied with the time limits laid down by the Act; and whether it complied with its obligations under section 17 to explain its application of the exemptions and its assessment of the public interest test.

Chronology

14. The Commissioner wrote to the complainant and DCMS on 15 January 2008. The complainant provided some further comments on 17 January.
15. DCMS wrote back on 12 February 2008. It provided its comments and some of the information which had been withheld. In relation to the information withheld in the original request it stated that the public interest had changed and now favoured disclosure.
16. On 11 April 2008 the Commissioner advised DCMS to release the information to the complainant if it considered that the public interest favoured so doing. He also asked DCMS to forward some of the withheld information from the second request which had been omitted from its previous letter.

17. DCMS forwarded that information to the Commissioner on 21 April 2008. It also provided evidence that on 17 April 2008 it had sent the complainant the information withheld in the original request.
18. The complainant wrote to the Commissioner on 29 April 2008 with some queries about the released information.
19. The Commissioner replied on the same day.

Analysis

Exemption – section 36

20. The full text of the relevant sections of the Act can be found in the Legal Annex at the end of the Notice.

Original request: exemption under section 36(2)(b)

21. The complainant's first request was for the information redacted from a letter dated 28 April 2006. He expressed his view that DCMS had used section 36 of the Act *'in a highly irregular way'* by applying it without obtaining a qualified person's opinion within 20 working days of the request, and that it had failed to explain why the exemption was engaged or to make a proper assessment of the public interest test.
22. During the course of the Commissioner's investigation DCMS indicated that, while it believed that the public interest test had been properly applied at the time of the request, it considered that the balance of the public interest had shifted and now favoured disclosure of the redacted information. Upon the Commissioner's invitation it therefore forwarded that information to the complainant on 17 April 2008. Since the information withheld in the first request has now been disclosed the Commissioner has not considered DCMS' application of the section 36(2)(b) exemption.

23. Supplementary request: exemption under section 36(2)(b) and (c)

24. The complainant's supplementary request was for information about the qualified person in the first request: *'the date on which the qualified person gave the reasonable opinion'* and *'a copy of that reasonable opinion'*. DCMS interpreted the opinion as comprising the submission made to the qualified person as well as an email sent on his behalf assenting to the application of section 36. It might be argued that the submission is not actually part of the opinion, but it may be that DCMS took the view that the assenting email in isolation could not be construed as a 'reasonable opinion'. Since that would be the view of the Commissioner himself, he has accepted DCMS' assessment of what information falls within the request.
25. DCMS informed the Commissioner that, at the time this request was made, it had considered that it *'was not required to provide this information under the Act and*

therefore that it should not be treated as an FOI request'. The Commissioner takes the view that this was a misguided response. He would remind DCMS that a request is a valid one under the Act if it is in writing (including email) and provides the applicant's name and an address for a response, regardless of whether the requested information is exempt or not. Furthermore, even if the information could be properly withheld by virtue of an exemption, DCMS was still obliged to consider the obligation which it had under section 1(1)(a) to inform the applicant in writing 'whether it holds information of the description specified in the request'.

Qualified person's opinion

26. Subsections 36(2)(b) and (c) of the Act provide that information is exempt if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or, according to section 36(2)(c), if it:

'would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'.

27. DCMS has confirmed that the qualified person was the Minister for Sport and that the opinion was sought on 8 December 2006 and obtained on 11 December 2006. The Commissioner is satisfied that this was the appropriate 'qualified person' as laid down in section 36(5) of the Act.

28. DCMS has also explained that the qualified person was asked to give an opinion as to whether disclosure of the information would (be likely to) inhibit the free and frank provision of advice or exchange of views, or otherwise prejudice the effective conduct of public affairs, and that he had been provided with information relating to officials' consideration of the public interest test.

29. Where the level of prejudice – *would*, or *would be likely* – has not been specified by the public authority then the Commissioner will apply the lower threshold unless there is clear evidence that the higher level should apply. In *McIntyre v The Information Commissioner and the Ministry of Defence (EA/2007/0068)*, which involved the application of the section 36 exemption, the Tribunal specified which standard of proof should apply when the level of prejudice was not designated by the public authority's qualified person:

'Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'

30. In this case the Commissioner has therefore applied the lower standard. Where the public authority has claimed that disclosure is only *likely* to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, *'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'*.

31. In deciding whether the qualified person's opinion was reasonable, the Commissioner notes that 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.
32. Since the requested information in this case was the submission dated 27 July 2007 which had been put to the qualified person for consideration in relation to the original request, it is clear that the qualified person had already seen the information and therefore did not need to be briefed about its nature. The Commissioner also notes that the qualified person was given advice about relevant issues concerning the application of the exemption. In relation to prejudice, what the qualified person identified was that disclosure would be likely to inhibit the willingness of officials and Ministers to engage in and record discussions in relation to future requests for information under the Act.
33. In the circumstances, the Commissioner is satisfied that in this case the opinion of the qualified person was both reasonable in substance and reasonably arrived at, in concluding that it was likely that disclosure of the requested information would be likely to lead to the relevant prejudice for section 36(2)(b). The exemption is therefore engaged.
34. Regarding the qualified person's application of section 36(2)(c), the Commissioner has had regard to the particular nature of section 36(2)(c). While section 36(2)(a) and (b) provide for exemption in specific circumstances, paragraph (c) takes a more general form, referring to prejudice to 'the effective conduct of public affairs'. As explained in the Commissioner's '*Awareness Guidance No 25*', paragraph (c) is not intended to be a 'catch-all', but instead to cover rare situations which could not be foreseen and which cannot be covered by another exemption, where it would be necessary to withhold information in the interests of good government. Section 36(2)(c) places the harm outside of the individual public authority and in the realm of 'public affairs'. In *McIntyre v The Information Commissioner & the Ministry of Defence* (EA/2007/0068) the Tribunal expressed its view about the intention behind the section 36(2)(c) exemption:

'this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another exemption, and where disclosure would prejudice the public authority's ability to offer an effective

public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure'.

35. Furthermore, since 36(2)(c) is expressed as arising from prejudice 'otherwise' than that which engages section 36(2)(b)(i) and (ii), it is only engaged where some prejudice can be demonstrated other than that which engages section 36(2)(a) and (b) (ie prejudice other than to the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation). In *R Evans v The Information Commissioner & the Ministry of Defence* (EA/2006/0064) the Information Tribunal commented that:

'The principle [sic] arguments in favour of this exemption [section 36(2)(c)] advanced by the MOD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves feely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the same arguments are to be advanced, then the prejudice feared is not "otherwise". Some prejudice other than that to the free and frank expression of advice (or views as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged.'

36. In light of these considerations the Commissioner takes the view that section 36(2)(c) is only available in cases where disclosure would prejudice a public authority's ability to offer an effective public service, or to meet its wider objectives or purpose, due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.
37. In this case, DCMS claimed that if information relating to section 36 opinions were 'to be routinely released by the department, the burdens imposed by the Act would be likely to increase substantially, diverting essential resources' and thereby prejudicing DCMS's ability to 'meet not only its obligations under the Act but impact on its ability to carry out its other functions...'. The Commissioner does not accept this view. DCMS has provided no evidence that it would have to 'routinely' release information about the qualified person's opinion, or that there would be a significant number of requests for such information, nor has it explained why releasing the requested information would result in a significantly greater resource burden than refusing disclosure. The Commissioner does not believe that disclosure of information about the qualified person's opinion would have an impact so wide-ranging as to prejudice the public authority's ability to deliver an effective public service or meet its wider purpose. He has therefore decided that section 36(2)(c) is not engaged in relation to the information requested.

Public interest test

38. Since section 36(2)(b) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'.

Public interest test – factors favouring disclosure

39. In favour of disclosing the qualified person's opinion and the date on which it was made, DCMS accepted that there was a *'legitimate public interest in understanding the way in which Government works and how Ministers interact with their advisers and officials'*, and also *'to understanding how requests for information under the Act are handled'*. It noted that: *'Greater transparency makes Government more accountable and is likely to increase trust...'*
40. The Commissioner considers that the following public interest factors favour disclosure of information about public authorities' administration of freedom of information requests. First, it may assist requesters in understanding the decisions which have been made in specific cases, and sometimes aid them in challenging those decisions. In the *Baker* case cited above the Tribunal found that there was a public interest in the transparent provision of the full information behind a decision because that 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'*.
41. Secondly, disclosure promotes accountability and transparency of public authorities in respect of their decisions and procedures, thereby encouraging improvement in the quality of decisions and administration. It may also increase public confidence that decisions are being made on the basis of the best available information, and improve public understanding of how government refines policy.
42. Thirdly, there is a strong public interest in understanding how public authorities are applying freedom of information legislation in general. Disclosure also facilitates the participation of the public at large and interested parties, such as the complainant in this case, in debate about the policy.

Public interest test – factors favouring non-disclosure

43. On the other hand, DCMS identified factors which favoured maintaining the exemption. First, it claimed that disclosure *'would have the effect of bypassing the statutory enforcement mechanisms approved by Parliament and carried out by the Information Commissioner and Information Tribunal'*. The Commissioner does not accept this argument. It makes an assumption about the purpose of the complainant's information request – that he requires the information in order to question DCMS' decision in relation to his original request. Not only does the Act contain no provision for a public authority to take account of the motive for an information request in this way, but there are other possible reasons why the complainant might want the information, in respect of which the statutory enforcement mechanism is irrelevant. In addition, the principle could be extended to any request for information which has an alternative 'enforcement mechanism' or which is obtainable by another route, for example by application to a court. The Commissioner takes the view that, if Parliament had intended that requests for information relating to information requests should not be disclosable as a matter of principle, then it could have devised a specific exemption for that category of

information. In the circumstances the Commissioner has decided that this factor carries little weight when assessed as part of the public interest test.

44. Secondly, DCMS stated that release of any of the requested information would *'inhibit the willingness of officials and Ministers to engage in and record such free and frank discussions in relation to future requests for information under the Act'*. In other words, there is a public interest in avoiding the 'chilling effect' which disclosure would have on the discussions and submissions between officials and Ministers, and on the records made in such cases, in future freedom of information cases. The Commissioner's view is that there may be a chilling effect on submissions provided by officials to qualified persons if such submissions are disclosed while individual freedom of information requests are 'active' (either during their processing by the public authority, or during the Information Commissioner and Information Tribunal appeal process). At the time when the request was made in this case – 24 July 2006 – the request to which the qualified person's opinion related (ie the original request) had still not been determined at first instance. The Commissioner's view is that there was accordingly a strong public interest in maintaining the exemption in respect of information which was material to DCMS' decision whether or not to disclose the information in the original request, since the decision was still under consideration and those involved were entitled to expect that the privacy of their deliberations would be protected at that stage.
45. Finally, DCMS made a third point, that a public interest in protecting advice about DCMS' legal obligations was relevant to this case. It claimed that the record of the qualified person's opinion contained free and frank advice on whether it met its obligations under the Act, and canvassed weaknesses as well as strengths. The Commissioner accepts this point insofar as it is a restatement of the 'chilling effect' argument. However, to the extent that it is a claim that advice to a qualified person should be treated as relating to legal obligations deriving from the Act, the Commissioner is not convinced. Such advice is given so that the qualified person can decide whether disclosure of certain information could be prejudicial to the conduct of public affairs, and it therefore relates to 'legal obligations' only indirectly.
46. The Commissioner has weighed up all of these public interest factors in relation to the requested information, which comprises the submission made to the qualified person, an email sent on his behalf assenting to the recommendation to apply section 36, and the date his opinion was given.

(i) The submission

47. The Commissioner considers that, at the time of the request, the public interest in maintaining the section 36(2)(b) exemption provided by the 'chilling effect' was sufficient to justify retention of the information in the submission. Disclosure could reveal officials' views about the strengths and weaknesses of their positions, and thereby prejudice their ability to defend their decisions at a time when the freedom of information process was still active. The decision of this Decision Notice relates to the action taken by DCMS' at the time of its refusal of the

request. The Commissioner has therefore decided that DCMS was justified in concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information contained within the submission.

48. However, since then the information subject to the original request has been disclosed by DCMS. There is accordingly no possibility of appeal and the qualified person's opinion is essentially a 'historical' document. Accordingly, it is likely that the balance of the public interest would be very different were a fresh freedom of information request to be made for the information contained within the submission.

(ii) The assent

49. Having considered the contents of this document the Commissioner does not believe it contains anything substantive, the disclosure of which could generate a 'chilling effect'. Accordingly, he has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information. (However, the Commissioner believes that some information is exempt under section 40, as explained below.)

(iii) The date

50. In relation to the date of the qualified person's opinion, the Commissioner does not consider that there are any public interest factors which justify maintaining the exemption. Whilst he accepts the likelihood of some prejudice, the Commissioner does not accept that officials and Ministers would necessarily be inhibited from discussing freedom of information requests by the prospect that the date on which the qualified person's opinion was given might be disclosed, nor does he consider that disclosure of that information would bypass the statutory enforcement mechanisms. Indeed, knowledge of whether a public authority has breached the provisions of section 36 may improve the complaints process by giving a potential complainant fuller knowledge of whether or not such a complaint might be justified and thereby facilitating a more rational decision as to whether to bring such a complaint. There are public interest factors in disclosure of the date of the qualified person's opinion, including accountability and the possibility of increasing trust in the ability of public authorities to apply freedom of information legislation properly. The Commissioner has therefore concluded that the public interest in maintaining the exemption did not outweigh the public interest in disclosure of the date, and DCMS therefore breached section 1(1)(b) of the Act by failing to communicate to the complainant information to which he was entitled.

Exemption – section 40

51. Although the Cabinet Office did not refer to section 40 of the Act, the Commissioner considers that the section is relevant to some of the information in the assent document. Section 40(2) provides that:

'Any information to which a request for information relates is also exempt information if—

it constitutes personal data which do not fall within subsection (1), and

either the first or the second condition below is satisfied.'

52. Such information is exempt if either of the conditions set out in subsections (3) and (4) are met. The relevant condition in this case is at subsection (3)(a)(i), where disclosure would breach any of the Data Protection Principles. The Data Protection Principles are set out in schedule 1 of the Data Protection Act 1998, and in this case the Commissioner believes that disclosure of the information identified above would breach the First Data Protection Principle. That Principle states:

'Personal data shall be processed fairly and lawfully...'

53. The assent document contains the names of relatively junior officials who were copied in or who performed a secretarial function. The Commissioner has concluded that these individuals would not have expected that their personal role would be put under public scrutiny. Accordingly, he has decided that it would be unfair if their names and contact details were disclosed, and he has therefore decided that this information should be redacted from the information when it is disclosed.

Procedural requirements

Sections 10 and 17

Breach of 20 day refusal notice

54. Section 10(1) of the Act provides that:

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

A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.

55. The complainant made the original request for the redacted information on 13 June 2006. DCMS replied on 12 July 2006, which was 21 working days after the request. However, it did not provide its final decision until 8 August 2006, 40 working days after the request was made. Section 17(2) of the Act allows a public authority to extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. This issue is addressed in the section below. However, since DCMS failed to provide any sort of response within 20 working days it failed to comply with its duty to issue a

refusal notice within the time limit set out in section 10(1), which constitutes a breach of section 17(1) of the Act.

56. Regarding the supplementary request, the complainant asked DCMS for the information on 24 July 2006. DCMS did not take this to be a formal freedom of information request. Owing to the nature of the request – for information about the qualified person in the original request – and the circumstances in which the request arose, that is perhaps understandable. However, even if DCMS did not consider it to fall within the provisions of the Act the Commissioner would still have expected it to have provided some response, and if necessary to have sought clarification from the complainant. In fact, when it responded to the complainant on 8 August 2006 DCMS made no reference at all to this supplementary request. The complainant made clear in his reply of 31 August 2006 that he considered the request for information about the qualified person to be a formal freedom of information request.
57. The Commissioner considers that at that point it should have been apparent to DCMS that the supplementary request should be addressed under the provisions of the Act. DCMS did not in fact do so until further representations had been made by the complainant, and it was only on 12 December 2006 that it issued a refusal notice. By this point the complainant had requested an internal review regarding DCMS's failure to engage properly with the supplementary request, but the Commissioner takes the view that DCMS had not in fact made a first instance decision in respect of the request until it issued its letter dated 12 December 2006. As the request was originally received on 24 July 2006, DCMS therefore took well in excess of the 20 working day time limit to respond. Accordingly, the Commissioner finds that DCMS failed to comply with its duty to issue a refusal notice within the time limit set out in section 10(1). This constitutes a breach of section 17(1) of the Act.

Extension of time limit

58. The complainant made his original request on 13 June 2006. DCMS replied on 12 July 2006, stating that it was *'still considering the application of section 36'* of the Act to part of the requested information but could not give an indication when that was likely to be concluded. On 8 August 2006 – 40 working days after the request had been made – it informed the complainant that the withheld information was exempt by virtue of section 36(2)(b) and it provided its assessment of the public interest test.
59. Section 10(1) of the Act provides that:
- 'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*
60. Section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. The refusal notice:

'must indicate that no decision...has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached'.

61. Where any additional time beyond the initial 20 working days is required to consider the public interest, the public authority must still serve a 'refusal notice' under section 17 of the Act within 20 working days of a request even in those cases where it is relying on a qualified exemption and has not yet completed the public interest test. That notice must state the exemption(s) being relied on and, if not apparent, why they apply.
62. The refusal notice must also include an estimate of the time by which this decision will be made. In this case, DCMS failed to provide an estimate. It claimed that it could *'not, at this point, provide you with a specific date for the conclusion of this matter...'* The Commissioner does not consider that the fact that DCMS could not provide a specific date precluded it from providing an estimate of the likely timeframe. Accordingly, he has concluded that DCMS breached its obligations under section 17(2).
63. The Commissioner has considered the circumstances in which this extension was made. Having regard to the dates on which the qualified person's opinion was sought and obtained, both of which post-dated its letter of 12 July 2006 and the 20 working day time limit, it seems likely that the extension was not obtained in order for DCMS to consider the public interest test, but for it to obtain the qualified person's opinion and to consider whether section 36 was engaged at all. It is the Commissioner's view that the extension to the time limit provided for by section 17(2) cannot be claimed until the public authority has identified an exemption as being engaged. In the case of section 36, that can only occur after a qualified person has given a reasonable opinion. Since it seems in this case that DCMS had not engaged section 36 when it invoked the time limit extension, the Commissioner has decided that it breached section 17(2).

Failure to specify exemption sub-paragraphs

64. DCMS' decision was that this information was exempt under section 36(2)(b) and (c) of the Act. In respect of section 36(2)(b) it stated that release of the information would have the prejudicial effects cited in either sub-paragraphs (i) or (ii), although it did not attempt to explain whether it was either or both of the sub-paragraphs which applied. Section 17(1)(b) of the Act places an obligation upon the public authority that its refusal notice *'specifies the exemption in question'*. The Commissioner's view is that the public authority is thereby required to refer to the specific part(s) of the relevant exemption(s). In this case DCMS referred generally to section 36(2)(b) without specifying which sub-paragraph(s) were being applied. It therefore breached section 17(1)(b).

The Decision

65. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in withholding the submission under section 36(2)(b).

66. However he has decided that it did not deal with the request for information in accordance with the Act in the following respects:

- in relation to both the original and supplementary requests DCMS failed to comply with its duty to issue the refusal notices within the time limit set out in section 10(1), which constitutes a breach of section 17(1) and 1(1)(b) of the Act;
- in the original request, in extending the time limit to consider the public interest it failed to apply the section 36 exemption before doing so;
- it improperly extended the time limit to allow further consideration of whether section 36(2)(b) applied to the information rather than merely to consider the public interest test, a breach of section 17(2);
- it failed to provide an estimate of the date by which it expected that the decision would be reached, a further breach of section 17(2);
- in the supplementary request DCMS breached section 1(1)(b) by inappropriately withholding some of the requested information by reference to section 36(2)(b) and (c);
- it also breached section 17(1)(b) in failing to specify which of the subparagraphs of section 36(2)(b) applied.

Steps Required

67. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act. DCMS should provide the complainant with some of the information which it claimed was exempt under section 36(2)(b) of the Act, that is:

- the date on which the qualified person's opinion was given;
- the qualified person's 'assent' email (with some information relating to personal data redacted).

68. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

69. 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

70. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

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

Dated the 10th day of December 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Section 1(1) provides that -

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

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

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

Section 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 10(3) provides that –

'If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.'

Section 10(6) provides that –

'In this section –

"the date of receipt" means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

"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 in any part of the United Kingdom.'

Section 17(1) provides that -

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

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.'

Section 17(2) states –

'Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.'

Section 17(3) provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

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

Section 36(2) provides that –

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

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

Section 36(5) provides that –

‘In subsections (2) and (3) ‘qualified person’-

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

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

Section 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.'