Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 April 2009

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

Summary

The complainant asked DCMS for information about the government's casino policy, which it subsequently clarified as being for *'any objective external assessment that led to the adoption of first the 8-8-8 policy, and then 1-8-8 policy; and, any advice from officials to Ministers that led to these decisions being taken'.* DCMS withheld the information by reference to section 35(1)(a) and (b) and section 43 of the Freedom of Information Act 2000 ('the Act'); at the internal review stage it added that part of the information was exempt by virtue of section 42. The Commissioner decided that section 43(2) was not engaged; that the balance of the public interest test for section 35(1)(a) and (b) did not favour withholding the information; and that one document was exempt under section 42(1). The Commissioner decided that DCMS breached section 17(1)(b) by failing to specify within the statutory time limit which sub-section of section 43 applied; and that, in using a blanket public interest assessment for all of the claimed exemptions, it breached section 17(3)(b) by failing to assess the public interest properly for each exemption. He also decided that, in failing to confirm or deny within 20 working days whether it held the requested information, DCMS breached the requirements of section 10(1) of the Act, and also breached section 17(1) by failing to provide the details required by that section within 20 working days. Finally, it breached 10(1) in failing to disclose information which was not exempt within the statutory time limit, and section 1(1)(b) in failing to disclose it at all. The Commissioner required DCMS to disclose the majority of the withheld information.

The Commissioner's Role

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

1. On 7 August 2006 the complainant requested from DCMS:

   'information regarding all analyses, studies and memoranda commissioned or produced by DCMS [Department of Culture, Media and Sport] regarding the government's decisions (i) initially to set the number of regional, small and large casinos envisaged under the Gambling Act 2005 to 8 of each; and (ii) subsequently to reduce the proposed number of regional casinos to be permitted under the Gambling Act 2005 from 8 to 1'.

2. DCMS acknowledged the request on 11 August 2006.

3. On 21 August 2006 it telephoned the complainant to clarify the terms of the request.

4. DCMS then provided its refusal notice on 22 September 2006. It stated that the complainant had agreed during the telephone conversation that DCMS would seek to identify:

   - *'any objective external assessment that led to the adoption of first the 8-8-8 policy, and then 1-8-8 policy; and,*
   - *any advice from officials to Ministers that led to these decisions being taken'.*

   It informed the complainant that it held information falling within the request, but was withholding it by reference to section 35(1)(a) and (b) and section 43. It explained its application of the public interest test. DCMS advised the complainant that he could request an internal review, and complain to the Commissioner.

5. The complainant responded on the same day, asking DCMS to confirm that no information at all could be provided, including even statistical information relating to policy formulation which had now been concluded.

6. On 29 September 2006 the complainant sent a reminder.

7. DCMS acknowledged this on 2 October 2006 and sent a substantive response on 4 October. It referred the complainant to the comments which it had made in its refusal notice, although it also indicated that the statistical information arose from independent research which drew upon *'commercially sensitive contributions provided in confidence to the researchers by private sector companies in the gambling industry'*, which was why it was exempt.

8. On 6 October 2006 the complainant requested an internal review.

9. DCMS acknowledged this request on the same day.

10. On 19 October 2006 DCMS advised the complainant that it expected to be able to provide its decision by 17 November 2006.

11. DCMS informed the complainant on 17 November 2006 that it had not been able to complete the internal review. It gave as an explanation the fact that a Director from a policy group different to that which had answered the original information request was conducting the review, and was required to discuss matters with the staff who had dealt with the original request and consider the case completely afresh. DCMS stated that it now aimed to send a response by 8 December.

12. The complainant sent a reminder on 12 December 2006.

13. DCMS acknowledged this reminder on 13 December 2006.

14. The complainant sent a further reminder on 19 December 2006.

15. DCMS provided another acknowledgement, on 20 December 2006, and repeated the explanation for the delay which it had already provided.

16. The complainant sent another reminder on 9 February 2007.

17. DCMS replied on the same day that a substantive reply should be available within two weeks. On 13 February 2007 it sent a further acknowledgement.

18. On 23 February 2007 DCMS advised the complainant that the matter was *'in the final stages of being concluded'* and that it aimed to provide a response by 9 March.

19. In the event it issued its internal review decision on 26 February 2007. It upheld the decision not to disclose the information for the reasons given in the refusal notice, and for the additional reason that part of the information was exempt by virtue of section 42 of the Act. It provided its assessment of the public interest test in relation to that exemption, and also addressed the complainant's point regarding the statistical information. DCMS reminded the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

20. The complainant complained to the Commissioner on 27 April 2007. He objected to DCMS' refusal to provide any information at all, and pointed out that section 35(2) provided that once a government policy decision had been taken relevant statistical information could not engage section 35(1)(a) or (b). He also complained about DCMS' delay in issuing both its refusal notice and its internal review, and noted that this had meant that the final decision came after the government's announcement on 30 January 2007 as to which city had been successful in the regional casino bid. In his investigation the Commissioner has

addressed the refined request that was agreed between the complainant and DCMS on 21 August 2006.

Chronology

21. The Commissioner wrote to the complainant and DCMS on 13 May 2008. He asked DCMS to comment on various issues and to provide him with the withheld information.

22. DCMS replied on 26 June 2008 that it would be providing a full response by the middle of the following week.

23. DCMS provided the requested comments on 3 July 2008, together with a copy of the withheld information.

24. On 29 August 2008 the Commissioner wrote again to DCMS with further queries.

25. DCMS acknowledged receipt of this letter on 2 September 2008.

26. The Commissioner sent a reminder on 21 October 2008.

27. DCMS contacted the Commissioner on 22 October 2008, stating that it needed to contact third parties before it was able to respond to the letter.

28. DCMS provided its substantive response on 4 November 2008.

Findings of fact

29. The information withheld by DCMS comprises a number of documents:

- a Study jointly commissioned with another government department;
- informal summaries of specific legal advice;
- briefing notes;
- draft Ministerial correspondence;
- covering emails.

Sections 35(1)(a) and/or (b) were applied to all of the documents; section 43 was additionally applied to the Study; and section 42 was additionally applied to the informal summaries of specific legal advice.

Analysis

Procedural matters

Delay in issuing refusal notice

30. The complainant objected that DCMS had failed to issue its original refusal notice within the statutory timescale of twenty working days. (He also claimed that DCMS had delayed severely in providing its internal review decision, but since there is no statutory timescale laid down for completing internal reviews this issue is addressed in the section 'Other matters' below.)

31. 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.'*

The Commissioner has provided guidance on this issue in his *'Good Practice Guidance No 4'.* 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.

32. Section 1(1) states:

> *'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.'*

Furthermore, section 17(1) of the Act states:

> *'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.'*

33. In this case the complainant made his request on 7 August 2006, but DCMS did not provide him with a decision until 22 September 2006. It therefore took 33 working days to respond to the information request. DCMS has expressed its view to the Commissioner that the request did not constitute a freedom of information request until the telephone conversation on 21 August 2006 providing further clarification. The Commissioner does not agree with DCMS' view in this regard, since he believes that the initial request on 7 August 2006 was clear, but was subsequently modified by agreement following discussion with DCMS. The Commissioner also notes that DCMS did not actually contact the complainant for 'clarification' until 21 August, some 10 working days after the request had been made.

34. The Commissioner recognises that DCMS' refusal notice in this case was issued prior to the issuing of his *'Good Practice Guidance No 4'* in February 2007, in which he provided advice to public authorities on relevant timescales. However, he notes that the 33 working days which DCMS took to issue its refusal notice was clearly in breach of the statutory timescale. Accordingly, the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, DCMS breached the requirements of section 10(1); and that it also breached section 17(1) by failing to provide the details required by that section within 20 working days.

Failure to specify specific sub-section of exemption

35. Section 17(1)(b) 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 of the relevant exemptions. In this case DCMS referred generally to section 43 without specifying that (2) was the relevant sub-section. The Commissioner has therefore decided that DCMS breached section 17(1)(b) of the Act.

Inadequate explanation of the public interest test

36. DCMS applied the same assessment of the public interest test to all of the exemptions which it cited. Section 17(3) of the Act provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information must:

> *'state the reasons for claiming –…*
>
> *(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'*

The Commissioner takes the view that, in providing the applicant with a blanket explanation of the public interest test for all of the claimed exemptions, DCMS failed to give the complainant adequate reasons as to why the public interest favoured maintaining each exemption, and that it therefore acted in breach of section 17(3)(b) of the Act.

Failure to disclose information

37. Section 1(1) of the Act provides that –

> *'Any person making a request for information to a public authority is entitled –…*
>
> > *…(b) if that is the case, to have that information communicated to him.'*

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.'*

38. In the following analysis the Commissioner has concluded that some information was withheld by DCMS which was not in fact exempt. The Commissioner has decided that DCMS therefore breached section 1(1)(b) of the Act in this regard, and he has also concluded that the relevant information should now be disclosed. In addition, since DCMS failed to provide the information within the statutory time limit it also breached section 10(1) of the Act.

Exemption – section 43

39. Section 43(2) of the Act provides that:

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

40. DCMS applied the section 43 exemption only to the Study. It originally also applied section 35(1)(a) to this document, but in its letter to the Commissioner dated 4 November 2008 it stated that the passage of time since its original refusal of the request meant that the public interest now favoured disclosure of that part of the Study that comprised background information used by the government to formulate and develop policy on casino gaming. DCMS identified those remaining parts of the Study which it believed should still be withheld on the basis of section 43.

41. DCMS originally expressed its view that the Study contains data relating to identifiable companies and businesses as well as to the casino industry more widely. In its letter to the Commissioner dated 4 November 2008 it clarified that it wished to continue withholding any information that *'would, or would be likely to, prejudice'* others' commercial interests. It identified, in particular, the authors of the Study and those parties *'from whom unpublished commercial information was obtained by the authors on a promise of confidence*'.

Engagement of the exemption

42. Section 43(2) is engaged when disclosure either would or would be likely to arise. In the case of *McIntyre v The Information Commissioner and the Ministry of Defence* (EA/2007/0068), the Tribunal specified which standard of proof should apply when the level of prejudice was not designated by the public authority's qualified person (that case had involved the application of the section 36 exemption):

> *'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.'*

In this case, DCMS referred to both levels of prejudice. The Commissioner has decided that the lower level of prejudice is the one which it is appropriate to apply.

43. Where the issue is 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*'.

44. In assessing whether there was a real and significant risk the Commissioner believes that those contracting with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. As he recorded in his Decision Notice FS50063478, which dealt with another case in which the section 43 exemption had been asserted:

> *'The Commissioner is of the view that those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force.'*

45. Furthermore, the Commissioner notes that in the case of *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026, EA/2005/0030), the Tribunal stated that the *'evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice'*. Accordingly, unsupported speculation or opinion will not be taken as evidence of the likelihood of prejudice, although the Tribunal has also indicated that public authorities do not need to prove that something specific will happen if the information in question is disclosed. Therefore, while there will always be some extrapolation from the evidence available, the public authority must be able to provide some evidence (not just unsupported opinion) from which to extrapolate.

46. Importantly, when considering prejudice to a third party's commercial interests the Commissioner believes that the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect – the prejudice must be based on evidence

provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself.

47. This stance was established by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* (EA/2006/0014). In that case the public authority had claimed that releasing the requested information would prejudice the commercial interests of a third party with which it had a commercial relationship, and the Commissioner had considered the public authority's arguments in this respect. The third party was not represented at the Tribunal or joined in to the proceedings. The Tribunal decided to disregard the third party's commercial interests when reaching its decision on the grounds that the public authority could not expound them on behalf of the third party:

> *'Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that [the third party's] commercial interests would be likely to be prejudiced*'.

48. The Commissioner has not concluded from this that only arguments provided by the third party itself can be taken into account. It may be that, due to time constraints for responding to requests, arguments are formulated by a public authority based on its prior knowledge of the third party's concerns. Where a public authority can provide evidence that such arguments genuinely originate in and reflect the concerns of the third party involved then the Commissioner may take them into account. Nevertheless, he considers that there is a presumption that, when an argument is adduced which relies on alleged prejudice to third parties, then evidence will need to be presented that the perception of potential prejudice is one which was shared by those third parties.

49. In this case, in responding to the Commissioner's queries DCMS stated that it was in a difficult situation for a number of reasons:

- the authors had not responded to its request for a list of the contacts used at the time the Study was written;
- the only feedback DCMS had received from the authors had been that the sources had been informed during preparation of the Study that the information provided by them would remain confidential, and the authors therefore did not wish that information to be released now;
- it would be unreasonable for DCMS to expect the authors to make enquiries of other parties about what should be treated as confidential or would be prejudicial to release;
- although DCMS had dropped its application of section 41, it still considered that there were genuine issues regarding confidentiality to be taken into

account, in that breaking the authors' promise of confidentiality might *'diminish their ability to promise confidentiality to their sources in future and therefore risk reducing the amount of paid work they could gain'*;

- disclosure would *'reveal the methodology by which the authors compiled their recommendations'*; and

- for DCMS to contact all of the organisations whose commercial interests could potentially be affected would be likely to disrupt its handling of other cases.

50. DCMS also accepted that some of the information in the Study might be from published sources or in the public domain for other reasons, but it did not know what part of the information remained confidential or commercially prejudicial. The Commissioner has conducted an internet search for random information from the Study that DCMS maintains is exempt by virtue of section 43; some of that information is readily available on the internet, including in press reports issued at the time. The Commissioner is therefore satisfied that at least some of the information which DCMS claimed was exempt was in fact in the public domain at the time of the complainant's request, and that DCMS could have established that fact with a minimum of effort.

51. To engage the section 43(2) exemption it is necessary for the public authority to demonstrate that disclosure of the information (a) would, or would be likely to, (b) cause prejudice to (c) the commercial interests of (d) a 'person'.

52. In relation to (c) and (d), the Commissioner is satisfied that the authors were 'persons' for the purposes of section 43(2). He is also satisfied that, in producing a Study commissioned by government departments, the authors were engaging in commercial activities. However, in relation to the parties consulted by the authors, DCMS has admitted that the authors did not respond to its request for a list of those contacts. It also claimed that it would be unreasonable for it to expect the authors to make enquiries of other parties about what information would be prejudicial or should be treated as confidential. In these circumstances the Commissioner is unable to reach any conclusion as to whether the consulted parties were 'persons' for the purposes of section 43(2); and whether their commercial interests were involved and, if so, what the likelihood was that disclosure of information would prejudice those interests. The Commissioner notes that, in its letter to him dated 4 November 2008, DCMS indicated that, if the Commissioner believed that:

> *'commercial confidentiality cannot apply without the demonstration of specific effect…we would request a further period of time to allow us (where this is reasonably feasible) to contact the various third, fourth and fifth parties, before a decision notice is issued'*.

In the view of the Commissioner it was the responsibility of DCMS, in applying the section 43(2) exemption, to obtain sufficient evidence to demonstrate a real and significant risk of prejudice to the third parties from release of the information. Without such evidence DCMS was not in a position to make a decision that

section 43(2) was engaged. In the circumstances, the Commissioner has decided that it would not be appropriate to provide DCMS with a further opportunity to seek that evidence. Since DCMS has not been able to identify who the consulted parties are, or provide any specific reasons as to why disclosure of the withheld information would prejudice them, the Commissioner has concluded that DCMS has failed to establish that disclosure of the withheld information would create a real and significant risk of prejudice to those consulted parties. Accordingly, the section 43(2) exemption is not engaged in respect of that part of the information in the Study which relates to the alleged commercial interests of those consulted by the authors.

53. In relation to the alleged prejudice to the commercial interests of the authors, DCMS identified the possibility that breaking the authors' promise of confidentiality to the consulted parties might *'diminish their ability to promise confidentiality to their sources in future and therefore risk reducing the amount of paid work they could gain'*; and the possibility that disclosure would *'reveal the methodology by which the authors compiled their recommendations'*.

54. Regarding this issue, DCMS commented to the Commissioner that the only feedback it had received from the authors was that their sources had been informed during preparation of the Study that information provided by them would remain confidential, and that the authors consequently did not wish the information to be released now. DCMS also stated that breaking the authors' promise of confidentiality *'would diminish their ability to promise confidentiality to their sources in future and therefore risk reducing the amount of paid work they could gain'*. However, the Commissioner notes that DCMS has not been able to positively identify what (if any) of the information in the Study was provided by the other parties, whether in confidence or not. Indeed, DCMS have stated that it would be unreasonable to expect the authors to make enquiries of other parties about what should be treated as confidential or would be prejudicial to release, and that for itself to contact all of the organisations whose commercial interests could potentially be affected would be likely to disrupt its handling of other freedom of information cases. In addition, the Commissioner has conducted an internet search of a random sample of the information which DCMS has identified as being exempt and established that at least some of this is definitely available in the public domain. In light of the failure of DCMS (and the authors, during DCMS' investigation) to identify the parts of the Study the disclosure of which might lead to the relevant prejudice, and DCMS' failure to specify how disclosure would create a 'real and significant risk' of the prejudice to the authors being actuated, the Commissioner has decided that DCMS has not demonstrated to the relevant standard that the prejudice would be likely to occur. Consequently, section 43(2) is not engaged.

55. In relation to that part of the Study the disclosure of which might have revealed the methodology by which the authors compiled their recommendations, the Commissioner notes that DCMS have not explained why revealing the methodology would cause prejudice to the authors. It appears to the Commissioner that that would be likely only if the methodology was novel or required some specialist techniques which had been developed uniquely by the authors. There is no evidence that that is the case here. In the absence of any

explanation from DCMS to substantiate the claim – including no evidence that the authors themselves identified such a potential prejudice – the Commissioner has concluded that there is no evidence of a real and significant risk that disclosure would prejudice the authors' commercial interests. Again, section 43(2) is not engaged.

56. Since section 43(2) is not engaged in relation to any part of the Study, and DCMS has advised the Commissioner (in its letter dated 4 November 2008) in respect of section 35(1) that it considers that *'the weight of public interest is now in favour of disclosure'*, the Commissioner has decided that the Study should now be disclosed to the complainant in its entirety.

Exemption – section 42(1)

57. DCMS applied section 42 to one document, comprising informal summaries of specific legal advice.

58. Section 42(1) provides that:

> *'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'*

59. DCMS first raised section 42 in its internal review decision of 26 February 2007. It explained in its letter to the Commissioner of 3 July 2008 that the document contained detailed references to legal advice. It expressed its view that *'once legal privilege is established – as it is in respect of the information to which we are referring here – there is a very cogent public interest in maintaining the exemption'*.

60. The Commissioner notes that the document is an email chain which reports legal advice which has been provided by a professional legal advisor. Although the emails are not the legal advice itself, they are in substance a report of the conclusions in the advice. The Commissioner is satisfied that DCMS could claim legal professional privilege for this information, and the section 42 exemption is therefore engaged.

Public interest test

61. Since section 42 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'*.

62. In relation to the public interest test, DCMS stated in its internal review decision of 26 February 2007 that there was a public interest in *'informed public participation in the development of policy, and that transparency makes government more accountable and is likely to increase trust in it'*. On the other hand, there was also a *'great public interest, acknowledged by the Courts, in the freedom of policy makers to seek the advice of a lawyer without their exchanges being made*

public', and disclosure *'would undermine the willingness of advisers to provide full and frank advice to Ministers, and in turn the future policy making process'*. It concluded that the balance of the public interest lay in maintaining the exemption.

63. The Commissioner believes that there is a public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately, and also where disclosure would help further the understanding of issues of the day. The Commissioner also accepts DCMS' view that disclosing such information can make government more accountable and increase trust in it. In this case, disclosing legal advice could allow the public a greater comprehension of the legal basis of the government's casino gaming policy. That is a policy which affects significant numbers of the public, which weighs in favour of disclosure. The Commissioner notes that, at the time of the request in August 2006, the decision making process to which the legal advice related appears to have been concluded more than one year earlier, with a corresponding reduction in the import of the legal advice.

64. On the other hand, the Commissioner acknowledges that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) the Tribunal stated that:

> *'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest*.'

65. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in future the principle of confidentiality might be undermined and the legal advice given might be less full and frank than it should be. The Tribunal in the *Bellamy* case made it clear that disclosure was unlikely to be justified in most cases:

> *'it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case…'.*

66. Furthermore, as legal advice has to be fair, frank and reasoned, it is inevitable that it will highlight the strengths and weaknesses of any course of action. Therefore, if advice obtained for the purposes of litigation were to be routinely disclosed, public authorities would potentially be in a weakened position in litigation compared with other persons not bound by the Act. The Tribunal in the *Bellamy* case acknowledged that English law considers *'privilege [to be] equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned'*. Therefore, there is a very strong public interest in ensuring that legal professional privilege applies equally to all parties before, during and after litigation.

67. Having weighed up the factors in favour and against disclosure, the Commissioner is satisfied that in this case the inherent public interest in

protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the section 42(1) exemption outweighs the public interest in disclosure of the information. However, the Commissioner does recognise that the balance of the public interest may change over time, and as more time elapses it might become appropriate to disclose this information.

Exemption – section 35(1)(a) and (b)

Section 35(1)(a)

68. DCMS applied sections 35(1)(a) and/or (b) to all of the documents. However, since it subsequently dropped its reliance on section 35 for the Study, and the Commissioner has concluded that the email chain reprising the legal advice is except by virtue of section 43(2), he has therefore not considered the application of section 35(1) to those documents.

69. Section 35(1) of the Act provides that:

> *'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*
>
> *(a) the formulation or development of government policy…'.*

The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action.

70. In this case, the Commissioner is satisfied that the information identified by DCMS as falling within section 35(1)(a) does indeed relate to the formulation or development of government policy, since it relates to deliberations about amendments to the Gambling Bill which were published on 18 October 2004.

Public interest test

71. Section 35(1)(a) is a qualified exemption and therefore subject to the public interest test. In its refusal notice dated 22 September 2006, and its letters to the Commissioner dated 3 July and 4 November 2008, DCMS explained its assessment of the test.

72. In the refusal notice it stated that the candour necessary to a rigorous policy debate would be:

> *'affected by [Ministers' and officials'] assessment of whether the content of their discussions will be disclosed in the future, when it may undermine or constrain Government's view on settled policy or policy that is at the time under discussion or development'*.

It also noted the convention that Ministers are collectively responsible for policy and its delivery, and stated that it was in the public interest that this convention be protected, since it creates the space for considering all (including radical) options and for refining policy positions. Finally, it noted that it was in the public interest that:

> *'the advice given to Ministers is broadly-based and that stakeholders (including the public, the industry, trade bodies and other Government Departments) are not deterred from providing advice or information…'*.

73. On the other hand, it identified the public interest in disclosure of the information in order to improve the accountability and transparency of the policy making process, although it noted that:

> *'transparency also has the potential to undermine another equally powerful public interest, which exists in the full and frank exchange of views in discussing a policy within Government and with stakeholder [sic] because that process makes for better quality policy decisions'*.

It also stated that it recognised that the public had a particular interest in gambling policy and that it had therefore considered the passage of time and whether disclosure of the information would actually cause the harms which it had identified. However, its conclusion was that the public interest would be best served by withholding the information.

74. In its correspondence with the Commissioner, DCMS stated that disclosure of communications (including drafts) between Ministers would put those Ministers *'in a very difficult position when defending the final policy or with the (current) implementation'*, and that this *'in turn might deter future full debate and communication on casino policy, and thereby undermine the quality and recording of the decision making in this area'*. It also stated that

> *'It was critical for Ministers (and those advising them) to have "private thinking space" in which full and frank debate might take place. There was also a need for an environment which did not discourage frank, effective communication and deliberation, as well as proper record keeping of what, how and why decisions had been made'.*

'Premature' disclosure would also be likely *'to have a repeated effect of inhibiting Ministers' ability to question and discuss in written communication the alternative approaches under consideration'*, which would be to the detriment of the future public interest. On the other hand, it accepted that disclosure *'might add slightly to the public's understanding of how discussions between Ministers led to the casino policy now being implemented'*.

75. DCMS also pointed out that much information relating to casino gaming policy was already publicly available, and expressed the view that there would be ongoing consideration by the government of policy relating to casino gaming for the foreseeable future. With its letter of 4 November 2008 DCMS included an Annex which listed *'key milestones, statements and other information already publicly available'* in relation to casino gaming policy.

76. The factors identified by DCMS which favour maintaining the section 35(1)(a) exemption were therefore that disclosure would damage the quality of advice given to Ministers and undermine the candour necessary to a rigorous policy debate (ie the so-called 'chilling effect'), undermine the (desirable) convention that Ministers are collectively responsible for policy and its delivery (and therefore require a 'safe space' to formulate it), and deter effective record-keeping. The Commissioner considers that these are generic factors that apply generally to policy formulation, and he notes that DCMS has not identified any factors in favour of maintaining the exemption which are specific to the information in this case.

77. The Information Commissioner's view is that there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by the threat of disclosure under the Act. He does not believe that the factors identified by DCMS as favouring maintenance of the exemption were of great significance in this case.

78. In relation to effective record-keeping, the Commissioner notes that the adjudication in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), where the Information Tribunal declared that it did not consider that it:

> *'should be deflected from ordering disclosure by the possibility that minutes will become still less informative…Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency'*.

The Commissioner agrees that public officials should have a suitably robust approach. There may be some occasions where disclosure would generate legitimate concerns for public officials responsible for record-keeping, and in those circumstances the balance of the public interest might fall in favour of maintaining the exemption in order to protect the integrity of the record-making process. However, the Commissioner is in agreement with the Tribunal that the possibility of disclosure of information should not generally have the effect of deterring officials from recording their discussions. He does not believe that DCMS have provided any specific reasons why officials might be so deterred in this case.

79. In relation to the effect on policy debate, the Commissioner draws a distinction between arguments relating to the need for a 'safe space' (ie the public interest in civil servants and Ministers being able to formulate policy and debate live issues without being hindered by external scrutiny) and those regarding the potential 'chilling effect' on the frankness and candour of debate that might flow from

disclosure of information. The 'safe space' was identified in the Information Tribunal case of *Scotland Office v the Information Commissioner* (EA/ 2007/0070) as *'the importance of preserving confidentiality of policy discussion in the interest of good government'*; in other words, the idea that the policy making process should be protected while it is ongoing in order to prevent it being hindered by lobbying and media involvement.

80. However, in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) the Tribunal commented that:

> *'This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.'*

The Commissioner notes that in this case the formulation and development of casino gaming policy was no longer ongoing at the time of the request, and had in fact been determined over a year earlier. The Commissioner is satisfied that, at the time of the request, the public interest in maintaining a 'safe space' had substantially diminished, and he therefore believes that this factor merits very little weight in the assessment of the public interest.

81. In relation to the 'chilling effect', the Commissioner notes the comments made by the High Court in the case of *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department* ([2008] EWHC 638 (Admin)):

> *'There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'*

He accepts that the 'chilling effect' of disclosure is likely to have some weight.

82. However, the Commissioner is also mindful of the length of time that has elapsed since these policy deliberations occurred. In the *Evening Standard* case the Tribunal stated that *'The timing of a request is of paramount importance*'. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy…will normally mark the end of the process of formulation'*.

83. In a further case, *The Secretary of State for Work and Pensions v The Information Commissioner* (EA/2006/0040), the Information Tribunal stated that section 35(2) *'seemed to envisage policy formulation as a series of decisions rather than a continuing process of evolution'*. In that case, at the time of the request a Bill had been presented to Parliament which established the principle of introducing identity cards and paving the way for secondary legislation to establish the details of the scheme. The Tribunal took the view that the process of policy formulation could be split into two stages: the high level decision to introduce identity cards, followed by policy decisions on the details of the scheme. The Tribunal considered that the public interest in maintaining the exemption for information relating to the high level decision was reduced, even though the information could be used to inform the more detailed policy issues that were still being considered, because that high level decision had already been taken in the case. In this case, the relevant policy decisions had already been taken by the time that the complainant made the request in August 2006.

84. The Commissioner also notes that, in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), the Tribunal stated that it was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that *'we are entitled to expect of [civil servants] the courage and independence that…[is]…the hallmark of our civil service'*, since civil servants are *'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions'* and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make officials responsible for providing advice and recording information less likely to perform their duties properly. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including DCMS, to ensure that their officials continue to perform their duties according to the required standards. The Commissioner also notes that DCMS has argued that much of the information has already been disclosed to the public, and has provided the Commissioner with an Annex listing *'key milestones, statements and other information already publicly available'* in relation to casino gaming policy. The Commissioner's view is that this weakens the arguments about the potential 'chilling effect' of disclosure of the withheld information.

85. In light of these considerations, the Commissioner is satisfied that in this case the weight that can properly be given to the 'chilling effect' of disclosure is very slight.

86. In contrast to the factors put forward by DCMS to support the public interest in maintaining the exemption, the Commissioner notes that casino gaming policy was a matter of widespread public interest, involving significant controversy and social impact. The Commissioner believes that there is a strong public interest in increasing public confidence that decisions have been taken properly and on the basis of the best available information. In the case of *Lord Baker v the Commissioner and the Dept for Communities and Local Government*

(EA/2006/0043) the Information Tribunal reached a number of conclusions about regulation 12(4)(e) of the Environmental Information Regulations 2004 which have a bearing on the application of the public interest test for the exemptions under sections 35 and 36. It indicated that, in cases where there are complex issues, that fact may increase the public interest in disclosure, since *'full disclosure of the deliberations underlying a decision on a complex matter is arguably more important than in a simple one, where the issues may be more immediately evident'.* It also stated that the 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'.* The Commissioner agrees that there is a strong public interest in promoting the accountability and transparency of politicians' decision-making on important matters of public policy. He also believes that disclosure would inform current and future debate and assist public participation in future decision making in this area of policy.

87. The Commissioner notes DCMS' arguments relating to the public interest in maintaining the convention that Ministers are collectively responsible for policy and its delivery. The Commissioner accepts the importance of respecting this convention, which is essential for effective Cabinet government, and notes that Section 1.2 of the Ministerial Code puts a Minister's duty to uphold the principle of collective responsibility first in the list of principles of ministerial conduct. The convention is in the public interest because it allows Ministers to consider sensitive policy issues without inhibition; protects high level government decisions from becoming personalised; and creates a confidential space for political differences of opinion between Ministers to be raised candidly.

88. However, the Act does not allow for Ministerial correspondence to be automatically withheld as a class of information, since section 35(1)(a) is a qualified exemption. In the *Evening Standard* case the Tribunal took the view that *'No information within s35(1) [the FOIA equivalent of regulation 12(4)(e)] is exempt from…disclosure simply on account of its status'*. The fact that the information relates to the deliberations of very senior officials or government Ministers does not of itself dictate that the information is sensitive, and *'To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1) a class of absolutely exempt information'*.

89. In the *Evening Standard* case the Tribunal stated that the public interest in maintaining the exemption provided by section 35 is in protecting, from compromise or unjust public criticism, civil servants rather than Ministers, and the Tribunal expressed its view that it is not unfair to politicians to release information that allows their policy decisions to be challenged after the event.

90. In light of the Tribunal's comments in the *Evening Standard* case, the Commissioner takes the view that the possibility that disclosure might cause embarrassment to an individual Minister should carry no weight in assessing the public interest. Furthermore, he does not consider that there is any significant public interest in withholding evidence that Ministers might have had a difference of opinion, since he believes that an informed public will realise that such

differences are a normal part of the policy-making process.

91. Accordingly, when applying the public interest test, the contents of Ministerial communications are of crucial significance, since there must be some detriment to the public interest for the balance of the test to justify maintaining the exemption. Upholding the convention of collective ministerial responsibility is potentially a significant public interest, but in each case the public authority must be able to identify specific harm which would be caused by disclosure. That will then add appropriate weight to the overall public interest in maintaining the exemption. However, the Commissioner does not consider that DCMS has identified any such specific harm in this case.

92. The Commissioner expects public authorities to be able to provide convincing arguments for each kind of impact being argued with reference to the particular disclosure being considered. DCMS has not done so in this case. Having considered the content of the withheld information, the timing of the request, and the adjudications of the Information Tribunal and High Court in previous cases, he has concluded that, in the all the circumstances of this case, the public interest in disclosure is not outweighed by the public interest in maintaining the exemption. In other words, the weighing test favours disclosure of that part of the information withheld by virtue of the exemption at section 35(1)(a).

Statistical information

93. In his complaint to the Commissioner of 27 April 2007, the complainant pointed out that section 35(2) of the Act states:

> *'Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-*
>
> *(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or*
>
> *(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.'*

In other words, once a government policy decision had been taken, statistical information relevant to the policy formulation and development cannot engage section 35(1)(a) or (b).

94. In its letter to the Commissioner dated 3 July 2008 DCMS stated that the statistical data was also used by another government department in its gambling tax model to evaluate options for gambling taxation and therefore for the formulation and development of government policy, and for this reason sections 35 and 43 would continue to apply to it. The Commissioner notes that DCMS provided little elaboration on this explanation. However, since the statistical information at issue is contained within the Study, which the Commissioner has concluded should be disclosed, he has not considered this point further.

Section 35(1)(b)

95. DCMS also asserted that some of the information was covered by section 35(1)(b) of the Act, relating to Ministerial communications. Section 35(1) of the Act provides that:

> *'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-…*
>
> *…(b) Ministerial communications…'.*

96. Such communications are written correspondence in any form between Ministers of the Crown, between Northern Ireland Ministers, or between Assembly Secretaries. Communications between civil servants on behalf of their minister are also likely to be included.

97. Having reviewed the documents which DCMS identified as falling within section 35(1)(b), the Commissioner notes that they comprise the following:

a) a note dealing with a particular aspect of casino policy which was said to be in the process of being simultaneously presented to the Minister in another government department;

b) internal DCMS covering notes;

c) draft letters between DCMS Ministers and Ministers in other government departments, together with attachments to the correspondence; and

d) administrative emails covering the draft letters.

98. The Commissioner takes the view that the policy note and the covering notes and emails do not constitute (or relate to) ministerial communications, since they are neither communications nor are they between Ministers. The draft letters are only drafts of potential correspondence, and there is no evidence to demonstrate that final versions of these drafts were ever sent. In the circumstances the Commissioner has decided that these documents are also not (and do not relate to) 'ministerial communications' for the purposes of section 35(1)(b). The exemption is accordingly not engaged. The Commissioner notes that, in any event, DCMS did not provide separate public interest assessments in its refusal notice and internal review decision for sections 35(1)(a) and 35(1)(b), and that for these documents the balance of the public interest in relation to section 35(1)(b) would have been similar to that for section 35(1)(a).

The Decision

99. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

100. The Commissioner has concluded that section 43(2) of the Act was not engaged; that the balance of the public interest test for section 35(1)(a) and (b) does not favour withholding the information; and that one document is exempt by virtue of section 42(1). The Commissioner therefore requires all of the withheld information except for one document to be disclosed.

101. The Commissioner has decided that DCMS breached section 17(1)(b) of the Act by failing to specify within the statutory time limit which sub-section of section 43 applied; and that, in using a blanket explanation of the public interest assessment for all of the claimed exemptions, it breached section 17(3)(b) by failing to assess the public interest properly for each exemption. He has also decided that, in failing to confirm or deny within 20 working days whether it held the requested information, DCMS breached the requirements of section 10(1) of the Act, and also breached section 17(1) by failing to provide the details required by that section within 20 working days. Finally, it breached 10(1) in failing to disclose information which was not exempt within the statutory time limit, and section 1(1)(b) in failing to disclose it at all.

Steps Required

102. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- DCMS should disclose to the complainant all of the withheld information except for the document numbered '3'.

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

Failure to comply

103. 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.

Other matters

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

Delay in conducting internal review

105. Part VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review.

106. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a public authority to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.

107. In this case, the complainant's internal review request was made on 6 October 2006. DCMS sent its internal review decision to him on 26 February 2007. DCMS therefore took 98 working days to complete the review. DCMS has informed the Commissioner that it aims to deal with internal reviews within 2 to 6 weeks. However, it claimed that in this case it had been *'quite time consuming'* for the reviewer to assess all of the papers associated with the original request, to discuss matters with the relevant staff, and to consult with HM Revenue and Customs. The Commissioner notes that DCMS gave the complainant a number of updates (on 19 October 2006, 17 November 2006, 9 February 2007 and 23 February 2007) in which it indicated when it expected to be able to provide him with its review decision, but failed to meet the projected timescale.

108. The Commissioner recognises that DCMS' internal review in this case was conducted prior to the issuing of the *'Good Practice Guidance No 5'* in February 2007. However, he does not believe that any exceptional circumstances existed in this case to justify the 98 working days which DCMS took to complete this internal review. He therefore wishes to register his view that DCMS fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale, and also in failing to meet the timescales that it had set itself.

Internal review not fair and thorough

109. Paragraph 39 of the section 45 Code of Practice encourages authorities to provide a fair and thorough review of matters, including a fresh look at the application of exemptions:

> *'The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints*

procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.'

It therefore requires that a fresh decision should be taken on reconsideration of all relevant factors. Such a review should be fair and thorough, and the public authority should undertake a full re-evaluation of the case.

110. In this case, in relation to section 35(1)(a) and (b) and section 43, DCMS' internal review decision simply stated: *'I uphold the Department's decision not to disclose the information'*. (However, it did provide further analysis in relation to the new exemption under section 42, and addressed the complainant's point regarding the statistical information.) The Commissioner takes the view that DCMS' internal review was insufficiently thorough and was accordingly inadequate, since it does not appear to have genuinely engaged with the complainant's points or to have undertaken a proper reconsideration of the issues insofar as they related to sections 35 and 43. The Commissioner advises that DCMS therefore ensure that future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice, and that the results are communicated to the applicant in full.

Right of Appeal

111. 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 6th day of April 2009

Signed ……..

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

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

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

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

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

Section 1(2) provides that -

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

Section 1(3) provides that –

'Where a public authority –

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

(b) has informed the applicant of that requirement,

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

Section 1(4) provides that –

'The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.'

Section 1(5) provides that –

'A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).'

Section 1(6) provides that –

'In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'.'

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(2) provides that –

'Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) 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(4) provides that –

'The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.'

Section 10(5) provides that –

'Regulations under subsection (4) may –

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.'

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 17(4) provides that -

'A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.'

Section 17(5) provides that –

'A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.'

Section 17(7) provides that –

'A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.'

Section 21(1) provides that –

'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'

Section 21(2) provides that –

'For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.'

Section 21(3) provides that –

'For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.'

Section 35(1) provides that –

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

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or

(d) the operation of any Ministerial private office.'

Section 35(2) provides that –

'Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.'

Section 35(3) provides that –

'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'

Section 35(4) provides that –

'In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.'

Section 35(5) provides that –

'In this section-

'government policy' includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

'the Law Officers' means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

'Ministerial communications' means any communications-

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

'Ministerial private office' means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

'Northern Ireland junior Minister' means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.'

Section 42(1) provides that –

'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'

Section 42(2) provides that –

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'

Section 43(1) provides that –

'Information is exempt information if it constitutes a trade secret.'

Section 43(2) provides that –

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

Section 43(3) provides that –

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