

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 November 2009

Public Authority: Arts Council England
Address: 14 Great Peter Street
London
SW1P 3NQ

Summary

The complainant submitted a number of requests to Arts Council England (ACE) about its decision to disinvest in a particular publishing company. ACE provided some information in response to the first request but withheld further documents on the basis of section 36 of the Act (effective conduct of public affairs). Further requests were refused on the basis that the aggregated cost of fulfilling them would exceed the cost limit. The complainant argued that both section 36 and section 12 had been incorrectly relied upon and furthermore argued that more information fell within the scope of his initial request and such information had not been disclosed. The Commissioner has concluded that no further information falls within the scope of the request other than that located during the course of his investigation. The Commissioner has also concluded that ACE was correct to refuse the further requests on the basis that the aggregated cost of fulfilling them would have exceeded the cost limit. Finally, with the exception of one document which the Commissioner has ordered ACE to disclose, he has concluded that section 36 has been correctly relied upon.

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.

Background

2. Arts Council England (ACE) is the national development agency for the arts in England distributing public money from the Government and the National Lottery.

3. ACE distributes this funding via a number of different mechanisms. For example, under its 'regular funding for organisations' programme it provides organisations with funding for a period of one, two or three years whereas its 'Grants for the arts' provides funding for specific activities.
4. In January 2007 ACE decided to review its entire portfolio of regularly funded organisations (RFOs). In late 2007 ACE informed each of the RFOs – of which there were around a thousand - whether it intended to continue providing them with regular funding or whether it intended to 'disinvest', i.e. stop funding in it as a regular organisation.
5. One such organisation which ACE decided to disinvest in was a small literary publisher based in Cambridgeshire called Dedalus.

The Request

6. In January and February 2008 the complainant submitted several letters and emails to ACE which contained a number of freedom of information requests. These requests focussed on the decision by ACE to disinvest in Dedalus.
7. The Commissioner has included in the Annex attached to this notice a table which details the dates and nature of each communication which was sent to ACE. The attached table also summarises the responses provided by ACE; indicates whether the complainant followed up any responses by asking for an internal review; and also details any response provided by ACE. For the purposes of this notice the Commissioner does not intend to replicate the entire contents of the Annex in this particular section. However, as the basis of the Commissioner's investigation focused heavily upon one request, that of 2 January 2008, and the corresponding responses, the Commissioner has set out in detail here the nature of these communications.
8. On 2 January 2008 the complainant sent ACE an email containing the following request:

'I am requesting from ACE under the provisions of The Freedom of Information Act the Dedalus Disinvestment File and all documentation, computer files and information, in whatever format relating to Disinvestment in Dedalus to be supplied to us.

I would also like you to put on the record the date in which ACE, E [Arts Council England, East] decided to disinvest in Dedalus and produce the documentation which supports this'.
9. ACE responded to this request on 10 January 2008 and provided the complainant with 137 pages of documents (the vast majority of which the complainant has explained were already in his possession). However, ACE also withheld one section of a document on the basis that it was exempt from disclosure on the basis of section 36(2)(b)(ii).

10. On 10 January 2008 the complainant contacted ACE and asked it to conduct an internal review of its decision to withhold information on the basis of section 36. The complainant explained that he would send further emails which would deal with queries in relation to the documentation that had been provided.
11. On 15 January 2008 ACE contacted the complainant and explained that as its Chief Executive Officer had been involved in the decision to apply section 36 of the Act there was nobody more senior to review his decision. Therefore ACE directed the complainant to go straight to the Commissioner and ask him to review its application of section 36.
12. The complainant subsequently sent a number of further emails (on 11, 16, 17, 22 and 25 January 2008) which effectively raised queries with regard to the amount of information provided in response to the 2 January 2008 request by identifying, and requesting, various pieces of additional information and particular documents.
13. On 25 January 2008 ACE sent a letter to the complainant with an opening paragraph which read: 'I refer to your emails of 11, 16, 17, 22 and 25 January 2008 in which you have requested information under the Freedom of Information Act'. The letter went on to explain that section 12 of the Act allows a public authority to refuse to disclose a request where responding to it would exceed the appropriate cost limit. ACE also noted that the Act allowed it to aggregate the separate related requests for the purposes of estimating the cost of responding to those requests. The letter went on to note that:

'We have therefore decided to refuse your recent **request** [emphasis added] for information, referenced above, because we estimate that the cost of providing this information is likely to exceed £450, when adding it to the other related requests you have made'.
14. The complainant sought an internal review of this decision on 7 February 2008.
15. ACE responded on 12 February 2008 and confirmed that it believed that it was correct to rely on section 12 on the basis set out in its letter of 25 January 2008.
16. In addition to this correspondence the complainant also sent further requests on 1 and 18 February 2008 which effectively sought further information which the complainant believed should have been disclosed in response to his request of 2 January 2008 because such information would have been used to reach the decision to disinvest in Dedalus.

The Investigation

Scope of the case

17. The complainant contacted the Commissioner on 1 February 2008 in order to complain about ACE's handling of his information requests. Due to a backlog of complaints about public authorities' compliance with the Act, the Commissioner was not able to begin his investigation of this complaint immediately. Therefore it was not until 5 December 2008 that the Commissioner was in a position to contact the complainant. Over the course of next two months the Commissioner and the complainant exchanged a number of rounds of correspondence in which the Commissioner clarified the nature of complaint.
18. By the time the Commissioner contacted ACE on 27 January 2009, the Commissioner had confirmed with the complainant that the nature of his complaint was as follows:
 - The decision to withhold one document on the basis of section 36 in response to the request of 2 January 2008.
 - Secondly, ACE's failure to provide 7 specific documents contained on the 'Disinvestment File', and/or documents ACE used to reach its decision to disinvest in Dedalus, i.e. ACE's failure to respond to the various requests of January 2008 and those of February 2008 which sought these particular pieces of information.
19. In agreeing to limit the scope to the above two points, the Commissioner understands that in the complainant's opinion he believed that the various documents he sought in the requests of 11, 16, 17, 22 and 25 January 2008 and those of 1 and 18 February 2008 in effect fell within the scope of his 2 January 2008 request because they were all pieces of information used by ACE to reach a decision about whether to disinvest. It was the lack of information received in response to his request of 2 January 2008 that led the complainant to submit these more specific further requests.
20. As this stage, i.e. when the Commissioner first wrote to ACE in late January 2009, the Commissioner had also agreed with the complainant that he would not address:
 - ACE's alleged failure to provide advice and assistance in order to help the complainant submit a refined request which could be answered within the cost limit.
 - The complainant's offer to pay up to £1000 in order to cover costs associated with providing the information that he was seeking.
 - The ACE's handling of the requests of 9, 11 and 16 January 2008.
21. However, due to a number of issues being clarified during the course of his investigation the scope of the Commissioner's investigation changed significantly; this change in the nature of the investigation was specifically due to the fact that ACE explained to the Commissioner that its refusal notice of 25 January 2008

was in fact meant to read 'We have therefore decided to refuse your recent **requests** [emphasis added]'. In other words this letter was not meant as refusal notice indicating ACE was simply refusing the request of 25 January 2008 on the basis of section 12(4) but in fact was meant as refusal notice saying that it was relying on section 12(4) to refuse **all** of the requests contained in the communications of 11, 16, 17, 22 and 25 January 2008. (The use of the singular 'request' rather than the plural 'requests' in the original refusal notice was in error.)

22. Therefore the Commissioner understood ACE had not in fact failed to respond to the complainant's requests of 11, 16, 17, 22 and 25 January 2008 – and thus failed to provide specific pieces of information - rather the position was that ACE was relying on section 12(4) to refuse to fulfil all requests up to and including the request of 25 January 2008. Similarly, ACE also refused the requests of 1 and 18 February 2008 on the basis of section 12(4) and the aggregated cost of complying within them when taking into account the costs of fulfilling previous requests.
23. Consequently, the scope of the Commissioner's investigation which formed the basis of his decision in this notice was as follows:
 - Request of 2 January 2008 – the complainant has argued that ACE was incorrect to rely on section 36 as a basis to withhold one document. The complainant has also argued that significant amounts of information falling within the scope of this request have not been provided to him. That is to say, in the complainant's opinion ACE used significantly more information to reach the decision to disinvest than had been disclosed. In essence this is the information falling within the scope of the complainant's subsequent requests of January and February 2008.
 - Requests of 11, 16, 17, 22 and 25 January 2008 and 1 and 18 February 2008 – the complainant argued that ACE were incorrect to rely on section 12(4) of the Act as he believed the information could be provided within the cost limit.

Chronology

24. As noted above the Commissioner first wrote to ACE on 27 January 2009 in relation to this complaint. The Commissioner asked to be provided with a copy of the information that had been withheld on the basis of section 36 along with confirmation as to whether it held a number of specific documents identified by the complainant.
25. The Commissioner received a substantive response from ACE on 2 April 2009 which amongst things clarified the refusal notice issued on 25 January 2008 (for further details see the 'Scope' section above).
26. The Commissioner contacted ACE again on 29 April 2009 in order to seek clarification on a number of matters, in particular the process by which ACE reached the decision to disinvest in Dedalus and thus what information fell within the scope of the 2 January 2008 request. The Commissioner also asked the ACE to provide a breakdown of the estimated costs of complying with the complainant's requests in order to support its reliance on section 12.

27. ACE provided the Commissioner with a response on 5 June 2009.
28. The Commissioner wrote to ACE again on 17 July 2009 and sought clarification on a number of outstanding issues.
29. ACE provided the Commissioner with a substantive response to this letter on 29 September 2009. In this response ACE explained that it was now prepared to provide the complainant with two further documents which had been located during the course of the Commissioner's investigation because it did not consider them exempt from disclosure. (These are the documents referred to as numbers 3 and 5 in the Analysis section which follows below).
30. Although the Commissioner asked ACE to disclose these documents to the complainant during the course of the Commissioner's investigation, at the date which this Notice is being issued, these documents have not been disclosed. The Commissioner has therefore included in the 'Steps Required' section of this Notice a requirement for ACE to disclose documents 3 and 5 to the complainant.

Analysis

Request of 2 January 2008

31. As set out in the 'Scope' section above there are a number of issues which need to be considered in relation to this request: The first is what information ACE actually holds which falls in the scope of this request and the second being which parts of this information should be disclosed under the Act.
32. The text of the complainant's request of 2 January 2008 read:

'I am requesting from ACE under the provisions of The Freedom of Information Act the Dedalus Disinvestment File and all documentation, computer files and information, in whatever format relating to Disinvestment in Dedalus to be supplied to us.

I would also like you to put on the record the date in which ACE, E decided to disinvest in Dedalus and produce the documentation which supports this'.
33. In response to this request the complainant was provided with 137 pages of documentation. The Commissioner has reviewed this documentation and established that the vast majority of it relates to previous reviews of Dedalus' performance carried out by ACE and associated correspondence. Also included in the documentation was an internal email chain between employees of ACE dated 9 October 2007 and a document entitled 'Summary document'. It is the second page of this document that has been withheld on the basis of section 36.

34. The complainant has provided the Commissioner with detailed submissions to support his view that ACE has not provided him with all of the information falling within the scope of his request of 2 January 2008. The Commissioner has summarised these points as follows:
- The majority of the documents, 119 pages of the 137 supplied, sent in response to the request 2 January 2008 were documents which had nothing to do with the disinvestment process and moreover were documents already in the complainant's possession or had been supplied by him to ACE;
 - The decision to disinvest goes back to 2003 and therefore information supplied to him should date back to that period (the information provided only went back to 2005);
 - There was a lack of internal documentation which documented how the decision to disinvest had been reached and this had been deliberately withheld by ACE.
35. In effect, the complainant argued that the requests he sent to ACE following his request of 2 January 2008, i.e. the requests of 11, 16, 17, 22 and 25 January 2008 and 1 and 18 February 2008 all sought particular pieces of information which he considered to fall within the scope of his 2 January 2008 request because in his opinion these pieces of information were all used by ACE as a basis upon which to decide not continue investing in Dedalus.
36. During the course of this investigation, the Commissioner agreed with the complainant that given the complexity and history of issues between ACE and Dedalus, the scope of his investigation on this point would focus on establishing an **objective** understanding as to the information used by ACE to reach the decision to disinvest in Dedalus and thus by implication the information falling within the scope of 2 January 2008 request.
37. The Commissioner therefore asked ACE to set out the process by which it had reached the decision to disinvest in Dedalus. ACE's response is summarised below:
38. In January 2007 ACE's National Council agreed a proposal for an Investment Strategy for grant in aid funding for 2008 to 2011. As part of this strategy it was decided to review the entire portfolio of RFOs. All funding agreements with almost a thousand organisations on the portfolio were due to come to an end on 31 March 2008 and ACE was due to receive the announcement of its settlement from government regarding grant in aid funding for 2008 to 2011.
39. Following the National Council meeting, general guidance was issued to regional offices from ACE's National Office. Regional offices were provided with a template document for lead officers to make initial recommendations. ACE has explained that the East Office, which was responsible for Dedalus, used the general guidance from the National Office and they also used a template called the '4Ps' which had been devised by the London office as a means by which to pull together key points from previous annual reviews and risk assessments of an RFO's performance.

40. The process of reviewing RFOs in the East region (under which Dedalus fell) was informed by lead officer assessments from annual reviews, drawing on information in annual submissions and based on organisational performance. Draft proposals were drawn up for each organisation. The proposals were informed by a variety of documentation, including documents from past annual reviews and performance reviews. In reviewing almost a thousand organisations ACE explained that it was not possible to create a 'Disinvestment File' for each organisation.
41. The East region then submitted a spreadsheet and supporting narrative document to the National Office for moderation in May 2007.
42. ACE received notification of its settlement from government in October 2007.
43. Regional Councils met in December 2007 to consider the proposals for each RFO in their region. The East Regional Council met on 5 December 2007 and considered the following documentation:
 - A paper entitled 'Arts Council England East long-term strategy for the advancement of the arts in the East of England';
 - A paper entitled 'RFO Investment Strategy 2008-11 Next Steps';
 - A financial spreadsheet showing the proposed budget allocation;
 - The summary document with the rationales for proposed disinvestment or non-renewal for each organisation on the portfolio, but with the context section removed as this was for the staff only;
 - Copies of the standard draft letters that would go out to each organisation.
44. On 12 December 2007 ACE wrote to each RFO advising them of their funding status. It was in such a letter that Dedalus were informed that the intention was not to renew their funding.
45. Dedalus were given a five week period to respond and did indeed do so. The East Regional Council met again in January 2008 to consider responses received from RFOs, including Dedalus. However, this meeting was held after the request of 2 January 2008 and thus any recorded information generated by it falls outside the scope of the request.
46. On the basis of the outline set out above the Commissioner is satisfied that no such thing as a physical 'disinvestment file' for any of the organisations under review was created by ACE. Rather ACE simply created a number of documents relating to the decision to disinvest in Dedalus as part of its overall review of funding for all organisations.
47. Furthermore, on the basis of the above outline, the Commissioner believes that it is clear that the following documents were created by ACE and clearly relate to the decision to disinvest in Dedalus:
 1. Previous RFO assessment summaries and annual reviews for Dedalus for the years 2005, 2006 and 2007;

2. The '4Ps template';
 3. Draft proposal;
 4. Summary document with the rationales for proposed investment or non-renewal for Dedalus;
 5. Financial spreadsheet showing the budget allocation.
48. Also on the basis of the above description the Commissioner believes the following information created by ACE may relate to the decision to disinvest in Dedalus:
6. The supporting narrative document submitted by ACE East office to the National Office for moderation in May 2007.
 7. The two papers considered by the East Regional Council when it met on 5 December 2007.
49. Furthermore, the Commissioner has identified a number of further internal emails in the papers provided to him in relation to this case which he considers may have been used by ACE as part of its decision to disinvest in Dedalus.
50. Firstly, in the internal email dated 9 October 2007 sent at 09:53 which has been disclosed to the complainant, there is a reference to a further internal email which was sent within ACE about Dedalus. ACE has provided the Commissioner with this email. (This email is also dated 9 October 2007 but was sent at 09:55.) The complainant, who has of course not seen this further email has argued that it falls within the scope of his 2 January 2008 request. ACE has argued that this email does not fall within the scope of 2 January 2008 request.
51. Secondly, ACE has also provided the Commissioner with an ACE internal email dated 30 October 2007 and sent at 13:39.
52. Thirdly, in this email (i.e. the one dated 30 October 2007 and sent at 13:39) the sender suggests that the recipient 'circulates an email (bullet-point format) outlining the rationale for discontinuation of funding [in Dedalus]'. If such an email was sent and was still held by ACE at the time this request was submitted the Commissioner believes that it would fall within the scope of this request.
53. It is the Commissioner's understanding that ACE accepts that documents numbered 1 to 5 above relate to its decision to disinvest in Dedalus, and thus fall within the scope of the 2 January 2008 request. Therefore in relation to these documents the Commissioner simply has to consider whether these documents, or more accurately, the parts of these documents which have been withheld by ACE should be disclosed under the Act. This analysis is set out below.
54. However, in relation to the remainder of the documents identified, i.e. those at numbers 6 and 7 and the various emails fall within the scope of the request the Commissioner has to first determine whether he considers them to fall within the scope of the 2 January 2008 request before deciding whether they are exempt from disclosure under the Act.
55. The Commissioner has considered very carefully the documents described at

numbers 6 and 7 and concluded that they do not fall within the scope of the complainant's request of 2 January 2008. The Commissioner's reasoning for reaching this decision is as follows: having reviewed the contents of the documents described at numbers 6 and 7, the Commissioner established that there is no reference in them to Dedalus. Although the Commissioner accepts such documents were clearly used by ACE as part of its overall review of the RFO funding, in the Commissioner's opinion they are sufficiently distinct from the actual information which has been located which focuses on the actual decision to disinvest in Dedalus.

56. In relation to the first email (i.e. the one dated 9 October 2007 but was sent at 09:55), ACE has argued that this email, although focusing on Dedalus, does not fall within the scope of the request of 2 January 2008. This is because it relates to a separate matter – Dedalus applying for ACE's Grants for the arts programme which is a distinct funding stream from the decision to disinvest in Dedalus. ACE has argued that the fact that this email was sent separately is indicative of the fact that this issue was separate to the decision to disinvest in Dedalus.
57. The complainant has argued that this further email does fall within the scope of his request because it is likely to demonstrate why ACE had decided that Dedalus should lose its annual grant because it had no plans to reverse its decline in sales, whilst at the same time ACE was accepting that this reason no longer applied and thus allowing Dedalus to apply for grant in aid.
58. The Commissioner has considered the contents of the first email and its attachment very carefully and has concluded that this information does not fall within the scope of the complainant's request of 2 January 2008. Obviously the Commissioner cannot discuss the content of the information in detail, but he believes that he can explain that whilst there is some discussion within this information of Dedalus' past performance, and discussion of its past performance was obviously used in order to determine the decision to disinvest, the discussion within the information focuses solely on the grants for art funding and moreover there is no discussion about the decision to disinvest. From an objective point of view, the Commissioner therefore favours ACE's view that this email does not fall within the scope of the request of 2 January 2008.
59. In relation to the second email which was sent at 30 October 2007 at 13:39 the Commissioner is satisfied that this email falls within the scope of the request because it contains direct references to the decision to disinvest in Dedalus.
60. With regard to the third email, the Commissioner notes that the ACE has searched both the paper and electronic documentation held at its National Office and the East Regional Office and no such email has been located. Given that ACE's searches have located a significant amount of other correspondence and information, the Commissioner believes that if such an email was sent it would have been located by ACE during the course of the Commissioner's investigation.
61. In summary then the information which the Commissioner considers falls within the scope of the 2 January 2008 request is as follows:

1. Previous RFO assessment summaries and annual reviews for Dedalus for the years 2005, 2006 and 2007;
 2. The '4Ps template';
 3. Draft proposal;
 4. Summary document with the rationales for proposed investment or non-renewal for Dedalus;
 5. Financial spreadsheet showing the budget allocation;
 8. An internal dated 9 October 2007 and sent at 09:53;
 9. An internal email dated 30 October 2007 and sent at 13:39.
62. The information that has been disclosed to the complainant consists of that contained at 1, part of document 4 (with the context section removed) and 8.¹ (As noted in the 'Chronology' section above ACE is now prepared to disclose the relevant sections from documents numbered 3 and 5 to the complainant. Both documents are spreadsheets setting out funding scenarios for various organisations and the Commissioner agrees with ACE that the only information which falls within the scope of this request on both spreadsheets are the rows pertaining to Dedalus. Given that ACE is now prepared to disclose this information the Commissioner has not considered whether it is exempt from disclosure on the basis of the one of the exemptions contained within the Act.)
63. It follows that the information which ACE maintains is exempt is that numbered 2, part of 4 and 9.
64. In relation to the complainant's point of complaint that further information falls within the scope of this request, as noted above the complainant accepts that the Commissioner's role is limited to establishing an objective understanding of the process followed by ACE in order to determine what information falls within the scope of 2 January 2008 request.
65. The Commissioner has considered the arguments advanced by the complainant carefully, along with the submissions provided by ACE, and has concluded that ACE does not hold any further information falling within the scope of the complainant's request, or more accurately, other recorded information that ACE may hold which could fall within the scope of the complainant's requests sent after the 2 January 2008 was not used to reach the decision to disinvest in Dedalus. The Commissioner has set out his basis for reaching this conclusion below:
66. In relation to the complainant's argument that ACE's decision to disinvest in Dedalus included an assessment of information dating back to 2003, the Commissioner acknowledges that there is a lengthy history between ACE and Dedalus and at times this relationship has been a difficult one. However, having reviewed the papers disclosed to the complainant in response to his request of 2 January and having considered the process which ACE followed in the Commissioner's opinion ACE's consideration of whether to disinvest was only based on a review of the paper work dating back three years, i.e. to 2005. This is because the decision to disinvest was taken in the context of ACE reviewing all

¹ Documents 1, part of document 4 and 8 were disclosed to the complaint in January 2008.

RFO organisations and in order to determine funding for the period 2008 to 2011. Therefore, although the complainant may believe that issues which occurred prior to 2005 may have affected the decision to disinvest, the Commissioner does not believe that based upon the information that he has seen he can objectively conclude that this was indeed the case.

67. Similarly, the Commissioner disagrees with the complainant that the 119 pages of information disclosed to him are irrelevant to his request. Rather the Commissioner considers these papers to be central to ACE's decision making process regarding the decision to disinvest in Dedalus. This is because, as the above paragraphs set out, an organisation's previous reviews formed the basis of deciding whether information ACE would continue to invest in an organisation. Although the Commissioner can understand the complainant's frustration in being provided with information in response to his request which he had in fact previously provided to ACE as part of the review process, this does not mean that such information does not fall within the scope of 2 January 2008 request. (Technically ACE could have relied on the exemption contained at section 21 of the Act, information reasonably accessible to the applicant, because the complainant was in possession of much of this information. However, as argued, this would not mean that it was not in the scope of the request of 2 January 2008.)
68. In relation to the lack of internal documentation provided by ACE in response to his request, the Commissioner does accept that this would appear to be sparse. However, as ACE was reviewing the funding for 1,000 organisations it is understandable that it does not have detailed records of the thinking and analysis behind each individual decision. Similarly, as ACE has managed to locate completed versions of various template documents, in addition to a number of internal emails, which set out the basis upon which the decision to disinvest in Dedalus was taken, the Commissioner believes that it is reasonable to argue that ACE does not need to hold any further internal recorded information in order to explain the basis upon which it reached the decision to disinvest in Dedalus. Furthermore during the course of the Commissioner's investigation ACE has conducted further searches and reviews of its files in relation to Dedalus and no further relevant information was found to be held.
69. In cases such as this where there is some dispute as to the amount of information which is held by a public authority, the Commissioner applies the civil standard of the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of any searches undertaken by a public authority. On the basis of the above, and on the balance of probabilities, the Commissioner is satisfied that ACE has identified (and in some cases already disclosed) all of the information which it used to reach its decision to disinvest in Dedalus and thus all of the information which falls within the scope of the complainant's request of 2 January 2008.

Section 36

70. The Commissioner now has to decide whether the documents which he has concluded do fall within the scope of the request but to date have not been

provided to the complainant are in fact exempt from disclosure under the Act. This consists of the information numbered at 2, part of 4 and 9.

71. ACE is relying on section 36(2)(b)(ii) to withhold these documents.
72. The full text of section 36 is included in the legal annex attached to this notice. As the text of the legislation indicates, section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to prejudice any of the activities set out in sub-sections of 36(2).
73. Sub-section 36(2)(b)(ii) states that:
- ‘(b) would, or would be likely to, inhibit-
(ii) the free and frank exchange of views for the purposes of deliberation’
74. In order to establish whether the exemption has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
75. With regard to the fourth criterion, in deciding whether the opinion was ‘reasonable’ the Commissioner has been led by the Information Tribunal’s decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013) in which the Tribunal considered the sense in which the qualified person’s opinion is required to be reasonable. It concluded that ‘in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at’ (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that ‘the opinion must be objectively reasonable’ (para 60).
76. The Commissioner has also been guided by the Tribunal’s findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant’. Therefore, in the Commissioner’s opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.
77. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase ‘would, or would be likely to’ be a

number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

78. Practically then in order to assess whether an opinion provided by a qualified person was reasonably arrived at the Commissioner asked ACE to provide:
- A copy of the submissions given to the qualified person in order for them to reach their opinion.
 - Confirmation as to whether the qualified person was in fact provided with any contrary arguments supporting the position that the exemption was not engaged.
 - A copy of the reasonable opinion which was subsequently provided.
79. Due to the way in which the Commissioner's investigation of this complaint developed ACE in fact provided two separate submissions in relation to its reliance on section 36. This is because when originally responding to the request of 2 January 2008 ACE only refused to disclose part of document 4 on the basis of section 36. The refusal made no reference to document 2 or document 9. This is because these latter two documents were only located and established to fall within the scope of the complainant's request during the course of the Commissioner's investigation. The Commissioner has therefore considered whether section 36 is engaged in two different parts, first in relation to the part of document 4 and then to documents 2 and 9.

Document 4

80. In response to the Commissioner's inquiry ACE provided him with a copy of the submission sent to Mr Peter Hewitt who in January 2008, as the Chief Executive of ACE, was its qualified person for the purposes of section 36. This submission sets out in detail why, in the author's opinion ACE should withhold part of document 4. Although the submission actually quotes all of section 36(2) it would appear from the text of the submission that the author considered section 36(2)(b)(ii) to be the most applicable sub-section. The submission does not specify which limb of likelihood, i.e. would or would be likely, should be relied upon. This submission was sent to Mr Hewitt on 9 January 2008.
81. The Commissioner has been provided with a copy of an email sent by Mr Hewitt on 10 January 2009 in which he simply states that he agreed with the submission.
82. In scenarios where a submission does not specify which limb of likelihood should be relied upon, i.e. would or would be likely, the Commissioner has noted the comments of the Information Tribunal in the case of *McIntyre* in which the Tribunal explained that:

'...in the absence of designation as to level of prejudice the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.' (para 45)

83. The Commissioner accepts that the opinion was one that was reasonably arrived at for the following reasons: the qualified person was provided with a detailed submission and the opportunity to view the information that was being withheld, along with part of the same document which was being disclosed in order to provide some context, and furthermore the opinion was given prior to the refusal notice being issued.
84. With regard to whether the opinion was reasonable in substance the Commissioner needs to explain what document 4 actually is and then briefly summarise the opinion that was given by Mr Hewitt (or more accurately the opinion which Mr Hewitt agreed to). Document 4 is a two part form which summarises ACE's reasons to disinvest in Dedalus. The first part is entitled 'rationale' and was disclosed to the complainant in response to the request and the second part is entitled 'context' and is the part which has been withheld on the basis of section 36(2)(b)(ii). ACE has explained that the rationale section was provided to the Regional Council although the context section was only intended for internal use. The opinion argues that the purpose of the context section was for ACE staff to share information about organisations, including problems that may arise or matters of concern that staff need to be aware of. The opinion argues that disclosure of the context section would, or would be likely to, prevent ACE staff frankly sharing information about organisations in the future.
85. The Commissioner has carefully considered this opinion and the context section of document 4 and he has concluded that the opinion is not one which is reasonable in substance. The opinion is based on the premise that disclosure of free and frank discussions about a particular organisation would be likely to inhibit future deliberations about the same or a different organisation. The Commissioner does not dispute the logic of this argument. However, in order for this argument to be reasonable the information that is being withheld has to contain free and frank comments. In the Commissioner's opinion the majority of the 'context' section of document 4 contains factual details about the background of ACE's history with Dedalus and this cannot be said to be information of a free and frank nature. Although the Commissioner accepts that the final paragraph of the context section contains remarks of a more commentary than factual nature, the Commissioner is not persuaded that such information can really be described as free and frank and is not sufficiently distinct from the information that has been disclosed in response to this request, in particular the part of document 4 which has been provided to the complainant. Consequently the Commissioner does not believe that it is reasonable to conclude that disclosure would be likely to inhibit future deliberations.
86. Therefore the Commissioner has concluded that the part of document 4 which was withheld is not exempt on the basis of section 36(2)(b)(ii).

Documents 2 and 9

87. As noted above, in relation to documents 2 and 9 it was only established during the course of the Commissioner's investigation that these two documents fell within the scope of the complainant's request. ACE confirmed to the Commissioner that it was seeking to rely on section 36(2)(b)(ii) to withhold both documents.
88. The Tribunal in *King v Information Commissioner and the DWP* found that: 'the Commissioner and the Tribunal have the power to consider exemptions raised in front of them for the first time. Whether it **will** consider a recently raised exemption will depend on the facts in each case' (Tribunal's emphasis) (para 55). The Commissioner takes this statement to suggest that the Commissioner has discretion as to whether he considers exemptions before him for the first time.
89. The Tribunal in *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072)* clarified this position emphasising that 'it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations.' (para 42).
90. In the circumstances of this case the two documents in question were only established to be in the scope of the request during the course of the Commissioner's investigation. ACE suggested that the failure to identify these documents when the request was originally handled was most likely due to an administrative error and/or a lack of understanding as to nature of the information being requested.
91. Having considered this carefully, the Commissioner is prepared to accept the late application of section 36 by ACE and notes that this is consistent with the Tribunal's acceptance in *DBERR* that it was reasonable for the Commissioner to consider exemptions for the first time when some of the disputed information was only identified by the public authority during the course of the Commissioner's investigation.
92. However, for section 36 to be engaged, even belatedly, ACE still needs to seek the opinion of the qualified person. Clearly, ACE's failure to collate this information at the time of refusing the request constitutes a flaw in the process of obtaining the opinion. However, such a flaw may not necessarily be fatal to the engagement of the exemption. The Commissioner finds support for such an approach in the comments of the Tribunal in the case *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)* in which the Tribunal explained that: 'where the opinion is overwhelmingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way need not be fatal to a finding that it is a reasonable opinion' (para 31).
93. In relation to documents 2 and 9 ACE provided the Commissioner with a copy of the submission provided to ACE's current chief executive, Mr Alan Davey, along

with a copy of his opinion. The submission was sent to Mr Davey on 28 September 2009 and included with it a copy of documents 2 and 9. The submission sets out why disclosure of these two documents would, or would be likely to, prejudice the free and frank exchange of views for the purposes of deliberation and thus should be withheld on the basis of section 36(2)(b)(ii) of the Act. The submission does not specify which limb of likelihood i.e. would or would be likely, should be relied upon. Mr Davey provided his opinion on the same day he was sent the submission; his response simply notes that he agrees with the submission.

94. Despite the failure to seek the qualified person's opinion at the time when this request was originally received, the Commissioner is prepared to accept that the opinion was reasonably arrived at once it was actually sought. This is because the qualified person was provided with a detailed submission and the opportunity to view the information that had been withheld. The Commissioner is also satisfied that the qualified person focused only on factors that were relevant to the time of the request and did not take into account any changes in circumstances since the request was originally received in January 2008 and the further opinion was sought in September 2009.
95. With regard to whether the opinion was reasonable in substance, again the Commissioner believes that it would be useful if he briefly sets out what the two documents are and then summarises the opinion that was given to/by Mr Davey:
96. Document 2, the 4Ps document, is a template document used by certain ACE offices during the scenario planning exercise in order to determine investment priorities. It pulled together the key points from annual reviews and risk assessments for each organisation. Document 9 is an internal email sent in October 2007 discussing issues relating to the planned disinvestment in Dedalus.
97. The opinion itself follows a similar logic to the opinion submitted in respect of document 4, i.e. disclosure of this information would inhibit the free flow and exchange of opinions as part of future deliberations undertaken by ACE concerning funding of organisations.
98. As noted above, the Commissioner accepts the underpinning logic of this argument – i.e. that disclosure of free and frank information used as part of a deliberative process could inhibit those who engage in such discussions in the future. In contrast to his findings above, the Commissioner accepts that the content of documents 2 and 9 can be accurately described as free and frank in nature. Furthermore, in terms of how disclosure would actually affect ACE in the future, the Commissioner accepts that central to ACE's functions is a decision making process which involves deciding at what level, if at all, organisations should continue to receive funding and moreover that central to this process being effective is ACE staff being able to freely and frankly exchange views on particular organisations. Therefore the Commissioner accepts that it is reasonable to argue that if this information was disclosed there would be an identifiable harm to ACE's future activities.

99. The Commissioner also notes that again none of ACE's submissions clearly identify whether the qualified person considers the likelihood of the prejudice to be one that 'would be likely to' occur, or whether the likelihood meets the higher test of 'would occur'. In line with the approach adopted by the Tribunal the Commissioner has therefore assumed that the limb of the test being relied upon is 'likely to prejudice'.
100. The Commissioner has therefore assumed that it is ACE's position that should the information be disclosed the likelihood of inhibition or prejudice occurring is one that is simply, likely to occur, rather than one that would occur
101. On the basis of the above submissions the Commissioner is satisfied that the opinion is one that was reasonably arrived at **and** reasonable in substance and thus the exemption contained at section 36(2)(b)(ii) is engaged in respect of documents 2 and 9.

Public interest test

102. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

'88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.'

103. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

104. There is an inherent public interest in disclosure of information to ensure that public authorities are accountable for, and transparent about, decisions that they have taken. Disclosure of this information could improve the public's understanding of the how ACE reached the decision to disinvest in Dedalus.

105. There is a public interest in disclosure of information which would assist the public in challenging decisions taken by public authorities. Although disclosure of this information at the time of the request would arguably only have assisted Dedalus in challenging ACE's decision to disinvest and could be seen as a private rather than public interest, as the High Court noted in *Home Office & Ministry of Justice v Information Commissioner* such a criticism is true of any individual case; there remains a public interest in disclosure of the information to reveal the integrity of ACE's decision making process.²
106. The complainant has noted that ACE's own disinvestment rules suggest that any information gathered for the purposes of disinvestment can be shared with the organisation which ACE is disinvesting from.

Public interest arguments in favour of maintaining the exemption

107. ACE has argued that there is a clear and strong public interest in ACE being able to undertake effective decision making. In order to do so it is essential that employees are able to record their opinions in a free and frank manner in order that the process of deliberation about funding for organisations is as effective as possible. It would not be in the public interest if the recorded versions of the deliberations which were recorded were less free and frank.
108. The documents which have been withheld relate from a time when ACE was undertaking particularly sensitive and difficult discussions about disinvestments in a range of organisations and it was paramount that ACE staff could be honest, clear and confident in recording their views.

Balance of the public interest arguments

109. ACE's argument in favour of maintaining the exemption focuses on the concept of the chilling effect. The chilling effect arguments are directly concerned with the argued loss of frankness and candour in debate and advice which would flow from the disclosure of information. This could result in poorer quality advice and less well formulated policy and decisions. The chilling effect can encompass a number of related scenarios:
- Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
 - The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
 - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process

² *Home Office & Ministry of Justice v Information Commissioner*, [2009] EWHC 1611 (Admin) (6 July 2009) – see paragraph 28.

(even after the process is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.

110. In the Commissioner's opinion the first two scenarios are relevant here. This is because ACE's decision making process in respect of the decision to disinvest in Dedalus was ongoing at the time of the request, i.e. 2 January 2008 (The East Regional Council met again in January 2008, and after the 2nd of that month, to consider responses received from RFOs, including Dedalus – essentially to consider appeals to the decision to disinvest.) Therefore in relation to the first scenario disclosure could have affected the frankness and candour with which ACE staff continued to comment on the decision to disinvest in Dedalus. Furthermore, in relation to the second scenario disclosure could have affected ACE discussions in relation to the decisions to disinvest in other organisations in relation to the current round of funding allocation and/or future funding rounds.
111. In considering the weight that should be attributed to the chilling effect arguments the Commissioner has taken into account the scepticism with which the Tribunal has treated the chilling effect arguments when they have been advanced by other public authorities in relation to their application under section 35 (formulation or development of government policy). The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* accurately summarises the position of various Tribunal decisions:

'we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner EA/2007/0001*. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.' (para 26).

112. However, the Commissioner has taken into account the comments of Mr Justice Mitting when hearing a Tribunal decision which was appealed to the High Court. Whilst supporting the view of various Tribunals that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather is likely to be relevant in many cases:

'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. 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.'

113. In light of the various pieces of case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence as to how disclosure of the information in question would result in the effects suggested by the public authority.
114. The Commissioner has considered the chilling effect arguments advanced by ACE very carefully in this case has concluded that they do deserve to be given weight. This is because firstly, having reviewed the withheld information that Commissioner accepts that it is of a genuinely free and frank nature, given the content of this information the Commissioner is prepared to accept that if this information was disclosed those involved in discussions about which organisations should receive funding, and at what level, would be unlikely to make such candid assessments in the future.
115. Secondly, in terms of the severity, extent and frequency of what harm would be likely to occur, the Commissioner accepts that the nature of the decision making process which would be disrupted – i.e. deliberations on what level of funds to allocate to organisations – is at the centre of what ACE does. In other words, it is not simply the decision making process undertaken by ACE for RFO organisations that would be likely to be affected but the decision making process in respect of every application for funding it receives. This is because every application, no matter which funding stream is being applied for, must be considered critically.
116. With regard to attributing weight to the public interest arguments in favour of disclosing the information, the Commissioner believes that inherent and general arguments surrounding accountability and transparency should not be dismissed lightly; nor should the public interest in assisting interested parties in challenging decisions that have been taken by public authorities.
117. However, having looked at the content of the withheld information the Commissioner believes that although it is of a free and frank nature, the extent to which disclosure would actually inform interested parties as to how ACE made this particular decision is relatively limited. Furthermore, although the Commissioner acknowledges the complainant's point regarding ACE's policy of being open with organisations it is disinvesting in, the Commissioner notes that such information would be disclosed by ACE simply to the organisation in question; such a disclosure would not be made under the Act. This is a significant point because when a public authority discloses information under the Act it is taken to be a disclosure to the world rather than to just one individual. Therefore in the Commissioner's opinion, ACE's policy of being open with organisations it is

disinvesting in is not directly relevant to the assessment of the public interest test under the Act.

118. On the basis of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs that in disclosing the information. In reaching this decision the Commissioner has placed particular weight on the fact that disclosure of the information would be likely to have a negative impact on a significant number of ACE's deliberations when considering applications for funding whereas disclosure of the information would only provide a very limited insight into the decision making process in respect of one organisation.

Requests of 11, 16, 17, 22 and 25 January and 1 and 18 February 2008

119. As noted above, the Commissioner has established that the refusal notice issued by ACE on 25 January 2008 which cited section 12 was intended to refuse the requests contained in the complainant's emails of 11, 16, 17, 22 and 25 January 2008. The refusal notice explained that the estimated aggregated cost of complying with these requests when taken added together (and including the cost of responding to previous requests submitted by the complainant) exceeded the appropriate cost limit of £450.
120. With regard to the requests the complainant submitted which were contained in his communications of 1 and 18 February 2008 the Commissioner understands that ACE issued a response on 7 March 2008 which aimed to address the freedom of information issues raised by the complainant in recent correspondence sent to ACE. In this response ACE explained that it was entitled to aggregate the costs of the complainant's separate requests despite his argument that ACE should treat them separately. The Commissioner has established with ACE that it intended the requests of 1 and 18 February 2008 to be refused on the basis of section 12(4) of the Act given the aggregated cost of complying with the previous requests submitted by the complainant on the same or similar issue.

Section 12

121. Section 12(1) of the Act provides that public authorities do not have to comply with a request where the estimated cost of responding to that request exceeds the appropriate limit as specified by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').
122. Section 4(3) of the Regulations sets out the basis upon which an estimate can be made:

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

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the

- information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

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

123. Furthermore section 12(4) of the Act provides that where a public authority receives two or more requests on a similar nature from the same individual or different persons acting in concert, then the estimated cost of complying with any of the requests is taken to be the estimated costs of complying with all of them. Regulation 5 confirms that requests which a public authority chooses to aggregate must 'relate, to any extent, to the same or similar information' and be received by the public authority within any sixty consecutive working day period.
124. The Commissioner is conscious of the comments made by the Information Tribunal in its decision in *Fitzsimmons v Information Commissioner and DCMS* (EA/2007/0124) and the implications they have for this case. In this decision the Tribunal confirmed that the test for aggregating requests as set in Regulation 5 of the Regulations is very wide; requests only need to relate to **any extent** to the same or **similar** information in order to be aggregated. The Commissioner takes the view that requests will be 'similar' where there is an overarching theme or common thread running between them in terms of the nature of the information that has been requested.
125. Furthermore, and again to follow the approach taken by the Tribunal in *Fitzsimmons*, in cases such as this where the complainant has submitted one piece of correspondence which includes a number of requests, in the Commissioner's opinion, multiple requests within a single item of correspondence are separate requests for the purpose of section 12.
126. In light of the Tribunal's comments the Commissioner is satisfied that ACE can aggregate the cost of complying with the requests of 11, 16, 17, 22 and 25 January 2008 and 1 and 18 February 2008 together, and moreover can aggregate this cost with the cost of responding to the request of 2 January 2008 to which ACE did respond. This is because in the Commissioner's opinion the information being sought by all of these requests can be said to be on the same or similar theme, namely the decision by ACE to disinvest in Dedalus.
127. Therefore the Commissioner accepts that ACE can rely on section 12(4) as a basis upon which to refuse to disclose the requests contained with the complainant's emails of 11, 16, 17, 22 and 25 January 2008 and 1 and 18 February 2008 if the cost of complying with just one of the requests exceeds the cost limit. Similarly, all of the requests could be refused if the aggregated cost of fulfilling two or more of requests exceeded the cost limit.

128. In considering estimates relied upon by public authorities in relation to section 12, the Commissioner has followed the approach of the Tribunal in *Alasdair Roberts v Information Commissioner* (EA/2008/0050) at paragraphs 9 to 13 in which the Tribunal confirmed that the approach of deciding whether an estimate was reasonable involved consideration of a number of issues, including:

- A public authority only has to provide an estimate rather than a precise calculation;
- The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
- Time spent considering exemptions or redactions cannot be taken into account;
- Estimates cannot take into account the costs relating to data validation or communication;
- The determination of a reasonable estimate can only be considered on a case-by-case basis; and
- Any estimate should be 'sensible, realistic and supported by cogent evidence'.³

129. In order to support its position that it was entitled to rely on section 12(1) of the Act ACE provided the Commissioner with internal ACE emails from the period the complainant actually submitted these requests, i.e. early 2008, which included a number of time estimates various individuals in ACE's East office had spent complying with the requests of 2 and 7 January 2008. The details contained in these emails were:

'Person A Retrieving and printing emails and documents 3 hours
Person B Retrieving and printing emails and documents 3 hours
Person C Collating and photocopying documents etc 3 hours
Person D Identifying information relevant to FOI request 2 hours
Person E Meeting to agree documents relevant to FOI request 30 mins
Person F Scanning and sending documents to National Office 30 mins.

Total amount of time to comply with FOI/1S016 by East office 16 hours'

130. ACE therefore argued that as it had already spent 16 hours on activities that came under the Regulations it was clear that any further work, i.e. that work being that needed to fulfil the further requests submitted in January and February 2008, would have resulted in the aggregated cost of responding to the all of these requests would have quickly exceeded the 18 hour limit.

131. In support of this view ACE also provided the Commissioner with further internal emails from January 2008 which discussed the estimated time it would take to fulfil the request of 11 January 2008:

'[it would take 7 hours] reviewing, photocopying and printing correspondence and folders related to the 2003 performance review...We have not completed this task yet and would anticipate that is [sic] will

³ [Alasdair Roberts v Information Commissioner \(EA/2008/0050\)](#)

require a further days work (7 hours) by [name redacted] to complete the collation of the information. In addition I will need to review the information to ensure that we have identified and included all the relevant documents. I would anticipate that this will take a minimum of 3 hours to complete'

132. In relation to the estimate provided by ACE, the Commissioner notes that it would appear that some of the activities are not ones it is entitled to charge for under the Regulations. For example, the Regulations do not allow public authorities to charge for data validation, which is what the Commissioner assumes the activity of reviewing the documents to ensure that all relevant information has been located amounts to. Furthermore, whilst a public authority can charge for the time taken to extract the requested information from a document, it cannot simply charge for the time it takes to photocopy an entire document if that document consists of the withheld information.
133. However, the Commissioner is also conscious that the Tribunal has indicated that an estimate has to be considered on a case by case basis. In this case the Commissioner notes that calculations in relation to the request of 2 and 7 January were based upon actual activities carried out rather than simply being estimates of the work that would be needed to be undertaken. Moreover, these calculations were created shortly after actual activities were carried out – the alternative being that ACE retrospectively estimated the time that had been taken during the course of the Commissioner's investigation.
134. Furthermore, despite the flaws in charging for some activities included in the Regulations, the Commissioner is prepared to accept that ACE has provided sufficient information to demonstrate that the **aggregated** cost of fulfilling the requests of 2, 7 and 11 January 2008 (but not the cost of fulfilling the individual requests) would have been likely to exceed the cost limit of £450. Moreover, ACE's position is in fact that it is the aggregated cost not just of the requests of 2, 7 and 11 January but also the aggregated cost of complying with the requests 16, 17, 22 and 25 January which supports its application of 12(4) in the refusal notice of 25 January. Given the nature of these requests, i.e. multipart, lengthy and covering a range of different topics (albeit all focused on the overarching issue of disinvestment) the Commissioner accepts that ACE was correct to refuse to fulfil the requests of 11, 16, 17, 22 and 25 January on the basis that the aggregated cost of fulfilling them, when taken with the earlier requests of 2 and 7 January, would have exceeded the fees limit. The Commissioner also accepts that ACE was entitled to refuse the requests of 1 and 18 February 2008 on the same basis.

Procedural Requirements

135. Part I of the Act includes a number of procedural requirements with which public authorities must comply.
136. These include section 1(1) which states 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.'

137. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt.
138. Furthermore, section 17 of the Act requires a public authority to provide an applicant with refusal notice stating the basis upon which it has refused a request for information.
139. By failing to disclose to the complainant the remaining part of document 4 which the Commissioner has decided is not exempt from disclosure, ACE breached section 1(1)(b) and 10(1) of the Act.
140. By failing to inform the complainant within 20 working days that it held documents 4 and 9, ACE breached sections 1(1)(a) and 10(1) of the Act. Furthermore by failing to provide a refusal notice citing section 36(2)(b)(ii) as basis to withhold these two documents ACE breached section 17(1).
141. Finally, by failing to provide the refusal notice of 7 March 2008 within 20 working days of 1 February 2008 request ACE breached 17(1).

The Decision

142. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - ACE was correct to withhold documents 2 and 9 on the basis that they are exempt from disclosure under section 36(2)(b)(ii) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
 - ACE was correct to rely on section 12(4) to refuse to fulfil the requests of 11, 16, 17, 22 and 25 January 2008 on 25 January on the basis that the aggregated cost of answering them, when taken with earlier requests, exceeded the appropriate cost limit.
 - Similarly, ACE was correct to rely on section 12(4) to refuse to fulfil the requests of 1 and 18 February 2008 on the basis that the aggregated cost of answering them, when taken with earlier requests, exceeded the appropriate cost limit.
 - The Commissioner is satisfied that ACE does not hold any further information which falls within the scope of 2 January 2008 request other than that which has been identified in the above Notice.

143. However, the Commissioner has also decided that the following elements of the requests were not dealt with in accordance with the Act:
- The part of document 4 not provided initially provided in response to the request is not exempt from disclosure on the basis of section 36(2)(b)(ii) of the Act. ACE breached section 1(1)(b) and 10(1) of the Act by failing to disclose this information.
 - ACE breached sections 1(1)(a) and 10(1) of the Act by failing to inform the complainant within 20 working days that it held documents 4 and 9. Furthermore by failing to provide a refusal notice citing section 36(2)(b)(ii) as a basis to withhold these two documents ACE breached section 17(1).
 - ACE breached section 17(1) by failing to provide the refusal notice of 7 March 2008 within 20 working days of 1 February 2008 request.

Steps Required

144. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complaint the part of document 4 which he has not been provided with, i.e. the section marked 'Context'.
 - Disclose to the complainant the relevant sections of documents 3 and 5. The relevant sections simply consist of the row from each spreadsheet about Dedalus.
145. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

146. 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

147. 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 23rd day of November 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Annex of requests and responses

Complaint to ACE

2 January 2008 request asking for:

- The Dedalus Disinvestment File and all documentation, computer files and information, in whatever format relating to Disinvestment in Dedalus
- To put on the record the date in which ACE, E decided to disinvest in Dedalus and produce the documentation which supports this.

7 January 2008 request asking for:

- The time and date when The Procedural Guidance for Disinvestment from RFOs was taken off the Arts Council website.
- The reason for removing The Procedural Guidance for Disinvestment from RFOs.

9 January 2008 request asking for:

- The names of the 194 arts organisations recommended for disinvestment by ACE.
- ACE office concerned.
- The amount of money they received as a RFO in 2007/8.
- The year in which they were funded.
- A complete list of the publishing companies which were RFO in 2007/8, their funding in that year and their funding in the next 3 years.

Request for review of **10 January** response

ACE to complaint

Response sent on **10 January 2008**: to requests of **2 and 7 January**

- Provided 'information that was used by Arts Council England to reach the recommendation concerning funding for Dedalus 2008-11'. This amounted to 137 pages of docs. One document was refused on the basis of s36.
- Explained that no final decision by ACE, E had been made on the RFO organisations yet.

Also included:

- Time and date provided.
- Explanation provided (notes that this explanation is now on website). Also noted that a number of other organisations have enquired about the guidelines.

18 January 2008 response explaining that:

- Refuse requests for 194 for firms because decision not yet taken – refusal s22, s43(2) and s36.
- Level of funding for all RFO publishing companies in 2007/08 provided. Their funding for the next 3 years is withheld on the basis of s22, s43(2) and s36.

Response on **15 January 2008** explains that no internal review possible on s36

Reference: FS50191595

and further requests sent on **11 January 2008**:

Requests are:

- What Chief Executive are you referring to?
- Which doc is exempt under s36?
- Explain why disinvestment file was vetted by CE and who referred it to him.
- Clarified that did not want to know when ACE, E ratified disinvestment decision but when disinvestment was first recommended by ACE officers. Complains that no information was disclosed about ACE, E's decision to disinvest in 2003 and subsequent performance review of 24/25 November 2003. Therefore, asks for all info in whatever format held about the performance review including minutes made on a laptop by [name redacted] delivered on floppy disk.
- Names and dates of other organisations who have contacted ACE re: disappearing guidelines and copies of that correspondence.

Request **16 January 2008** asks for:

- A complete list of changes made to The Arts Council website in January. Please give the date of the change and who authorised the changes.
- Please send me a list of all documents that you presented to the regional council upon which they made the decision to recommend disinvestment from Dedalus on 5 December 2007.

17 January 2008 email asking for:

- Confirmation of Peter Hewitt's leaving date (and whether Christopher Frayling is senior to Peter Hewitt).

issue – go direct to Commissioner.

Reference: FS50191595

- Why hasn't ACE supplied the documentation concerning ACE's disinvestment in Dedalus in 2003 and the Performance Review of 2003 and subsequent documentation?
 - All press releases made about the Dedalus by ACE.
 - The 4 people who conducted the Dedalus Performance Review Team in 2003 – to explain in writing why the recommendations made orally at the end of the Performance Review Meeting on 25 November 2003 were omitted from the final report.
 - Particular ACE employee and CEO should give a written account of what involvement they had in getting the report "changed".
 - At the London office Peter Hewitt (CEO), Sir Christopher Frayling (Chairman) and Gary McKeone (Director of Literature at the time) should be invited to give a written account of their involvement in this matter and the actions they took to cover up the actions of their colleagues in the Cambridge office.
 - Sir Christopher Frayling and Peter Hewitt should explain why after ACE put on the record that Dedalus was trading while insolvent and in breach of its ACE funding, they took the decision to reinstate and in breach of its ACE funding, they took the decision to reinstate Dedalus's funding rather than supply Dedalus with the Minutes of the Performance Review Meeting on floppy disk?
 - I particularly want to see the emails relating to why ACE allowed Dedalus to apply Grants for the Arts (in reference to an email from [name redacted] to [name redacted]).
- 22 January 2008** chasing letter sent saying no response to requests/clarification raised on 11 January, including:

Reference: FS50191595



- Minutes of 5 December regional ACE, E council meeting.
- Missing documents from disinvestment file.
- Emails between ACE managers in 2007 about Dedalus.

25 January 2008 request asking for lists of documents from each council member he or she was given prior or at the 23rd January and also prior to the 5 December meeting at which they recommended disinvestment from Dedalus. It would also help to know at what date the various documents were received by council members.

1 February 2008 repeats request for information which should have been in disclosed in Dedalus Investment file:

- The one document withheld under s36.
- The emails between [name redacted] and [name redacted] mentioned in a document but not in the file.
- Exchanges between ACE, E in Cambridge and the office of Sir Christopher Frayling about making a comment about Dedalus' 25 anniversary.

In addition also asks for:

What date the officers at ACE decided to recommend disinvestment from Dedalus; there is an undated summary on the file and we would like to know when it was written and by whom.

7 February 2008 request asking:

- To be provided with estimated costs of requests for information so that understand why s12 was applied.
- Also asks if s36 refusal will be reversed.

18 February 2008 – contacts ACE and states that there is no need to aggregate

25 January 2008 – stating that emails of 11, 16, 17, 24 and 25 January had been received and on this basis decided to refuse 'your recent request for information' on basis of aggregated cost of complying when added to your previous requests.

12 February 2008 explains four activities that were taken into account when calculating why limit of £450 had been reached.

7 March 2008 – ACE explain that they not under any duty to treat requests separately as to do so would negate PA's ability to aggregate under s12.

Reference: FS50191595

requests and the best way forward would be to deal with them individually until the limit in ACE's opinion has been reached.

The first five requests that the complainant wanted answering were the following:

- Emails between [name redacted] and [name redacted] mentioned in a document in the file but not included in the file and all ACE internal documentation which deals with why allowed Dedalus to apply for Grants for the Arts on 25 May 2007 having refused permission on 27 April 2007.
- Exchanges between ACE, E in Cambridge and the office of Sir Christopher Frayling about making a comment about Dedalus' 25 anniversary.
- The minutes of Dedalus Performance of 24/25 November 2003 on floppy disk.
- There is an undated summary in our file and we would like to know when it was written and by whom.
- Documentation which shows the date at which ACE officers in Cambridge decided to recommend disinvestment from Dedalus.

31 July 2008 – complainant informs ACE that it will pay ACE £1000 for cost of providing the documentation requested.

8 August 2008 – ACE explains that it considers matters to be concluded and in the hands of the ICO.

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 10(1) provides that –

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

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

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

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

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 21(1) provides that –

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

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides that –

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

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