

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 December 2009

Public Authority: HM Treasury
Address: 1 Horseguards Road
London
SW1A 2HQ

Summary

The complainant submitted a request to HM Treasury for a copy of the 'Sandstorm Report' (the report) which was submitted to the Bank of England by Price Waterhouse in 1991. The report addressed allegations of fraudulent activities committed by the Bank of Credit and Commerce International. In responding to the request HM Treasury noted that a significant portion of the report was available on the internet and it therefore considered these parts of the report to be exempt from disclosure by virtue of section 21 of the Act (information reasonably accessible to the applicant by other means). Although the Treasury provided the complainant with some of the parts of the report which were not available on the internet, it argued that the remaining sections were exempt from disclosure on the basis of section 40(2) (personal data) and section 27(1)(a) (international relations). The Commissioner has concluded that HM Treasury was correct to rely on these three exemptions to withhold the remainder of the report although in handling this request it breached a number of procedural requirements of the Act.

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. The Bank of Credit and Commerce International (BCCI) was a major international bank founded in Pakistan in 1972.

3. In March 1991 the Bank of England asked Price Waterhouse to undertake an audit of BCCI under section 41 of the Banking Act 1987.
4. Price Waterhouse submitted the report to the Bank of England on 24 June 1991. The report became known as the 'Sandstorm Report' ('the report') after the code name given to BCCI by Price Waterhouse.
5. Following receipt of the report, the Bank of England ordered BCCI to close down its activities in the UK. Regulators in other countries followed the Bank of England's decision and BCCI collapsed owing creditors around \$10bn.
6. The British government set up an independent inquiry in 1992 to look into the BCCI affair. The inquiry, which was chaired by Lord Justice Bingham, published its findings in October 1992 in the House of Commons publication *Inquiry into the Supervision of the Bank of Credit and Commerce International*.
7. The US Senate on Foreign Relations also published a report in 1992, *The BCCI affair: A report to the Committee on Foreign Relations by Senator John Kerry and Senator Hank Brown*.
8. Following the publication of the report, BCCI's liquidators launched the *Three Rivers v Bank of England* case on behalf of thousands of creditors who were suing the Bank of England for allegedly failing to properly regulate BCCI. This case ended in 2005 when the Chancellor of the High Court determined that it was no longer in the creditors' interest that the case continued. As part of the case the Sandstorm report was disclosed to the court and included in the trial bundles.
9. Further legal action in relation to BCCI was also launched in other countries in which it had operated. This action included cases where a number of BCCI employees and executives were found guilty of fraudulent conduct in relation to their activities whilst employed at BCCI.

The Request

10. The complainant submitted the following request to HM Treasury (the Treasury) on 6 March 2006:

'On March 4 1991, the Bank of England directed Price Waterhouse to prepare a report under Section 41 of the UK Banking Act of 1987. A draft of the Section 41 report, code named the *Sandstorm Report*, was delivered to the Bank of England on 22 June 1991. I would be very grateful for a release of this report'.
11. The Treasury acknowledged receipt of this request on 10 April 2006 and explained that although the Act obliged it to respond to a request within 20 working days of any request, when a qualified exemption applied it was entitled to extend the time taken to consider the public interest test. The Treasury estimated

- that it would have completed its consideration of the public interest test in relation to this request by 11 May 2006.
12. The Treasury wrote to the complainant on 28 March 2007, apologising for the delay in providing a substantive response to his request. In this letter the Treasury explained that it had established that the majority of the report was available on the internet and provided a website address where these sections could be viewed.¹ It therefore explained that it considered these parts of the report to be exempt on the basis of section 21 of the Act.
 13. Consequently, the Treasury explained that it had focused its deliberations on whether the remaining information not already in the public domain could be disclosed. It suggested that this information could be divided into three classes:
 - some financial data that had been mistyped in the internet version;
 - the names of individuals that had been redacted from the internet version of the report; and
 - the whole of section 1 of the report entitled 'History and current status of problems'.
 14. In relation to the first class of information, the Treasury provided the complainant with financial figures from the draft report to replace those mistyped in the internet version. In relation to the second class of information, the Treasury explained that it considered these names to be exempt from disclosure on the basis of section 40(2) of the Act. In relation to the third category of information, the Treasury provided the complainant with the majority of section 1 of the report but again redacted the names on the basis of section 40(2) and also redacted some sections on the basis of section 27(1)(a) of the Act.
 15. On 31 July 2007 the complainant contacted the Treasury and asked for an internal review to be conducted of its decision not to provide a complete and unredacted copy of the report.
 16. Having received no response, the complainant sent the Treasury a chaser letter on 14 September 2007.
 17. The Treasury responded on 25 September 2007 which explained that it did not receive the complainant's letter of 31 July 2007, however having received his subsequent correspondence of 14 September 2007, it had initiated an internal review.
 18. On 13 March 2008 the Treasury wrote to the complainant and informed him of the outcome of the internal review. The review concluded that the decision to withhold the remainder of the information on the basis of the exemptions set out in the refusal notice had been upheld.

¹ The Commissioner cannot provide a link to the internet version of report because it is no longer available online.

The Investigation

Scope of the case

19. On 16 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The Treasury's delays in responding to his request; and
 - The Treasury's decision to withhold a complete version of the report on basis of the various exemptions cited, namely sections 21, 27 and 40.
20. The complainant also asked the Commissioner to consider the Treasury's delay in conducting an internal review. However, as Part 1 of the Act does not include a requirement for public authorities to complete internal reviews within a particular time scale, the Commissioner has not addressed this issue in the main body of this Notice. He has, however, commented on the Treasury's delay in the Other Matters section at the foot of this Notice.

Chronology

21. Due to a backlog of complaints received about public authorities' compliance with the Act, the Commissioner was unable to begin his detailed investigation of this case immediately. Therefore it was not until 3 July 2009 that the Commissioner wrote to the Treasury in relation to this complaint. The Commissioner asked to be provided with a copy of the information falling within the scope of this request – i.e. a complete and unredacted copy of the report – along with detailed submissions to support the Treasury's application of the three exemptions cited above.
22. The Treasury provided the Commissioner with some initial submissions and a copy of the report on 5 August 2009.
23. On 21 September 2009 the Treasury provided the Commissioner with a further set of submissions.

Findings of fact

24. In responding to this request the Treasury informed the complainant and that an unredacted version of the report was filed in court by the Bank of England as part of the *Three Rivers Case* referenced above. The Treasury therefore suggested to the complainant that he may wish to contact Her Majesty's Court Service (HMCS) and submit a request to it seeking a copy of the report.
25. The complainant subsequently contacted HMCS and requested a copy of report which was served into court in relation to a cases involving BCCI. HMCS informed the complainant that it had located 6 case references relevant to his request. However, HMCS explained that files for three of these cases had been destroyed in line with records management procedures and although the case

files had been retained in relation to three other cases, they had been searched and no copy of the report had been located. HMCS suggested that this was unsurprising given that court files tend not to include evidence bundles; rather bundles of evidence are destroyed or collected by parties at the end of any hearing.

Analysis

Exemptions

Section 21 – information accessible to the applicant

26. Section 21 states that information is exempt from disclosure if it is reasonably accessible to the applicant by any other means.
27. The Treasury has explained to the Commissioner that at time of the complainant's request a redacted version of the report was available online and therefore in its opinion these sections of the report were reasonably available to the complainant and thus it was exempt from disclosing these particular sections in response to this request.
28. The Commissioner has also established that it was in fact the complainant who posted this redacted version of the report online and thus at time of submitting his request he was also in physical possession of the redacted version of the report (in addition of course to being able to view the redacted version of the report online).
29. The Commissioner is therefore satisfied that these sections of the report were reasonably accessible to the complaint at the time of his request and thus the Treasury was correct to rely on section 21 of the Act as a basis to refuse to disclose these particular sections.

Section 40 – personal information

30. The Treasury has argued that the names of individuals contained in the report which were redacted from the internet version of the report were exempt from disclosure on the basis of section 40(2).
31. Section 40(2), in conjunction with section 40(3)(a)(i) provides that information which is personal data of a third party is exempt if its disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
32. In order to rely on this exemption the information being withheld must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

'...data which relate to a living individual who can be identified
a) from those data, or

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

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.’

33. The information which the Treasury has argued is personal data and exempt by virtue of section 40(2) consists of:
- Names of individuals who were employed, or had been employed by BCCI;
 - Names of individuals who had financial dealings with BCCI; and
 - Names of companies or organisations from which individuals could be identified.
34. The Commissioner accepts that the information falling within the first two classes of information clearly consists of personal data as defined by the DPA.
35. In relation to the third category of information the Treasury has explained that given the amount of information in the public domain about BCCI, disclosure of certain company names could lead to the identification particular individuals. The Treasury has provided the Commissioner with a number of examples which demonstrate this point. The Commissioner is therefore prepared to accept that in the unusual circumstances of this case information falling within the third category of information constitutes personal data as defined by the DPA.
36. The Treasury has argued that disclosure of this personal data would be unfair and thus breach the first data protection principle which states that:
1. Personal data must be processed fairly and lawfully, and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
37. The Commissioner’s guidance on section 40 of the Act suggests that a number of issues should be considered when assessing whether disclosure of information would be fair, namely²:
- Would the third party expect that his or her information might be disclosed to others?
 - Had the person been led to believe that his or her information would be kept secret?
 - Has the third party expressly refused consent to disclosure of the information?
38. The Commissioner’s guidance also notes that in thinking about fairness, it is likely to be helpful to ask whether the information relates to the private or public lives of the third party. Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to

² [‘The exemption for personal information’](#)

deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.

39. The Treasury has advanced the following arguments to support its position that disclosure of the information which is personal data would be unfair:
40. In relation to the individuals who were tried and convicted, or indeed acquitted, the Treasury has argued that their involvement with BCCI has been dealt with by the courts and it would be unfair to disclose information which raised their involvement in this matter again.
41. In relation the employees of BCCI who did not face legal action, the Treasury has argued that the release of information linking them to BCCI would be unfair in case it affected their current or future job prospects.
42. The Treasury argued that those individuals who had a financial relationship with BCCI would clearly have a legitimate expectation that information about their personal finances would not be disclosed.
43. Furthermore, the Treasury argued that given the high profile nature of the BCCI affair, disclosure may well lead to an intrusive interference into the lives of individuals mentioned in the withheld information by parties who were interested in the case.
44. In submissions to the Commissioner, the Treasury noted that given the amount of information in the public domain, including the sections of the report published on the internet and the various court cases that had taken place, it was possible that some of the personal data was already in the public domain. The Treasury explained to the Commissioner the steps it had taken to establish whether this was the case and why it had concluded that although some individuals' names (and details of their involvement in BCCI) had been mentioned in the public domain, others had not. On this basis the Treasury took a cautious approach and proceeded on the basis that if the names were not mentioned in the sections of the report already published on the internet they should be withheld on the basis of section 40(2).
45. The Commissioner has considered the applicability of the Treasury's submissions to the specific categories of personal data set out above in paragraph 33 in the following paragraphs. However, before doing so the Commissioner wishes to note that in the circumstances of this case he is willing to accept the Treasury's approach in assuming that the names of the individuals not published in the internet sections of the report are not in the public domain. The Commissioner has reached this conclusion given the voluminous nature of the report and thus the significant number of individuals' names that are included in it; the passage of time since the report was produced; the numerous ways in which individuals' names may have been placed in the public domain; and the sensitive nature of the issues upon which the report focuses. In other words, the Commissioner believes that practically, in cases such as this, it is not plausible for public authorities (or the Commissioner) to establish whether each individual's name is

in the public domain. Rather, it would be more appropriate to adopt a more cautious approach and assume that they are not.

Information about individuals who were employed, or had been employed by BCCI

46. In relation to the names of such employees who faced legal action, the Commissioner has noted the findings of a previous decision notice and Information Tribunal decision both of which considered whether disclosure of personal data may still constitute a breach of the data protection principles even after it had been disclosed in open court.
47. In decision notice FS50075171, which concerned information about prosecutions relating to bus fare irregularities, the Commissioner recognised that although personal data was disclosed in court and could be reported in the press, this does not mean that disclosure under the Act in the future will automatically be 'fair':

‘...in practice public knowledge of the issues is only short lived and may be limited to only a small number of people. Even where cases are reported in newspapers this does not lead to the establishment of a comprehensive, searchable database of offenders.

To create such a database would prejudice the principle of the rehabilitation of offenders. There is established public policy on controlling access to the records of those who have been involved with the criminal justice system as demonstrated by the creation of the Criminal Records Bureau. It is clearly not desirable for the Freedom of Information Act to undermine these principles.’

48. The Tribunal in case *Armstrong v Information Commissioner and HMRC* (EA2008/0026) supported this principle. In this case the applicant requested papers referred to in court in the 2001 trial of Abu Bakr Siddiqui. The Tribunal noted that ‘even if the ... information had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain...knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is generally short-lived’. (paragraph 85).
49. In general the principle evidenced by these decisions is that the more time that has elapsed since the date of the court hearing or conviction, the less likely any disclosure will be fair and lawful.
50. In the circumstances of this case it is not possible to point to one particular court case in which BCCI staff were convicted in relation to their role in BCCI. This is because the Commissioner understands that the legal action was brought in a number of countries in the years following the collapse of BCCI. However, what is clear is the fact that the legal action focused on events, and individuals’ responsibility for them, in the run up to the collapse of BCCI in 1991. Consequently, by the time of the complainant’s request in 2006 some 15 years had passed.

51. Therefore, given the lapse in time since the collapse of BCCI, the Commissioner believes that the argument advanced by the Treasury that it would be unfair to raise the involvement of these employees who received convictions again by disclosure of the report deserves weight.
52. In relation to the employees who did not face legal action (or indeed were acquitted of any charges) the Commissioner accepts that disclosure of their personal data would link them directly to the collapse of BCCI and potentially could lead them to be seen as guilty by association. The Commissioner accepts that such a consequence would be unfair because given the lapse of time since the collapse of BCCI, allied to their established lack of responsibility for those who were acquitted, these employees would have a reasonable expectation that their involvement with BCCI would not be placed in the public domain. The Commissioner notes that disclosure of the names of some employees would not simply result in disclosure of their names but extend to actions and decisions they took while at BCCI.
53. Therefore, the Commissioner is satisfied that disclosure of the names of employees of BCCI – both those who were found guilty of offences and those who were not – would be unfair, albeit for different reasons.

Names of individuals who had financial dealings with BCCI

54. The Commissioner obviously accepts that individuals who have a financial relationship with a bank, either as a creditor or debtor, have a legitimate expectation that their personal data about such a relationship will not be placed in the public domain. The Commissioner does not believe that this expectation of confidence is affected because the bank which is the focus of this case collapsed in controversial circumstances. The Commissioner therefore accepts that the disclosure of the personal data of individuals who had financial dealings with BCCI which is contained in the report would be unfair.
55. The Treasury has noted that the names of some of these individuals are already in the public domain, in some cases because of legal action that had been taken. However, the Treasury argued that simply because the names of some individuals had been disclosed, this did not equate to the disclosure of detailed information about their transactions with BCCI, such as that included in the report. Furthermore, the Treasury re-iterated the point made in relation to disclosure of information about employees who had been convicted.
56. The Commissioner accepts that simply because an individual's association with BCCI is in the public domain this does not equate to disclosure of their personal data in relation to financial relationship with BCCI and thus disclosure of some information would be unfair. Furthermore, and for the reasons set out above, the Commissioner accepts that disclosure of personal data about individuals who had financial dealings with BCCI and have been convicted of an offence, would also be unfair.

Names of companies or organisations from which individuals could be identified.

57. The Commissioner understands that disclosure of this category of information could lead to the identification of individuals who had a financial relationship with BCCI. For the reasons set out above the Commissioner is satisfied that disclosure of this information would be unfair.

Schedule 2, Condition 6

58. In submissions to the Commissioner, the Treasury argued that even if disclosure was fair and lawful, no condition in Schedule 2 of the DPA could be met in relation to any of the three categories of personal data. Indeed the Treasury argued that the only relevant condition was the sixth condition which reads:

‘The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.’

59. In analysing this condition, the Commissioner follows the approach taken by the Information Tribunal in another case involving the House of Commons: *House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*, in which the Tribunal interpreted the sixth condition as setting out a three part test which must be satisfied, namely:
- there must be legitimate interests in disclosing the information;
 - the disclosure must be necessary for a legitimate interest of the public; and
 - even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms & legitimate interests of the data subject.
60. The Treasury suggested that although it accepted that there was a legitimate interest in the public knowing more about the collapse of BCCI, it did not believe that such an interest extended to knowing the names of particular individuals, especially where individuals had not been found guilty of any criminal actions in relation to BCCI. Furthermore the Treasury noted that the Tribunal in Leapman confirmed that ‘necessary’ in this context carried with it the same connotations from the European Convention on Human Rights, including the proposition that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued.
61. In relation to whether the sixth condition is met, the Commissioner agrees that there is a legitimate interest in informing the public about the collapse of BCCI. However, he also accepts that disclosure of the names of all the individuals contained in the report would be not be necessary in order to increase transparency and accountability about the BCCI affair.
62. On the basis of the above the Commissioner has concluded that disclosure of the personal data withheld by the Treasury would be unfair and the sixth condition in

Schedule 2 of the DPA cannot be met. Therefore such information is exempt from disclosure on the basis of section 40(2).

Section 27 – international relations

63. The Treasury has argued that the remaining sections of the report which are not exempt on the basis of section 21 or section 40, and which were not supplied to the complainant by the Treasury on 28 March 2007, are exempt from disclosure by virtue of section 27(1)(a) of the Act.

64. This section states that:

‘27(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

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

65. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to happen if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

66. The Treasury has provided the Commissioner with detailed submissions to support its position that disclosure of the information would prejudice the UK's relations with another State or States.

67. However, in the circumstances of this case the Commissioner is not in a position in the main body of this Decision Notice to set out the Treasury's submissions in any detail without potentially disclosing the content of the withheld information itself. This includes identifying which State or States the Treasury believes the UK's relations with would be prejudiced if the information was disclosed. It follows that the Commissioner is also unable to include in the main body of the decision notice a detailed analysis of the Treasury's submissions.

68. Instead the Commissioner has set out in a confidential annex his analysis of the Treasury's section 27 submissions. This annex will be provided to the Treasury but not to the complainant.

69. However, the Commissioner believes that he is able to confirm in the body of this notice that he is satisfied that all the criteria set out above have been met and thus the exemption contained at section 27(1)(a) is engaged:
70. In relation to the first criterion the Commissioner is confident that the harm which the Treasury has identified is one which is inherent to the exemption contained at section 27(1)(a). In relation to the second criterion the Commissioner is satisfied that disclosure of the withheld information can be clearly linked to the prejudice set out at section 27(1)(a) and furthermore that the prejudice will be not trivial or insignificant but real and of substance. Finally, in relation to the third criterion the Commissioner is satisfied that the Treasury has provided sufficient evidence to demonstrate that the likelihood of prejudice is one that meets the higher test of 'would' occur rather than 'would be likely to' occur.
71. In reaching this conclusion the Commissioner wishes to emphasise that he has taken into account the fact that a significant amount of information about the BCCI affair is already in the public domain (such a factor is also considered below in relation to the public interest test). The Commissioner is conscious that this fact could be used to cast doubt on the conclusion that disclosure of very similar information by the Treasury would result in such prejudicial effects to the UK's international relations. However, in the circumstances of this case in the Commissioner's opinion the risk of prejudice occurring emanates not simply from certain information entering the public domain, but the fact the such information would in fact be disclosed officially by a UK government department.

Public interest test

72. However, section 27 is a qualified exemption and thus subject to the public interest test set out at section 2 of the Act. Therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
73. Again, as with his analysis in relation to the engagement of section 27(1)(a), the Commissioner's discussion in the main body of this Decision Notice is limited; further comments explaining his conclusion in relation to the public interest test are included in the confidential annex.

Public interest arguments in favour of disclosing the requested information

74. Disclosure of the report could inform the public about the issues surrounding the collapse of BCCI, and in particular inform those with a particular interest in the subject, for example those directly affected by that issue and academics and members of the public with a particular interest in BCCI.

Public interest arguments in favour of maintaining the exemption

75. The Treasury argued that there was a strong public interest in the UK maintaining effective relations with its international partners.

76. The Treasury has noted that the general events surrounding BCCI had been widely investigated and thus there was a large amount of information in the public domain as a result of these various investigations. The Treasury noted that such information included details of the independent inquiry chaired by Lord Justice Bingham and the US Senate investigation which was available on the internet. The Treasury therefore suggested that disclosure of the parts of the report which were not exempt on the basis of section 40 would not add greatly to the public's knowledge of events surrounding the demise of BCCI beyond that already in the public domain.

Balance of the public interest arguments

77. The Commissioner believes that the argument that disclosure of the report would aid transparency and contribute to the public's understanding of the collapse of BCCI should not be dismissed lightly. It is clear that regulation of BCCI in the years leading up to its collapse, as well as the collapse itself, was an issue of international significance evidenced not only by the ensuing court cases but also the inquiry undertaken by Lord Bingham and US Senate investigation. Therefore the Commissioner believes that to the extent that disclosure would inform the public further about this the BCCI affair, this factor deserves notable weight.
78. Furthermore the Commissioner does not agree with logic of the Treasury argument that because there is a significant amount of information already in the public domain in relation to this issue, there is little public interest in disclosing further information. Following the lead of the High Court in *ECGD v FoE*, the Commissioner's position is that when disclosure of withheld information would further inform the public, then the fact that there is already similar information in the public domain should not be taken into account in balancing the public interest test. This is because there is a public interest in all information being made available in order to give the public the fullest picture about the issue in question.³
79. However, as the Tribunal has emphasised on a number of occasions the exercise of balancing the public interest must focus on the content of the withheld information. Having reviewed the content of the information withheld on the basis of section 27(1)(a) the Commissioner is not sure how much the disclosure of this information would in fact add to the public's understanding of the BCCI affair.
80. Moreover, the Commissioner accepts that it is very clearly in the public interest that the UK maintains strong and effective relations with its international partners. In the particular circumstances of this case, which cannot be detailed here, but are included in the annex, the Commissioner believes that this factor should be given particular weight because of a number of significant and specific reasons highlighted by the Treasury. Furthermore, the Commissioner notes that the exemption has been engaged not the basis that prejudice would only be likely to occur, but that prejudice would occur if the information was disclosed.

³ *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008).

Consequently, this adds further weight to the public interest in favour of maintaining the exemption.

81. Given the significant weight that should be given to the maintenance of the exemption in the circumstances of this case, along with the fact the Commissioner is not convinced that disclosure of the information would contribute in any significant way to the public's understanding of this issue, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural Requirements

82. Section 1(1) of the Act 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.’

83. Section 10(1) of the Act requires that a public authority must comply with the requirements of section 1(1) promptly and no later than the twentieth day following the date of receipt.
84. 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. In particular section 17(1)(b) requires a public authority to state the exemption or exemptions upon which it is relying. Section 17(2) allows a public authority to extend the time it needs to consider the public interest test set out in section 2 of the Act.
85. Although the Treasury issued a refusal notice on 10 April 2006 within 20 working days of the complainant's request, this notice failed to specify which exemptions it believed were engaged and the exemptions for which it needed to extend time taken to consider the public interest test. The Commissioner considers this to be a breach of 17(1)(b).
86. Furthermore, by failing to provide the complainant with the information that the Treasury did not consider to be exempt within 20 working days of the request, the Commissioner has concluded that the Treasury breached sections 1(1)(b) and 10(1).

The Decision

87. 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:
- The Treasury was correct to withhold the parts of the report that it did not disclose to the complainant on the basis of the exemptions contained at sections 21, 40(2) and 27(1)(a) of the Act.
88. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Treasury breached section 17(1)(b) by failing to specify in the refusal notice which exemptions it was relying on.
 - The Treasury also breached section 1(1)(b) and 10(1) by failing to provide the complainant with the information that it did not consider to be exempt within 20 working days of the request.

Steps Required

89. The Commissioner requires no steps to be taken.

Other matters

90. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
91. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act.⁴ This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstances should the total time taken exceed 40 working days. In this case, the Treasury received correspondence from the complainant in September 2007 asking it to conduct an internal review its handling of his request. The Treasury did not inform the complainant of the outcome of this review until 6 months later in March 2008.
92. The Commissioner has also issued guidance on the time public authorities should take when extending the public interest test.⁵ This guidance notes that whilst the Act and the section 45 Code of Practice do not specify how long a public authority can extend the public interest for, even in exceptional cases, the time taken should not exceed 40 working days. Clearly, in dealing with this request the

⁴ [Freedom of Information Good Practice Guidance No. 5](#)

⁵ [Freedom of Information Good Practice Guidance No. 4](#)

Treasury took substantially longer than 40 working days to reach its conclusions in relation to the balance of the public interest test.

93. In the future the Commissioner expects the Treasury to ensure that when it extends its consideration of the public interest test it adheres to the time guidelines set out in the guidance paper reference above. Similarly the Commissioner also expects the Treasury to adhere to the guidance paper regarding the time taken to conduct internal reviews.

Right of Appeal

94. 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 14th day of December 2009

Signed

**Graham Smith
Deputy 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 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) 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 public authority holds the information

section 1(1)(a) does not apply.”

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 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(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 21(1) provides that –

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

Section 27(1) provides that –

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

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

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection

Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Data Protection Act 1998

Part I

- 1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

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

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

- 2.** The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3.** The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- 4.** The processing is necessary in order to protect the vital interests of the data subject.
- 5.** The processing is necessary—
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 6.** — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.