

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 25 November 2009

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9DA

### Summary

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In January 2008 the complainant made a request for information under the Freedom of Information Act ("the Act"). The public authority responded by confirming that it held the information but stating that it was exempt under section 35(1)(a) (formulation of government policy). It maintained this at internal review. During the Commissioner's investigation the public authority also sought to include the exemption at section 40(2) (personal information) in respect of staff named within the withheld information. This was not contested by the complainant so is not further considered. The Commissioner finds that the exemption at section 35(1)(a) is engaged but that the public interest in maintaining the exemption does not outweigh that in disclosure. The complaint is upheld. The public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

### The Commissioner's Role

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

### The request

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2. On 21 January 2008 the complainant made the following information request:

*"...I would be grateful if you could send me any assessments made by the Department of Work and Pensions, or its predecessors the Department for Social Security, on the impact on UK pension funds of the decision to withdraw the payment of tax credits on UK dividends in 1997."*

3. On 4 April 2008, having received no reply, the complainant chased a response by email and included a copy of her original request.
4. On 9 April 2008 the public authority acknowledged the email and confirmed that it had never received the original request, which had been sent by post. It advised that it hoped to respond by 2 May 2008, which was within the 20 working day time limit for providing a response.
5. On 20 May 2008, having heard nothing further, the complainant telephoned the public authority to chase her response.
6. On 21 May 2008 the public authority wrote to the complainant to extend the time limit. It confirmed that it had identified information relevant to her request but that it required more time to consider the public interest under section 35 of the Act – formulation of government policy. It further advised that it hoped to respond in full by 30 May 2008.
7. On 30 May 2008 the complainant again chased a response. Having heard nothing she telephoned the public authority on 3 June 2008 and was advised that an email would be sent to confirm a new response date. Again, having heard nothing, the complainant chased a response on 6 June 2008.
8. On 19 June 2008 the complainant contacted the Commissioner to complain that she had still received no response from the public authority.
9. On 1 August 2008 the Commissioner wrote to the public authority to chase its response.
10. On 29 August 2008 the public authority sent out its refusal notice. It withheld the information under the exemption at section 35(1)(a).
11. On 3 September 2008 the complainant sought an internal review. This was acknowledged on 10 September 2008. On 8 October 2008, more than 20 working days after requesting her internal review, the complainant chased a response.
12. On 28 October 2008 the public authority sent its internal review. It upheld its earlier position that the information was exempt under section 35(1)(a) of the Act.

## **The investigation**

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### **Scope of the case**

13. On 4 November 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She also asked him to consider the public authority's decision not to release any information by virtue of the exemption at section 35(1)(a).

14. During his investigation the public authority also sought to introduce the exemption at section 40(2) – personal information – in respect of individuals named within the withheld information. It also withheld some job titles, departments, initials and telephone numbers.
15. When asked, the public authority agreed that, without the person's name, the job title and department would not, in isolation, fall under the exemption at 40(2). It maintained that the exemption still applied to the actual name, the initials and the telephone numbers.
16. When the Commissioner contacted the complainant, she advised that she did not contest the removal of names, initials and telephone numbers from the information. Therefore, the Commissioner will not further consider the applicability of section 40(2) in this case.

### Chronology

17. On 30 July 2009 the Commissioner wrote to the complainant to advise her that he was about to commence his investigation. He asked her to confirm that she still required the requested information, which she did on the same day.
18. On the same day, the Commissioner commenced his enquiries with the public authority. He raised various queries and requested sight of the withheld information. He sought its response within 20 working days.
19. The Commissioner received a response on 27 August 2009. On 7 September 2009 he raised further queries; these were responded to in full by 11 September 2009.

### Findings of fact

20. The following is an extract from a report written by The Institute for Fiscal Studies in June 2005, entitled "Dissecting Dividend Decisions: Some Clues About The Effects of Dividend Taxation from recent UK Reforms"<sup>1</sup>.

*"Prior to July 1997, the UK tax system was unusual in that a major class of shareholders - UK pension funds, and insurance companies managing pension-related assets - had a more favorable tax treatment of dividend income than capital gains. Tax credits, which reduced personal income tax on dividends for tax-paying shareholders, were repaid to these tax-exempt funds. This position changed sharply in July 1997. Although dividend tax credits remained for taxpayers, they were no longer refundable to UK pension funds and insurance companies. After July 1997, these institutional investors had an equal tax treatment of dividend income and capital gains."*

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<sup>1</sup> <http://www.ifs.org.uk/wps/wp0517.pdf>

21. In the 1997 Budget the Chancellor decided that the payable tax credit on dividends should be abolished. He announced this decision in his Budgetary Statement as follows (paragraphs 72 to 74)<sup>2</sup>:

*“The present system of tax credits encourages companies to pay out dividends rather than reinvest their profits.”*

*“This cannot be the best way of encouraging investment for the long term as was acknowledged by the last Government.”*

*“Many pension funds are in substantial surplus and at present many companies are enjoying pension holidays, so this is the right time to undertake a long-needed reform.”*

22. The Commissioner has previously issued a Decision Notice in respect of a similar request made to HM Treasury in February 2005; a copy is available on his website<sup>3</sup>. The resulting disclosed information is also available online<sup>4</sup>.

## Analysis

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### Exemption

#### **Section 35 – formulation of government policy**

23. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy.

24. Section 35 is a class based exemption; this means that there is no need to consider the ‘prejudice’ test in relation to the requested information. Therefore, in order to engage section 35(1)(a) the information in question must relate to the formulation or development of government policy.

25. The withheld information in this case has been described by the public authority as follows:

*“The relevant documents, five in all, that DWP has identified as coming within the scope of the request relate to the consideration and assessment of policy options connected to the 1997 Budget, in particular, assessments of the potential impact on UK pension funds of the decision to withdraw the payment of tax credits on UK dividends in 1997.”*

26. The public authority has also confirmed that the withheld information all relates to the *formulation* of government policy. The Commissioner takes the view that the *formulation* of government policy comprises the early stages of the policy process

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<sup>2</sup> <http://archive.treasury.gov.uk/budget/1997/report/budget97.htm>

<sup>3</sup> [http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50088619.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50088619.pdf)

<sup>4</sup> [http://www.hm-treasury.gov.uk/foi\\_dividendtaxcredits\\_2007.htm](http://www.hm-treasury.gov.uk/foi_dividendtaxcredits_2007.htm)

– where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister.

27. In this case the Commissioner accepts that the information requested relates to the impact of withdrawing payment of tax credits on UK dividends and that it was written to assist in formulating government policy. Given the nature of the request, and having examined the withheld information, the Commissioner is satisfied that section 35(1)(a) is properly engaged in respect of the withheld information.
28. Section 35 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider where the balance of the public interest lies and decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

*Public interest arguments in favour of disclosing the requested information*

29. The public authority did not provide the complainant with a public interest test at either refusal or internal review stage. It only identified what it perceived to be the potential harm that may occur were the information to be disclosed. However, in later correspondence with the Commissioner it identified the following public interest factors in favour of disclosure:
  - there is a general public interest in disclosure;
  - greater transparency makes government more accountable to the electorate and increases trust;
  - as knowledge of the way government works increases, the public contribution to the policy making process could become more effective and broadly-based;
  - the public interest in being able to assess the quality of advice being given to ministers and subsequent decision making;
  - the greater the impact on the country or on public spending the greater the public interest may be in the decision-making process being transparent.
30. The Commissioner notes that the arguments presented here are generic in nature and have not been put forward with any direct reference to the particular information which has been sought in this case.
31. The Commissioner agrees that there is a general public interest in increasing the accountability for and the transparency of government decisions. He believes that this public interest is particularly strong when it affects a large number of people, as it does in this particular case.
32. The Commissioner also agrees that the disclosure of the withheld information would increase the public understanding of the policy options that were considered by the Government in reaching its decision to withdraw the payment of tax credits on UK dividends. This, he believes, would also lead to increased participation in the public debate about policy formulation and development on these issues, which was the subject of detailed and widespread public debate at the time.

33. In relation to the withheld information, the Commissioner notes that this is impartial advice which was obtained from independent actuaries. Whilst some similar information has already been put into the public domain by way of an earlier decision he has made (see paragraph 21 above), the Commissioner notes that this is a different public authority which has sought and provided its own independent advice. Given the high profile of the policy changes made by the Government, the Commissioner believes that there is a significant public interest in increasing the public's understanding of the public authority's role and the value of its advice in the formulation of this policy. The Commissioner believes that the disclosure of the withheld information would increase the public's understanding of this.

*Public interest arguments in favour of maintaining the exemption*

34. As already mentioned above, the public authority did not provide the complainant with a public interest test at either refusal or internal review stage. It only identified what it perceived to be the potential harm that may occur were the information to be disclosed. However, in correspondence with the Commissioner it identified the following public interest factors in favour of maintaining the exemption:
- good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options;
  - advice should be broad based and there may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice because it might be disclosed;
  - the impartiality of the civil service, and in this instance Government actuaries, might be undermined if advice was routinely made public as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making;
  - ministers and officials also need to be able to conduct rigorous and candid risk assessments of their policies and programmes, including considerations of the pros and cons, without there being premature disclosure which might close off better options;
  - there needs to be a free space in which it is possible to 'think the unthinkable' and use imagination, without the fear that policy proposals will be held up to ridicule.
35. The Commissioner again notes that the arguments presented here are generic in nature and have not been put forward with any direct reference to the particular circumstances of this case.
36. The Commissioner believes that the factors identified by the public authority in favour of maintaining the exemption at section 35(1)(a) can loosely be grouped under two areas. These are, firstly, that disclosure would inhibit the free and frank discussion of all policy options, thereby damaging the quality and candour of advice given (i.e. the so-called 'chilling effect' argument); and, secondly, that it would undermine the 'safe space' that Ministers require to formulate and develop policies and make decisions and defend them.

### *Balance of the public interest arguments*

37. In its refusal notice the public authority advised the complainant that:

*“In creating new policy, civil servants and Ministers need the freedom to create, examine and debate ideas, and to change their views in the light of discussions. This process would be severely inhibited if it were to take place under the public gaze. There are a number of reasons why this is so, including the importance of frankness and candour; the danger of narrowing the circle of people who formulate policy; the damaging effect of disclosure on difficult policy decisions; the impact on proper record-keeping and the damage to relations between Ministers and civil servants and to the role of civil servants in the formulation of policy.”*

*“In summary the disclosure of policy material poses great dangers for good decision-making. If Ministers and their officials cannot provide advice in confidence on policy matters, there is a real danger that the candour and quality of that advice may be compromised. Ministers and their officials are likely to become more risk-averse, less innovative in policy formulation, and less likely to challenge accepted wisdom or vested interests.”*

38. The Commissioner fully accepts that when creating ‘new policy’ there is a public interest in ensuring a ‘safe space’ and the ‘*freedom to create, examine and debate ideas, and to change their views in the light of discussion*’ within public authorities. However, he notes the information requested in this case cannot be accurately described as ‘new policy’, being over ten years old at the time of the request. The need to protect the safe space to develop the policy question significantly fell away once the policy was announced. He does not therefore consider that this argument carries much weight, the public authority have not demonstrated how disclosure of this information would be likely to impact on the safe space for any other ongoing policy formulation and development.
39. The public authority has also stated that the policy process “*would be severely inhibited if it were to take place under the public gaze*”, and the Commissioner accepts that there may be weight to this point of view in some cases. However, as the information requested was produced more than ten years prior to the information request being made, then again he does not accept that this argument carries much weight in this particular case.
40. The public authority has also advanced arguments to demonstrate how the disclosure of the withheld information would inhibit the free and frank discussion of all policy options, and damage the frankness and candour of communications, between Ministers and civil servants. It believes that this would lead to a loss of candour and that the quality of advice given may be compromised. It also states that both Ministers and their officials are likely to become “*more risk-averse, less innovative in policy formulation, and less likely to challenge accepted wisdom or vested interests*”. This, the public authority has argued, would not be in the public interest. The Commissioner considers this to be a ‘chilling effect’ argument.

41. As the request in this case was made a long time after the implementation of the government policy in question, the Commissioner believes that the public authority's arguments are that, although the information does not relate to a "live" issue, disclosure would affect the frankness and candour with which Ministers debate other live issues in the future.

42. The public authority also raised the following argument in support of its position:

*"In the "Sakhalin appeal" brought by the Export Credits Guarantee Department the judge found that the generic thinking space arguments advanced by government were "at the heart" of the public interest considerations in the case. The Judge's analysis gave weight to the points government had advanced in the earlier witness evidence from Lord Turnbull mentioned above. While the Judge noted that "the weight to be given to those considerations will vary from case to case" he could "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". "*

*"It is clear from this that generic arguments remain highly relevant to any decision on disclosing information relating to the formulation of policy."*

43. And, in correspondence with the Commissioner, the public authority stated the following with specific regard to the age of the material requested:

*"Given the age of the material our key Fol arguments for withholding are generic ones: in particular the need to maintain a private space around Ministers and officials when developing policy, and to avoid the "chilling" effect which Fol disclosure could have on the free and frank provision of advice. The age of the material in question does not prevent or dilute the risk of this corrosive effect. The fact that related and similar information is already in the public domain does not preclude the chilling effect. In practice the drip drip nature of such disclosures in relation to this subject arguably increases this chilling effect".*

44. The public authority also made reference to the generic arguments which had been put forward by the *Information Tribunal in Department for Education and Skills v ICO & the Evening Standard* [EA/2006/0006] at paragraphs 27 to 36<sup>5</sup>.

45. In reaching a view on this argument the Commissioner has also been mindful of the findings in the above Tribunal, which stated at paragraph 75(i) that in relation to the chilling effect argument:

*"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant*

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<http://www.informationtribunal.gov.uk/Documents/decisions/DeptEdandSkillsVInfoCommandTheEveningStandard19Feb07.pdf>



*indirect and wider consequences from the particular disclosure must be considered case by case.”*

46. The Commissioner has also considered the views of the Tribunal in *Cabinet Office v ICO & Dr Christopher Lamb* [EA/2008/0024 & EA/2008/0029] which discussed the potential for a chilling effect on Ministers. The Tribunal stated that,

*“When considering how to behave in future Cabinet Ministers will be aware that, as a result of the decision to make this type of information the subject of a qualified, not an absolute exemption, the risk of disclosure in appropriate circumstances has existed since January 2005. Their attitude will no doubt also be affected by the frequency with which disclosure is made and the reasons given for ordering it. Early disclosure as a matter of routine will clearly have greater impact than if it is seen that disclosure is ordered only in cases that merit it and then only after a reasonable passage of time.”*

47. As already mentioned above, the Commissioner considers the public authority's arguments in this case to be somewhat generic, and he does not consider that it has provided any compelling arguments to support its position that disclosure would have a 'chilling effect'. The Commissioner understands the necessity for free and frank advice and the particular significance of this whilst the subject matter is 'active' and being relied on by Ministers to formulate government policy. However, he also notes that the withheld information did not relate to an issue which was 'live' at the time of the request, the policy having been implemented more than ten years previously, and he considers it likely that any "chilling effect" is likely to gradually diminish after the event. Bearing in mind the contents of the withheld information, the age of the information and the fact that it does not relate to a live issue, the Commissioner does not find the public authority's arguments here convincing. Whilst he is open to the idea that such a disclosure may not be routinely expected, the Commissioner believes all parties must be aware that the Act provides an assumption in favour of disclosure and the public interest will favour disclosure in a range of cases. Consequently, the Commissioner is satisfied that in this case the weight that can properly be given to the 'chilling effect' of disclosure is only slight.

48. The Commissioner also notes the public authority's reference above to the 'drip drip' nature of disclosures in relation to this subject increasing the 'chilling effect', stating that this is because related and similar information is already in the public domain. In response to this view, the Commissioner again notes that the information is over ten years old. He further notes that the public authority only has a relatively small amount of information which falls within the scope of the request, namely five documents, and he does not accept that an inclusive request covering all this information can be said to be of a 'drip drip' nature. The Commissioner also thinks it important to stress that the similar information which is already available (see paragraph 21 above) was released by a different public authority and provided by a different source. He therefore does not agree that this argument holds much weight.

49. The public authority has also referred to a harmful impact on proper record-keeping were the information to be disclosed. However, the Commissioner again notes that this has only been a generic reference with no specific harm identified. In relation to effective record keeping, the Commissioner notes the views of the Tribunal in *Department for Education and Skills v ICO & the Evening Standard* [EA/2006/0006], where it declared that,

*“As to record-keeping...we do not consider that we should be deflected from ordering disclosure by the possibility that minutes will become still less informative...Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency.”*

50. The Commissioner agrees that public officials should have a suitably robust approach to record keeping. There may be some occasions where disclosure would generate legitimate concerns for public officials responsible for record keeping, and in those circumstances the balance of the public interest might fall in favour of maintaining the exemption in order to protect the integrity of the record-keeping process. However, the Commissioner agrees with the Tribunal that the possibility of disclosure of information should not generally have the effect of deterring officials from recording their discussions. In relation to the withheld information in this case, he does not believe that the public authority has provided any specific reasons as to why the disclosure of the advice would deter officials from effective record keeping in the future. Therefore, he does not find this argument persuasive.
51. The public authority has made reference to the large amount of information that HM Treasury released about this policy area in March 2007 (see paragraph 21 above). It stated to the Commissioner that:

*“This release generated media interest at the time and we maintain that the public interest in the development of this 1997 policy has therefore already been met by information that is already in the public domain. This reduces significantly the public interest in further disclosures relating to the same policy particularly where much of the information is similar in content.”*

52. The Commissioner accepts the public authority's position that similar information has already been released as a result of an earlier decision he made. However, he would here refer to the “Sakhalin appeal”, also referred to by the public authority above, where the High Court commented (at paragraph 43)<sup>6</sup> that:

*“the Tribunal concluded that the fact that information about the Sakhalin II was in the public domain, and extensively so, was an irrelevant factor. Its conclusion is unimpeachable if I had in mind only the narrow questions of public interest to which I have already referred; that is to say, whether ECGD had been properly advised and whether the government department giving the advice had properly fulfilled its statutory duty. But if the Tribunal is to be taken as saying that the fact the information of the*

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<sup>6</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2008/638.html>

*kind requested is generally in the public domain is an irrelevant factor, then its views are mistaken.”*

53. The Commissioner is of the view that, where release of the particular information in question further informs the public, the fact that there is already other information on the same subject in the public domain is not relevant, because there is a public interest in all information being made available to give the public the fullest possible picture. He is also of the view that when “*information of the kind requested*” is generally in the public domain, then this may be a relevant factor to be weighed in the public interest, in so much as it may provide an indication of the likely harm or the likely public interest benefits that could result from disclosure.
54. In summary, the Commissioner’s approach to information already in the public domain is the mere fact that other information is in the public domain is not relevant as a general argument. What may be relevant is whether the disclosure will add to or enhance understanding of the issues at stake, already illuminated by the other information, but there is always a relevant weight to be given to the full picture argument. He also believes that information in the public domain may be relevant as an indication that no harm has occurred from this related information being in the public domain and it may be relevant in comparing what benefits already exist from the information in the public domain.
55. The Commissioner notes that this disclosure related to a different public authority which received its own independent advice. The fact that the previous release generated public debate back in 2007 only serves to demonstrate that the information was still of value to the public even though it was around ten years old at that time. In the Commissioner’s view, the release of the information requested now would be likely to further that public interest. He is also of the opinion that this information serves to advise a different public authority and, in any event, if the public authority considers that the information is reasonably similar to what has already been released, then it is difficult to understand why it would seek to withhold it.

### *Conclusion*

56. The Commissioner considers that the public authority’s fundamental arguments against disclosure are that it would have a ‘chilling effect’ by limiting the free and frank discussion of policy options, and affecting the quality and candour of communications. The public authority has also argued that disclosure could lead to poorer record keeping.
57. In reaching a view on the balance of public interest the Commissioner is mindful of the conclusions he has reached above in relation to the public authority’s arguments in favour of maintaining the exemption, and the weight he has attached to those arguments. In particular he has noted his comments concerning the generic nature of the arguments presented.
58. He has also been mindful of the points he made in relation to the public interest factors in favour of disclosing the information. In particular he believes that the

public debate surrounding the earlier disclosure of similar information made by HM Treasury in 2007 demonstrates that there remained a public interest in the subject area of the request despite the passage of time. He is of the view that this interest is unlikely to have diminished despite the further passage of time and that there remains a significant public interest in increasing the public's understanding in relation to the formulation of the policy, and in increasing the public's understanding of the public authority's role in this formulation. Even were the release of the information in this request to spark a critical media response, the Commissioner does not accept that the release of information which is essentially over ten years old could genuinely have a 'chilling effect' on those who are considering the formulation of current policies. He is of the view that policy advisors must already be aware that the advice they provide may be the subject of a future information request made under the Act.

59. The point about the importance of timing was considered in the High Court appeal case of *Office of Government Commerce v The Information Commissioner* ([2008] EWHC 737 (Admin)). In summary, the Commissioner's view is that there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by disclosure under the Act. He notes that, in the DfES case mentioned above, the Information Tribunal stated that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy...will normally mark the end of the process of formulation'*. In this case, the Commissioner considers that the public authority's contribution to the process of policy formulation had effectively ended, and that by the time of the public authority's refusal notice the information related to policy decisions which were essentially 'historical'. Giving particular consideration to the historical nature of the information, and having regard to the other factors identified as favouring withholding and disclosing the information, he has concluded that the information should be disclosed, on the basis that the public interest in withholding it does not exceed the public interest in disclosure.

## Procedural Requirements

60. 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."*

61. Section 10(1) of the Act states 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.”*

62. The original request was made on 21 January 2008, although the public authority states that it did not receive the request until it was re-sent by the complainant on 4 April 2008. On 9 April 2008 the public authority advised the complainant that it would send its response within 20 working days unless it needed to extend the time limit in order to consider the public interest in disclosure. Having heard nothing further the complainant chased a response on 20 May 2008. On 21 May 2008 the public authority advised that it needed additional time to consider the public interest in respect of section 35. By failing within the 20 working day limit to provide either a response or advise that it required a time extension to consider the public interest, the public authority breached section 17(1).
63. At both refusal and internal review stages the public authority failed to provide an adequate public interest test, only citing the reasons against disclosure. The Commissioner therefore finds that it was in breach of section 17(3)(b).
64. As the Commissioner has decided that the information covered by the request is not exempt from disclosure on the basis of section 35(1)(a), he believes that this information should have been provided in line with the duty at section 1(1)(b). The public authority's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the public authority also breached section 10(1).

## The Decision

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65. The Commissioner's decision is that section 35(1)(a) does not provide a basis to withhold the information requested by the complainant and that this information must therefore be provided to the complainant. By failing to provide this information in response to the request the Commissioner has found that the public authority breached sections (1)(1)(b) and 10(1) of the Act.
66. By failing to issue a timely refusal notice the public authority breached section 17(1). By failing to provide an adequate public interest test it also breached section 17(3)(b).

## Steps required

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67. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - disclose the information covered by the request (other than staff names).

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

## Failure to comply

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69. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Other matters

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

71. In its refusal the public authority advised the complainant as follows:

*“You mentioned when we spoke that you are a special adviser to [a named] MP and you referred to a similar FoI request that he had made of DWP some time ago. Given that your request is in the same terms please treat this as a response to that outstanding request too.”*

72. Whilst the Commissioner has not received a separate complaint in respect of this apparently unanswered request, he would not generally consider it good practice for authorities to respond to freedom of information requests submitted by different individuals (whether they are known to each other or not) within the same correspondence.

### *Time limit for public interest test*

73. On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test (PIT)<sup>7</sup>. This recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. The Commissioner is concerned that in this case it took over 100 working days for the authority to communicate the outcome of the public interest to the complainant, despite the publication of his guidance on the matter.

### *Time for internal review*

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_guidance\\_practice\\_guidance\\_4.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_guidance_practice_guidance_4.pdf)

74. In February 2007, the Commissioner issued guidance on time limits for carrying out internal reviews<sup>8</sup>. The guidance recommended that public authorities should aim to complete internal reviews in 20 working days. Although it suggested that it may be reasonable to take longer where the issues are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. The Commissioner notes that in this case it took 40 working days for the authority to communicate the outcome of the internal review to the complainant. In his opinion, the content of the internal review decision issued to the complainant on 28 October 2009 does not suggest that the issues were exceptionally complex and he is therefore not persuaded that the additional time needed was reasonable.

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_guidance\\_practice\\_guidance\\_5.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_guidance_practice_guidance_5.pdf)

## Right of Appeal

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75. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 25<sup>th</sup> day of November 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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



## Legal Annex

### Access to information

**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.”

### Time for compliance with request

**Section 10(1)** provides that –

“...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.”

### Refusal of Request

**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.”

### Formulation of government policy, etc

**Section 35(1)** provides that –

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

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.”