

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 March 2010

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

Summary

The complainant requested information about the sale of part of the UK Gold reserve announced in May 1999, by HM Treasury. HM Treasury applied exemptions at section 27 (1) (a), 29 (1) (b) and section 35 (1) (a) to the withheld information. The Commissioner considers that most of the information requested is exempt by virtue of section 29 (1) (b). The Commissioner has however identified a small portion of the withheld information which he does not consider to be exempt and accordingly finds HM Treasury in breach of section 1(1)(b) and section 10 (1) of the Act for not providing it within the statutory timescales. The Commissioner has detailed that information in an Annex to this decision notice to be served only on HM Treasury.

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 complainant made a request for information in relation to a decision by Her Majesty's Treasury ('HMT'), announced on 7 May 1999, to sell 415 tonnes of its gold reserves reducing the UK's holdings to 300 tonnes (from 715 tonnes). HMT has overall responsibility for the UK's reserve assets and the Bank of England acts as its agent to manage these reserves. HMT announced that the overall aim of the

sale was to restructure the UK's reserve holdings to achieve a better balance in the portfolio by increasing the proportion held in currency.¹ The sale of the gold reserves was carried out by the Bank of England in a phased programme of planned gold auctions over several years. Following the sale the National Audit Office ('NAO') released a report 'the Sale of Part of the UK Gold reserves'² detailing its review of the gold sales programme and the HMT released its report 'Review of the sale of part of the UK gold reserves'. The NAO report formed the basis of the Public Accounts Committee hearing which took place in February 2001 assessing the part sales of the gold reserves.³

The Request

3. On 23 January 2006 the complainant made the following request for information to "HMT": -

"I would be grateful if you could send me any minutes of meetings, internal memos and other correspondence relating to the decision to reduce the reserves of Britain's official bullion reserves from 715 tonnes to 300 tonnes in May 1999.

I would also be grateful if you could send me all statistical information relating to the decision to sell the bullion in 1999. I would also be grateful for any material relating to meetings and correspondence between the former Bank of England governor and ministers over the decision to sell gold bullion in 1999 written after May 1997. I would also like to be sent copies of Treasury studies on the aftermath of and lessons learnt from the decision to sell the official bullion reserves."

4. On 22 February 2006 HMT wrote to the complainant acknowledging her request and stating that it needed more time to consider the public interest. On 19 May it corresponded with the complainant via e-mail stating that it needed further time to consider the public interest.
5. On 13 June 2006 HMT issued a substantive refusal notice to the complainant. That notice stated that HMT held information in relation to the first, second and fourth parts of the complainant's request but no documents were found in relation to the third part. It stated that it had considered the exemptions under sections 27 (international relations), 29 (the economy), 35 (formulation of government policy), 36 (prejudice to effective conduct of public affairs) and 43 (commercial interests) of the Act, however it had chosen not to rely upon the exemptions under sections 36 and 43 as a basis for withholding the

¹ HM Treasury Press Release 77/99 07 May 1999

² See Public National Audit Office Report 'the Sale of part of the UK gold reserves' HC86, session 2000-2001

³ See Public Accounts Committee, 7th Report 'Sale of Part of the UK Gold Reserves' Session 2001, Para 4

- information. HMT released some statistical information contained within a report published by the London Bullion Market Association to the complainant as it was already in the public domain.
6. The complainant requested an internal review of that decision on 13 June 2006.
 7. On 13 November 2006 HMT sent a substantive reply to the complainant with the result of its internal review. That reply upheld the original decision to withhold the information under the exemptions in the aforementioned sections. However the reply also specified the relevant subsections, i.e. sections 27(1)(a), 29(1) (b) and 35(1)(a) of the Act.
 8. The complainant had, in her request for internal review, referred to the Guidance issued by the precursor to the Ministry of Justice, the Department of Constitutional Affairs on the release of "statistical information." In summary, that guidance states that background statistical information cannot fall within the terms of the exemption under section 35(1)(a) and (b) of the Act. In its internal review dated 13 November 2006, HMT stated that it held a limited amount of statistical information in a report published by the London Bullion Market Association. Although it considered this information to be exempt under section 21 of the Act (information accessible by other means) it enclosed a copy of that report for the complainant's ease of reference.
 9. On 23 November 2006 the complainant wrote to the Commissioner seeking a review of HMT's decision to withhold the information outlined in the first, second and fourth parts of her request. That complaint was received by the Commissioner on 24 November 2006.

The Investigation

Scope of the case

10. On 23 November 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider HM Treasury's application of the exemptions as set out in sections 27(1)(a), 29(1)(b) and 35(1)(a).

Chronology

11. On 4 December 2006 the Commissioner corresponded with the complainant stating that the complaint was being allocated to one of the Commissioner's case resolution teams. The Commissioner at the same time informed HMT of the fact that a complaint was being allocated. Unfortunately, however, due to a backlog of complaints at the Commissioner's office over a year elapsed before work on the case commenced.
12. On 21 February 2008 the complaint was allocated to a case officer, who wrote to both HMT and the complainant to inform them of that allocation and to request from HMT a copy of the withheld information.
13. Between 12 March 2008 and 28 March 2008 there was an exchange of e-mails between the case officer and HMT with the purpose of arranging for the case officer to meet with HMT officials and inspect the withheld information. That meeting and inspection took place on 2 April 2008. HMT wrote to the case officer on 23 April 2008 outlining the issues arising from the nature of the withheld information and attaching detailed reasoning as to its application of the specific exemptions and the public interest test applied to the information.
14. On 12 November 2008, the allocated case officer having left the Commissioner's employment, the new case officer wrote to the complainant to inform her of the position. That letter offered apologies for the delay to date in the resolution of the complaint and informed the complainant that the case officer may have to go back and meet with HMT to clarify a few points in relation to the withheld information.
15. Between 18 November 2008 and 17 December 2008 there was an exchange of e-mails between the case officer and HMT with the purpose of arranging for the case officer to meet with HMT staff to further inspect and discuss the withheld information. That meeting was arranged for 29 January 2009 and the complainant was updated accordingly.
16. On 29 January 2009 the case officer met with HMT staff and inspected the withheld information at their offices. The Commissioner then corresponded with the complainant via e-mail on 2 February 2009 to inform her that the inspection had been completed and a Decision Notice could now be drafted.
17. On 9 February 2009 the Commissioner corresponded with HMT via e-mail to ask it to consider releasing a small amount of the withheld information to which the Commissioner did not consider that the

exemptions could be applied. An Annex identifying that information was attached to the e-mail. The Commissioner asked for further clarification from HMT as to the background of the information he had identified in the Annex. HMT responded to the Commissioner with arguments that the names of individuals and some other information in emails were exempt. The Commissioner considered HMT's arguments.

Analysis

18. In the course of his investigation the Commissioner considered that the majority of the withheld information was exempt. The Commissioner however identified a small parcel of information which he considered was not exempt from disclosure. For ease of reference the Commissioner has split his analysis of the exemptions into two sections, the first dealing with that information which the Commissioner considers is exempt and should not be disclosed; and the second dealing with that information which although section 35 is engaged the Commissioner considers should be disclosed after applying the public interest test. In Part 1 of his analysis the Commissioner has dealt with that information which he considers should be withheld (**'the exempt information'**) and has set out his analysis of the exemptions and the public interest test at paragraphs 19 to 44 below in relation to this information. In part 2 of his analysis the Commissioner has dealt with that information which he considers can be released. He has detailed the particulars of this information in Annex A to this decision notice, only to be served on HMT. The Commissioner has set out his analysis of the exemptions and, where relevant, the public interest test in relation to the information which he considers should be released (**'the releasable information'**) at paragraphs 45 to 90 below.

Part 1 Analysis of the information the Commissioner considers should not be disclosed– the "exempt information"

Exemptions

19. The Commissioner has noted that HMT has applied section 27 (1) (a), 29 (1) (b) and section 35 (1) (a) to all the information it has withheld in this case. HMT has also made arguments to the Commissioner in relation to the application of other exemptions which they consider may be also be engaged but which they have not applied when handling the complainant's request. In reviewing the exempt information and owing to its nature the Commissioner considered primarily the exemption at 29 (1) (b) to this information. For that reason he considered the engagement of this exemption before those

others applied by HMT. The Commissioner has set out his analysis in relation to section 29 (1) (b).

Section 29 – The economy

20. Section 29(1) (b) of the Act states that information is exempt if its disclosure would, or would be likely to, prejudice the financial interests of any administration in the United Kingdom. This includes the United Kingdom government.
21. HMT has argued that disclosure of the exempt information would be likely to cause such prejudice for the following reasons:
 - Some of the withheld information relates to the location of the United Kingdom's gold holdings (past and present) which, if released, would increase the risk to the security of those holdings, thereby damaging the United Kingdom's market position and consequently the financial interests of its government.
 - The withheld information contains market sensitive information which, if released, would be likely to damage the United Kingdom's market position and therefore its financial interests. This claim is made on the basis that the information is relevant to both past and future decisions regarding management of the United Kingdom's gold reserves. This would be likely to have a detrimental effect upon management of the said reserves, with consequent damaging effect upon the financial interests of the United Kingdom.
22. The complainant put forward the possibility that HMT could release some of the withheld information, with the information relating to the location of gold holdings having been redacted. HMT stated that it had considered that possibility during its handling of the original request, however it had decided against redaction. This was because it would be necessary to redact so much of the information that the remainder would add little or nothing to that which is already in the public domain. The Commissioner considered the existence of prejudice and the test of prejudice in this case.

The prejudice test

23. In Hogan v the ICO and Oxford City Council (EA/2005/0026 & 0030) the Tribunal stated that
"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of the 'prejudice' being claimed must be consideredA third

step for the decision-maker concerns the likelihood of occurrence of prejudice." (paras 28 to 34).

Nature of the prejudice

24. The Tribunal in the above case commented as follows (at para 30) "Second the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance".⁴ If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."
25. A fuller extract of the quote from Lord Falconer of Thoroton is, "*Finally, on the subject of exemptions, I want to emphasise the strength of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The Commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is "real, actual or of substance"* .
26. The Commissioner, having inspected the exempt information and discussed it with HMT staff and having received extensive representations in confidence from HMT, accepts that the prejudice claimed by HMT is real, actual and of substance as opposed to trivial or insignificant. He accepts, therefore, that HMT has identified the possibility of actual prejudice to the United Kingdom government's financial interests should the exempt information be disclosed.

Likelihood of the prejudice

27. HMT claims that disclosure of the exempt information would be likely to prejudice the financial interests of the United Kingdom government.
28. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* the Tribunal confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" (para 15).
29. In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

⁴ Hansard HL (VOL 162, April 20, 2000, col.827)

Evidence of Prejudice

30. The Commissioner's view is that there is an evidential burden on the public authority to be able to demonstrate that: -the nature of the prejudice claimed can be linked back to the disclosure of the information in question; and-the likelihood of the prejudice occurring meets the test for the level of likelihood claimed.
31. It is also the Commissioner's view that although the unsupported speculation or opinion of a public authority will not be taken as evidence of the nature or likelihood of prejudice neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. The public authority must, however, be able to provide some evidence (not just unsupported opinion) from which to extrapolate a likelihood of prejudice..
32. The Commissioner has inspected the exempt information and discussed it in detail with HMT officials. The nature of these discussions and representations with HMT must remain confidential. The arguments presented to the Commissioner by HMT in relation to the application of the exemptions are closely interlinked and contain detail of the exempt information itself. For this reason the Commissioner has not repeated the detail of those arguments in this decision notice but has taken them into account in his decision in this case. Upon reviewing those arguments and the exempt information, the Commissioner is satisfied that there would be a real and significant risk of prejudice to the financial interests of the United Kingdom government should the withheld information be disclosed.
33. The Commissioner concludes that the nature of the prejudice claimed by HMT can be linked back to disclosure of the exempt information and that the likelihood of that prejudice occurring meets the test for the level of likelihood claimed, i.e. is substantially more than remote.
34. He accepts that the exemption within section 29(1)(b) is engaged in relation to all of the exempt information. The Commissioner has therefore gone on to consider the application of the public interest test in relation to the information which the Commissioner considers has been properly withheld under section 29(1)(b).

The public interest test

35. Section 2 of the Act requires a public authority to consider, where it has applied a qualified exemption to information requested, whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often

referred to as the "public interest test". There is an assumption running through the Act that openness is, in itself, to be regarded as something which is in the public interest.

36. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2006/0040)* the Tribunal clarified that only relevant public interest considerations could be taken into account, stating that, "*As section 2(2)(b) makes clear, the relevant exercise is to weigh the public interest in maintaining the exemption which is manifested by the relevant provisions against the public interest in disclosing the information. If the weighing process is in favour of the maintenance of the exemption, then any duty to communicate or disclose is disapplied. It necessarily follows that not all public interest considerations which might otherwise appear to be relevant to the subject matter should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions relied upon.*" (para. 5).
37. The Commissioner has considered HMT's application of the public interest test to the exempt information having regard to the Tribunal's comments in the above case.

Public interest arguments in favour of disclosing the requested information

38. The Commissioner in this case has considered the following public interest arguments as relayed to the complainant by HMT in favour of disclosing the requested information: -

-There is a strong public interest in release of information relating to HMT's management of the UK's gold reserves. This is in order to inform the UK public of portfolio decisions and to promote public confidence in reserves management. The Commissioner is aware that information is available in the public domain about the part sale of the UK's gold reserves.

-Disclosure of the requested information may promote a greater understanding of Treasury policy and processes in relation to reserves management, in particular a greater understanding of the basis upon which the UK government took the decisions on reserves policy in 1999 and that upon which it continues to take such decisions.

Public interest arguments in favour of maintaining the exemption

39. The Commissioner has also considered the following public interest arguments put forward by HMT in favour of maintaining the exemption: -

-The withheld information contains market sensitive information which, if disclosed, would be likely to cause damage to the UK's financial interests.

-The references to the past and present locations of UK gold holdings contained within the withheld information could, if released, present a very real risk to those holdings, which would not be in the financial interests of the UK.

-The withheld information relates to live and current policy which is still as significant as when the sale took place in 1999 in relation to market sensitive information about current strategy for investing and managing the gold reserves.

Balance of the public interest arguments

40. The Commissioner considers that there is a clear public interest maintaining public confidence in Treasury processes and decisions relating to reserves management. He also notes that, on occasion, there will be conflict between the emphasis on openness and the need to maintain the confidentiality of the processes behind specific decisions.
41. In balancing the competing public interest arguments, the Commissioner has noted that a good deal of information on the management of the gold reserves, and on the 1999 decision to sell gold from those reserves, has been published proactively by HMT.
42. The Commissioner considers there is a need for transparency as far as possible in relation to the management of UK gold reserves which are a publicly owned asset. To this end HMT has informed the Commissioner it has proactively published as much material as it believes it can to explain decisions taken regarding the gold reserves and the consequences of those decisions.
43. HMT has stated to the Commissioner that it also recognises that there is a presumption of openness running through the Act. However, HMT has expressed the view, with which the Commissioner agrees, that openness should not be at the expense of causing detriment to the market and government of the UK. It should also not be at the expense of risking the security of its gold reserves, nor of damaging the longer-term financial interests of the nation. The Commissioner has taken these arguments into account when considering where the public interest lies in this case.
44. Having inspected and discussed in confidence the exempt information with HMT officials, the Commissioner has concluded, on balance that there is a greater public interest in maintaining the exemption than in

disclosing the exempt information. He has reached this conclusion in relation to the entirety of the exempt information. The Commissioner has therefore not considered any other exemptions applied by HMT to the exempt information.

Part II Information not exempt – the ‘releasable information’

45. As explained in paragraph 18 above, the Commissioner has identified a small parcel of information which he considers is not exempt by virtue of any of the exemptions applied (‘the releasable information’). The Commissioner has identified this information to HMT in Annex A to this decision notice, served only on HMT. HMT sent the Commissioner further submissions regarding the context of these documents and the extent of their sensitivity. The Commissioner took these into account when considering his decision and finalising the detail of this notice.
46. HMT submitted that for many of the Commissioner’s suggestions as to what could be released it would have no objection to releasing if asked to do so by the Commissioner. HMT did raise objections about the release of information in relation to the identities of staff and officials. At the time of writing of this decision notice HMT has not released any further information to the complainant. Therefore the Commissioner has considered each of the exemptions applied by HMT in respect of the balance of the withheld information. HMT did make submissions to the Commissioner regarding the identification of officials. HMT submitted that officials’ names which appear in the withheld information should not be disclosed. The Commissioner has dealt with these submissions at paragraphs 71 to 90 below. The Commissioner has begun his analysis in relation to the releasable information by considering those exemptions applied by HMT to all of the withheld information, i.e. s.27(1)(a), s.29(1)(b) and s.35(1)(a).

Section 27(1) (a)

47. The Commissioner has considered whether the Department was correct to apply sections 27(1)(a) to the releasable information.

Section 27(1) (a) 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,

48. HMT has argued that the effective conduct of international relations on an ongoing basis depends upon maintaining trust and confidence between governments. HMT has included emanations of the state in their definition of ‘governments’. This, HMT has argued, includes central banks and other international organisations. HMT considers this

relationship allows for the free and frank exchange of information on the understanding by all sides that it will be treated in confidence. HMT argues that if the UK does not respect such confidences, its ability to protect and promote UK financial and economic interests at an international level will be hampered in a number of ways. HMT has pointed to the importance of a good working relationship between central banks on a global level being greater now (at the time of the Commissioner's investigation) than it has been at any time in the last decade. HMT pointed the Commissioner to the coordinated action taken by central banks to alleviate pressures in the financial markets as announced on 11 March 2008 and 12 December 2007.⁵

49. HMT considers that the UK's relationships with these international partners would be compromised if the information were to be disclosed.

The nature of prejudice

50. The Commissioner has reviewed HMT's argument against the releasable information he has identified to them. The Commissioner has noted that HMT has claimed that it has no major objections to that release of the information at Annex A, save for the concerns about the identities of the individuals throughout the information. The Commissioner also considers that, as the releasable information is very general or already widely known, significant adverse reaction from relevant international bodies with whom the UK has a relationship could not be said to be likely.
51. In light of the above, the Commissioner does not consider that HMT has demonstrated a causal relationship between the disclosure of the releasable information and the identified prejudice. He does not consider the exemption to be engaged.

Section 29 (1) (b)

52. The Commissioner does not accept that the exemption provided by section 29(1)(b) is engaged in relation to the releasable information.
53. For s.29 (1) (b) to be engaged, it must be the case that disclosure of the information requested would, or would be likely to, prejudice the financial interests of any of the UK administrations.
54. In making its arguments in relation to the totality of the withheld information (but not specifically to the releasable information identified by the Commissioner) HMT has argued that disclosure would be likely

⁵ See Press Release <http://www.ecb.int/press/pr/date/2008/html/pr080311.en.html> from European Central bank 11 March 2008 'Specific Measures to address liquidity pressures in funding markets'

to prejudice the UK economy. In its letter to the complainant dated 13 June 2006 HMT state that some of the information relates to the location (past or present) of the UK's gold holdings, which if made known could increase risks of its security. This would not be in the UK's financial interests. In addition HMT claims that some of the papers contain market sensitive information which if released would, or would be likely to, damage public financial interests.

55. For the Commissioner to conclude that prejudice would be likely to result, the probability of this prejudice must be at least real and significant. This is in line with the approach taken by the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* in which it stated:
"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (paragraph 15)
56. The key factor taken into account by the Commissioner when considering whether the prejudice identified by HMT would be likely to occur is the content of the information in question. Having considered the content of the releasable information, the Commissioner does not accept that its disclosure would be likely to result in either kind of prejudice identified by HMT. The Commissioner does not consider that HMT's arguments that prejudice to the UK's financial interests would be likely to arise from disclosure apply to this limited amount of information as they do to the majority of the withheld information. Indeed the Commissioner has noted that save for the identities of individuals featured throughout the releasable information HMT appear to have been largely in agreement with the release of that information which the Commissioner has identified for in Annex A. The Commissioner therefore finds that the exemption at s.29(1)(b) is not engaged. In those circumstances it has not been necessary for the Commissioner to go on to consider the balance of the public interest.

Section 35 (1) (a)

57. Section 35(1)(a) provides that information is exempt if it relates to the formulation or development of government policy. The task for the Commissioner here is to consider whether the information relates to the formulation or development of government policy. This exemption is subject to the public interest, so even if it is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
58. It is first necessary to establish whether the public authority is amongst those to which this exemption is available. As the HMT in this

case is a central government department, it is clear that this exemption is available to it.

59. The releasable information in this case consists of information about the decision to sell some of the gold reserves portfolio, namely exchanges and factual information informing that decision.
60. The Commissioner's approach to the term 'relates to' as it is used in this exemption is that this can safely be interpreted broadly. This is in line with the approach taken by the Information Tribunal in *DfES v the Information Commissioner & the Evening Standard (EA/2006/0006)*, in which it stated:
61. *"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable."* (paragraph 58)
62. On this basis, the Commissioner considers that the releasable information does relate to the formulation and development of government policy. Selling part of the UK's gold reserves is clearly a matter of government policy. The exemption provided by section 35(1)(a) is therefore engaged. The Commissioner therefore has gone on to consider the public interest test.

The balance of the public interest.

63. In reaching a conclusion on the balance of the public interest, the Commissioner has taken into account those factors that relate to the specific information in question here (i.e. the releasable information), including what harm, if any, may result through disclosure and whether disclosure of information relating to the policy decision to sell part of the UK's gold stock would serve the public interest. This is in addition to the general public interest in transparency and openness in relation to the government policy formulation and development process.
64. That the releasable information falls within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard (EA/2006/0006)*, where it stated in connection with section 35(1)(a): *"The weighing [of the public interest] exercise begins with both pans empty and therefore level."* (paragraph 65)
65. Covering first those factors that favour maintenance of the exemption, the Commissioner has noted the arguments made by HMT to the

totality of the withheld information and assessed them against the releasable information. HMT has argued that disclosure would have implications for long term decisions and future policy development in this area. It claims that to release the information would weaken future policy development and impinge on the ability to have free and frank discussions in relation to policy development. HMT also considers that all of the withheld information in this case concerns confidential and market sensitive information on considerations around the reserve portfolio which reflect current policy issues and potential future investment decisions.

66. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the public authority about disclosure resulting in inhibition to participants in the policy making process are relevant to two factors highlighted by the Tribunal: 'safe space' and 'chilling effect'.
67. The term 'chilling effect' refers to an adverse effect on the frankness and candour of participants in the policy making process. Arguments about 'safe space' are related to chilling effect arguments but distinct, as the need for a safe space within which to debate policy exists regardless of any chilling effect that may result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy making process.
68. The weight that the Commissioner affords to chilling effect and safe space arguments will depend on how closely they relate to the information in question. For example, an argument that disclosure would result in a chilling effect on policy making in general would usually carry less weight than an argument that a chilling effect would result in relation to the specific policy area to which the information relates. Also key is the stage reached in the policy-making process at the time of the request. Where a public authority argues that harm would result to a specific and ongoing policy-making process, this will generally carry more weight than an argument suggesting that harm would result to future policy-making in general through disclosure of information relating to policy that was complete at the time of the request.
69. In this case, the releasable information represents only a small part of the withheld information which the Commissioner has identified to the HMT. Taking into account the nature of the releasable information the Commissioner considers that very little weight should be given to the

chilling effect argument in this case in relation to the releasable information.

70. Turning to those factors that favour disclosure, the subject of the policy-making process to which the information relates is of relevance here. The Commissioner considers there to be a particular public interest in any information that relates to the formulation and development of government policy about the sale of the UK's gold reserves. The Commissioner believes that disclosure of the information in question here is in the public interest in order to advance transparency and public understanding on the subject of government policy-making in this area in general. However, given the limited and innocuous nature of the information identified by the Commissioner for release, he considers that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure of this releasable information.

Section 40 – Personal data of the individuals identified in the releasable information.

71. Whilst this was not one of the exemptions claimed by HMT during its handling of complainant's request, HMT has made representations to the Commissioner in relation to the issue of officials' names mentioned throughout the documents identified within the releasable information.

HMT argued to the Commissioner that:

-They [officials' names] are not part of the information sought. The request, if properly interpreted seeks recorded information leading up to and informing the decision to sell gold. HMT contends that the name of the author of or recipient of the information is not relevant and is not part of the information sought.

-If the Commissioner disagrees, HMT considers that the officials' names are exempt information by virtue of section 40 (2) of the Act. They contend that the information is personal information and the disclosure of which would be unfair as officials writing at the time (whether junior or senior) would never have expected that their names would be made public. HMT points out many of the documents had been created before the advent of the Freedom of Information Act. HMT contends there is no operative Schedule 2 Data Protection Act condition that allows disclosure. HMT states that the officials in question had a reasonable expectation of privacy and this was all the more true for those 'junior' officials contained within the documents in question.

72. The Commissioner does consider that the names of officials in these documents contained within the releasable information do fall within the scope of the complainant's request. In fact the Commissioner

considers that the identity of the individuals who wrote and received these documents is an integral part of the information that the complainant requested. The Commissioner has therefore considered the exemption at section 40 (2) of the Act in relation to the officials' names within the 'releasable information' for the purposes of this decision notice.

73. Section 40(2) provides an exemption for information which is the personal data of a third party. The engagement of section 40(2) is contingent on two conditions. The first condition requires first that the information to be personal information under the Data Protection Act 1998 ('DPA') and second that the disclosure of it would contravene one of the data protection principles set out in Schedule 1 of the DPA. And in particular the first data protection principle.
74. Section 1 (1) of the DPA defines personal data as 'data which relate to a living individual who can be identified from those data, or 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 indication of the intentions of the data controller of any other person in respect of the individual...'
75. When considering disclosure or non-disclosure of third-party personal information, an authority is required to consider the data protection principles as set out in Schedule 1 of the Data Protection Act 1998 (DPA)
76. The first data protection principle requires that the processing of personal data is fair and lawful and,
 - at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
77. When considering fairness under the first data protection principle it is necessary to consider what the reasonable expectations of a person would be in relation to how their information would be used. The Commissioner's guidance on section 40(1)⁶ suggests a number of issues that should be considered when assessing whether disclosure of information would be fair. These are as follows:
 - the individual's reasonable expectations of what would happen to their personal data;
 - the seniority of any staff;

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¹http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

- whether the individuals specifically refused to consent to the disclosure of their personal data;
 - whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals;
 - the legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.
78. Furthermore, the Commissioner's guidance suggests that, when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. His guidance states:

"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 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. Therefore, the only other basis on which the information requested could be lawfully disclosed would be if condition 6 of Schedule 2 of the DPA was met."

79. A full text of section 40 is available in the Legal Annex at the end of this Notice.

Is the information personal data?

- 80 HMT has argued to the Commissioner that the identity of individuals within the withheld information constitutes their personal data. For the purposes of the releasable information the Commissioner considers that the identities of the individuals within the documents which the Commissioner has identified and detailed to HMT at Annex A is the personal data of staff and other individuals and officials for the purposes of the DPA. As the Commissioner is satisfied this information is personal data he has then considered whether the disclosure would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

81. The Commissioner considers the first data protection principle to be relevant in this case. It 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.'*

82. The Commissioner considers that the relevant condition for him to consider in Schedule 2 is the sixth condition. The sixth condition states

that the processing of personal data will be fair where it 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 or prejudice to the rights and freedoms or legitimate interests of the data subject.*

83. In considering whether disclosure of the identities of the officials who can be identified within the 'releasable information', would be unfair and contravene the first data protection principle, the Commissioner has taken the following factors into account
- (a) the reasonable expectations of the employees and officials about what would happen to their personal data
 - (b) Whether the information relates to the individual's personal or private life
 - (c) The position and roles of the individuals identified
 - (d) The legitimate interests in the public knowing the identities of those contained with the releasable information.
 - (e) Any unwarranted prejudice to the rights and freedoms or legitimate interests of the individuals identified.

a. Reasonable expectations

84. HMT has argued to the Commissioner that disclosure would not be fair to those individuals and officials writing at the time (whether junior or senior) would never have expected that their names would be made public. HMT points out that when this information was largely created before the passage of the Freedom of Information legislation. HMT considers that the officials in question had a reasonable expectation of privacy at the time they created and exchanged the correspondence.
85. The Commissioner has not been provided with any evidence that the individuals were given explicit assurances of confidentiality. The Commissioner does not accept as conclusive HMT's argument that there should be an increased expectation of confidentiality or privacy to information simply because the information was created before the introduction of the Freedom of Information legislation.

b. Personal or private life

86. The Commissioner has produced [Awareness Guidance on Section 40⁷](#), which makes it clear that where the information relates to an individual's private life (i.e. their home, family, social life or finances) as opposed to their public life (i.e. their work as a public official or employee) it will deserve more protection than information about them

⁷ Available at www.ico.gov.uk

acting in an official or work capacity. The Commissioner is satisfied on viewing the releasable information that it is information which relates to the individual's professional work life and was generated as a result of their roles in their employment capacity.

c. Seniority and roles

87. The above Awareness Guidance on section 40, also makes it clear that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details about the private lives of other people (e.g. the official's family). Despite the Commissioner asking, HMT has not confirmed to him the individual grades of the officials in question. Indeed during a telephone call the Commissioner pointed out the name of one individual who he found by an internet search and who holds quite a senior post. HMT has also informed the Commissioner that owing to the age of the information that the individuals named in the releasable information may not then have held as senior a position as they now do or did at the time of the request. In reviewing the releasable information the Commissioner does not consider any of the individuals mentioned in the releasable information to be 'junior' members of staff. The Commissioner has researched the roles and job titles of the individuals' within the releasable information. The Commissioner does not consider any of these roles to be 'junior' administrative staff. Indeed coupled with the content and nature of the information the Commissioner would not expect junior members of staff to be privy to it or indeed involved in its discussion, dissemination or creation. The Commissioner considers that at the time when the information was created only relatively senior individuals would have been involved owing its nature. The Commissioner is also satisfied that the individuals involved, were involved as a result of their professional working roles and not their private lives.

d. legitimate interests of the public

88. The Commissioner has considered the above three factors in the light of the legitimate interests of the public in knowing the identities of the individuals involved. The Commissioner considers that there is a legitimate public interest in transparency as to the individuals who were involved in the discussions and correspondence surrounding the decision to sell part of the UK's gold reserves. The Commissioner also considered those legitimate interests in this information being released to the public. He considers that the legitimate interest can be cast

quite broadly and includes the legitimate interest in openness, in the value of understanding the roles played by senior staff in making such important decisions which the Commissioner has considered in this case. The Commissioner has also considered the interest in the accountability of professional individuals being able to stand over work done in a professional work related capacity on such an important decision as the sale of part of the UK gold reserves. Added to that the Commissioner is aware there is a large amount of information about this sale already in the public domain.

e. Unwarranted processing by reason of prejudice to the rights and freedoms/ legitimate interests of the data subject.

89. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects (i.e. the individuals identified within the releasable information). The Commissioner does not accept as conclusive the argument that because comments/information were created at a time prior to the enactment of Freedom of Information legislation individuals would have a heightened expectation that their comments/roles in a particular situation would not be disclosable at a future date. Having considered the content of the releasable information the Commissioner considers the content to be largely innocuous and therefore does not consider that any prejudice would arise for the individuals mentioned.
90. On balance, the Commissioner accepts that disclosure of the releasable information would be necessary to fulfil the public's legitimate interests and agrees that this outweighs the unwarranted prejudice that might be caused to the individuals' rights, freedoms and legitimate interests. The Commissioner is therefore satisfied that condition 6 of Schedule 2 of the DPA is met in this case. The Commissioner is also satisfied that it is fair to those individuals to disclose this information. The Commissioner therefore concludes that section 40 (2) does not apply to the releasable information.

Substantive Procedural Matters

91. Section 10 (1) of the Act states that requests for information should be dealt with promptly and in any event no later than the twentieth day following the date of receipt of the request. Section 1 (1) (b) of the Act allows an individual to have the information he has requested communicated to him unless it is otherwise exempt. For the reasons set out at paragraphs 45 to 92 of this decision notice the Commissioner considers that HMT were incorrect to withhold a small

portion of 'releasable information'. He accordingly finds HMT in breach of section 10 (1) and section 1(1) (b) of the Act as this information was not provided to the complainant within the statutory time for compliance, i.e. 20 working days following receipt of the request.

The Decision

92. 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:
93. HMT were correct in their application of section 29 (1) (b) to all of the "exempt information" and the balance of public interest favours withholding all of this information.
94. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
95. The Commissioner has identified a body of information (i.e. the "releasable information") which is not exempt under any of the sections HMT applied, i.e. section 27 (1) (a), section 29 (1) (b) or section 35 (1) (a). The Commissioner also considered the exemption at section 40 (2) as it was pleaded in the alternative to him during his investigation. The Commissioner concludes that HMT was incorrect to exempt this information and has identified the releasable information to HMT in Annex A to this decision notice served only on the HMT.
96. HMT were also in breach of section 1 (1) (b) and section 10 (1) of the Act by not providing this information within the statutory timescales under the Act.

Steps Required

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

To disclose all of the information identified at Annex A of this decision notice (served only on HMT) to the complainant,.
98. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Other matters

100. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
101. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
102. The Commissioner recognises that HMT, in its reply to the complainant's request for internal review, apologised sincerely to the complainant for the length of time it had take to complete the review. It stated that this was due to the necessity for detailed examination of a highly complex area of policy and stated that it normally tried to complete reviews promptly. Whilst he recognises that in this case the delay occurred before the publication of his guidance on the matter, the Commissioner has noted that it took over 100 working days for an internal review to be completed.

Right of Appeal

103. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 22nd day of March 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Legal Annex

Section 2(2) provides that: -

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 17(1) states 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 –
states that fact,
specifies the exemption in question, and
states (if that would not otherwise be apparent) why the exemption applies.

Section 27 provides that: -

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

Section 28 provides that: -

(2) In subsection (1) “administration in the United Kingdom” means—

(a) the government of the United Kingdom,

(b) the Scottish Administration,

(c) the Executive Committee of the Northern Ireland Assembly, or

(d) the National Assembly for Wales.

Section 29 provides that: -

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

(b) the financial interests of any administration in the United Kingdom, as defined
by section 28(2).

Section 35 provides that:-

- 1) 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

Section 40 provides that:-

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
(2) 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.

Schedule 2 of the Data Protection Act

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, or
 - (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.

Section 48 of the Freedom of Information Act 2000 provides that:-

(1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a "practice recommendation") specifying the steps which ought in his opinion to be taken for promoting such conformity.

(2) A practice recommendation must be given in writing and must refer to the particular provisions of the code of practice with which, in the Commissioner's opinion, the public authority's practice does not conform.

(3) Before giving to a public authority other than the Public Record Office a practice recommendation which relates to conformity with the code of practice under section 46 in respect of records which are public records for the purposes of the [1958 c. 51.] Public Records Act 1958, the Commissioner shall consult the Keeper of Public Records.

(4) Before giving to a public authority other than the Public Record Office of Northern Ireland a practice recommendation which relates to conformity with the code of practice under section 46 in respect of records which are public records for the purposes of the Public Records Act (Northern Ireland) 1923, the Commissioner shall consult the Deputy Keeper of the Records of Northern Ireland.

Annex A – This is only to be served on the HMT and represents that information which the Commissioner is ordering the HMT to release.

Note to HMT: Please note that this Annex of releasable information contains instructions to HMT. Please read instructions carefully and only release that information which the Commissioner has ordered. Please note that the Commissioner may not be ordering release of an entire document or page and has detailed if he does not require HMT to release the whole document/page. Please contact the case-officer dealing with this case at the Information Commissioner's Office if in doubt.