**Freedom of Information Act 2000 (Section 50)**

**Decision Notice**

**Date: 1 March 2010**

**Public Authority:** Department for Children Schools and Families
**Address:** Sanctuary Buildings
Great Smith Street
Westminster
London SW1P 3BT

## Summary

The complainant requested information relating to a patent. After several revisions and clarifications, DCSF refused the request under section 12(1) of the Act. After the internal review DCSF disclosed some of the information requested but withheld the majority of the information citing sections 21, 35(1)(c), 36(2)(b) and (c) and 42 of the Act. As a result of the Commissioner's intervention some additional information was disclosed to the complainant. With regard to the remaining withheld information DCSF no longer relied on section 35 and section 21 of the Act but applied sections 40, 36 and 42. The Commissioner finds that DCSF correctly applied sections 36(2)(b)(i) and (ii) and 42 to the information it withheld in this case. However, the Commissioner finds that DCSF wrongly applied sections 36(2)(c) and 40(2). The Commissioner also recorded a number of procedural breaches in relation to DCSF's handling of this request.

## 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 request in this case centres around a patent in relation to technology being provided to schools. In 1992, European Patent (UK) No. 0 664 061 (the patent) was secured by Frontline Technology Ltd (Frontline) for an electronic registration system for schools. Frontline's sister company, Bromcom Computers Plc (Bromcom), was the UK licensee of Frontline. The patent covers the process of transferring student data over a wireless network, allowing teachers to take

attendance and assessment data 'on the move' and transfer it by wireless means to the school's/college's central system.

3. In 1998, a report by Downing Street's Social Exclusion Unit recommended electronic registration (e-registration) as a way to deal with truancy.

4. Bromcom initiated legal proceedings against a competitor alleging breach of patent for using a wireless network to transfer student data. The Department for Children, Schools and Family (DCSF) was concerned that Bromcom would not conclude licensing agreements with local education authorities or schools which would result in a patent based monopoly for the wireless system marketed by Bromcom. DCSF considered a number of options that included considering legal action in respect of challenging the patent and discussing options regarding advice to schools should they be subject to any legal action from the complainant. In June 2003, DCSF announced it had "issued proceedings in the High Court to test the validity of the wireless technology patent". In December 2005, both parties reached an out of court settlement, thereby bringing an end to the patent dispute.

5. The Commissioner notes that the complainant originally made his request to the Department for Education and Skills (DfES). DfES became DCSF on 28 June 2007. For consistency and ease of reference the Commissioner has referred to DCSF throughout this Notice.

## The Request

6. On 5 April 2005, the complainant made the following request to DCSF:

> "*Pursuant to the Freedom of Information Act, I request copies of the following information which is in the control of the Department for Education & Skills. I request copies of minutes, memos, letters, emails and other documented information from:*
>
> 1. *the date of issue of the enclosed letter of 7 November 2001 from Estelle Morris to Eric Forth to*
>
> 2. *the date of issue of the enclosed letter of 12 November 2002 from Doug Brown to all Local Education Authorities.*
>
> *Between the 2 letters there was a change of policy by the DfES regarding patents, please send copies of all meetings, discussions and consultations and other information about this change of policy*".

7. This request was refused by DCSF as it considered that compliance would exceed the cost limit at section 12 of the Act. Between April 2005 and March 2006 the complainant refined his request a number of times in attempts to bring its scope within the cost limit. Full details of these previous requests are set out at annex 2 to this Notice.

8 On 2 March 2006, the complainant submitted the following refined request to DCSF:

> "*Could you kindly please supply our company with the minutes, memos, letters, any other documented information, emails and other electronic resources; regarding DfES policy with respect to Frontline Technology Ltd patent (ep0664 061 B1) from the date of issue of the letter of 12 November 2002 from Doug Brown to all Local Authorities backwards in date (towards 2001) to the extent that £600 threshold is reached*".

9. On 4 April 2006, DCSF responded to the complainant advising it had conducted a search and that it held no information of the description specified.

10. On 20 June 2006, the complainant wrote to DCSF complaining about the handling of his requests, highlighting the chronology of the requests to date and requesting an internal review.

11. On 18 July 2006, DCSF advised the complainant that it would search 12 paper files of information being recalled from storage. It advised however that such a search would be likely to exceed the £600 cost limit set out at section 12.

12. On 24 July 2006, the complainant wrote to DCSF clarifying how he would like the search prioritised to meet the £600 cost threshold.

13. On 14 August 2006, DCSF wrote to the complainant to advise that it would now be contacting all those persons who may have been involved to ensure all appropriate files were identified and made available for checking.

14. DCSF also advised that now that the request had been refined it would be able to consider all files (paper and electronic) that fell within the scope of the complainant's request. DCSF confirmed that the search that it was undertaking was in relation to the complainant's refined request of 2 March 2006, rather than any earlier, broader requests.

15. Following further correspondence between the complainant and DCSF, on 29 November 2006, DCSF advised the complainant that the internal review was now complete. DCSF released some information and withheld the remainder in reliance on sections 21, 35(1)(c), 36(2)(b) and (c), and 42 of the Act.

## The Investigation

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### Scope of the case

16. On *5* January 2007, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant raised the following issues:

- The complainant was of the view that DCSF had wrongly applied exemptions to the information he had requested
- The complainant was unhappy at the time taken to deal with his request in that DCSF continually applied the cost limit despite his attempts to refine the request.

17. The complainant did not indicate the view that DCSF had wrongly applied the cost limit to his initial request, so this Decision Notice does not consider DCSF's application of section 12 in relation to this request. The Commissioner has investigated DCSF's handling of the refined request of 2 March 2006. The Commissioner also considered whether DCSF provided appropriate advice and assistance as required by section 16 of the Act.

## Chronology

18. On 3 September 2008, following confirmation that the complainant wished to continue with this case, the Commissioner wrote to DCSF outlining the nature of the complaint. The Commissioner questioned DCSF on its handling of this case and asked for further information in relation to the application of the exemptions cited.

19. On 28 November 2008, DCSF provided the Commissioner with copies of the withheld material, advising that it was exempt under sections 35, 36 and 42 of the Act. DCSF also provided details of its application of section 36.

20. In response to the Commissioner's suggestion that DCSF reconsider its position on the case, DCSF accepted that in this case the request was not only made some years previously but related to litigation that was now complete. DCSF agreed to reconsider the withheld material.

21. On 18 March 2009, DCSF released some of the withheld information to the complainant. DCSF maintained that the remaining withheld information was exempt under sections 36, 40 and 42 of the Act.

22. On 27 March 2009, the complainant advised the Commissioner that he remained dissatisfied with DCSF's response. The complainant requested that the Commissioner issue a Decision Notice in relation to the remaining withheld information.

## Analysis

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### Substantive procedural matters

### Section 1(3) - interpretation of the request

23. DCSF interpreted the complainant's initial request dated 15 April 2005 to relate to a change of policy regarding patents. At this time DCSF advised the complainant it held no information relevant to this request. However, it was later established

that there was an alternative objective reading to the request and that the information requested was in fact held by DCSF.

24. The Commissioner is of the view that, where a public authority is aware than an information request can be objectively read in more than one way, it should engage with the complainant in order to identify the information requested. This is because public authorities have a duty under section 16 to provide advice and assistance to applicants. The Commissioner considers that in this case DCSF focused on an over-literal reading of the request (i.e. whether there was a change of policy or not) and did not consider the broad thrust of the request itself.

25. The Commissioner notes that DCSF has now accepted that it did not interpret the complainant's initial request accurately. The Commissioner also acknowledges that this request was made in 2005, when access rights under the Act were relatively new. Therefore the Commissioner expects that DCSF will take steps to avoid this re-occurring in relation to future requests.

**Exemptions**

**Section 36: prejudice to the effective conduct of public affairs**

26. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

27. Section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. Information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, inhibit the free and frank exchange of views or would, or would be likely to, prejudice the effective conduct of public affairs. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown.

28. DCSF withheld some of the requested information under section 36(2)(i) and (ii), and withheld other information under section 36(2)(c). The Commissioner considers that it is acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection.

**Opinion of the qualified person**

29. In order to establish whether the section 36 exemption has been applied correctly the Commissioner considers it necessary to:

    1. Ascertain who was the qualified person or persons for the public authority in question;

2. Establish that an opinion was given;
3. Ascertain when the opinion was given; and
4. Consider whether the opinion given was reasonable.

30. In this case the Commissioner has established that the reasonable opinion was given by Lord Adonis, who at the time of this request was Under Secretary of State. The Commissioner is therefore satisfied that Lord Adonis was a qualified person for the purposes of section 36 of the Act.

31. In its submissions to support the application of section 36, DCSF has explained the process by which this opinion was provided. Lord Adonis's opinion was sought on 8 November 2006, before the DCSF response was sent to the complainant. Lord Adonis approved the use of the section 36 exemption and signed a statement to that effect. The DCSF submission to Lord Adonis included arguments that he took into account in reaching his opinion that certain pieces of information were exempt of the basis of section 36(2)(b) of the Act as well as the wording explaining the application of the public interest test. However, the Commissioner has seen no evidence in the submission to suggest the qualified person considered any arguments in respect of information withheld under section 36(2)(c).

32. To investigate further, the Commissioner sought clarification from DCSF in relation to the qualified person's opinion. DCSF advised the Commissioner that Lord Adonis saw all of the withheld information and that his decision was not based solely on that submission. DCSF further advised that because of the age of this case, most of the officials and legal advisers concerned with the case had left the Department and the qualified person, Lord Adonis had since moved to the Department of Transport.

33. DCSF consulted with those remaining staff who had involvement in the matter but have advised the Commissioner it was unable to speculate on what the Minister may or may not have known, however DCSF was confident that the Minister would have satisfied himself about the strength of the argument before forming the opinion that both limbs of section 36 were engaged. In addition DCSF argued that, having inspected the withheld information the Minister would have been able to draw firm conclusions about the wider context in which the request was being made – regardless of his level of prior knowledge.

34. The Commissioner has reviewed the DCSF submission to Lord Adonis which led him to form the view that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and notes it comprised of a brief summary describing the withheld information and outlining DCSF's view that disclosure would be likely to deter officials from engaging in written discussions and policy advice and that it would not be in the public interest.

35. The Commissioner notes that whilst the submission outlines the factors Lord Adonis took into account in reaching his decision, no evidence has been provided on the factors that he considered in forming the view that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

36. During the course of the Commissioner's investigation, DCSF supplied the Commissioner with more detailed reasoning as to why it believed the information remained exempt under section36(2)(b) and 36(2)(c).

37. This leaves the Commissioner in a difficult position. Although the DCSF's submission suggests why Lord Adonis reached the opinion he did, it is not explicitly clear that he considered the section 36(2)(b) exemption to apply on the basis of the more detailed reasoning as supplied by DCSF to the Commissioner. The Commissioner has been guided by the Information Tribunal's comments in the case McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068*)* in which the Tribunal explained that:

> 'Where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is flawed in some way need not be fatal to a finding that it is a reasonable opinion'

38. In deciding whether the opinion was 'reasonable' the Commissioner has been assisted by the Tribunal's decision in the case Guardian Newspapers & Brooke v Information Commissioner & BBC [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that 'in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).

39. Despite not being provided with evidence that explicitly explains why the qualified person considered the information in question to be exempt (as opposed to why the DCSF considered the information to be exempt), the Commissioner is satisfied that the opinion appears to be overridingly reasonable in substance for the following reasons.

40. With regard to section 36(2)(b), the Commissioner accepts that it is reasonable to conclude that disclosure in this case would reveal examples of free and frank discussions which could lead to civil servants being less willing to discuss issues in a free and frank nature in the future and may deter officials from engaging in written discussion, exchanging comprehensive views and advice. Therefore, despite not being provided with details of the explicit evidence which led Lord Adonis to reach the conclusion that the information was exempt on the basis of section 36(2)(b), The Commissioner is of the view that the opinion can be considered reasonable in substance. He is therefore satisfied that section 36(2)(b)(i) and (ii) is engaged in relation to the information withheld under that section.

41. However, with regard to section 36(2)(c), the Commissioner has not been provided with any real evidence to suggest that Lord Adonis considered any arguments in support of this limb of the section 36 exemption other than reviewing the withheld information. Consequently the Commissioner is not satisfied that a reasonable opinion was provided, and therefore the Commissioner finds that section 36(2)(c) is not engaged in relation to the information withheld

under that section and the information withheld under that section should be released.

**Level of prejudice**

42. Before moving on to consider the public interest test, the Commissioner notes that the qualified person's opinion clearly identifies the likelihood of the inhibition in the case of section 36(2)(b) (ii) occurring as one that meets the lower test of 'would be likely to inhibit'.

**Public interest test**

43. Section 36(2)(b) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in Guardian & Brooke [EA/2006/0011 and 0013] indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

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

44. As noted above, at paragraph 91 of this decision the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion, this means that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the prejudice or inhibition to the subject of the effective conduct of public affairs.

45. The Commissioner has only considered public interest arguments in relation to the information withheld under section 36(2)(b)(i) and (ii) of the Act, as he has found that section 36(2)(c) is not engaged..

**Public interest arguments in favour of disclosing the information – section 36(2)(b)(i)**

46. DCSF considered that there is a public interest in providing greater transparency and accountability in relation to decision making processes, allowing individuals

and organisations to understand decisions made by public authorities that affect their lives and work and where appropriate, to challenge those decisions.

47. DCSF also considered there is a public interest in accountability and transparency in policy matters which relate to the spending of public money, in this case securing IT solutions through public funds.

48. The Commissioner considers disclosure of the withheld information in this case would show the public how a key mechanism within DCSF makes decisions that impact on their children's lives and education and how this process happens. Open policy making may lead to increased trust and engagement between citizens and government. Furthermore, disclosure of officials' advice and deliberations could provide a certain level of encouragement to ensure the quality of advice they provide in the future and actually improve decision making processes.

**Public interest arguments in favour of maintaining the exemption - section 36(2)(b)(ii)**

49. DSCF argued that there is a public interest in providing a private space for free and frank provision of advice, and the deliberations of such advice. This private space allows for the opportunity for the discussion of issues relevant to the case and permits officials to 'think the unthinkable' without the fear of having to defend extreme options.

50. The Commissioner accepts that disclosure of litigation tactics in question would be likely to have the effect of inhibiting the provision of advice or exchange of views, impacting negatively on DCSF's ability to defend the interests of schools and the educational interests of pupils and young people.

**Balance of the public interest**

51. In considering where the balance of the public interest lies, the Commissioner notes that the arguments for non-disclosure outlined above rely on the fact that the content of the information requested indicates frank discussions having taken place, and that disclosure would inhibit similar discussions in the future. The Commissioner is not generally persuaded that disclosure of one set of discussions would necessarily inhibit future discussions, but is of the view that such arguments must be considered on a case by case basis.

52. Having reviewed the withheld information, the Commissioner considers that the opinions and views expressed by the officials at DCSF internally and to other third parties were given freely and frankly and with the intention of providing advice in dealing with the impending litigation. In relation to any 'chilling effect' on the frankness of future advice provided by officials that might result in poorer decision making, the guiding principle is the robustness of officials – i.e. they should not be easily deterred from doing their job properly.

53. However, the Commissioner considers that in defending DCSF's stance in this patent issue the views expressed by personnel within DCSF were key to

mitigating against an adverse impact on the interests of schools and the educational interests of pupils and young people. The Commissioner considers that disclosure of DCSF's thinking process, when that that process may be used again to defend the best interests of schools would not be beneficial and could lead to firms in the future predicting the Government's litigation strategy and weakening its response. This could have the same end result as it did in this case, delaying the implementation of crucial infrastructure projects across the schools sector as well as the unnecessary expenditure of public funds.

54. The Commissioner believes that in this case, withholding the information would protect the DCSF's ability to undertake similar action in the future and accepts that in this particular case there is a real and likely risk that similar discussions would be inhibited in future if officials are not able to give such opinions freely and frankly when considering DCSF's position in the face of litigation.

55. The Commissioner accepts there is a public interest in the need to a "safe space" to debate "live issues" and reach decisions without being hindered by external comment. This need for a "safe space" exists separately to, and regardless of, any potential "chilling effect" on the frankness and candour of debate that might flow from disclosure under the Act.

56. However, in this case, as the litigation matter was settled in December 2005 it is the Commissioner's view there would be no particular risk that disclosure would disrupt the options that had been considered by the Department.

57. The Commissioner acknowledges that disclosure could provide the public with further information as to the Government's position on a sensitive issue, however, in weighing the public interest arguments, the Commissioner considers that there is a stronger public interest in protecting the ability of officials to exchange views and provide advice, when litigation is a possibility and particularly where that litigation may impact of the education system. In particular, the Commissioner is mindful of the role free and frank discussion plays in enabling early stage discussions about issues threatening the delivery of objectives, providing officials with the opportunity to develop thinking and explore options and their implications in a frank and candid way.

58. On balance the Commissioner concludes that the public interest in maintaining the exemptions contained at sections 36(2)(b)(i) and (ii) outweighs the public interest in disclosing this information.

**Section 40(2) – personal information**

59. The exemption under section 40(2) applies to information which is the personal data of an individual other than the applicant, where disclosure of the information would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).

60. DCSF withheld information that it classed as personal data relating to 'junior civil servants' and some third parties. DCSF considered a junior civil servant to be

anyone below senior civil service grade 5 (Deputy Director level). None of the information is personal data of the complainant.

**Is the information personal data?**

61. "Personal data" is defined at section 1(1) of the DPA:

> "'personal data' means data which relate to a living individual who can be identified –
>
> (a) from those data, or
>
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller

62. The Commissioner has first considered whether or not the withheld information does in fact comprise personal data relating to living individuals. The Commissioner notes that the information withheld under this exemption comprises names of a number of individuals, some of whom are civil servants and some of whom are not. The individuals' names have biographical significance in that they record employer's names, the individuals' whereabouts at a particular time and that he or she took part in a meeting with a government department. The Commissioner is therefore satisfied that the names of staff constitute the personal data of these individuals.

**Would disclosure contravene any of the data protection principles?**

63. DCSF claimed that disclosure of the withheld information in this case would contravene the first data protection principle in that it would be unfair to the individuals concerned.

**First data protection principle**

64. The first data protection principle provides that:

> "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
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> (a) at least one of the conditions in Schedule 2 is met, and
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> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

**Would it be unfair to disclose the information?**

65. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individual's reasonable expectations of what would happen to his or her information;
- The seniority of the individuals;

- Whether disclosure would cause any unnecessary or unjustified damage to the individuals; and
- The legitimate interests of the public in seeing the withheld information.

66. In considering the processing conditions in Schedule 2 to the DPA, the Commissioner has considered Schedule 2(6) of the Act. As the information does not contain sensitive personal data the requirements in relation to Schedule 3 do not apply.

67. The Commissioner is mindful that he has issued guidance which gives advice to public authorities on when the names of staff, officials, elected representatives or third parties acting in a professional capacity should be released in response to an access request. The key point to consider when disclosing names is to consider whether it would be fair in all the circumstances to identify an individual. The presumption is in favour of protecting privacy, so the release of personal information will in most cases only be fair if there is a genuine reason to disclose that information. The Commissioner is of the view that public authorities should consider the following:

- The public authority should identify the legitimate interests which a member of the public might have in the information. These may not be the same as, or limited to, any interest expressed by the particular requester, although any arguments they put forward should be considered.

- The public authority should consider whether the names add to the value of the information, or whether the interests would be fully met by providing information with the names redacted.

- The public authority should decide whether the benefits of disclosure are proportionate to any potential harm, distress or intrusion to the individuals named.

68. In considering individuals' expectations the Commissioner has considered how senior the staff member was, whether they had a public profile and whether their role required a significant level of personal judgement and individual responsibility. As has been recognised by the Information Tribunal (for example, in DfES v the Information Commissioner and the Evening Standard (EA/2006/0006); Secretary of State for Work and Pensions v the Information Commissioner (EA/2006/0040) and Ministry of Defence v the Information Commissioner and Rob Evans (EA/2006/0027), in considering whether or not the names of government officials should be released, a distinction may be drawn between junior and senior officials, and that the names of the former are more likely to be withheld than the latter. In the *DfES* case the Tribunal has, however, also made it clear that each decision will depend on the facts of the individual case.

69. DCSF argued that it would not be fair to release names of junior civil servants as the information relates to each individual's professional, not public role, and apart from one staff member whose details were disclosed, no member of staff had given their consent to disclosure. DCSF confirmed that it had not sought consent

from each individual, as it considered this would be a waste of scarce public resources and in itself might cause distress.

70. DCSF argued that the individuals in questions would not expect their roles to be subject to public scrutiny. DCSF recognised that the disclosure of officials' names may assist scrutiny of the decision making processes but inferred that these arguments would only apply to senior civil service staff. DCSF expressed the view that junior civil servants had no decision making powers, and they did not hold public facing roles. Therefore these individuals would have no expectation that their names might be published. DCSF further advised that it believed all the officials named had now moved to other teams within DCSF, or out of DCSF, and the consequences of releasing their names could disrupt those officials' current work which was unrelated to this particular matter.

71. The Commissioner is of the opinion that DCSF applied a blanket definition of 'junior civil servant', defining all those civil servants not classed as senior civil service as junior – that is all staff below the Grade 5 (Deputy Director level). It is not clear from any of the information provided by DCSF what grade those staff members named would fall within and what their level of responsibility was.

72. The Commissioner asked DCSF whether, in its view, disclosure of the personal data would cause unwarranted damage or distress to the individuals concerned. This would include risks to a person's safety and security; it may include unfair damage to their career or reputation but would not include embarrassment, legitimate criticism, or the risk of misunderstanding or misrepresentation. DCSF advised the risk was considerable, highlighting a risk of exposure of officials to inappropriate pressures from the applicant as well as distress caused to them by disruption of their current work. However, DCSF did not provide any evidence to support this argument.

73. The Commissioner has inspected the personal data withheld under section 40(2), and has considered the somewhat limited information provided by the DCSF. The Commissioner is of the view that the individuals concerned were not the most junior with DCSF. Indeed the Commissioner considers that the subject matter of the correspondence would suggest that individuals had to exercise a significant level of judgement, give opinions with a high degree of autonomy, and correspond on a subject matter which no junior member of staff would likely be involved.

74. The Commissioner considers that it is good practice to have a policy on routine disclosure of names at certain levels, in certain roles or in certain circumstances, however this does not always mean that the names of more junior staff should always be withheld. Often it will not be unfair to release their names as the context will not be sensitive or controversial. The fact that a public authority has not specifically advised employees or officials about the implications of the Act is not a bar to disclosure, as they should anyway be aware of the Act's existence. DCSF policy appears to be that the names of civil servants below Grade 5 will not be released and the Commissioner notes that DCSF did not make any attempt to contact the individuals concerned to seek their consent to release the information.

75. The Commissioner believes that staff involved in this particular case are sufficiently senior to expect to be able to stand over their opinions and work. Therefore the Commissioner does not consider that it would be unfair to any of the individuals to release their names.

**Would it be unlawful to disclose the information?**

76. The Commissioner having decided that disclosure of officials' names would not be unfair has gone on to consider whether the processing would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting the information and he is satisfied that the disclosure would not be unlawful.

**Schedule 2 conditions**

77. The sixth condition provides that:

"personal data shall be processed in accordance with the rights of the data subjects under this Act"

78. It establishes a three part test which must be satisfied:

- there must be legitimate interests in disclosing the information,
- The disclosure must be necessary for a legitimate interest of the public, and
- Even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.

79. The Commissioner believes there is a legitimate interest in DCSF being as open and transparent as possible and that there is a general public interest in knowing who is making or influencing decisions impacting on the education system. The Commissioner is of the view that disclosure of the names in question is necessary to achieve that aim.

80. Having already established that the processing is indeed fair, the Commissioner is also satisfied that the release of the individuals' names would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subjects. The Commissioner is satisfied that the information relates only to those individuals' professional lives and does not intrude on their private and family lives. Furthermore, there is no evidence to suggest that disclosure would compromise their personal safety or lead to harassment in their working lives.

81. The Commissioner concludes that DCSF wrongly applied the section 40(2) exemption, and ought to have disclosed this information to the complainant.

**Section 42(1) – legal professional privilege**

82. Section 42(1) of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege.

Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.

83. The common law principle of legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of Bellamy v the Information Commissioner and the DTI as:

> "*a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and* [third] *parties if such communication or exchanges come into being for the purpose of preparing for litigation*." (paragraph 9)

84. DCSF has applied the section 42(1) exemption to specific pieces of information contained within various documents, claiming that this information constitutes legal advice relating to the patent dispute. Having examined the information in question the Commissioner is satisfied that it falls within the terms of litigation privilege, in that the relevant communications fall within the categories as set out in *Bellamy.* Having satisfied himself that the dominant purpose of all the communications being withheld related to the provision of legal advice, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived or lost. The Commissioner has not seen any evidence to suggest that DCSF has waived privilege in this case.

85. The complainant stated to the Commissioner that the legal case between DCSF and Bromcom was settled in December 2005 (see paragraph 2 above). Therefore the complainant was of the view that the information could not be withheld on the grounds of legal professional privilege. However the Commissioner notes that privilege is not time limited. The fact that the litigation has finished does not in itself mean that the information has lost the need for confidentiality which privilege provides. Therefore the Commissioner is of the view that the withheld information in this case is still capable of attracting legal professional privilege.

86. For the reasons set out above, the Commissioner is satisfied that the exemption under section 42(1) is engaged. Section 42(1) is, however, a qualified exemption and therefore the Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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

87. The Commissioner is of the view that there is generally a legitimate public interest in disclosing information which will help determine whether or not a public authority has acted appropriately.

88. Disclosure of the information would help inform the public as to DCSF's reasoning with regards to the litigation.

**Public interest arguments in favour of maintaining the exemption**

89. In making his assessment of where the balance of the public interest lies, the Commissioner is mindful of the Tribunal's decision in the *Bellamy* case which concerned the specific exemption relating to legal professional privilege in section 42 of the Act. In paragraph 8 of the decision the Tribunal observed:

> "*there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned*."

90. In summing up the Tribunal stated:

> "*there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest".* It concluded, at paragraph 35, that:
>
> *"it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case…"*.

91. The Commissioner acknowledges that there is a strong inherent public interest in protecting confidential communications between client and legal adviser. It is certainly in the public interest for authorities to have the ability to consult openly with their legal representatives so that forthright views can be expressed without fear of that advice subsequently being made public.

92. The Commissioner has also considered the question of what constitutes "live" legal advice. This definition very much depends on the specific circumstances as in some cases, advice can remain relevant for a long time, whilst in others it may be less relevant where legislation and case law have changed rapidly. For example, in Kessler v Information Commissioner and HMRC (EA/2007/0043), advice which was weeks old was described as relatively recent" whilst in Kitchener v Information Commissioner and Derby City Council (EA/2006/0044), advice which was 6 years old was described as "still relatively recent" whereas in Mersey Tunnel Users Association v Information Commissioner and Merseytravel (EA/2007/0052), advice which was over 10 years old was considered "not recent". In this particular case the legal advice dated from 2002, so was only four years old at the time DCSF conducted its internal review.

**Balance of the public interest**

93. The complainant notes that there are significant public interest arguments both for and against disclosure. As indicated above, the complainant pointed out that the legal advice in question related to a case which was settled in December 2005.

The complainant was of the view that the legal advice was no longer live, therefore it should be disclosed. The Commissioner accepts that generally speaking the older the information, the more likely it is to have served its purpose and the less likely it is to still be relevant to decision making or subject to challenges. The advice in question was given between February 2002 and November 2002 and related to an issue that was no longer live when DCSF was considering the complainant's information request, namely at the time of its internal review in November 2006.

94. However, while it will sometimes be appropriate to overturn legal professional privilege where weighty public interest factors favour disclosure, there remains a strong public interest in protecting the confidentiality of legal advice. The Commissioner is of the view that public authorities need to be able to rely on legal professional privilege as a mechanism to help ensure that they are able to obtain accurate and relevant legal advice. This is particularly relevant in the case at hand, where DCSF took the decision to test the validity of a patent in the High Court.

95. Having considered all the arguments, the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemption under section 42(1) outweighs the public interest in disclosure of the information. The Commissioner is therefore satisfied that DCSF was entitled to withhold the information in question.

**Procedural requirements**

**Section 1(1)(a): duty to provide information**

96. Section 1(1)(a) of the Act requires a public authority to confirm or deny within the statutory time limit (twenty working days) whether it holds information of the description specified by the applicant. In this case, the complainant submitted a refined request on 2 March 2006, and DCSF responded on 4 April 2006 to advise that it did not hold any relevant information. DCSF revised its stance after the complainant requested an internal review, and it was not until 29 November 2006 that DCSF confirmed that it held the requested information. Therefore the Commissioner finds that DCSF breached section 1(1)(a) of the Act in failing to confirm that it held the requested information.

**Section 16 – duty to provide advice and assistance**

97. The complainant did not dispute that his request of 15 April 2005 was too broad in terms of the cost limit at section 12 of the Act. However, the complainant was of the view that he was required to make a number of refined requests, because DCSF failed to provide him with the appropriate advice and assistance.

98. DCSF has accepted that it should have offered advice and assistance to the complainant in accordance with section 16 of the Act to narrow the scope of the request to enable it to fall with the cost limit as set out in section 12. As previously stated, the Commissioner considers that DCSF wrongly focused on a literal interpretation of the request, and did not consider what information may be

relevant to that request. DCSF advised the complainant to refine his request on a number of occasions, resulting in a delay of over a year before a substantive response was provided. The Commissioner is of the view that, had DCSF properly engaged with the complainant at the time of his first request, much of this delay could have been prevented. Therefore the Commissioner finds that DCSF failed to comply with section 16 of the Act.

99. DCSF has accepted that it could have done more to assist the complainant, stressing the request was made "*in the early days of FOI*". DCSF has provided assurances to the Commissioner that since 2005, it has developed its expertise and revised guidance and training has been provided to staff.

**Section 17(1) – refusal notice**

100. Section 17(1) provides that, where a public authority refuses a request for information, it is required to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon. This notice should be provided to the applicant within twenty working days. DCSF responded to the refined request of 2 March 2006 on 29 November 2006, which was clearly outside of this time limit.

101. In addition, the Commissioner notes that DCSF only claimed reliance on the exemption at section 40(2) of the Act during the course of the investigation.

102. Accordingly, the Commissioner finds that DCSF's refusal notice breached the requirements of section 17(1)(a), (b) and (c) in that it failed to provide a refusal notice within the statutory time limit which stated all the relevant exemptions and explained why they applied.

**Section 17(5) – refusal notice where section 12 is claimed**

103. If a public authority wishes to claim reliance on the exclusion at section 12 of the Act, it is required under section 17(5) to issue a refusal notice stating this, within twenty working days. As explained at paragraph 16 above the Commissioner's decision relates to the complainant's refined request of 2 March 2006. DCSF did not claim reliance on section 12 until 18 July 2006. This was well outside of the time limit, and the Commissioner therefore finds that DCSF failed to comply with section 17(5) of the Act.

## The Decision

104. The Commissioner's decision is that DCSF dealt with the following elements of the request in accordance with the requirements of the Act:

- DCSF correctly applied the exclusion under section 12(1) in relation to the request of 2 March 2006
- DCSF correctly withheld some information under sections 36(2)(b)(i) and (ii)
- DCSF correctly withheld some information under section 42(1).

105. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- Section 1(1)(a) in that DCSF wrongly claimed it did not hold information relevant to the request
- Section 16 in that DCSF failed to provide advice and assistance to the complainant
- Section 17(1)(a), (b) and (c) in that DCSF failed to cite section 40(2) in its refusal notice of 29 November 2006
- Section 17(5) in that DCSF failed to provide a refusal notice citing section 12(1) within the statutory time limit
- Section 36(2)(c) in that DCSF failed to obtain a qualified person's opinion as to whether this limb of the section 36 exemption was engaged.

## Steps Required

106. The Commissioner requires DCSF to take the following steps to ensure compliance with the Act:

- To disclose to the complainant the information previously withheld under section 36(2)(c) of the Act; and
- To disclose to the complainant the names of the individuals previously withheld under section 40(2) of the Act.

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

## Failure to comply

108. 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

109. The internal review, requested on 20 June 2006, was completed on 29 November 2006, some five months later. The Code of Practice issued under section 45 of the Act deals with best practice in relation to internal reviews. Paragraph 39 states:

> *"…internal reviews should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue and should encourage a prompt determination of the complaint*".

110. The Commissioner is of the view that DCSF took an excessive time to complete the internal review of the complainant's request. However the Commissioner notes that it was only at this stage that DCSF confirmed that it held information relevant to the request. The Commissioner has seen no evidence to suggest that the delay was deliberate, and he is of the view that in this case the internal review provided an opportunity for DCSF to rectify some of its procedural breaches in relation to earlier requests submitted by the complainant.

**Right of Appeal**

111. 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 1st day of March 2010**

**Signed ……..**

**Steve Wood**
**Assistant Commissioner**

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

**Legal Annex: Relevant statutory obligations**

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**Section 1 General right of access to information held by public authorities**

(1) 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.

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

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and
(b) has informed the applicant of that requirement,

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

**Section 10 - Time for compliance with request**

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

**Section 12 - Exemption where cost of compliance exceeds appropriate limit**

Section 1(1) of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit.

**Section 16 - Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

**Section 17 - Refusal of request**

(1) 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.

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

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

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
(b) contain particulars of the right conferred by section 50.

**Section 36 - Prejudice to effective conduct of public affairs**

(1) This section applies to—

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

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—
(i) the free and frank provision of advice, or
(ii) the free and frank exchange of views for the purposes of deliberation, or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 40 - Personal Information**

(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.

(3) The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene -
(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.]

Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

**Section 42 - Legal professional privilege**

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

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

**Regulation 4 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004** provides that -

(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act, and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

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

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

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

**Data Protection Act 1998**

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

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

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

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

**Schedule 1 – The Data Protection Principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

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

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

**Annex 2: chronology of previous correspondence**

1. On 5 April 2005, the complainant made a request to the Right Honourable Ruth Kelly, the then Secretary of State for Education at DfES. The request was as follows:

> "*Pursuant to the Freedom of Information Act, I request copies of the following information which is in the control of the Department for Education & Skills. I request copies of minutes, memos, letters, emails and other documented information from:*
>
> 3. *the date of issue of the enclosed letter of 7 November 2001 from Estelle Morris to Eric Forth to*
>
> 4. *the date of issue of the enclosed letter of 12 November 2002 from Doug Brown to all Local Education Authorities.*
>
> *Between the 2 letters there was a change of policy by the DfES regarding patents, please send copies of all meetings, discussions and consultations and other information about this change of policy*".

2. On 6 May 2005, DCSF confirmed to the complainant it was unable to provide the information requested, advising the following:

> "*There has been no change of policy by the Department regarding patents, there are no records that fit with your request and the Department is therefore unable to provide the information you asked for*".

3. On 2 June 2005, the complainant expressed dissatisfaction with DCSF's response of 6 May 2005 and reiterated that he wished to have the information he had requested on 15 April 2005.

4. On 9 June 2005, DCSF responded to the complainant seeking clarification as to what specific information was being sought to enable the Department to determine whether the information was available or not. DCSF advised that the complainant's letter of 2 June 2005 was not a new request stating:

> "*It reiterates your original request about an alleged change of policy, which I have already answered*".

5. On 10 June 2005, the complainant clarified his request for information as follows:

> "*Please supply copies of minutes, memos, letters, emails and other documented information regarding DfES policy with respect to patents held by suppliers of goods and services to the DfES between the following dates:*
>
> *(1) The date of issue of the letter of 7 November 2001 from Estelle Morris to Eric Forth, and*

(2) *The date of issue of the letter of 12 November 2002 from Doug Brown to all Local Authorities*".

6. On 21 July 2005, DCSF responded to the complainant, treating the 10 June 2005 request as a new request for information. The Commissioner considers that at this point DCSF, having obtained clarification from the complainant, was in receipt of a valid request and has considered this correspondence to be DCSF's refusal notice under the Act. In response DCSF advised the complainant that to comply with the request would exceed the £600 cost limit. DCSF did not cite any section of the Act in this correspondence for refusal of this information.

7. Further correspondence between the complainant and DCSF has lead to this request which was initially refused under section 12 being refined many times to bring it within what DCSF considered was the cost limit. The Commissioner has treated these refined requests as a new request under the Act and has set out the chronology as regards the refining of the complainant's original request.

*The Refined Requests*

8. On 28 July 2005, the complainant asked that DCSF consider waiving the cost of providing the information requested, or alternatively, the complainant enclosed a fee for the monies quoted by DCSF as being the cost of complying with his request minus the appropriate fees limit of £600.

9. On 26 August 2005, DCSF responded to the complainant returning the payment and confirming that the request was exempt under section 12 of the Act. DCSF however confirmed that it held information falling within the description specified in their request of the 10 June 2005 and invited the complainant to limit the scope of his request.

10. On 13 October 2005, the complainant wrote to DCSF to advise that he had decided to amend his requests made earlier on 2 and 10 June 2005 as follows:

> "*I would be glad if you could kindly please supply our company with the minutes, letters and any other documented information (hard copy) except from the emails and other electronic resources regarding DfES policy with respect to patents held by suppliers of goods and services to the DfES between the following dates:*
>
> *The date of issue of the letter of 7 November 2001 from Estelle Morris to Eric Forth, and the date of issue of the letter of 12 November 2003 from Doug Brown to all Local Authorities*".

11. On 14 November 2005, DCSF responded to the complainant and advised that despite narrowing the request to exclude emails and other electronic resources the request still was refused under section 12 of the Act.

12. On 17 November 2005 the complainant wrote to DCSF further narrowing the scope of his request as follows:

"*Please supply our company with the minutes, memos, letters and any other documented information (hard copy) except from the emails and other electronic resources; regarding DfES policy with respect to patents held by suppliers of goods and services to the DfES from the date of issue of the letter of 12 November 2002 from Doug Brown to all Local Authorities backwards in date (towards 2001) to the extent that the £600 threshold is reached*".

13. On 20 December 2005, DCSF responded to the complainant and whilst acknowledging that he had refined his request, advised that it was still not possible to keep costs within the £600 cost threshold.