

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 1 March 2010

**Public Authority:** The Department of Health  
**Address:** Richmond House  
79 Whitehall  
London  
SW1A 2NS

### Summary

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The complainant requested various pieces of information regarding communication with HM Treasury in relation to the 2002 Spending Review. Specifically, the complainant requested the Bid Letter from the Department of Health (the "DoH"), the Settlement Letter from HM Treasury, and the internal advice provided in relation to the Bid Letter. The DoH refused to disclose this information under sections 35(1)(a) and (b). During the investigation the Commissioner formed the view that some of the withheld information was 'statistical information'. Therefore the DoH applied sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) in relation to that information. After investigating the case the Commissioner upheld the DoH's use of sections 35(1)(a) and (b), 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) in relation to some of the withheld information. However, he also found that in relation to some of the statistical information sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) were not engaged. Therefore this information should be disclosed. Finally, the Commissioner also found that the DoH breached sections 10(1) and 17(1).

### The Commissioner's Role

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

### The Request

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2. In an email dated 13 July 2007 the complainant contacted the DoH and requested the following information:

- (1) “Please send me a copy of the Department of Health’s final submission setting out his Department’s financial needs for the period covered by the 2002 spending review that his Department made to HM Treasury as part of the spending review process before a final settlement was agreed.”

This has been referred to as the ‘Bid Letter’ throughout the rest of this Notice.

- (2) “Please send me a copy of all advice provided by officials to Ministers at the Department of Health [...] on this submission to the Treasury, including the level of funding that it requested for different areas and the reasons why such levels of funding were required.”

- (3) “Please send me a copy of the settlement letter sent to the Department of Health by HM Treasury notifying the Department of the resources it had been allocated for the years covered by the 2002 Spending Review.”

This has been referred to as the ‘Settlement Letter’ throughout the rest of this Notice.

3. The DoH responded in an email dated 7 August 2007 and confirmed that it held information relating to the request. However, it refused to disclose the information, stating that it believed that sections 35(1)(a) and (b) of the Act provided an exemption from disclosure. It also informed her of her right to request an internal review.
4. The complainant contacted the DoH in an email dated 7 August 2007 and requested an internal review. She argued that,

“My request relates to a spending review which took place a full five years ago. Given the time that has lapsed, I am unconvinced that the balance of public interest lies in favour of withholding this information, Ministers have long since moved posts and the period covered by the funding allocations has now finished. The spending review process could adequately be protected by a refusal to release information relating to the most recent spending review.”
5. The DoH carried out an internal review, and responded in an email dated 26 November 2007. It informed the complainant that in its view sections 35(1)(a) and (b) had been correctly applied, and the public interest favoured withholding the information. Finally, it informed the complainant of her right to complain to the Commissioner.

## The Investigation

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### Scope of the case

6. The complainant contacted the Commissioner on 26 November 2007 to complain about the way her request had been handled. The complainant specifically asked the Commissioner to consider whether the DoH was correct to withhold the information in question.
7. During the course of the investigation the DoH sought to rely upon sections 40(2) and 40(3)(a)(i) to withhold the names of civil servants referred to in the withheld information, where those civil servants were below Senior Civil Service grade. Following a query from the Commissioner, the complainant confirmed in an email on 1 July 2009 that she was not seeking access to this information. Therefore the Commissioner has not gone on to consider the DoH's use of sections 40(2) and 40(3)(a)(i) in this case.
8. Further to this, during the course of the Commissioner's investigation the DoH disclosed some of the previously withheld information. Therefore the Commissioner has not gone on to consider the application of sections 35 or 36 to this information.
9. Although not referred to by the complainant, the Commissioner has also considered whether the DoH met with the requirements of sections 1, 10 and 17 of the Act.

### Chronology

10. The Commissioner wrote to the DoH on 20 November 2008 and asked it to provide him with a copy of the withheld information. He also asked it to provide further submissions in regard to the use of sections 35(1)(a) and (b).
11. Following an extension to the deadline for a response, the DoH rang the Commissioner on 27 January 2009 and asked for a further extension. The Commissioner agreed a new deadline of 10 February 2009, but pointed out that unless he received a response by this time he would consider issuing an Information Notice under section 51 of the Act.
12. On 11 February 2009 the DoH provided a copy of the withheld information, together with its submissions to support its use of sections 35(1)(a) and (b). It also informed the Commissioner that if he believed that sections 35(1)(a) and (b) did not apply to any of the withheld information it would seek to rely upon section 36.
13. On 24 March 2009 the Commissioner asked the DoH for further submissions to support its use of sections 35(1)(a) and (b).
14. The DoH responded in a letter dated 22 April 2009, and provided further submissions to support its use of sections 35(1)(a) and (b). It also informed the

- Commissioner that it was now prepared to disclose some of the previously withheld information to the complainant.
15. On 26 June 2009 the DoH confirmed to the Commissioner that the disclosure of this information had taken place.
  16. In an email dated 19 August 2009 the Commissioner contacted the DoH. He stated that after considering the withheld information he had formed the view that some of the withheld information was statistical information for the purposes of section 35(2). Given this, and the DoH's previous reference to section 36, he asked it for further submissions to support its use of section 36. Further to this, he also identified some information which he believed was background empirical evidence, and he invited the DoH to reconsider whether this information should be disclosed.
  17. The DoH responded in a letter dated 14 September 2009. It provided arguments as to why it did not agree with the Commissioner that the information he had identified was statistical information. It provided further submissions to support its use of sections 35(1)(a) and (b), but also informed him that if he maintained the view that the information he had identified was statistical it would seek to rely upon sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to withhold that information. The DoH also noted that it believed that it could have applied section 29(1) and/or section 43 to some of the withheld information – although it did not state that was relying upon these exemptions. Finally, it informed the Commissioner that it was now prepared to disclose additional information it had previously withheld, including the background empirical evidence identified by the Commissioner.
  18. The Commissioner wrote to the DoH on 22 September 2009 and asked it for clarification of its arguments as to why it did not agree with the Commissioner that the information he had identified was statistical. The DoH wrote to the Commissioner on 29 September 2009 and provided further clarification of its arguments.

## Analysis

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### Exemptions

19. As stated above, in this case the DoH has relied upon sections 35(1)(a) and (b) to withhold the information in question. Although it does not agree with the Commissioner's view that some of the information is statistical information for the purposes of section 35(2), it has stated that if the Commissioner retains that view it is relying upon sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to withhold this information.
20. The Commissioner has first considered the application of sections 35(1)(a) and (b) to that information which he does not consider to be statistical information. He

has then gone on to consider the application of sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to the information which he does consider to be statistical.

### **Section 35**

21. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to Ministerial communications.
22. The full text of section 35 can be found in the Legal Annex at the end of the Notice.
23. In order to engage section 35(1)(a) the information in question must relate to the formulation or development of government policy. In order to engage section 35(1)(b) the information in question must relate to Ministerial communications. The Commissioner has first considered whether the withheld information – other than that which he believes is statistical – relates to the formulation and development of government policy.
24. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
25. In this case the Commissioner accepts that the Spending Review process is a reflection of government policy. Given the nature of this request, and having examined the withheld information, the Commissioner believes that this information clearly relates to the formulation and development of this policy. As such, he is satisfied that section 35(1)(a) is engaged in respect of the non-statistical withheld information.
26. The Commissioner has gone on to consider whether the non-statistical withheld information relates to Ministerial communications.
27. The withheld information in this case consists of:
  - The DoH's final submission to HM Treasury setting out its financial needs for the period covered by the 2002 Spending Review. This is the Bid Letter from the Secretary of State for Health to the HM Treasury Minister.
  - The Settlement Letter from the HM Treasury Minister to the Secretary of State for Health.
  - Internal advice provided to the Secretary of State for Health in relation to the Bid Letter.

Having considered the withheld information, and bearing in mind the wording of part (2) of the request, the Commissioner believes that this internal advice is clearly closely linked to the drafting of the Bid Letter.

28. In relation to parts (1) and (3) of the request, as the withheld information consists of correspondence between an HM Treasury Minister and the Secretary of State for Health the Commissioner believes that it clearly falls within the definition of a Ministerial communication. In relation to part (2) of the request, the Commissioner notes that this internal advice was provided to the Secretary of State specifically for the purposes of the drafting of the Bid Letter to the HM Treasury Minister. In reaching a view on whether this internal advice relates to Ministerial communications the Commissioner has been mindful of the views of the Tribunal in *Scotland Office v ICO* [EA/2007/0070]. In this the Tribunal took a broad view of the interpretation of the term 'relates to', and commented that,

“The exemptions in section 35(1) apply where the information “relates to” the matters set out in the sub-sections, so information is exempt if it relates to the formulation or development of government policy in the case of sub-section (a), or relates to Ministerial communication, in the case of sub-section (b). This means that the information in question does not have to be, for example, Ministerial communications; it comes within the scope of the exemption if it “relates to” Ministerial communications...”<sup>1</sup>

Bearing this in mind, the Commissioner is satisfied that the letters between the Secretary of State for Health and the HM Treasury Minister, together with the internal advice to the Secretary of State, **other** than where it falls under the definition of statistical information, relates to Ministerial communications. Therefore the Commissioner is also satisfied that section 35(1)(b) is engaged in respect of this information.

29. Sections 35(1)(a) and (b) are qualified exemptions and are therefore subject to the public interest test. The Commissioner must therefore consider where the balance of public interest lies and decide if the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information.
30. Given the circumstances of this case, the Commissioner has first listed the public interest factors in favour of disclosure, and has then moved on to consider the public interest factors in favour of maintaining the sections 35(1)(a) and (b). He has then gone on to consider the balance of the public interest in relation to each of these exemptions in turn.

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

31. The DoH has stated that it believes that the public interest factors in favour of disclosure are:

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<sup>1</sup> EA/2007/0070, para 50.

- Disclosure of information in relation to a previous Spending Review would help ensure that the Government was accountable for the decisions it had made and would enable full public scrutiny of the decision making process.
- There is a public interest in greater transparency of Spending Review decisions made by the Government in order to enable more informed debate about these, given their significant impact on overall public spending and the services people receive.
- There is a public interest in being able to review the advice given to Ministers to assess its quality and the quality of subsequent discussions to enable public scrutiny of whether the processes which inform Spending Review decisions are effective.

32. Given the significant role played by the Spending Review process in the spending of public money and the allocation of budgets to government departments (and the significant impact that this may have on future policy development by those departments) the Commissioner believes that there is a strong public interest in increasing the transparency of this process. In particular he believes that there is a strong public interest in increasing public knowledge and understanding of the way in which the final outcome of the 2002 Spending Review was reached, and in increasing the public's ability to assess the quality of advice given to the Secretary of State for Health when he submitted the DoH's Bid Letter. The Commissioner believes that the disclosure of the withheld information would increase the public understanding of the issues that were considered and discussed, prior to the publication of the 2002 Spending Review, which would in turn increase the public understanding in the formulation and development of this government policy. This, he believes, would also lead to increased participation in the public debate about the formulation and development of this Spending Review. Finally, the Commissioner believes that there is a public interest in increasing the public's understanding of what resources the DoH asked for, what it did or did not get, and how it made its case for spending priorities.

### **Public interest arguments in favour of maintaining the exemptions**

33. The DoH has stated that it believes that the public interest factors in favour of maintaining sections 35(1)(a) and (b) are:
- Disclosure of the withheld information would undermine the convention of collective responsibility.
  - There is a public interest in maintaining good government, which is dependent on good decision making based on the best advice available and a full consideration of all the options. During the Spending Review process, Ministers and officials need to be able to conduct rigorous assessments of their options and proposals. Disclosure of the withheld information would be likely to reduce the quality of this advice, as the individuals concerned would be inhibited from expressing their opinions freely and frankly.
  - Disclosure could inhibit Ministers or civil servants from conducting a full consideration of all the options, meaning that decision making will not be based on all available evidence and will become poorer.



- It is in the public interest that the Government is able to plan and deliver its spending priorities efficiently and effectively. This requires scrutiny of public spending to ensure Departments are discharging their functions in an efficient and effective way and are not overspending against predetermined cash limits. The Spending Review process provides these functions through the scrutiny and monitoring of Departments' spending plans by HM Treasury. Exposure of the process and the detailed negotiations would be harmful to the formulation and development of government's policies.
  - The Spending Review process is a crucial part in the development of government policies in that, ultimately, HM Treasury is tasked with recommending the allocation of resources to different Departments according to their analysis of where that spending will do most good. Only robust statements of what will be sacrificed in the lower growth scenario, when replicated across all spending Departments, enables HM Treasury to form a picture of the pressures 'at the margin'. Anything which undermines their ability to do this by compromising the evidence presented by individual Departments is counter to the public interest.
  - The public interest in transparency is somewhat met by the fact that the outcome of Spending Reviews are fully reported in annual Departmental Reports and HM Treasury Public Expenditure Statistical Analyses, Budget and pre-Budget reports. These publications allow the public, commentators, academics, private sector investors and international organisations to determine how well the Government is managing public spending.
34. The Commissioner believes that the factors identified by the DoH which favour maintaining sections 35(1)(a) and (b) can loosely be grouped under four headings. These are that disclosure would:
- undermine the convention that Ministers are collectively responsible for policy and its delivery (and therefore require a 'safe space' to formulate, develop and make decisions, and defend them);
  - inhibit the free and frank discussion of all spending options, and damage the quality and candour of communications between Ministers, and between Ministers and their advisors (the chilling effect argument);
  - undermine the Spending Review process, and HM Treasury's ability to scrutinise public spending; and
  - lead to poorer decision making.
35. In relation to the argument about collective responsibility of Ministers the Commissioner believes that this can be expanded somewhat. In particular he believes that the public interest in maintaining the convention of collective responsibility covers two separate, though related, public interest arguments.
36. Firstly there is a public interest in protecting the safe space required by Ministers to engage on frank and candid debate and reach a collective position in relation to a particular issue.



37. Secondly, there is a public interest in allowing Ministers to promote and defend an agreed position without revealing divergent views. Not allowing this could potentially result in valuable government time being spent publicly debating (and defending) views that have only ever been individual views, rather than government positions, and in commenting on the significance of, and implications of, a divided Cabinet. In essence, it is not in the public interest that disclosures of information under the Act would undermine confidence so much that it is unable to devote sufficient attention to the process and business of governing.

### **Balance of the public interest arguments**

38. The Commissioner recognises that the DoH's main argument to support its use of sections 35(1)(a) and (b) is that disclosure could undermine the convention of collective responsibility. For this reason he has gone on to consider the balance of the public interest arguments in relation to section 35(1)(b) first.

#### Balance of public interest in relation to section 35(1)(b)

39. As noted at paragraph 33 above, the DoH has argued that the disclosure of the withheld information would undermine the convention of collective responsibility. The Commissioner has considered this as the primary public interest argument in favour of withholding the information in question under section 35(1)(b).
40. The convention of collective responsibility allows government to be able to engage in free and frank debate in order to reach a collective position and to present a united front after a decision is made. The Tribunal in *Scotland Office v ICO* [EA/2007/0070] provided the following description,

“...the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed.”<sup>2</sup>

The Commissioner believes that the convention of collective responsibility can extend beyond immediate members of the Cabinet to all Ministers. In this case the withheld information consists of letters between the Secretary of State for Health and an HM Treasury Minister, as well as internal advice to the Secretary of State directly relating to his letter to the other Minister. The Commissioner is satisfied that the information represents a substantive and significant communication in relation to government policy, and he therefore believes that it is relevant in considering the public interest test in relation to the withheld information in this case to consider the convention of collective responsibility.

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<sup>2</sup> EA/2007/0070, para 82.

41. In reaching a view on this public interest argument the Commissioner is mindful of the factors identified by the Tribunal in *Scotland Office v ICO* [EA/2007/0070], which stated that,

“Where Ministerial communication does engage the convention of collective responsibility, it is necessary, in particular, to assess whether and to what extent, the collective responsibility of Ministers would be undermined by disclosure. Factors such as the context of the information, whether it deals with issues that are still “live”, the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest balance.”<sup>3</sup>

Therefore, how much weight the public interest in maintaining the convention of collective responsibility will carry in any individual case, will vary depending on the specific circumstances of the case and the public interest in disclosure.

42. In relation to the context of the information, the Commissioner has noted the DoH's arguments that the letters between the Ministers are written in a robust style. In addition to this, he also notes that the internal advice provided to the Secretary of State for Health was also written in a similar 'robust style'. The withheld information represents a tough negotiation process, in which Ministers from various departments conduct robust negotiations with HM Treasury, which is, in turn, trying to ensure efficiency and value for money. The Spending Review process represents a key core process for the DoH, as it affects its budgetary levels for several years to come. Given the fact that the Spending Review process has a central role in the expenditure of public money across government departments (which in the DoH's case would also affect NHS funding levels), which, in turn, affects future government policies, whilst raising issues of efficiency, the Commissioner is persuaded that the context of this information is one of high political sensitivity. Although he accepts that request was made five years after the completion of the 2002 Spending Review, for the reasons given in the following paragraph he believes that the context of the withheld information remained sensitive at the time of the request.
43. The complainant has pointed out that the request relates to a Spending Review which had concluded five years prior to the request being made in 2007. In response to this the DoH has presented two arguments. Firstly it has argued that the funding settlements announced in the 2002 Spending Review were still live issues at the time of the request, as it had announced funding settlement growth for the NHS for the five years 2003/2004 to 2007/2008. Secondly it also argued that whilst the 2002 Spending Review was indeed completed at the time of the request, the nature of the Spending Review process means that one feeds directly into the next one. In this way, the DoH has argued, Spending Reviews relate to a 'non-time limited fiscal process'.

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<sup>3</sup> EA/2007/0070, para 87.

44. Having considered the DoH's arguments, and the contents of the withheld information, the Commissioner is persuaded that the Spending Review process has a cyclical nature – in which one Spending Review feeds into the next one – and in which issues raised in one Spending Review could remain live and sensitive for several years to come. Therefore the Commissioner believes that information relating to one Spending Review process can remain sensitive after its publication. He has gone on to consider, later in this Notice, whether the disclosure of information relating to one Spending Review would be likely to impact on the conduct of a future one.
45. In relation to the extent of public interest and debate in the issues referred to in the withheld information, as the Commissioner has noted at paragraph 32 above, he believes that given the role of the Spending Review process in the spending of public money and the allocation of budgets to government departments, there is a significant public interest in increasing the transparency of this process. However, he has not been made aware, by either party in this case, of a specific issue in relation to this particular Spending Review, whilst noting that most spending reviews will contain difficult decisions about public spending.
46. In relation to the question of whether the withheld information reveals the specific views of the Ministers concerned, clearly the Commissioner cannot comment in great detail on the content of the information itself as to do so would reveal the contents of the withheld information. However, he notes that the specific views of the Secretary of State for Health are identifiable in the Bid Letter, and the HM Treasury Minister's views are identifiable in the Settlement Letter. Furthermore, the internal advice, referred to in part (2) of the request, gives an insight into the views expressed by the Secretary of State for Health in the Bid Letter.
47. Having considered the withheld information, the Commissioner accepts that at the time of the request both Ministers were still active in politics, and that both are identifiable.
48. In addition to the issue of maintaining the convention of collective responsibility, the DoH has also argued that disclosure would have an inhibitory effect on Ministers expressing their views freely and frankly. In particular the DoH has argued that the Spending Review process is a process in which tough choices have to be made, and in which both Ministers discuss these issues in a free, frank and robust manner. The disclosure of the withheld information could inhibit the manner in which such tough choices are discussed in the future. The Commissioner believes that this is a chilling effect argument.
49. A chilling effect argument is directly concerned with the potential loss of frankness and candour in debate / advice which, as a result, would lead to poorer quality advice and less well formulated policy and decisions. This, it is argued, would not be in the public interest.
50. In considering this argument in relation to the information withheld under section 35(1)(b) the Commissioner has been mindful of the views of the Tribunal in *DFES v ICO & The Evening Standard* [EA/2006/0006] which stated that,

“The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.”<sup>4</sup>

51. In reaching a view on the weight to attach to this argument in balancing the public interest the Commissioner has been mindful of the contents of the withheld information. Although he is unable to discuss in detail the contents of the withheld information, the Commissioner notes that it reflects the tough negotiation process of a Spending Review, and includes discussions around efficiency and prioritisation of resources, etc which are discussed in a free, frank and robust manner. As noted above, the Commissioner believes that discussions around the expenditure of public money, and its impact on the implementation of DoH policies and NHS funding, are politically sensitive.
52. With regard to the timing of the request, and the effect that this might have on any ‘chilling effect’ the Commissioner again notes that complainant’s argument that the withheld information relates to a Spending Review process which had been completed five years before the request was made. When considering ‘chilling effect’ arguments the Commissioner considers that that as the argued impact gets wider, it will be more difficult for convincing arguments to be sustained. This may particularly be the case for the widest ranging arguments – that disclosures relating to policies, where the process of formulation or development is complete, and historic issues would affect the frankness and candour of contributions to future live policies and debates. However, in this case and as noted above, the Commissioner is persuaded that the Spending Review process has a cyclical nature – in which one Spending Review feeds into the next one – and in which issues raised in one Spending Review could remain live and sensitive for several years to come. Therefore, due to the particular circumstances of this case, the Commissioner is persuaded that the disclosure of the withheld information would be likely to have a chilling effect on Ministers in future Spending Review processes.
53. After considering the DoH’s arguments the Commissioner also believes that it has argued that there is a ‘safe space’ argument in favour of maintaining the exemption. This, he believes, ties into the convention of collective responsibility, as it is based on the premise that it is in the public interest for Ministers to be able to have a full and open debate away from external scrutiny, to enable them to reach an agreed position. In reaching a view on this the Commissioner has been mindful of the Tribunal’s views in *Scotland Office v ICO* [EA/2007/0070] where it stated that,

“...as with formulation of government policy under section 35(1)(a), timing is likely to be of paramount importance. Where the Ministerial communication is in relation to an issue that was “live” when the request was made, the public interest in preserving a “safe space” for Ministers to have a full and open debate, and the public interest in the Government

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<sup>4</sup> EA/2006/0006, para 75(i).

being able to come together successfully to determine what may, in reality, have been a contentious policy issue, may weigh the balance in favour of maintaining the exemption. However, that does not detract from the need to assess each case on its own circumstances.”<sup>5</sup>

As stated above, the Commissioner has noted that the 2002 Spending Review had completed five years before the request was made. However, the Commissioner is persuaded that the Spending Review process has a cyclical nature. Therefore, due to the particular circumstances of this case, the Commissioner is persuaded that the disclosure of the withheld non-statistical information would be likely to impact on the safe space needed by Ministers for the next Spending Review.

54. In balancing these factors against the public interest in disclosure the Commissioner believes that there is a significant public interest in increasing the public's understanding of the Spending Review process. In particular he believes that there is a strong public interest in increasing public knowledge of the decision making process related to health funding, given the importance of the NHS in the life of the nation. These public interest arguments are particularly strong given the fundamental role played by the Spending Review process in the allocation of budgets to the DoH, and the impact that this will have on the future activities of the DoH.
55. However, despite these strong public interest factors in favour of disclosure, the Commissioner also believes that the public interest factors in favour of maintaining this exemption to be significant. In particular he believes that the significant public interest in maintaining the convention of collective responsibility, and the likely 'chilling effect' on the provision of free and frank advice in this important area of policy development particularly weighty. This is especially the case given the central role played by the Spending Review process in setting departmental budgets, and the knock on affect this has on departmental spending, emerging departmental policies, efficiency drives, etc. Taking this into account the Commissioner is persuaded that the public interest in avoiding likely prejudice to this important process particularly weighty.
56. On balance the Commissioner has therefore concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(b) in relation to the withheld non-statistical information, that this exemption applies to, outweighs the public interest in disclosing this information.

Balance of public interest in relation to section 35(1)(a)

57. In considering the balance of the public interest in relation to section 35(1)(a) the Commissioner has again noted that although the request was made five years after the 2002 Spending Review, he is persuaded that the Spending Review process has a cyclical nature – in which one Spending Review feeds into the next one – and in which issues raised in one Spending Review could remain live and sensitive for several years to come.

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<sup>5</sup> EA/2007/0070, para 88.



58. The Commissioner also believes that the DoH's arguments regarding the convention of collective responsibility are also a valid public interest factor in favour of maintaining section 35(1)(a). As noted at paragraphs 40 to 47 above, the Commissioner believes that this is a substantive and weighty factor in favour of maintaining the exemption.
59. In addition to this, the Commissioner notes that policy makers, including Ministers, need a private space to discuss the development and formulation of government policy freely and frankly, without fear that such discussions will be subject to public scrutiny. Such debate makes for a robust and strong policy making process and it is not in the public interest that this process is undermined. Such a need for a private 'safe space' is particularly true when policy makers are considering and discussing difficult and controversial decisions such as those surrounding the Spending Review process. In reaching a view on the weight to attach to this 'safe space' argument the Commissioner has been mindful of the conclusions he has reached at paragraph 53 above.
60. In addition to this, the DoH has argued that the disclosure of the withheld information would have a 'chilling effect' by limiting the free and frank discussion of policy options in relation to future Spending Reviews. This, the DoH has argued, would be likely to prejudice the Spending Review process, as it relies on free and frank discussions in order to achieve the best outcomes. As this process plays a crucial part in the development of government policies, prejudice to this process would not be in the public interest.
61. In reaching a view on the weight to attach to the 'chilling effect' arguments when balancing the public interest the Commissioner is mindful of the conclusions he has reached above in relation to the DoH's application of section 35(1)(b), and the weight he attached to those arguments. In particular he has noted his comments at paragraphs 48 to 52 above.
62. In balancing these factors against the public interest in disclosure the Commissioner has been mindful of the points he has made at paragraphs 31, 32 and 54 above, in favour of disclosure. In particular he believes that there is a significant public interest in increasing the transparency and public understanding of the Spending Review process.
63. Nevertheless, after balancing the public interest factors, the Commissioner believes that the public interest in maintaining section 35(1)(a) in relation to the withheld non-statistical information, that this exemption applies to, outweighs the public interest in disclosing this information. In reaching this view, the Commissioner has been mindful of the points he has made at paragraph 55 above.
64. The Commissioner has detailed the information that he believes should be withheld under sections 35(1)(a) and (b) in the Confidential Annex attached to this Notice.



### Statistical Information

65. As noted at paragraph 16 above, after considering the withheld information the Commissioner believes that some of it falls under the definition of 'statistical information' for the purposes of section 35(2) of the Act.
66. Section 35(2) states that once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded –
- for the purposes of section 35(1)(a) as relating to the formulation or development of government policy, or
  - for the purposes of section 35(1)(b) as relating to Ministerial communications.
67. Therefore in relation to this information, as the 2002 Spending Review process had clearly been completed at the time of the request, the DoH is unable to rely upon sections 35(1)(a) or (1)(b) to withhold this information. As noted at paragraph 17 above, the DoH has relied upon sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to withhold this information.
68. In reaching a view on whether some of the withheld information was statistical, the Commissioner has been guided by the definition set out in the guidance issued by the Ministry of Justice,<sup>6</sup> and relied upon by the Tribunal in *DWP v ICO* [EA2006/0040].<sup>7</sup> This states that,

“Statistical information used to provide an informed background to government policy and decision making or in ministerial communications will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, and so on, to be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being (i) derived from some recorded or repeatable methodology, and (ii) qualified by some explicit or implied measures of quality, integrity, and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the limitations of the methodology, and the relevant measures of quality, and so on, allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy.”

<sup>6</sup> <http://www.justice.gov.uk/guidance/docs/foi-exemption-s35.pdf>

<sup>7</sup> EA/2006/0040, paras 20 and 77.

69. In reaching a view on which parts of the withheld information falls under this definition the Commissioner finds that the information uses mathematical principles to develop information such as estimates and projections. Some of information also considers relationships between different sets of statistical information. Some of this statistical is represented in tabular form and some is presented in the text of the documents, supporting arguments or conclusions.
70. A list of the information that he considers statistical is detailed in the Confidential Annex attached to this Notice.
71. The Commissioner has therefore gone on to consider the application of section 36 to this information.

### Section 36

72. In this case the DoH has relied upon sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to withhold the information that the Commissioner believes to be statistical.
73. The relevant parts of section 36(2) state that,
  - “Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
    - (a) would, or would be likely to, prejudice-
      - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or  
[...]
    - (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.”
74. In addition to this, section 36(4) is relevant to this case. Section 36(4) states that,
  - “In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of the qualified person” .”
75. Therefore, as the information in question is statistical information, under section 36(4) there is no requirement for the ‘reasonable opinion of the qualified person’ for the provisions of section 36(2) to be engaged. The DoH has confirmed that it has not sought the reasonable opinion of the qualified person in applying these exemptions.

76. The full text of section 36 is available in the Legal Annex at the end of this Notice.

77. The DoH has argued that if the statistical information were to be disclosed, it believes that it would be likely to prejudice:

- the maintenance of the convention of the collective responsibility of Ministers of the Crown,
- the free and frank provision of advice,
- the free and frank exchange of views for the purposes of deliberation, and/or
- would otherwise prejudice the effective conduct of public affairs.

78. The DoH has argued that the Spending Review process should take place in a protected space, without the risk that such material might be subject to public scrutiny in the future, as,

“The expectation of publication and scrutiny by a range of vested interests could undermine the objectivity of the process and reduce the range of options under consideration. It would lead to more guarded communication and inhibit the ability of officials and Ministers to express themselves openly, honestly and completely, or to explore extreme options. In this sense, section 36(2)(b)(i) and (ii) are clearly engaged...”

79. The DoH has gone on to argue that,

“...the candour and rigour of the [Spending Review] process is essential if HM Treasury is to fulfil its difficult balancing act of prioritising and allocating finite resources between different Departments. Discussions between Departments and HMT would not be couched in such candid terms if they were to be released into the public domain. The prospect of disclosure would undermine the unprejudiced examination of spending priorities because Ministers will be less willing to spell out the risks of bad outcomes arising from lower levels of funding...Disclosure will inhibit the full exploration of radical options and work against the reconsideration of options that have been rejected in the past...The danger in releasing such information is that it is likely to constrain such communications in the future, thus preventing HM Treasury from allocating resources according to best intelligence of marginal costs and benefits.”

80. In addition to this, the DoH has also provided the Commissioner with some specific arguments relating to particular sections of the statistical information. However, due to the nature of these comments, the Commissioner is unable to refer to them in detail in this Notice, as to do so may give away some of the contents of the withheld statistical information. However, these arguments are detailed in paragraph (3) of the Confidential Annex attached to this Notice. After considering these arguments he is satisfied that they go towards supporting the DoH's arguments that disclosure of (at least some of) this information would be likely to cause the likely prejudice argued above.

81. In support of its use of section 36(2)(a)(i) the DoH has referred the Commissioner to the views of the Tribunal in *Scotland Office v ICO* [EA/2007/0070], as quoted at paragraph 40 above. It has argued that disclosure in this case would put the convention of collective responsibility in jeopardy, and this would not be in the public interest.
82. In order for these exemptions to be engaged disclosure would have to, or be likely to,
- prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown,
  - inhibit the free and frank provision of advice,
  - inhibit the free and frank exchange of views for the purposes of deliberation, and/or
  - otherwise prejudice the effective conduct of public affairs.

In this case, the DoH has argued that prejudice/inhibition would be likely.

83. Therefore, in considering the application of these exemptions the Commissioner has first considered whether the prejudice or inhibition argued by the DoH would be likely to occur.
84. In reaching a decision on the question of the likelihood of prejudice/inhibition the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office* [2003] EWHC 2073, and followed by the Tribunal in the case of *John Connor Press Associates Limited v ICO* [EA/2005/0005], where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that, "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."<sup>8</sup>
85. When considering the effects of disclosing statistical information the Commissioner has accepted that data such as assumptions and estimates being used in the process of developing statistical information will reveal the intentions of Ministers or officials and therefore substantive aspects of the negotiations that were taking place. This is only true for some of the statistical information.
86. In relation to the DoH's use of section 36(2)(a)(i), after considering the contents of the withheld information, the Commissioner believes that the disclosure of some of the statistical information would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown. In reaching this conclusion the Commissioner has been mindful of his comments about potential prejudice to the convention of collective responsibility at paragraphs 40 to 46 above, as well as the contents of some of the statistical information.
87. In relation to the DoH's use of section 36(2)(b)(i) the Commissioner believes that this would be most applicable to the statistical information that falls under the

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<sup>8</sup> EA/2005/0005, para 15.

scope of part (2) of the request (i.e. the provision of advice from DoH officials to the Secretary of State for Health). The DoH's arguments regarding this, as referenced at paragraphs 78 and 79 above, are very similar to the 'chilling effect' and 'safe space' arguments advanced by the DoH in relation to sections 35(1)(a) and (b). In reaching a view on whether the disclosure of some of the statistical information would be likely to cause this prejudice the Commissioner has been mindful of his previous comments about these arguments at paragraphs 48 to 53, and 59 to 60. Bearing in mind the contents of some of the statistical information; the political sensitivities of issues surrounding funding, the expenditure of public money, and suggested attempts to improve efficiency; together with the robust nature of the Spending Review process; the Commissioner believes that the disclosure of some of the withheld statistical information would be likely to prejudice the free and frank provision of advice. Therefore he is satisfied that section 36(2)(b)(i) is engaged in relation to some of the withheld statistical information.

88. In relation to the DoH's use of section 36(2)(b)(ii) the Commissioner believes that this would be most applicable to the statistical information that falls under the scope of part (1) of the request (i.e. statistical information attached to the Bid Letter from the Secretary of State for Health to the HM Treasury Minister). Again, the DoH's arguments regarding this, as referenced at paragraphs 78 and 79 above, are very similar to the 'chilling effect' and 'safe space' arguments advanced by the DoH in relation to sections 35(1)(a) and (b). In reaching a view on whether the disclosure of some of the statistical information would be likely to cause this prejudice the Commissioner has been mindful of his previous comments about these arguments at paragraphs 48 to 53, and 59 to 60. Bearing in mind the contents of some of the statistical information; the political sensitivities of issues surrounding funding, the expenditure of public money, and suggested attempts to improve efficiency; together with the robust nature of the Spending Review process, the Commissioner believes that the disclosure of some of the withheld information would be likely to prejudice the free and frank provision exchange of views for the purposes of deliberation. Therefore he is satisfied that section 36(2)(b)(ii) is engaged in relation to some of the withheld statistical information.
89. In relation to the DoH's use of section 36(2)(c), it has provided some arguments which, due to their nature, the Commissioner is unable to quote in this Notice, as to do so may give away some of the contents of the withheld statistical information. These arguments are detailed in the Confidential Annex attached to this Notice. After considering these arguments the Commissioner is persuaded that the disclosure of some of the withheld statistical information would be likely otherwise to prejudice the effective conduct of public affairs. Therefore the Commissioner is satisfied that this exemption is engaged in relation to some of the withheld statistical information.
90. Finally, in relation to a small amount of the withheld statistical information, after considering the DoH's arguments and the contents of the information itself, the Commissioner is not persuaded that the disclosure of this information would be likely to have any of the prejudicial affects as set out at paragraph 82 above. Therefore the Commissioner is not persuaded that sections 36(2)(a)(i), 36(2)(b)(i)

and (ii), and/or 36(2)(c) is engaged in respect to some of the withheld statistical information, and as such he believes that this information should be disclosed.

91. The information which the Commissioner believes does not engage sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and/or 36(2)(c) (and should therefore be disclosed), is detailed in the Confidential Annex attached to this Notice.
92. In relation to the information the Commissioner believes does engage sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and/or 36(2)(c), he has gone on to consider whether the public interest in maintaining these exemptions outweighs the public interest in disclosure.

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

93. The public interest arguments in favour of disclosing the requested information are listed at paragraphs 31 and 32 above. In addition to these, the Commissioner believes that there is a strong public interest in increasing public understanding of the statistical information which was used to inform the decisions made in the 2002 Spending Review.

### **Public interest arguments in favour of maintaining the exemptions**

94. As noted at paragraphs 33 and 34 above, the DoH has made a number of arguments as to why it believes that the public interest in maintaining the exemptions outweigh the public interest in disclosure.
95. Whilst these arguments have been made primarily in order to support the use of sections 35(1)(a) and (b), the Commissioner believes that some of them are also applicable to its use of sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and/or 36(2)(c).
96. In particular, the DoH has argued that it is in the public interest to avoid undermining the convention of collective responsibility, and, given the importance of the Spending Review process, in avoiding any likely prejudice to that process. This, the DoH believes, would be likely as, given the political sensitivities of the issues discussed in this process and the fact that the process relies on matters being discussed in a robust and frank manner, disclosure of this withheld statistical information would be likely to have an inhibitory affect on the individuals involved in that process.

### **Balance of the public interest arguments**

97. In relation to section 36(2)(a)(i) the Commissioner has already considered in detail the weight to attach to the public interest argument for maintaining the convention of collective responsibility (see paragraphs 40 to 56 above). Whilst he accepts that this was in relation to the maintenance of a different exemption, he believes that the public interest arguments in favour of maintaining sections 36(2)(a)(i) and 35(1)(a) to be similar. In particular he has again noted the significant public interest in maintaining the convention of collective responsibility. Whilst he accepts that there are strong public interest factors in favour of disclosing this statistical information, the Commissioner has concluded that, in the



- circumstances of this case, the public interest in maintaining section 36(2)(a)(i) outweighs the public interest in disclosing this information.
98. In relation to section 36(2)(b)(i) the Commissioner fully accepts that there is a public interest in the free and frank provision of advice. It is important for decision makers to be provided with the best possible advice which, at times can include difficult or controversial issues. The Commissioner believes that it is in the public interest that advice on truly sensitive and important issues is provided in an unfettered manner, in order to allow for a fully informed decision to be made.
99. Whilst the Commissioner believes that there are significant public interest factors in favour of disclosure, taking into account the chilling effect arguments made by the DoH (and discussed in detail at paragraphs 48 to 53 above), and the central role played by the Spending Review process in setting departmental budgets (and the knock on affect this has on departmental spending, emerging departmental policies, efficiency drives, etc...) he has concluded that the public interest in maintaining section 36(2)(b)(i) outweighs the public interest in disclosing this information.
100. In relation to section 36(2)(b)(ii) the Commissioner fully accepts that there is a public interest in the free and frank exchange of views for the purposes of deliberation. In this instance the statistical information in question is contained in the Bid Letter from the Secretary of State for Health to the HM Treasury Minister. The information forms an integral part of the Secretary of State's bid to HM Treasury for the future funding of the DoH. Given the important role of the Spending Review process, the Commissioner believes that there is a weighty public interest in the Ministers involved in that process being able to exchange views in a free and frank manner.
101. As previously noted, the Commissioner believes that there are significant public interest factors in favour of disclosing the statistical information that fed into the 2002 Spending Review process. However, taking into account his previous conclusions on the DoH's chilling effect arguments, and the significance of the Spending Review process, the Commissioner believes that the public interest in maintaining section 36(2)(b)(ii) outweighs the public interest in disclosing this information.
102. In relation to section 36(2)(c), the Commissioner believes that the public interest in maintaining section 36(2)(c) outweighs the public interest in disclosing this information.
103. The information which the Commissioner believes should be withheld under sections 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), and 36(2)(c) is detailed in the Confidential Annex attached to this Notice

### **Procedural Requirements**

104. Section 1(1) of the Act states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

105. Section 10(1) of the Act states that

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

106. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under any of the exemptions cited by the DoH, he believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The DoH’s failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the DoH also breached section 10(1).

107. The Commissioner has also considered whether the DoH has complied with its obligations under section 17(1) of the Act.

108. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.

109. During the course of the investigation the DoH sought to rely upon sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to withhold some of the requested information. However, it did not cite any of these exemptions in the refusal notice or the internal review. For this reason the Commissioner believes that the DoH did not comply with the requirements of section 17(1) of the Act.

110. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

## The Decision

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111. The Commissioner’s decision is that the DoH dealt with the following elements of the request in accordance with the requirements of the Act:

- Some of the requested information was correctly withheld under sections 35(1)(a), 35(1)(b), 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), and 36(2)(c).

112. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The DoH did not deal with the request for information in accordance with section 1(1)(b) insofar as it inappropriately relied upon sections 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii), and 36(2)(c) to withhold some of the requested information. In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).
  - The DoH also failed to meet the requirements of section 17(1) in that it failed to notify the complainant that it was also seeking to rely upon sections 36(2)(a)(i), 36(2)(b)(i) and (ii), and 36(2)(c) to withhold some of the requested information.

### Steps Required

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113. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:

The DoH should disclose the withheld information as set out in the Confidential Annex attached to this Notice.

114. The DoH must take the steps required by this Notice within 35 calendar days of the date of this Notice.

### Failure to comply

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

## Right of Appeal

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116. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 1<sup>st</sup> day of March 2010**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal Annex

### Section 1

- (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 the 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.

- (4) The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
  - (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

### Section 10

- (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.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on

which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

**(3)** If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

**(4)** The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.

**(5)** Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.

**(6)** In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

## **Section 17**

**(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.



**(2)** Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

**(3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

**(4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**(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.

**(6)** Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

**(7)** A notice under section (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 35

- (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,
  - (b) Ministerial communications,
  - (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
  - (d) the operation of any Ministerial private office.
- (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-
  - (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
  - (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
- (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.
- (5) In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

### Section 36

(1) This section applies to-

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

(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-

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

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".
- (5) In subsections (2) and (3) "qualified person"-
- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
  - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
  - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
  - (d) in relation to information held by the House of Commons, means the Speaker of that House,
  - (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
  - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
  - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
  - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
    - (i) the public authority, or
    - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
  - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
  - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
  - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
  - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
    - (i) the public authority, or
    - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
  - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
  - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
  - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
    - (i) a Minister of the Crown,
    - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
    - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."
- (6) Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
  - (b) may be general or limited to particular classes of case, and
  - (c) may be granted subject to conditions.
- (7)** A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
- (a) disclosure of information held by either House of Parliament, or
  - (b) compliance with section 1(1)(a) by either House,
- would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.