

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

The complainant made a request to the Department of Health (the "DoH") for correspondence between it and HM Treasury regarding the DoH's "near cash overspend" in 2005-6. Specifically the complainant requested information from January to July 2006. The DoH refused to disclose this information under sections 35(1)(a) and (b). During the investigation of the case the DoH informed the Commissioner that it was also relying upon section 31(1)(c) to withhold some of the information. After investigating the case the Commissioner concluded that the majority of the information should be withheld under sections 35(1)(a) and (b). However, he also decided that some information previously withheld under section 35(1)(a) should be disclosed. He also found that the DoH had not met with the requirements of sections 10(1) and 17(1).

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.

The Request

2. In an email dated 2 July 2007 the complainant contacted the DoH and requested the following information:
 - (1) "Please send me a copy of all correspondence (including emails, letters or other papers) from officials or Ministers at the [DoH] to officials or Ministers at HM Treasury regarding the [DoH's] near cash overspend in 2005-6. I

would like this request to be limited to material dated between January 2006 and July 2006.”

- (2) “Please send me a copy of all correspondence (including emails, letters or other papers) from officials or Ministers at HM Treasury to officials or Ministers at the [DoH] to regarding the [DoH’s] near cash overspend in 2005-6. I would like this request to be limited to material dated between January 2006 and July 2006.”
3. The DoH responded in an email dated 17 July 2007 and refused to disclose the information, stating that it believed that sections 35(1)(a) and (b) applied. It also informed her that after carrying out the public interest test, it believed that the public interest favoured withholding the information. Finally it informed her of her right to request an internal review.
4. The complainant contacted the DoH in an email dated 17 July 2007 and requested an internal review. She argued that,

“I am unconvinced by the arguments you present in claiming that the balance of public interest lies in withholding this information, and withholding it in full. The information I have requested relates to the [DoH’s] financial position for a year for which the accounts have long been finalised and measures to deal with the overspend have now been taken so releasing this information would not undermine this process.”
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

Scope of the case

6. The complainant contacted the Commissioner on 26 November 2007 to complain about the way her request for information 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 section 35 in relation 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 that it provide further submissions in regard to the use of sections 35(1)(a) and (b).
11. There followed a series of communications between the Commissioner and the DoH in regard to the provision of this information. On 27 January 2009 the Commissioner informed the DoH that unless he received a substantive response by no later than 10 February 2009 he would issue an information notice under section 51 of the Act.
12. The DoH provided a substantive response in a letter dated 11 February 2009, together with a copy of the withheld information. It stated that it believed that sections 35(1)(a) and (b) applied to some of the withheld information, and sections 36(2)(b) and (c) applied to other parts of the withheld information. It also stated that in relation to some of the withheld information, if the Commissioner did not accept that sections 35(1)(a) and (b) applied, it would rely upon sections 36(2)(b) and (c) in the alternative.
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 stated that it now sought to rely upon sections 35(1)(a) and (b) to withhold all of the requested information. It also informed the Commissioner that it was relying upon section 31(1)(c) to withhold some of the information in question. It also referred in passing to section 29(1)(b) and section 43 in relation to some of the withheld information, although it did not state that it was seeking to rely upon these exemptions.
15. In an email dated 23 September 2009 the Commissioner contacted the DoH. He stated that after considering the withheld information he believed that some of the withheld information was factual evidence that had been used, or was intended to be used, in making the decisions that had been made in relation to the near cash overspend. Section 35(4) of the Act states that in considering the public interest test in relation to section 35, 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 making. Given the effect of section 35(4) in relation to information of this nature the Commissioner invited the DoH to reconsider whether this information should be disclosed.

16. The DoH responded in a letter dated 6 October 2009 and provided further submissions to support its use of sections 35(1)(a) and (b). It also provided further arguments in relation to some of the information the Commissioner had identified as factual evidence. Finally, it informed him that it was now prepared to disclose some of the previously withheld information.
17. Following a telephone conversation, the DoH emailed the Commissioner on 11 November 2009. It agreed that some of the information the Commissioner had identified was factual, and that that information had now been disclosed to the complainant. The DoH provided further confirmation of what it had disclosed in an exchange of communications on 13 November 2009. Following a further telephone conversation and email on 24 November 2009 the DoH provided further submissions to support its position to the Commissioner in an email dated 4 December 2009 and a telephone call on 11 December 2009.

Analysis

Exemptions

18. As noted above, in this case the DoH has relied upon section 35(1)(a) to withhold all of the information in question, and section 35(1)(b) to withhold some of the information in question.
19. The Commissioner has first considered the application of sections 35(1)(a) and (b) to the withheld information. He has then gone on to consider the application of the public interest test in relation to the information withheld under this exemption.

Section 35

20. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. Section 35(1)(b) states that information held by a government department is exempt information if it relates to Ministerial communications.
21. The full text of section 35 can be found in the Legal Annex at the end of the Notice.
22. The Commissioner has first considered whether the withheld information relates to the formulation and development of government policy.
23. 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.

24. After considering the submissions of the DoH, the nature of the request, and the contents of the withheld information, the Commissioner believes that the government policy in this case is the renegotiating and re-profiling of the DoH's budget, following its near cash overspend in 2005-6. In addition to this the Commissioner also believes that this case relates to the Spending Review process, and to the actions of HM Treasury ("HMT") in carrying out its spending control function, reflecting the government's public spending policies. In turn, this directly effects the allocation and expenditure of public money. Therefore the Commissioner accepts that the Spending Review process is also government policy. In simple terms the Commissioner believes that the negotiation of budgets relates to government policy in that a) the details of the negotiations reveal the priorities given to competing policies and b) the control of central government spending by HMT is reflects government policy.
25. In addition to this, the Commissioner also believes that the formulation and development of this policy was still underway at the time of the request. In its letter to the Commissioner dated 11 February 2009, and confirmed in its email of 4 December 2009, the DoH argued that this renegotiation was not complete at the time of the request, and in fact was not finalised until Autumn 2007. The DoH also provided further submissions and evidence to support this point, and these are detailed at paragraphs 1 to 3 of the Confidential Annex attached to this Notice. After considering the withheld information the Commissioner believes that it relates to the development of this policy. Furthermore, after considering the DoH's submissions he also believes that this policy was still underway at the time of the request. Therefore, 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 government policy. As such, he is satisfied that section 35(1)(a) is engaged in respect of the withheld information.
26. The Commissioner has gone on to consider whether some of the withheld information relates to Ministerial communications.
27. Some of the withheld information in this case consists of communications between the DoH and HMT recording Ministerial discussions. These consist of letters between Ministers, or between officials at those departments recording and communicating those discussions and negotiations. In addition to this, some of the withheld information consists of appendices attached to those letters, and draft versions of those appendices. Having considered the contents of these appendices the Commissioner believes that they clearly show details of the negotiations between the Ministers relating to the re-profiling of the DoH's budget. During the course of the investigation the DoH identified the information which it believed related to Ministerial communications.
28. In reaching a view on whether these communications relate to Ministerial communications the Commissioner has been mindful of the views of the Tribunal in *Scotland Office v ICO* [EA/2007/0070]. In this case 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...”¹

Bearing this in mind, the Commissioner is satisfied that all of the information set out in paragraph 26 above relates to Ministerial communications, and as such he is satisfied that section 35(1)(b) is engaged in respect of the information the DoH has identified as relating to Ministerial communications. The Commissioner has listed the information that he accepts falls under this exemption in the Confidential Annex attached to this Notice.

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 sections 35(1)(a) and (b). Finally, he has 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:
 - There is a public interest in transparency to allow public scrutiny of the financial position of the DoH
 - There is a public interest in transparency to allow public scrutiny of decision making processes on issues relating to public sector finances.
32. In addition to this, the complainant has argued that,

“...given recent cuts and closures in the NHS and the direct and serious impact these have on people’s lives, there is an extremely strong public interest in information being made available to shed light on how decisions relating to financial management of the Department of Health’s budget were taken.”
33. Given the significant role played by the Spending Review process in the expenditure of public money and the allocation of budgets to government departments, together with the subsequent actions of the DoH and HMT in relation to the near cash overspend and the re-profiling of the DoH’s budget, the

¹ EA/2007/0070, para 50.

Commissioner believes that there is a strong public interest in increasing the transparency of this process, thereby increasing public knowledge and understanding of these issues. He also believes that there is a strong public interest in increasing the public's ability to assess the quality of discussion and advice between officials at the DoH and HMT which underlay the negotiations between the two departments, and the decisions that were reached in regard to the DoH's budget.

34. The Commissioner believes that the disclosure of the withheld information would increase the public understanding of these issues, which would in turn increase the public understanding of the formulation and development of this government policy. This, he believes, would also lead to increased participation in the public debate about the DoH's near cash overspend, and the subsequent actions of the DoH and HMT in relation to this. Finally, the Commissioner believes that there is a public interest in increasing the public understanding of the effect that these negotiations had on the DoH's budget.

Public interest arguments in favour of maintaining the exemptions

35. The DoH has stated that it believes that the public interest factors in favour of maintaining sections 35(1)(a) and (b) are:
- In relation to the information that it has applied section 35(1)(b) to, the DoH has argued that disclosure would undermine the convention of collective responsibility.
 - It is essential to the efficient development of Government policy that the DoH and HMT can have a full exchange of views without apprehension that this will be publicly exposed. Disclosure would present the real risk that decision making across Government will become poorer, will not be based on all available evidence, will not take account of the full range of options and will be recorded inadequately. This will not be in the public interest.
 - 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. Spending control encompasses not just the process of setting budgets in Spending Reviews, but the continuous process of discussing and debating with spending departments the merits of new spending proposals and the actions that may be necessary should budgets overrun. In such circumstances it is essential for Ministers and officials at the DoH and HMT to share candid assessments of pressures and potential areas of saving. The prospect of disclosure in the future would constrain and could undermine similar communications in the future, making this inter-departmental cooperation less rigorous and productive and materially damaging the effectiveness of HMT's role in controlling public spending.
 - Given the amount of more accurate information already in the public domain, disclosure of the withheld information would not contribute in a constructive way to the public interest at large.

- Disclosure could inhibit Ministers or officials 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.
 - Disclosure could inhibit the ability of Ministers or officials to scrutinise the competing arguments in a 'private thinking space'.
 - 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 HMT. Exposure of the process and the detailed negotiations would be harmful to the formulation and development of government's policies.
 - It is one of HMT's key responsibilities to ensure departments keep within agreed spending totals and to take appropriate remedial action if they appear to risk exceeding those limits. The actions taken by HMT might differ between different departments and at different time. The disclosure of communications between Ministers and their officials on overspends and plans to achieve savings to 'pay back' the overspend will compromise HMT's flexibility to respond differentially in the future. Anything which undermines their ability to do this 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 HMT 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.
36. The Commissioner believes that the public interest factors identified by the DoH that 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 options, and damage the quality and candour of communications between Ministers, and between officials in the DoH and HMT (the chilling effect argument).
 - Undermine HMT's ability to ensure departments keep within agreed spending totals (as set in Spending Reviews) and to take appropriate remedial action if they appear to risk exceeding those limits. This will in turn undermine the Spending Review process, which is a key part of managing the expenditure of public money.
 - Lead to poorer decision making.
37. 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.

38. 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.
39. 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

40. The Commissioner has first considered the balance of the public interest arguments in relation to section 35(1)(b).
41. As noted at paragraph 34 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).
42. 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.”²
43. 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 to which the DoH has applied section 35(1)(b) to consists of communications between the DoH and HMT recording Ministerial discussions and negotiations. In addition to this, some of the withheld information consists of appendices to those letters, and draft versions of those appendices. This information relates to the DoH's near cash overspend, and the discussions and negotiations between the DoH and HMT Ministers about the appropriate remedial action to take (i.e. the re-profiling of the DoH's budget). The Commissioner is satisfied that this information represents a substantive and significant

² EA/2007/0070, para 82.

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.

44. 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.”³

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.

45. In relation to the context of the information, the Commissioner has noted that this information represents a robust negotiation process between the two departments, in regard to the expenditure of large amounts of public money. In this case, due to the near cash overspend, there was also a robust discussion of what remedial action was appropriate, which would include possible discussions of efficiency savings. Given the potential impact on departmental budgets, the ‘hard choices’ that would have to be robustly discussed and debated, and the potential knock on effects that this might have on DoH policies and NHS funding, the Commissioner is persuaded that the context of this information is one of high political sensitivity. In addition to this, as noted at paragraph 24 above, the Commissioner accepts that the negotiations and re-profiling of the DoH budget was not complete at the time of the request.

46. In addition to this, the DoH has argued that HMT’s role in spending control is part of the Spending Review process, as:

- In the final settlement of one Spending Review HMT will set a cash limit and define future key objectives that the relevant Department is expected to deliver within that cash limit. It will also flag up areas of concern and risk.
- There is an ongoing need to monitor and control spending to the pre-determined limits to the end of the Spending Review period.
- If spending limits are breached, negotiations to rectify and re-profile spending may extend into, and impact upon, subsequent spending reviews.

³ EA/2007/0070, para 87.

- The financial position and levels of service provision in the last two years of one Spending Review are critical in determining the levels of funding in the next.
47. Given the potential for overspend, the potential impact on departmental spending in any subsequent negotiations to rectify and re-profile spending, and the knock on effect this would have on the next Spending Review, the Commissioner is satisfied that the negotiations between the DoH and HMT which lie at the heart of this request are intrinsically linked to the Spending Review process.
48. 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 the withheld information dates from 12 to 18 months prior to the request, for these reasons and the reasons given in paragraphs 50 to 53 below he believes that the context of the withheld information remained sensitive at the time of the request.
49. The complainant has argued that the withheld information, "relates to the department's financial position for a year for which the accounts have long been finalised and measures to deal with the overspend have now been taken so releasing this information would not undermine this process."
50. In response to this the DoH has presented two arguments. Firstly it has argued that the withheld information relates to an issue that was still live at the time of the request. Further details of this argument can be found at paragraphs 1 to 3 of the Confidential Annex attached to this Notice, and at paragraph 24 above. The Commissioner has found these arguments persuasive, and accepts that the issues which are discussed in the withheld information were still live at the time of the request.
51. Secondly it has also argued that,
- "Spending control encompasses not just the process of setting budgets in Spending Reviews, but the continuous process of discussing and debating with spending Departments the merits of new spending proposals and the actions that may be necessary should budgets overrun. The correspondence between DH and HM Treasury requested in [this case] relates to spending control of individual Departments and its link to the Government's fiscal objectives."

As noted at paragraph 47 above, the Commissioner believes that the spending control activities of HMT are intrinsically linked to the Spending Review process.

52. The DoH has provided additional arguments in relation to a similar case (FS50185270) in which it has argued that 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'. The Commissioner considered these arguments in FS50185270, and was 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. The Commissioner believes that HMT's spending control also directly affects the Spending Review process by altering departmental budgets and spending – which will in turn directly affect the next Spending Review.
53. Taking all these factors into account the Commissioner believes that the withheld information remained sensitive at the time of the request.
 54. 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 paragraphs 33 and 34 above, he believes that given the role of Spending Reviews and HMT's spending controls in the allocation and spending of departmental budgets, there is a significant public interest in increasing the transparency of this process.
 55. 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, having considered the information to which the DoH has applied section 35(1)(b) to (and as described in paragraph 27 above) he is satisfied that it reveals the specific views of the Secretary of State for Health and the HM Treasury Minister, or gives a detailed insight into those views.
 56. 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.
 57. 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 and officials expressing their views freely and frankly in this process. In particular the DoH has argued that the negotiations and discussions which took place during HMT's intervention and spending control required a frank and candid assessment of the situation, spending pressures and potential areas for saving. 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.
 58. 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.
 59. 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.”⁴

Therefore in considering arguments of this kind the Commissioner will consider the contents of the withheld information. He will also consider the timing of the request – for instance, does the information relate to an issue what was still live at the time of the request?

60. 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 which lies at the heart of HMT’s spending control processes, and includes discussions around efficiency and the reallocation 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.
61. With regard to the timing of the request the Commissioner again notes the complainant’s argument that the withheld information relates to a process which had been completed prior to the request being made (see paragraph 49 above). However, the Commissioner has also noted the conclusions he has reached in relation to the withheld information relating to an issue that was still live at the time of the request (see paragraphs 24, and 50 to 52 above). Given this conclusion, the Commissioner is satisfied that in the circumstances of the case, the withheld information was still live and sensitive at the time of the request. 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 and officials.
62. 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 being able to come together successfully to determine what may, in reality,

⁴ EA/2006/0006, para 75(i).

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.”⁵

As noted at paragraphs 24 and 50 above, the Commissioner is persuaded by the DoH’s argument that the withheld information relates to an issue that was still live at the time of the request. Therefore the Commissioner is persuaded that the disclosure of the withheld information would be likely to impact on the safe space needed by Ministers for the issues that were still live at the time of the request.

63. In balancing these factors against the public interest in disclosure the Commissioner believes that there is a significant public interest in increasing public knowledge and understanding of the DoH’s near cash overspend, and the subsequent actions of the DoH and HMT in relation to this (i.e. the spending control process), as well as the Spending Review process (which he believes this information is intrinsically linked to). 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 HMT in the discussions and negotiations surrounding the near cash overspend, what remedial action was appropriate, and how this would effect the allocation of financial resources to the DoH, as well as the impact that this had on the future activities of the DoH.
64. 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 are particularly weighty. This is especially the case given the central role played by HMT in circumstances such as this, 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 is particularly weighty.
65. 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 information to which it has been applied outweighs the public interest in disclosure. Therefore this information should be withheld.
66. As noted at paragraph 18 above, the DoH has withheld some information solely under section 35(1)(a). The Commissioner has gone on to consider the balance of the public interest in relation to this information.
67. In considering the balance of the public interest in relation to section 35(1)(a) the Commissioner has again noted that the withheld information relates to an issue

⁵ EA/2007/0070, para 88.

that was still live at the time of the request. He has also noted that that the issue was highly sensitive.

68. The Commissioner 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). Having considered the withheld information he believes that this public interest argument is valid in relation to some of the information withheld under this exemption. As noted at paragraphs 42 to 56, and 64 above, the Commissioner believes that this is a substantive and weighty factor in favour of maintaining the exemption.
69. 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, the near cash overspend, and the subsequent re-profiling of the DoH's budget. In this case much of the information withheld under section 35(1)(a) reveals detailed discussions between officials in the two departments, which were being made in support of both the ministerial meetings and HMT's spending control function. This led to difficult choices for the DoH and HMT in relation to the allocation of budgets, potential areas of saving and efficiency, etc... 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 61 above. He has also been mindful that the withheld information relates to an issue that was still live at the time of the request. He believes that the 'safe space' argument is particularly weighty when the information in question relates to a government policy that is still being processed and developed.
70. In addition to this, the DoH has argued that the disclosure of the withheld information would have an inhibitory effect on Ministers and officials expressing their views freely and frankly in this process. In particular the DoH has argued that the negotiations and discussions which took place during HMT's intervention and spending control required a frank and candid assessment of the situation, spending pressures and potential areas for saving. The disclosure of the withheld information could inhibit the manner in which such tough choices are discussed in the future. This, the DoH has argued, would be likely to prejudice HMT's ability to carry out its spending control function in relation to individual departments. As this process plays a crucial part in the development of government policies (including the allocation of public funds and decisions on public expenditure), prejudice to this process would not be in the public interest.
71. 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 56 to 60 above.

72. In balancing these factors against the public interest in disclosure the Commissioner has been mindful of the points he has made at paragraphs 31 to 34, and 63 above, in favour of disclosure. In particular he believes that there is a significant public interest in increasing public knowledge and understanding of the DoH's near cash overspend, and the subsequent actions of the DoH and HMT in relation to this (i.e. the spending control process), as well as the Spending Review process.
73. Nevertheless, after balancing the public interest factors, the Commissioner believes that the public interest in maintaining section 35(1)(a) in relation to some of the withheld information 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 64 above.
74. However, after considering the withheld information, the Commissioner is not persuaded that all of it is as sensitive. After considering the DoH's arguments at length, he is not persuaded that the disclosure of some of the information would have the same prejudicial effect on the convention of collective responsibility, or would be likely to have the same 'chilling effect' on the provision of free and frank advice. Therefore, taking into account the substantial public interest factors in favour of disclosure, the Commissioner believes that, in relation to some of the withheld information, the public interest in maintaining section 35(1)(a) does not outweigh the public interest in disclosure. Therefore he believes that this information should be disclosed.
75. 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. He has also listed the information where he believes that the public interest in maintaining sections 35(1)(a) does not outweigh the public interest in disclosure in the Confidential Annex.

Section 31

76. The DoH has relied upon section 31(1)(c) to withhold some of the requested information, which it has also applied sections 35(1)(a) and (b) to. As the Commissioner has already decided that this particular piece of information should be withheld under section 35(1)(b), he has not gone on to consider the application of section 31(1)(c) any further.

Procedural Requirements

77. 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.”

78. 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.”

79. 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).

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

81. 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.

82. During the course of the investigation the DoH sought to rely upon section 31(1)(a) to withhold some of the requested information. However, it did not cite this exemption 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.

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

The Decision

84. 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) and 35(1)(b).

85. 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) of the Act insofar as it inappropriately relied upon section 35(1)(a) 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 section 31(1)(a) to withhold some of the requested information.

Steps Required

86. 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.

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

Failure to comply

88. 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

89. 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

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.