

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 May 2010

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
London
SW1P 4QP

Summary

The complainant wrote to the Parliamentary and Health Service Ombudsman ('the Ombudsman') to request information regarding 80 complaints referred to the Ombudsman between 2006 and 2007 by Dr Tony Wright MP. The Ombudsman responded to the request by explaining that the information requested was exempt from disclosure under section 44 of the Act. The Ombudsman cited Section 11(2) of the Parliamentary Commissioner Act 1967 as the relevant statutory prohibition. In addition, the Ombudsman advised the complainant that the information requested was also exempt from disclosure under section 36(2)(c) of the Act. However, the Ombudsman acknowledged that there was a legitimate public interest in the Ombudsman's relationship with Dr Tony Wright MP and provided the complainant with some of the information requested. This information was provided in aggregated form and outside the Ombudsman's obligations under the Act. As the Ombudsman's decision had been taken by the Ombudsman herself, no internal review was offered to the complainant.

The complainant subsequently wrote to the Ombudsman and requested a schedule of the communications generated by his previous request for information and copies of any such communications. The Ombudsman responded to this further request and confirmed that it did not hold a schedule of the correspondence generated by the complainant's previous request. The Ombudsman further advised the complainant that it would not be releasing copies of its communications to him as this would result in the complainant either obtaining information already received or information that had been already withheld from the complainant and/or heavily redacted documents. The complainant was informed that some of the information held was a request for internal legal advice, and was therefore exempt under

section 42 of the Act on account of legal professional privilege. The Ombudsman carried out an internal review of this decision which upheld the decision.

The Commissioner has considered the complaint and has found that the Ombudsman correctly withheld the original information requested under section 44 and correctly withheld the additional information requested under section 42 of the Act. The Commissioner requires no steps to be taken by the Ombudsman.

The Commissioner's Role

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

Background

2. Dr Wright was, at all relevant times, the Chairman of the Public Administration Select Committee (PASC), part of whose role is to scrutinise reports of the Ombudsman dealing with Parliamentary matters.

The Request

3. The complainant wrote to the Ombudsman on 29 November 2007 making the following information request:

'For the 80 Parliamentary cases referred to the OPHSO (Ombudsman) during the 2006/2007 business year by Dr. Tony Wright MP, please provide the following information:

1. Case reference number.
2. Organisation subject to complaint
3. Town of residence of complaint
4. Recorded outcome of complaint/indication that case is still under investigation
5. Date OPHSO received complaint

6. Date OPHSO closed case

In addition, please provide the Criteria for Case selection document provided for the PASC meeting of 17th October 2007, referred to during the session in question Q34 by Mr Liddell-Grainger'.

4. The Ombudsman responded to the request on 20 December 2007. The Ombudsman informed the complainant that she did not hold the 'Criteria for Case selection' document requested. The complainant was advised that, whilst the Ombudsman did hold the case details information requested, she considered that most, if not all, of this information came within the ambit of section 11(2) Parliamentary Commissioner Act 1967 and was therefore statute barred from disclosure under section 44 of the Act.
5. The Ombudsman also informed the complainant that the information was exempt under section 36(2)(c) of the Act. The complainant was advised that, 'While each of the elements of your request may appear innocuous, the cumulative effect of responding to you in the format requested, would place in the public domain, very specific details about individual cases. The potential harm of doing so is to undermine the confidence in PHSO's service'. The Ombudsman explained that she had considered the public interest in disclosure but was not satisfied that this outweighed the public interest in maintaining the privacy of her investigations. As the decision had been taken by the Ombudsman herself, the complainant was advised that there would be no offer of an internal review with regard to the decision and any appeal should be made to the Information Commissioner.
6. In recognition of the fact that there is a legitimate public interest in the Ombudsman's relationship with Dr Wright (in his role as Chairman of PASC), the Ombudsman decided it would be appropriate to release to the complainant some of the information which he had requested but in an aggregated form. This information related to the recorded outcome or status of the 80 complaints referred by Dr Wright to the Ombudsman, the number of days which it had taken the Ombudsman to complete each case, the number of cases referred to the Ombudsman by Dr Wright, and the number taken on for investigation, and how many of the investigated cases had been upheld or not upheld.
7. The complainant contacted the Ombudsman on 7 January 2008 and made the additional request that he please be provided with:

'The schedule and copies of communications generated as a consequence of the request' (of 29 November 2007)

8. The Ombudsman responded to this request on 4 February 2008. The complainant was informed that the Ombudsman did not hold any such schedule of communications and that she would not be releasing copies of the communications themselves as 'to do so would result in you receiving either information that you have already received and/or information which has already been withheld from you and/or heavily redacted documents'. Advising the complainant that the rights of access in the Act relate to information, and not documentation, the Ombudsman had decided that the best way to respond to this additional request was to provide the complainant with a summary of the information held. As part of this summary, the Ombudsman advised that some of the communications generated were protected by legal professional privilege and were therefore exempt from release by virtue of section 42 of the Act.
9. Following the complainant's request for an internal review on 7 February 2008, the Ombudsman provided him with her internal review decision on 10 March 2008. The decision upheld the Ombudsman's original decision to withhold the request handling information and provide the complainant with the summary.
10. The complainant contacted the Ombudsman on 14 March 2008 and asked that he be provided with all the information requested in his request of 29 November 2007. He referred to a previous freedom of information request which he had made to the Information Commissioner's Office (ICO), in which he had been provided with Ombudsman case reference numbers and the postcodes of those individuals who had complained about the ICO to the Ombudsman.
11. The complainant also revised his original request in two respects. Firstly, he stated that he would be happy to be provided with the 'number of elapsed days', during which the Ombudsman had considered the complaints referred by Dr Wright, if the Ombudsman did not wish to provide the actual dates of complaint receipt and closure. Secondly, in addition to the town of residence of each complainant, the complainant requested the postcode details as well.
12. The Ombudsman subsequently responded to the complainant's request in a letter dated 19 May 2008. It was confirmed that the exemptions at sections 44 and 36(2)(c) continued to apply to the information requested, including the postcode details. However, in order to assist the complainant, the Ombudsman provided him with a table, giving information about the length of time it had taken to conclude the cases referred by Dr Wright in 2006/2007. As this table provided information as to how long the cases had taken to conclude from the time of

receipt by the Ombudsman (expressed generally as '3 < 4 months' for example) it neither satisfied the complainant's preferred request as to the actual date on which each case was received by the Ombudsman and on which actual date each case was subsequently closed, or the 'number of elapsed days' during which each case had been considered by the Ombudsman.

The Investigation

Scope of the case

13. On 31 March 2008 the complainant contacted the Commissioner to complain about the way his two requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

The Ombudsman's refusal to disclose the information requested and the exemptions cited in support of this decision.

The Ombudsman's delay in responding to his request and its failure to engage with him throughout the process (The Commissioner has addressed this in the 'Other matters' section).

14. In her letter to the complainant of 4 February 2008 (responding to his request of 7 January 2008), the Ombudsman informed him that he would not be provided with information that 'has already been withheld from you' (i.e. information withheld under section 44 and section 36(2)(c)). Therefore, although section 44 was not explicitly cited in this letter, it was clear that the Ombudsman was in part relying on the exemption in order to withhold the information requested on 7 January. Following discussions with the Commissioner, the Ombudsman agreed to disclose the Ombudsman case reference numbers to the complainant, and a table providing information as to the dates when each of the 80 cases were received and closed by the Ombudsman and the outcome in each case. The Ombudsman also agreed to disclose a copy of the complainant's file in this matter (i.e. the communications generated as a result of the request of 29 November 2007), with the exception of information previously withheld under section 44 and section 42. Consequently, the Commissioner's findings have been restricted to the withheld information still within scope of the request to which the above exemptions have been applied. For clarification, that outstanding information is a) organisation subject to complaint, b) town of residence of

complaint/postcode details, and c) request for internal legal advice by the Ombudsman.

Chronology

15. On 25 April 2008 The Commissioner wrote to the Ombudsman with details of the complaint. He requested copies of the information withheld from the complainant and specific reasoning as to why she considered the exemptions to apply to the information in question.
16. The Ombudsman replied to this letter on 15 June 2009, enclosing the information withheld under section 44. The Ombudsman provided answers to the specific questions posed by the Commissioner and apologised for not having provided a full response sooner. The information withheld under section 42, was subsequently provided to the Commissioner by the Ombudsman in March 2010.
17. On 30 July 2009, the Commissioner wrote to the complainant, requesting clarification of his second complaint, i.e. 'copies of communications generated as a consequence of the [original] request'. The complainant replied to the Commissioner by email and confirmed that he wished the Commissioner to include the refusal of the public authority to provide him with these communications within his current complaint to the Commissioner.
18. The Commissioner spoke with the complainant in a telephone call on 9 November 2009 to ensure that his understanding of what information the complainant was seeking to obtain was correct.
19. On 23 November 2009, the Commissioner wrote to the Ombudsman, and made a number of observations and queries about the reasoning and rationale provided by the Ombudsman for her use of the section 44 and 36(2)(c) exemptions in relation to the complainant's original request for information which had formed the basis of his first complaint to the Commissioner.
20. On 15 January 2010, the Ombudsman wrote to the Commissioner, setting out her position on all matters raised by the complainant's request for information, in what was termed, ' a full and comprehensive reply'.

Findings of fact

21. The complainant had previously made an information request to the Ombudsman on 18 October 2007, in which he had requested the

following information for the business year 2006 to 2007, as broken down by MP:

The number of complaints submitted to the Ombudsman;
The number of complaints accepted; and
The number of complaints upheld.

22. The Ombudsman provided the complainant with this information on 15 November 2007.

Analysis

23. A full text of the relevant statutes referred to in this section is included as an annex to this decision notice.

Exemptions

Section 44 – Prohibitions on disclosure

24. The public authority refused to disclose the information falling within the scope of the first request (29 November 2007) under section 44 section 36(2)(c) of the Act. Section 44 provides for an exemption from disclosure under the Act for information which is prohibited from disclosure under any law or enactment. The Ombudsman has cited section 11(2) of the Parliamentary Commissioner Act 1967 as the relevant statutory prohibition. Section 36(2)(c) provides an exemption from disclosure under the Act where the effective conduct of public affairs would be prejudiced, or be likely to be prejudiced. The Commissioner will first consider the Ombudsman's application of section 44.
25. The Commissioner accepts that section 11(2) of the Parliamentary Commissioner Act 1967, acts as a statutory prohibition on the disclosure of information 'obtained' by the Ombudsman 'in the course of, or for the purposes of, an investigation under this Act'. The Commissioner also accepts that responding to a freedom of information request is not one of the 'gateways' to disclosure set out in sub-sections a) – c) of section 11(2), since these specific exceptions ('gateways') to section 11(2) are (a) where the Ombudsman discloses the information for the purposes of the investigation concerned and any subsequent report, (b) discloses the information for the purposes of proceedings for an offence under the Official Secrets Act or for an offence of perjury, as allegedly committed by the Ombudsman or one of her officers, and (c) discloses the information for the purposes of any proceedings under section 9 of the Parliamentary Commissioner Act 1967.

26. The issue to be considered by the Commissioner, therefore, is whether the information requested by the complainant and withheld by the Ombudsman under section 44 of the Act, can be said to have been obtained by the Ombudsman in the course of, or for the purposes of, an investigation under the Parliamentary Commissioner Act 1967.
27. The withheld information consists of (in relation to the cases referred to the Ombudsman by Dr Wright) the organisation subject to the complaint, the town of residence of the complainant, and the first three digits of the postcode of each complainant.
28. The complainant has argued that the statute bar of Section 11(2) of the Parliamentary Commissioner Act 1967 does not apply to his request, 'As none of the requested information has the complaint as its focus, or was obtained in the course or for the purposes of the investigation, but generated by the PHSO (Ombudsman) in consequence of their investigation. The information requested relates only to the operations of the PHSO. Consequently, this exemption clearly does not apply'.
29. As support for his argument, the complainant has cited the Commissioner's decision notice FS50101616. In that case (which concerned the same public authority as in the present case) it was confirmed that, 'The Commissioner has found that some of the information it holds was passed to the public authority by the Department for Trade and Industry during the course of the investigation, or was obtained by the public authority as a result of interviews it conducted with that department. The Commissioner is satisfied that such information is information obtained in the course of, or for the purposes of an investigation, and that the exceptions in a) – c) of section 11(2) of the Parliamentary Commissioner Act 1967 do not apply. The Commissioner finds that this information is exempt from disclosure under section 44 of the Act'.
30. The complainant has also placed reliance on the Information Tribunal case of Commission for Local Administration in England v The Information Commissioner (EA/2007/0087), which was an appeal against the Commissioner's decision FS50112347. This case concerned the statutory prohibition contained in section 32(2) of the Local Government Act 1974, which is analogous to the section 11(2) statute bar of the Parliamentary Commissioner Act 1967.
31. In FS50112347, the Commissioner set out the categories of information that could be considered to be held by the Local

Government Ombudsman. The Commissioner commented, at paragraph 16:

'On reviewing the complaint file, it is clear that significant amount of the information was passed to the public authority either by the complainant, the public authority or third parties. The Commissioner is satisfied that such information has been obtained in the course of, or for the purposes of, the investigation into the complaint against Herefordshire County Council and that sub-sections a) - c) of section 32(2) of the Local Government Act 1974 do not apply'.

32. The Commissioner confirmed that he was satisfied that, 'such information is covered by the statutory prohibition and that it is exempt from disclosure under section 44 of the Act'.
33. In the Tribunal case referred to above, the Tribunal clearly stated, at paragraph 16 of its judgement: 'We conclude, therefore, that it is only information obtained from a third party, and not information passed between a Local Commissioner and an individual working with him, that falls within the prohibition against disclosure set out in section 32(2) and therefore the exemption provided by FOIA section 44'.
34. Applying the above reasoning to the present case, it is clear that the Information withheld from the complainant, namely, the organisation subject to complaint, the town of residence of the complainant and the first three digits of the postcode of each complainant, was passed to the Ombudsman for the purposes of an investigation. The whole point of these complainants approaching, either in writing or by telephone, the Ombudsman in the first place was so that their complaint could be investigated by the Ombudsman. The Ombudsman would be unable to investigate any of the complaints without the name of the organisation complained against and contact details for the complainant. 'Obtained' refers both to information which the Ombudsman proactively obtains as part of her investigations and information supplied by those wishing the Ombudsman to carry out an investigation. Therefore, the Commissioner is of the view that such information is considered information obtained for the purposes of an investigation.
35. In the present case, it can be seen that most of the information requested (i.e. organisation subject to complaint, town of residence of the complainant and postcode details), was obtained from a third party or parties (those complainants referred by Dr Wright) and would thus be exempt under section 44 of the Act, in accordance with the Commissioner's previous findings and the above decision as upheld by the Tribunal.

36. The complainant has highlighted the Tribunal's general comments at paragraph 10 of the above case as providing support for his contention that the information requested does not fall within the ambit of section 11(2). Specifically, the Tribunal stated that:

'It might be said that even information such as the name of the authority being complained about or the very fact that the complaint existed, constituted information which the CLA (The Commission for Local Administration) would not have been in possession of, had the complaint not been made, and that it was therefore information obtained in the course of the investigation or information obtained for the purposes of the investigation. We believe that this would introduce an element of artificiality, and that applying the plain meaning of the statute leads to the conclusion that none of the internal memoranda contained in the closed bundle, falls within the statutory prohibition. Similarly, in relation to communications between the CLA and the authority about whom the complaint was made, it might be said that the position played by the individual to whom a letter or email was sent, his or her email address or the postal address of the authority, was information that the CLA 'obtained' in the course of, or for the purposes of, the investigation. But, ignoring artificiality as before, we conclude that documents in the closed bundle of this type, which were created in the course of making arrangements for the handling of an aspect of the investigation, but which make no reference to what was involved in the investigation, are not covered by the statutory prohibition and are not therefore exempt from disclosure'.

37. Whilst the Commissioner acknowledges the Tribunal's general comments as to the risk of artificiality that could occur from an unfeasibly wide interpretation of section 32(2) of the Local Government Act 1974 (and by analogy, section 11(2) of the Parliamentary Commissioner Act 1967), he has been guided by the fundamental distinction which the Tribunal drew in paragraph 11 of EA/2007/0087. Specifically, the Tribunal noted 'the distinction, which we believe section 32(2) creates, between the subject matter of an investigation (to be kept secret), and the processes followed in conducting the investigation (a valid subject matter for public scrutiny)'.
38. Applying the logic of this distinction to the information which the complainant has requested from the Ombudsman in the present case, the Commissioner is satisfied that the name of the organisation subject to complaint, the town of residence of the complainant, and the first three digits of the postcode of each complainant, is information more in keeping with the subject matter of an investigation than the processes followed in conducting the investigation. Therefore, the distinction

drawn by the Tribunal in EA/2007/0087, supports the Ombudsman's use of the section 44 exemption in the present case.

39. In representations to the Commissioner, the Ombudsman also referred to the Tribunal case of EA/2007/0087, stating that: 'It was common ground between the parties to that Tribunal (including The Information Commissioner), and accepted by the Tribunal itself, that information passed to the Commissioner by a third party in the course of or for the purposes of his investigation, is covered by s.32(2) LGA'.
40. However, this selective extract from the Tribunal's findings fails to take account of the Tribunal's comments regarding 'artificiality' in paragraph 10 of EA/2007/0087, quite properly highlighted to the Commissioner by the complainant. It is important that the Ombudsman appreciates and understands the whole of the Tribunal's findings in EA/2007/0087 and the fact that the crucial factor as to whether information would or would not fall within the section 11(2) statutory prohibition is the distinction (between subject matter and processes) made by the Tribunal and applied to the current case above.
41. In support of its argument that the section 11(2) statutory prohibition applies to the information withheld from the complainant, the Ombudsman has also drawn the Commissioner's attention to section 7(2) of the Parliamentary Commissioner Act, which provides as follows: 'Every such investigation shall be conducted in private, but except as aforesaid, the procedure for conducting an investigation shall be such as the [Parliamentary] Commissioner considers appropriate in the circumstances of the case'.
42. The Commissioner agrees with the Ombudsman's argument that the Parliamentary requirement for her investigations to be conducted in private would, or would be likely to be, undermined and jeopardised by the disclosure of the information requested by the complainant. Such disclosure of the information withheld under section 44 of the Act, could conceivably inhibit, or discourage, individuals from bringing their concerns to the attention of the Ombudsman or having confidence in engaging with her office as freely and frankly as possible. It should be noted that this need for privacy would diminish in cases where the Ombudsman had concluded her investigation(s).
43. It should be noted that the Ombudsman has also cited the section 36(2)(c) exemption in support of its refusal to disclose the information requested. There is clearly some overlap between this exemption and the rationale surrounding section 7(2) above. However, as the Commissioner is satisfied that the section 44 exemption was appropriately engaged by the Ombudsman to withhold the case specific

identifying information requested (i.e. organisation subject to complaint, town of residence of complaint and postcode details), he has not gone on to examine the Ombudsman's use of the section 36(2)(c) exemption in this matter.

Section 42 – Legal professional privilege

44. Section 42 provides that information is exempt from disclosure if the information is protected by legal professional privilege, and this claim to privilege could be maintained in legal proceedings.
45. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending, and litigation privilege where litigation is contemplated or pending.
46. The category of privilege which the Ombudsman is relying on to withhold the legal advice request is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently, not all communications from a professional legal adviser will attract advice privilege.
47. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be found by inspecting the documents themselves.

The Ombudsman's position

48. The communications in question concern an email from the Ombudsman's Head of Freedom of Information Requests & Data Protection to the Ombudsman's Head of Legal Services, requesting advice with regard to the complainant's first information request of 29 November 2007 (document 1), and an internal memo to the Ombudsman which appraises her of the legal advice obtained (document 2). The Ombudsman has submitted that both documents concern legal advice requested and received by the Ombudsman, and are all therefore exempt information by virtue of the section 42 exemption for legal professional privilege.

The Commissioner's position

49. The Commissioner accepts that both documents fall within the scope of the section 42 exemption. This is because the dominant purpose of

these communications is either Ombudsman officials seeking legal advice from Ombudsman lawyer(s) or that advice being provided to the Ombudsman. The section 42 exemption applies irrespective of the fact that the legal advice was sought and obtained “in-house”.

Public interest test

50. Section 42(1) is a qualified exemption and therefore subject to the public interest test under section 2(2)(b) of the Act. Section 1(1)(b) of the Act, which provides that where a person makes a request for information to a public authority and that public authority holds the information requested, then the person should have that information communicated to him, does not apply if that information is subject to an exemption, and ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’ (Section 2(2)(b)).

Public interest arguments in favour of the maintenance of the exemption

51. In the context of legal professional privilege, the courts do not distinguish between private litigants and public authorities. There is a public interest in both individuals and public authorities being able to consult legal advisers, and to do so in a full and frank manner. Public authorities need high quality, comprehensive legal advice for the effective conduct of their business and functions. Any legal advice provided may well include counter arguments, as well as arguments in support of the final conclusion. It is therefore possible that such legal advice may comment upon perceived weaknesses of the public authority’s position. In the absence of such specialist advice, the public authority’s decision making process would be adversely affected because it would not be fully informed. This is contrary to the public interest. Were the information in this case (concerning the legal advice) to be disclosed, then there is a real risk that such disclosure would negatively impact on any future legal advice, since it would inhibit the free and frank quality of such advice, and its ultimate usefulness and benefit to the recipient.
52. There will always be a strong element of public interest inbuilt into the legal professional privilege exemption. However, it is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. In *Bellamy v the Information Commissioner (EA/2005/0023)*, the Information Tribunal confirmed that: ‘There is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing

considerations would need to be adduced to override that inbuilt public interest' (paragraph 35).

Public interest arguments in favour of disclosure

53. Weighty though the above factors are, they must be balanced against the arguments in favour of disclosing the legal advice contained in the aforementioned documentation. In *Mersey Tunnel Users Association v The Information Commissioner and Mersey Travel* (EA/2007/0052). In that case, the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel on the basis, amongst other factors, that the legal advice related to an issue of public administration and therefore concerned issues which affected a sizable number of people.
54. The Commissioner is of the view that there is a strong public interest in the public understanding the reasons for decisions made by public authorities. This public interest was highlighted by the complainant in his representations to the Commissioner, when he argued that, 'Policy advice provided by the Ombudsman legal adviser should not be exempt under the ICO's guidance as publishing the reasons for the decision would improve the OPHSO's transparency and accountability'. The complainant also contended that, 'Clearly, there is a very strong public interest in establishing the quality of the legal advice, professional judgement and the processes by which the OPHSO have arrived at such a flawed decision' (the refusal to disclose the information requested). Disclosure of the legal advice documentation would reassure the public that decisions taken by the Ombudsman were being made on the basis of good quality legal advice and thus increase public confidence in the Ombudsman and the decisions taken by her office.

Balance of public interest

55. Notwithstanding the arguments outlined above, the Commissioner considers that the well established and persuasive public interest arguments in protecting legal professional privilege must be accorded due weight and importance. Therefore, on balance, the Commissioner has concluded that in the circumstances of this case, the public interest arguments in favour of disclosure, both generic and specific (such as transparency of the Ombudsman's decision making processes), are insufficiently strong to override or equal the strong generic public interest arguments in favour of maintaining the section 42 exemption.

The Decision

56. The Commissioner's decision is that the Ombudsman dealt with the following elements of the request in accordance with the requirements of the Act: The Ombudsman dealt with the request in accordance with the Act to the extent that it correctly withheld the information falling within the scope of section 44(1) of the Act (due to the section 11(2) statute bar of Parliamentary Commissioner Act 1967). The Ombudsman dealt with the request in accordance with the Act to the extent that it correctly withheld the information falling within the scope of section 42(1) of the Act.

Steps Required

57. The Commissioner requires no steps to be taken by the Ombudsman.

Other matters

58. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
59. In representations to the Commissioner, the complainant has stated that, 'Despite having attempted to engage the OPHSO on multiple occasions so as to prevent the need for ICO involvement, the Ombudsman's office has declined any dialogue regarding its decisions and review process. Although offering a review regarding the third information request, the OPHSO provided absolutely no opportunity to provide additional information or requested any clarification, as such, it was quite obviously a completely pointless exercise'.
60. The Commissioner appreciates that the complainant is of the firm view that the Ombudsman erred in her decision not to provide him with the information requested, and was therefore keen to engage with the Ombudsman so as to prevent the need for the involvement of the ICO in this matter. However, it should be recognised that the Ombudsman was equally entitled to maintain that she had reached the correct decision, thus requiring the complainant to refer a formal complaint to the Information Commissioner.
61. In making a request for internal review of the Ombudsman's decision, the Commissioner considers that it would be the responsibility of the

complainant to provide the Ombudsman with any further submissions or evidence in support of his contention that the original decision had been misconceived or flawed.

62. However, the Commissioner both acknowledges and agrees with the concerns expressed by the complainant with regard to opportunities for clarification in this case. Having spoken with the complainant in several telephone discussions about his request and his outstanding concerns, the Commissioner has found this direct contact of considerable assistance in understanding exactly what information the complainant was seeking to obtain, and what further action on the part of the public authority might satisfy (in part if not in whole) his request. Such attempts at engagement often result in clarification and clarity being achieved as soon as possible, and can considerably shorten an otherwise protracted and resource intensive process. The Commissioner would encourage the Ombudsman and, indeed, all public authorities to be more proactive in terms of telephone contact with individuals making information requests, as such a greater level of engagement would pay dividends in terms of reducing the scope for complainant frustration and dissatisfaction with the process.
63. The Commissioner's Good Practice Guidance No.5 states that the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional cases, it may be appropriate for this period to be extended to 40 working days. The Commissioner is satisfied with the time taken by the Ombudsman to conduct the internal review in this case.
64. With regard to her letter of 4 February 2008 to the complainant, the Commissioner would point out to the Ombudsman that paragraph 6 of the Explanatory Notes to the Act, states that, 'The Act will permit people to apply for access to documents, or copies of documents, as well as the information itself'.

Right of Appeal

65. 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 24th day of May 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section 1(1) of the Act provides that:

'Any person making a request for information to a public authority, is entitled –
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.'

Section 42(1) of the Act provides that:

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

Section 44(1) of the Act provides that:

'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

is prohibited by or under any enactment.

is incompatible with any Community obligation, or

would constitute or be punishable as a contempt of court.'

Section 36(2)(c) of the Act provides 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, would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'.

Parliamentary Commissioner Act 1967:

Section 11(2) of the Parliamentary Commissioner Act 1967 provides that:

'Information held by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except –
for the purposes of the investigation and of any report to be made thereon under this Act;

for the purposes of any proceedings for an offence under the Official Secrets Acts 1911 to 1989, alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act, or for the purposes of an inquiry with a view to the taking of such proceedings; or

for the purposes of any proceedings under Section 9 of this Act;

and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid), of matters coming to his or their knowledge in the course of an investigation under this Act'.

Section 7(2) of the Parliamentary Commissioner Act 1967 provides that:

'Every such investigation shall be conducted in private, but except as aforesaid, the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case'.