

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 1 March 2010

**Public Authority:** Department for Communities and Local Government  
**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

### Summary

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The complainant requested that the public authority provide her with the information generated by a complaint, regarding the development of the "Home Information Pack" legislation, made previously to the National Audit Office by the Royal Institute of Chartered Surveyors. The public authority declined to release the information it held by relying on section 36(2)(b)(i) and (ii) and (c) of the Act. The Commissioner finds that section 36(2)(b)(i) and (ii) are engaged and that the public interest in favour of maintaining the exemptions does outweigh the public interest in disclosure. The Commissioner therefore did not go on to consider the applicability of section 36(2)(c).

### The Commissioner's Role

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

### Background

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2. A "Home Information Pack" is a collection of documents provided by the seller of a residential property to potential purchasers where the property is put on the market. There are a number of documents that must be included in a pack relating to the title and tenure of the property, local search information and the property's energy performance (The Home Information Pack (No. 2) Regulations 2007).

3. In November 2006, the Royal Institute of Chartered Surveyors (RICS) wrote to the Comptroller and Auditor General setting out a number of concerns about the Government's approach to the development of Home Information Packs, the regulation of Home Inspectors and the use by the Department for Communities and Local Government (DCLG) of consultants on the project, and requesting that the National Audit Office (NAO) examine in detail the issues raised. The RICS' complaint was the subject of a NAO report that was sent to the DCLG and RICS and published on the NAO's website on 8 August 2007. The report was titled "Letter to RICS about the implementation of Home Information Packs (August 2007)"<sup>1</sup>.

## The Request

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4. The complainant on 2 October 2007 requested the DCLG provide her with:
  - All minutes and notes of meetings involving DCLG officials and electronic communications (both formal and informal) between them regarding the RICS' complaint.
  - All correspondence between officials in DCLG and other government departments and agencies that relates to the National Audit Office's investigation into RICS' complaint.
5. On 18 October 2007 the DCLG informed the complainant that it did hold the information requested. However it stated that to disclose the information "would or would be likely to inhibit ...the free and frank provision of advice or...the free and frank exchange of views for the purposes of deliberation, or would be likely otherwise to prejudice, the effective conduct of public affairs". The DCLG advised that it was therefore exempt from disclosure by virtue of section 36 (2)(b) and (c) and concluded that the public interest test favoured the maintenance of the exemption.
6. On 24 October 2007 the complainant asked the DCLG to review its decision. This they did and the outcome of the review, that its original decision was correct, was conveyed to the complainant in a letter dated 29 May 2008.

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<sup>1</sup><http://www.nao.org.uk/idoc.ashx?docId=AA10BA3D-C211-4C1C-B585-5877071E8E16&version=-1>

## The Investigation

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### Scope of the case

7. On 6 June 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled.

### Chronology

8. As part of his investigation the Commissioner, amongst other things, on 22 September 2009 asked the DCLG to provide him with a copy of the withheld information and details of the seeking and receiving of the qualified person's opinion as required by section 36 of the Act. In particular, regarding the qualified person's opinion, he asked:
  - When was this opinion sought and when was it given?
  - What information did the qualified person have access to when giving this opinion?
  - For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
  - Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?
  - Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?
9. The Commissioner also asked the DCLG to clarify which limb(s) of section 36(2) the qualified person considered to be engaged and to clarify (as regards section 36(2)(c)) what the nature of the prejudice was.
10. The DCLG provided its substantive reply to the Commissioner in correspondence dated 26 November 2009. A copy of the section 36 submissions and the Minister's response were also provided to the Commissioner. As to the Commissioner's queries regarding the qualified person's opinion it said as follows:
  - When was the opinion of the qualified person sought and when was it given?

#### Reply

The dates of the submission and the response from the Minister's office are 3 and 12 October 2007 respectively.

- What information did the qualified person have access to when giving this opinion?

#### Reply

The Minister had access to the submission of 3 October 2007 and attachments. The Minister was provided with an explanation of the

information held, together with the schedule of the relevant documents. The submission offered to provide the actual documents and further information if required, but the Minister was content to give an opinion without that being necessary.

- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?

Reply

Yes, the 3 October submission.

- Was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?

Reply

Not directly however the degree of inhibiting effect or prejudice was stated in the submission and that counter-arguments aimed at balancing this were therefore not necessary or appropriate.

11. As to the Commissioner's request that the DCLG confirm which limb(s) of section 36(2) it was relying on, the DCLG replied that the limbs considered to be engaged were section 36(2)(b)(i) and (ii) and section 36(2)(c).

### **Findings of fact**

12. Having seen supporting evidence the Commissioner accepts that the qualified person's opinion was sought on 3 October 2007 and that the opinion was given by the qualified person, Yvette Cooper MP, on 12 October 2007. However, as conceded by the DCLG the qualified person did not view the relevant information but utilised a summary of the same provided by DCLG.
13. The withheld information consists of an exchange of drafts (and comments thereon) of the "report".

### **Analysis**

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14. The Freedom of Information Act 2000 provides a right of access to information held by public authorities. Section 1 of the Act establishes this right to know by placing two related obligations on public authorities. Firstly, when an applicant requests information, a public authority has a duty to write to the applicant saying whether it holds the information. This is known as the duty to confirm or deny. Secondly, if the authority does hold the information it must communicate it to the applicant unless an exemption to the duty applies.

## Exemptions

### Section 36(2)(b)

15. Section 36(2) 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 - ...

... (b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation...’.

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

16. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*, EA/2006/0011 and EA/2006/0013) that a qualified person’s opinion under section 36 is reasonable if it is both ‘reasonable in substance and reasonably arrived at’. It elaborated that the opinion must therefore be ‘objectively reasonable’ and based on good faith and the proper exercise of judgement, and not simply ‘an opinion within a range of reasonable opinions’. However, it also accepted that ‘there may (depending on the facts) be room for conflicting opinions, both of which are reasonable’.
17. In considering whether an opinion was reasonably arrived at, the Information Tribunal in *McIntyre v Ministry of Defence* (EA/2007/0068) proposed that the qualified person should only take into account relevant matters and that the *process* of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
18. The Commissioner notes, having viewed the material provided to the qualified person prior to giving her opinion that she was provided with a description of the evidence and a summary of the factors she may wish to consider. While the Commissioner considers it preferable that the qualified person personally views the withheld information he accepts that, in this case, the qualified person had been given a comprehensive and accurate description of the withheld information and this was sufficient enough not to invalidate the process. The Commissioner accordingly finds that the process was satisfactory and the opinion was reasonably arrived at.
19. Regarding the application of section 36(2)(b)(i) and (ii) the submission to the Minister was that the withheld information consisted of information generated between the DCLG and the NAO in the belief or need for a frank provision of advice and exchange of views and these were needed to ensure the accuracy of the NAO’s investigation. The Commissioner accepts it is a reasonable opinion to

conclude that to release this information, at the time the request was made would be likely to introduce a degree of reticence in this candour and frankness. The Commissioner, having viewed the information and considered the submissions made to the qualified person, is satisfied that the opinion was an objectively reasonable one.

20. In this instance, under 36(2)(b)(i) and (ii), even though the qualified person has concluded that the exemption applies, the public interest test must be applied to determine whether to disclose the information. It is only where the public interest in maintaining the exemption outweighs the public interest in disclosure that the information should not be disclosed. The Commissioner has therefore gone on to consider the public interest test in this case.
21. The Commissioner, when considering the application of the public interest test, will do so in the context of the time the information request was made. This view reflects that taken by the Information Tribunal in *DBERR v the Information Commissioner and the Friends of the Earth* (EA/2007/0072).
22. When it comes to weighing the balance of public interest, it is impossible for the Commissioner to make the required judgement without forming a view on the severity, frequency and extent of any prejudice and the Commissioner notes the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would be likely to have the stated detrimental effect. That means that the qualified person has made a judgement about the degree of *likelihood* that the detrimental effect would occur and does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.
23. The right approach, consistent with the language of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which the detrimental effect will or may occur.
24. Whilst considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner recognises that there are competing public interest arguments. He has gone on to consider these arguments in turn.
25. Public interest arguments in favour of disclosing the requested information
  - Assist public scrutiny of the NAO investigation of the RICS' complaint.
  - Assist public scrutiny of the development and implementation government policy as regards Home Information Packs.
  - Better informed public opinion as to how the NAO investigates complaints against government departments.

- Disclosure of information by public authorities on request is in itself of value and in the public interest so as to promote transparency and accountability in relation to the activities of public authorities.
- Disclosure of the drafts could increase public confidence in the final version of the report if disclosure revealed a careful drafting process.
- If the disclosure of the drafts revealed a process by which the drafts were not subjected to adequate scrutiny then it could be argued that it would be in the public interest to disclose the drafts in order to reveal these failures.

26. Public interest arguments in favour of maintaining the exemption

- The disclosure of confidential exchanges between the NAO and government departments may inhibit such exchanges and thereby compromise the effective conduct of affairs.
- None of this material was written with publication in mind and it was created in an environment where frank provision of advice and a free and frank exchange of views were essential to ensure the accuracy of the NAO report and investigation.
- The free and frank provision of advice and free and frank exchange of views contribute to the accuracy of the NAO investigation and report.

**Balance of the public interest arguments**

27. As stated above the withheld information consists of exchanges between the NAO and the DCLG of drafts (and comments thereon) of the “report”. As stated above, by accepting the reasonableness of the qualified person’s opinion, the Commissioner notes that he must give some weight to this finding but will need to determine the severity and frequency of the effects himself when considering the final weight to be placed on maintaining the exemption. The Commissioner takes cognisance of the role of the NAO in the investigating of the efficiency and effectiveness of government departments. It is apparent from a reading of the withheld information that this function of the NAO is assisted by the candour and frankness of the DCLG.
28. In the circumstances of this case the Commissioner accepts the disclosure has the possibility to create a “chilling effect” on the candour of exchanges and, to some extent, hamper and or prolong the NAO’s investigatory functions. The Commissioner has considered the timing of the request, which was made after the report was published and therefore disclosure would not directly impact on the “safe space” needed to complete the report and this mitigates some of the prejudice that may occur. The Commissioner notes that a “chilling effect” is likely to be most severe when matter the requested information directly relates to has not concluded. The Commissioner also notes that is often reasonable to expect civil servants to continue share frank views and opinions (in the face of a disclosure) once the matter directly related has concluded. However, the circumstances of this case are relevant, considering the close proximity of the request to the conclusion of the report and the fact that Home Information Packs were still a “live” issue DCLG and other public bodies were still addressing at time of the request. The Commissioner there accords significant weight to

- maintaining section 36(2)(b)(i) and (ii) as he accepts the likely “chilling effect” in this case would be significant.
29. The above factors for the maintenance of the exemption have to be weighed against the public interest benefits from the disclosure of the information to the public. These benefits includes the general increase in the public’s knowledge of how concerns about a policy implementation by a government department are investigated and the report is compiled. The release of the information to some degree would increase the public knowledge of the government’s approach to implementation Home Information Packs. The Commissioner notes the impact this policy has had on a significant percentage of the population and the business sector; he also notes the high level of public debate about the approach taken by DCLG. However the Commissioner considers that the draft reports would not significantly further public understanding of the policy developments regarding Home Information Packs or DCLG’s conduct given that the final report has been published. That is it would not significantly add anything to the information that is already in the public domain and this, the Commissioner finds, weakens the public interest in releasing the information. Consideration of the content of the information does not raise additional public interest weight in favour of disclosure above the general weight and factors the Commissioner has acknowledged above.
30. On balance the Commissioner finds that that the public interest in maintaining the exemption outweighs the public interest in releasing the information.
31. Having found that the exemption provided by section sections 36 (2) (b) (i) and (ii) are engaged and that the public interest test favours the maintenance of the exemption the Commissioner did not consider the applicability of section 36 (2) (c).

## The Decision

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32. The Commissioner’s decision is that the public authority dealt with the request for information in accordance with the Act.

## Steps Required

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33. The Commissioner requires no steps to be taken.

## Other matters

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34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:



### Late Review

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner expresses his concerns that it took over five months for an internal review to be completed.

## Right of Appeal

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

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

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

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

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## **Legal Annex**

### **General Right of Access**

**Section 1(1)** provides 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.”

### **Time for Compliance**

**Section 10(1)** provides 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.”

### **Prejudice to Effective Conduct of Public Affairs**

**Section 36(2)** 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-

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