

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 10 March 2010**

**Public Authority:** Department for Work and Pensions  
**Address:** The Adelphi  
1-11 John Adam Street  
London  
WC2N 6HT

### Summary

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The complainant requested the public authority's review into how people in polygamous marriages are treated within the benefits system. The public authority explained to the complainant that the information it held which fell within the scope of his request consisted of four submissions to Ministers. However, it considered these submissions to be exempt from disclosure on the basis of section 35(1)(a). This decision was upheld at internal review. Some months later the public authority provided the complainant with all of the factual and/or background information contained within the submissions. However it continued to withhold the remaining information on the basis of section 35(1)(a) and added that some of the remaining information was also exempt from disclosure on the basis of section 42(1). The Commissioner has concluded that although all of the remaining information falls within the scope of section 35(1)(a), the public interest favours disclosing this information. However, the Commissioner is satisfied that for the small amount of information which also falls within the scope of section 42(1) the public interest favours withholding this information.

### The Commissioner's Role

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

## The Request

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2. The complainant submitted the following request to the Department for Work and Pensions (DWP) on 28 February 2008:

'I am requesting the release of the internal review into polygamous marriages referred to in the written answer of James Plaskitt, 20/02/08, Hansard column 756W.'

3. The DWP responded on 27 March 2008 and explained that although it held the information requested it considered it to be exempt from disclosure on the basis of section 35(1)(a) of the Act – formulation and development of government policy – and the public interest favoured maintaining this exemption.
4. On 27 March 2008 the complainant asked the DWP to conduct an internal review.
5. The DWP informed the complainant of the outcome of the internal review on 2 May 2008. The review upheld the decision to withhold the requested information on the basis of exemption contained at section 35(1)(a).
6. On 22 January 2009 the DWP wrote to the complainant and explained that it had reviewed its position in relation to this request and was now prepared to disclose some of the information it held. In reaching this decision the DWP explained that it had taken into account the requirements of section 35(4) of the Act which state that particular regard should be given to the public interest in disclosure of factual background used, or intended to be used, to provide an informed background to government decision-making. The DWP explained that it had now concluded that disclosure of such information contained within the submissions covered by this request would be in the public interest. The DWP therefore provided the complainant with all of the material contained in the submissions which could be considered to be factual and/or background information. The DWP noted that it believed that public interest under section 35(1)(a) favoured maintaining the remainder of the information. The DWP also noted that it believed that some of information that it continued to withhold was exempt from disclosure on the basis of section 42(1) of the Act.

## The Investigation

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### Scope of the case

7. The complainant contacted the Commissioner on 14 August 2008 to complain about the DWP's refusal to disclose the information falling within the scope of his request. As noted in the preceding paragraph the DWP subsequently contacted the complainant and provided him with some of the information that it held which fell within the scope of his request.
8. Therefore, the scope of the Commissioner's investigation has therefore been to determine whether the information that has not been disclosed to the complainant is exempt from disclosure under the Act, i.e. this decision notice does not consider whether the information which was disclosed to the complainant in January 2009 should have been disclosed by the DWP in response to the request in February 2008. Such an approach is in line with the Commissioner's robust case handling policy under which he will not normally issue a Decision Notice if a public authority discloses information to a complainant belatedly, i.e. outside of the time period for compliance required by section 10(1) of the Act.<sup>1</sup>

### Chronology

9. Due to a backlog of complaints received about the Act, the Commissioner was unable to begin his detailed investigation of this case immediately. Therefore it was not until 28 August 2009 that the Commissioner wrote to the DWP. In this letter the Commissioner asked to be provided with complete and unredacted copies of the information falling within the scope of the complainant's request along with detailed submissions to support its position that the remaining information was exempt from disclosure.
10. The DWP provided the Commissioner with a response on 28 September 2009. As part of this response the DWP provided the Commissioner with complete and unredacted copies of the information which fell within the scope of the complainant's request. The DWP also provided submissions to the Commissioner to support its position that the remainder of the information that had not been disclosed to the complainant was exempt from disclosure on the basis of section 35(1)(a) of the Act. The DWP also explained why it believed that some of the withheld information was also exempt from disclosure on the basis of section 42(1) of the Act.

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<sup>1</sup> [A Robust Approach to FOI Complaint Cases](#)

11. The Commissioner contacted the DWP again on 1 February 2010 in order to clarify a number of outstanding issues.
12. The DWP provided the Commissioner with this clarification on 19 February 2010.

### **Findings of fact**

13. The 'review' which the complainant's request seeks information about consists of advice to Ministers in the form of four separate submissions spanning a 12 month period. These submissions set out the existing position of people in polygamous marriages, how individuals in such marriages are treated within the benefits system, and options for possible change to this system.
14. The four submissions are dated 9 November 2006, 13 December 2006, 19 January 2007 and 13 November 2007.
15. The information that was disclosed to the complainant in January 2009 consisted of extracts from all four of the submissions that were provided to Ministers.
16. The DWP maintains that all of the remaining information that has not been disclosed is exempt from disclosure on the basis of section 35(1)(a). In addition a small portion of this information is also exempt from disclosure on the basis of section 42(1).
17. The existing benefits system, which was subject to the review, had been in place since 1988.

### **Analysis**

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#### **Substantive Procedural Matters**

18. In its submissions to the Commissioner the DWP confirmed that in its opinion as the complainant's request only sought a copy of the 'review', which in practice consisted of the four submissions from policy officials to Ministers, it believed that the names of officials and copy lists of the submissions fell outside the scope of the complainant's request.
19. Having considered both the nature of the request and the four submissions themselves, the Commissioner disagrees with the DWP's position. In the Commissioner's view it is clear that the names of the

officials who wrote each submission, along with the names of officials referred to in the submissions and the copy lists which detail who the submissions were sent to, all form an integral part of the submissions. The names are actually contained within the submissions documents themselves. As the complainant's request in effect asked for the submissions, the Commissioner believes that such information also falls within the scope of the request.

## Exemptions

### **Section 35(1)(a) – formulation and development of government policy**

20. The DWP has argued that all of the remaining information is exempt from disclosure on the basis of section 35(1)(a). (The exception being the names of officials which, for the reasons set out above, it does not consider to fall within the scope of the request.) This section states that:

'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'

21. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
22. The complainant has argued that the information he requested did not fall within the scope of section 35(1)(a) of the Act because the 'review' consisted of a reconsideration of existing legislation rather than policy development. Furthermore, the complainant argued that the legislation being reviewed was not even implemented by current government but by its Conservative predecessor.
23. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has

been taken on a policy line and it's not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage..

24. Therefore in the Commissioner's opinion although the requested information in this case consists of a review of an existing policy, rather than the introduction of a completely new and novel policy, this does not preclude the four submissions from falling within the scope of the exemption contained at section 35(1)(a). Consequently the Commissioner is satisfied that section 35(1)(a) is engaged in respect of the contents of all four submissions.

### **Public interest test**

25. However, section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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

26. The DWP highlighted a number of arguments in favour of disclosing the withheld information, namely:
27. There is a generic public interest in disclosure of information which would make the government more accountable for, and transparent about, decisions it had taken; this can increase trust in the government.
28. Disclosure of the information could contribute to the public's understanding of how government works and could improve the public's contribution to the policy making process and in doing so make the policy making process more effective and broadly based.
29. There is a public interest in the public being able to assess the quality of the advice being given to Ministers and the subsequent decision making.
30. The complainant argued that a lack of transparency had increased public resentment of those with multiple wives in receipt of benefits and may fan the flames of racism and hatred. In the complainant's opinion disclosure of the withheld information would allow for a calm debate on the pros and cons of the policy.

31. Furthermore, the complainant argued that as this policy had been in place for 20 years at the date of his request, it was not unreasonable for the public to see an assessment of the workings of a reasonably long standing piece of legislation.

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

32. The DWP argued that disclosure of the information, which would reveal the detailed discussions of how polygamous marriages might be alternatively treated within the benefits system, would prejudice and constrain future policy development in this area. This could lead to a corrosive effect in the conduct of good government with the risk that decision making will become poorer and will be recorded inadequately.
33. In order to support its position that such an effect would occur the DWP highlighted a number of generic arguments usually quoted in support of maintaining the exemption contained at section 35(1)(a), namely:
34. There could be a 'chilling effect' if this information was disclosed; i.e. those who contribute to policy making may be reluctant to do so in the future if they believed that their contributions would be disclosed under the Act. The DWP argued that there could be such a deterrent effect on external experts or stakeholders but also on officials within government departments. In support of this effect the DWP highlighted the comments of Justice Mitting in *Friend of the Earth v The Information Commissioner and Export Credit Guarantee Department* in which he stated that such arguments are not, as suggested by the Information Tribunal, ulterior considerations rather although the weight to be given to such considerations will vary from case to case, he could 'state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between'.<sup>2</sup>
35. Ministers and officials also need to be able to conduct rigorous and candid risk assessments of their policies and programmes including considerations of the pros and cons without there being premature disclosure which might close off better options. Such a 'safe space' also allows those involved in policy making to 'think the unthinkable' and use imagination without the fear that policy proposals will be held up to ridicule.
36. The impartiality of the civil service and, in this instance, government actuaries, might be undermined if advice was routinely made public as

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<sup>2</sup> *Export Credit Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/638.html>, para 38.

there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.

37. The DWP argued that the effects outlined in the preceding paragraphs would not be in the public interest because good government needs to be based upon the best advice available and full consideration of all policy options. In order to support these generic arguments the DWP noted that at the time of the request the requested information was still relatively recent – i.e. the formulation and development process had only recently been concluded – and this supported the relevance of such arguments. Moreover, Ministers may wish to return to these proposals and consider them afresh in the light of the continuing debate on the treatment of polygamous marriage.
38. The DWP also highlighted the following specific reason why disclosure of the information in this case would not be in the public interest. Disclosure of the detailed discussions of how polygamous marriages might be treated within the benefits system could put unrestrained and unprejudiced assessment of how their treatment within the benefits system could be changed at risk to the detriment of the continued development of the policy.

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

39. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) along with the more recent comments contained in High Court judgments in which the *DFES* the decision was referenced.<sup>3</sup>
40. In particular the Commissioner has considered key two principles outlined in the *DFES* decision. The first was the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

‘Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the “...threat of lurid headlines depicting that which has been merely broached as agreed policy.’

41. The second being:

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<sup>3</sup> The two High Court cases in question are the *ECGD* quoted at the previous footnote and *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/737.html>



'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.' (Para 75(i)).

42. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:
43. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
  - Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
  - The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
  - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
44. As suggested in the Findings of Fact section above by the time the complainant submitted his request in February 2008 the DWP's review of the benefits system was complete; the last submission is dated November 2007 and the Commissioner understands that the decision not to amend the existing benefits system, which signified the completion of the formulation and development, was taken in December 2007. Therefore it is only the last of three chilling effect scenarios which is relevant to this case.
45. The Commissioner accepts, particularly in light of Justice Mitting's comments referred to by the DWP, that the chilling effect arguments should not be dismissed lightly. Nevertheless the Commissioner believes that a public authority still has to provide some case specific evidence which supports their application of the chilling effect arguments. In this case, the DWP has simply asserted that disclosure of the withheld information may have a chilling effect on the

formulation of future policies. Moreover, the DWP did not clearly identify when or why it would want to re-visit the policy options in this specific area; it simply suggested that may wish to return to these proposals at some point in the future in light of the continuing debate on the treatment of polygamous marriage. Whilst the Commissioner accepts that the content of the withheld information does contain, in places genuinely free and frank comments, he does not believe that the DWP has sufficiently demonstrated how disclosure of this information would have a significant chilling effect on future policy formulation or development. Therefore, bearing in mind the comments of Justice Mitting, and the content of some of the information, the Commissioner believes that although the chilling effect argument deserves some weight, he does not believe that it should be given any significant weight in this case.

46. With regard to the arguments surrounding safe space, the Commissioner again notes that by the time the request had been submitted the policy formulation and development had been completed. As safe space arguments focus on providing a private space in which to develop live policy, and in this case by the time of the request the policy was no longer live, the Commissioner does not believe that the safe space argument deserves to be given any particular weight.
47. In relation to the argument that the disclosure of the withheld information could harm the impartiality of the civil service, the Commissioner notes the comments of the Tribunal in a number of cases where similar arguments were advanced. In respect of a change of behaviour by politicians towards civil servants if information was disclosed the Tribunal was clear that the public were entitled to expect a substantial measure of political sophistication and fair-mindedness from politicians and it would therefore be correct to proceed on the assumption that Ministers will behave fairly towards officials, regardless of the decisions particular civil servants had taken in the past. To do otherwise as the Tribunal suggested 'would plainly betray a serious misunderstanding of the way the executive should work. It would, moreover, be wholly unjust'.<sup>4</sup> Similarly with regard to a change in the behaviour of civil servants towards politicians resulting from disclosure of the information, the Commissioner notes the comments of the Tribunal in *DCMS v The Information Commissioner (EA/2007/0090)* at para 40:

'some emphasis was placed in cross examination on the role of professional integrity and the standards required in the Civil Service code as a bulwark against possible degradation of relationships between Ministers and civil servants caused by the

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<sup>4</sup> DFES, (EA/2006/0006), paragraph 75 (ix)

possibility of their communications being disclosed under FOIA, including the integrity of advice and record keeping.'

48. The Commissioner's position is that whilst he would accept that if civil servants did come under political pressure not to challenge ideas in the formulation of policy, this would compromise the effectiveness and neutrality of the civil service, and are thus not 'ulterior considerations' as with chilling effect arguments, the Commissioner agrees with the Tribunal's position that the standards that we should realistically be able to expect from both officials and politicians should limit this effect. Therefore as the DWP have failed to identify specific and convincing arguments in this case, the Commissioner has not attributed any particular weight to this argument.
49. With regard to the argument that disclosure of the information could have a negative impact on the effect on record keeping, the Commissioner again following the findings of the Tribunal in a number of decisions, would attribute little weight to this argument. In the Commissioner's opinion any impact on record keeping which flows from disclosure of information under the Act could be properly addressed by staff management. Moreover there is a clear business need for public authority's to keep detailed and accurate records of discussions and decision making regardless of the fear of potential of disclosure of such records under the Act.<sup>5</sup>
50. With regard to attributing weight to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon in support of the public interest in favour of disclosure, i.e. they focus on openness, transparency, accountability and contribution to public debate. However, this does not diminish their importance as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances, again the key ones being the content of the information and the timing of the request.
51. The Commissioner accepts that the treatment of those in polygamous marriages within the benefits system is an issue which is one which is clearly of some significant public interest. This is demonstrated not only by the parliamentary questions which were submitted on this issue but also by the media interest in the issue, particularly around the time of the request when the press focused on the outcome of the DWP's review, i.e. the decision to leave the existing policy in place.

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<sup>5</sup> See *Guardian and Brooke v Information Commissioner and BBC*, (EA/2006/0011 and 0013) at paragraph 107 and *Baker v Information Commissioner and DCLG* (EA/2006/0043) at 18.

52. Having considered the content of the information the Commissioner believes that disclosure of the withheld information would genuinely inform the public about the various policy alternatives. This is because the withheld information contains, in the Commissioner's opinion, a detailed and rigorous assessment of policy options and the rationale for ultimately not changing the system. Consequently the Commissioner believes that disclosure of the information would also reassure the public that such a sufficiently rigorous review had been undertaken.
53. Nevertheless, the Commissioner does accept that given the timing of the request, disclosure of the information would not have allowed the public to feed into the review referred to in the complainant's request because it had been completed by the date the complainant had submitted his request. This is of course not to say that it could not be used by the public to feed into future reviews of this policy but as noted above in relation to the chilling effect arguments, it is not clear when this policy will be reviewed again.
54. In conclusion, in the Commissioner's opinion the arguments in favour of maintaining the exemption do not outweigh the public interest in disclosing the information. In reaching this finding the Commissioner would emphasise the fact that generic arguments advanced by the DWP in favour of the maintenance of the exemption have not, in his opinion, been backed up by any case specific evidence beyond the suggestion that Ministers may wish to return and re-visit this policy at some point in the future. In contrast, the Commissioner believes that the content of the four submissions would genuinely inform the public about the review that took place.

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

55. The DWP has also argued that a small portion of the withheld information is also exempt from disclosure on the basis of section 42(1) which provides an exemption for information to which a claim to legal professional privilege could be maintained in legal proceedings. This information consists of paragraph 22 of the first submission dated 9 November 2006 and paragraphs 12 to 15 of the second submission dated 13 December 2006.
56. 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.
57. The Commissioner understands that the category of privilege the DWP is relying on 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. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. 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 and answer which can usually be found by inspecting the documents themselves.

58. The DWP has argued that whilst the submissions themselves do not consist of communications between a client and a lawyer, the paragraphs that have been redacted on the basis of section 42(1) reflect the content of legal advice provided to the relevant policy officials. In support of this position the DWP provided the Commissioner with two memorandums between a DWP lawyer and policy officials.
59. The Commissioner has reviewed the contents of the memorandums in question and is satisfied that their dominant purpose was the provision of legal advice.
60. Furthermore the Commissioner has established that paragraphs 12 to 15 of the second submission are a direct reflection of the content of specific parts of the memorandums. On this basis that Commissioner is satisfied that paragraphs 12 to 15 are exempt from disclosure on the basis of section 42(1).
61. With regard to paragraph 22 of the first submission, the DWP explained that it could not provide the Commissioner with the exact written legal advice upon which this submission was based. (The first submission predates the two legal advice memorandums.) However, the DWP informed the Commissioner that the content of both submissions was drafted after face to face meetings between policy officials and lawyers. Lawyers were then asked to comment on the draft submissions in order to ensure that they described the legal position correctly. Therefore the DWP argued that legal position as set out at paragraph 22 of the first submission would not have been drafted without some legal input. Furthermore the DWP noted that the content of paragraph 22 is very similar to paragraph 12 of the second submission thus supporting the conclusion that paragraph 22 reflects the content of legal advice provided to the relevant policy officials.
62. On this basis the Commissioner is also prepared to accept that paragraph 22 of the first submission is also exempt from disclosure on the basis of section 42(1) of the Act.

### **Public interest test**

63. However, section 42 is a qualified exemption and therefore subject to the public interest.

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

64. The Commissioner believes that the public interest arguments in favour of disclosing the information withheld under section 42(1) are similar to those set out above and therefore he has not replicated them here.

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

65. In arguing that the public interest favoured withholding this information, the DWP has highlighted the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. Furthermore, the DWP highlighted the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1):
66. Government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter arguments; as a consequence legal advice may well set out the perceived weaknesses of the department's position. Without such comprehensive advice, the government's decision making process would be reduced because it would not be fully informed and this is contrary to the public interest.
67. Disclosure of legal advice has a significant prejudice to the government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

68. There is also a risk that lawyers and clients will avoid making a permanent record of the advice that is given or make only a partial record. This too would not be in the public interest. If this scenario was taken to its logical extreme, it is possible that there may even be a reluctance to seek legal advice.
69. This could lead to decisions being taken that are legally unsound. Not only would this undermine the government's decision making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided.
70. The DWP concluded that although section 42 is a qualified exemption, given the very substantial public interest in maintaining confidentiality of legal professionally privileged material, it is likely to only be in 'exceptional circumstances' that this will be outweighed by the public interest in disclosure. The DWP suggested that in this case there was no 'clear case' that suggests that the strong public interest in maintaining legal professional privilege is outweighed.

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

71. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

72. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

73. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
- the number of people affected by the decision to which the advice relates;
  - the amount of money involved; and
  - the transparency of the public authority's actions.
74. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of decision making process.
75. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
76. The advice dates from late 2006 and therefore the Commissioner accepts that at the time when the complainant submitted his request for information, February 2008, the advice was still relatively recent. Furthermore, the Commissioner understands that as the legal advice was used as part of the ultimate decision not to change the policy position on polygamous marriages, it can be said to still be live at the time of the request.
77. With regard to attributing weight to the public interest arguments in favour of disclosing the advice, again the Commissioner notes that these are ones that are often relied upon in order to argue that information should be disclosed under a qualified exemption, albeit that this should not diminish their relevance.
78. The Commissioner notes that the Tribunal, in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* (EA/2007/0052) felt that the disclosure of the requested legal advice was necessary because of the crucial lack of transparency by the public authority in question. In the circumstances of this case the Commissioner does not believe that the DWP could be correctly accused of such a fundamental lack of transparency. Furthermore, although for the reasons set out above the Commissioner believes that disclosure of the four submissions could genuinely inform the public



about the review of the policy in question, the amount of information that has been withheld on the basis of section 42(1) only forms a small proportion of two of the submissions. Thus the degree to which disclosure of this information would inform the public is relatively limited.

79. The Commissioner is also conscious that in the *Merseytravel* case the Tribunal emphasised the fact that the level of money involved, and the number of people affected by the decisions based upon the legal advice, were key considerations in its conclusion: the amount of money involved was estimated to be around £70m with approximately 80,000 directly affected. In the *Pugh* case quoted above the legal advice focused on pension funds with a value estimated to be around £1bn.
80. In the circumstances of this case, the Commissioner understands that the number of people in the UK estimated to be in polygamous marriages is around 1,000 and thus the amount of people the legal advice has a direct impact on is relatively small. Moreover, although it could be argued that all taxpayers are affected by the decisions taken in respect of benefit policies – it is after all the revenue from their taxes which pays for such benefits – the Commissioner understands that the amount of money needed to cover these benefits paid under the existing system, whilst not insignificant, is small in comparison to the figures quoted in the Tribunal cases.<sup>6</sup>
81. In conclusion, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege, the fact that this information is recent and, in effect, is still being relied upon and the fact that disclosure would not add substantially to issues of transparency, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Procedural Requirements**

82. Part I of the Act includes a number of procedural requirements with which public authorities must comply.
83. These include section 1(1) which states that:

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

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<sup>6</sup> Media reports estimated that the ‘benefits bill for income support’ under the existing policy could reach £10m; see The Daily Mail, [‘Muslim husbands with more than one wife to get extra benefits as ministers recognise polygamy’](#), 4 February 2008

(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.'

84. Section 10(1) requires a public authority to respond to a request within 20 working days following the date of receipt.
85. Section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice, within the time for compliance set out at section 10(1), stating the basis upon which it has refused a request for information.
86. In handling this request the DWP failed to provide to the complainant with a refusal notice citing section 42(1) of the Act within 20 working days of the request. This constitutes a breach of section 17(1) of the Act.
87. As the Commissioner has decided that public interest under section 35(1)(a) does not favour withholding the requested information, the four submissions should have been disclosed to the complainant. (The exception of course being the parts exempt from disclosure on the basis of section 42(1).) Failure to provide this information constitutes a breach of sections 1(1)(b) and 10(1) of the Act.

## **The Decision**

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88. The Commissioner's decision is that the DWP dealt with the following elements of the request in accordance with the requirements of the Act:
  - Paragraph 22 of the first submission dated 9 November 2006 and paragraphs 12 to 15 of the second submission dated 13 December 2006 are exempt from disclosure on the basis of section 42(1) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
89. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The names of the officials and copy lists form part of the four submissions and therefore fall within the scope of the complainant's request.
- The remainder of the four submissions not provided to the complainant in January 2009 fall within the scope the exemption contained at section 35(1)(a) but the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.
- By failing to provide a refusal notice citing section 42(1) within 20 working days of the request the DWP breached section 17(1) of the Act.
- By failing to provide the complainant with the remainder of the submissions not previously disclosed, the DWP breached section 1(1)(b) and 10(1) of the Act.

## Steps Required

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90. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide the complainant with the parts of the four submissions previously withheld on the basis of section 35(1)(a), with the exception of paragraph 22 of the first submission dated 9 November 2006 and paragraphs 12 to 15 of the second submission dated 13 December 2006.
  - Provide the complainant with the names of officials where they appear within the four submissions along with the copy lists for the submissions.
91. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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

## Right of Appeal

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93. 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 10th day of March 2010**

**Signed .....**

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

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

## **Legal Annex**

### **Freedom of Information Act 2000**

#### **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.”

**Section 1(2)** provides that -

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

#### **Effect of Exemptions**

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

#### **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.”

#### **Refusal of Request**

**Section 17(1)** provides that -

"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."

### **Formulation of Government Policy**

**Section 35(1)** provides that –

"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.

**Section 35(2)** provides that –

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

**Section 35(4)** provides that –

"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."

### **Legal Professional Privilege**

**Section 42(1)** 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.”