

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 May 2010

Public Authority: Department for Transport
Address: Great Minster House
76 Marsham Street
London
SW1P 4DR

Summary

The complainant requested a copy of the content of any email in the folders of the Secretary of State, Ministers and their secretaries which contained the word embarrassing. The Department for Transport (the "DfT") initially relied upon section 14(1) to refuse this request. During the Commissioner's investigation the DfT dropped its reliance on section 14(1) and disclosed some information to the complainant. However, it also withheld some information under sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 40(3)(a)(i), and 43(2). At a later stage of the investigation it also relied upon section 41. After investigating the case the Commissioner decided that the outstanding information was exempt from disclosure under section 36(2)(b)(ii). However, the Commissioner also decided that DfT failed to meet the requirements of sections 10(1), 17(1) and 17(5).

The Commissioner's Role

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

The Request

2. The complainant contacted the DfT on 3 September 2008 and made the following request,

"Request from within the e-mail folders of the Secretary of State, Ministers and their secretaries to know the content of all e-mails that contain the word "embarrassing".

Please disclose to me...the contents of all e-mails (together with the contents of any attachments) in the in-box, sent or deleted items folders of the Secretary of State, your Ministers of State and their personal secretaries (i.e. the personal secretaries or assistants for the Secretary of State and for the Ministers of State) that contains the word "embarrassing" (or any misspelling of that word: please try one r, two esses; two rs, one s and one r and one s). Please disclose the subject headings of each of these emails by reference to the contents of the e-mail concerned (unless it is that you are claiming the e-mail content for a certain e-mail(s) to be exempt but disclosing the subject heading alone in respect of the specific e-mail(s): while not acceptable, in that you have withheld the e-mail content, it will allow me to know the subject heading albeit not by reference to the content and I also request to know this if I cannot be told the content of some or all of the e-mails in respect of those e-mails whose content is not disclosed and to know the subject heading and content for the remaining e-mails that contain the word or misspelling of the word)."

3. The DfT responded in a letter dated 15 September 2008, and requested clarification in relation to certain aspects of the request. Specifically it queried what time period the request was referring to.
4. The complainant responded in a letter dated 17 September 2008 and provided further clarification. In particular he stated that,

"...you say that I do not specify "which Secretaries of State or Ministers [I] would like to be included." As far as I am aware, there is only one Secretary of State, that is the Secretary of State for Transport. My letter is addressed to the "Department for Transport" and clearly covers its Secretary of State. I would clearly not be seeking, from your Department, the information held in the folders of any other Secretary of State...There is similarly no reason to request clarification of what I mean by "Ministers of State" as this is a clearly defined group of people. It

means all those people who have the title of Minister of State within your Department...There is clearly no need for me to clarify "Ministers of State" (or "Secretary of State"). It is perfectly clear. You only have a limited, and precise, number of Ministers at your Department. It is also obvious that ministers means current ministers and does not include former ministers."

5. The DfT wrote again to the complainant on 25 September 2008 and confirmed the details of the searches it would undertake in relation to the request. It stated that it would search the email accounts (Inbox, Sent Items, Deleted Items and Archive) of the Secretary of State, Minister of State and their Private Secretaries. It also noted that it would search the email accounts of the Parliamentary Under Secretaries of State and their Private Secretaries.
6. The DfT wrote again on 17 October 2008 and confirmed that it held information that fell under the scope of the request. However, it informed the complainant that it needed further time in order to consider the public interest test in relation to sections 35(1)(a), 35(1)(d), and 36(2)(b). It intended to be in a position to respond by 18 November 2008.
7. The DfT wrote again on 17 November 2008, informing the complainant that it was still considering the public interest test in relation to these exemptions. It did not inform him when it intended to be in a position to respond, and instead stated that, "we are seeking further advice before a decision can be made."
8. The DfT wrote again on 12 January 2009 and stated that after considering the request further it considered it to be vexatious, and as such it believed that section 14(1) of the Act applied. Consequently it did not believe that it was required to comply with the request.
9. The complainant requested a review of this decision in a letter dated 14 January 2009. The DfT conducted an internal review and responded in a letter dated 2 March 2009. In this letter it upheld its decision to apply section 14(1) to the request.

The Investigation

Scope of the case

10. The complainant initially complained to the Commissioner in a letter dated 11 April 2009 to complain about the way that his request had

- been handled. The Commissioner wrote to the DfT on 22 June 2009 and expressed concerns about its application of section 14(1).
11. In a letter dated 7 August 2009 the DfT informed the Commissioner that it was no longer relying upon section 14(1), and was now prepared to disclose some of the previously withheld information to the complainant. However, it still intended to withhold one email in full as it believed that this information was exempt under sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 40(3)(a)(i), and 43(2). It also provided the Commissioner with a copy of this email.
 12. On 10 September 2009 the DfT disclosed four emails to the complainant – stating that it had redacted the names of junior civil servants from these emails under sections 40(2) and 40(3)(a)(i).
 13. The Commissioner wrote to the complainant on 7 January 2010. He noted that the DfT had now disclosed some of the previously withheld information to him, and stated that he intended to focus his investigation on the DfT's use of sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 40(3)(a)(i), and 43(2) to withhold the one outstanding email. He asked the complainant to confirm whether he was satisfied with the redactions that had been made in the emails that had now been disclosed to him, or whether he also wished him to investigate the DfT's use of sections 40(2) and 40(3)(a)(i) to withhold this redacted information.
 14. The complainant emailed the Commissioner on 17 January 2010, and informed him that he did not wish to complain about the DfT's use of sections 40(2) and 40(3)(a)(i) to redact the emails that had now been disclosed to him.
 15. Therefore the Commissioner has focused his investigation on the DfT's use of sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 40(3)(a)(i), 41 and 43(2) to withhold the one outstanding email. He has also considered whether the DfT has complied with the requirements of sections 1, 10 and 17.

Chronology

16. The Commissioner wrote to the DfT on 19 January 2010 and asked it to provide further submissions to support its use of sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 40(3)(a)(i), and 43(2).
17. The DfT responded in an email dated 5 March 2010, and provided further submissions to support its use of the exemptions. It also confirmed that it was relying upon sections 36(2)(b)(i) and (ii), and

36(2)(c) to withhold all the contents of the email in question, and sections 40(2) and 40(3)(a)(i), and 43(2) to withhold some of the email in question. In addition to this, it informed the Commissioner that it also believed that section 41 applied to the whole email.

Analysis

18. The DfT has relied upon sections 36(2)(b)(i) and (ii), 36(2)(c), and 41 to withhold the email in question in its entirety. In addition to this, it has also applied sections 40(2) and 40(3)(a)(i), and 43(2) to some of the email. The Commissioner has first considered its application of section 36.

Exemptions

Section 36

19. As noted above, in this case the DfT has relied upon sections 36(2)(b)(i) and (ii), and 36(2)(c) to withhold the outstanding information.
20. The relevant parts of section 36(2) state that,
- “Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
- [...]
- (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.”

This is a qualified exemption, and is therefore subject to the public interest test.

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

22. The Commissioner has first considered the application of section 36(2)(b)(ii).
23. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences described at paragraph 20 above. In order to establish whether the exemption has been applied correctly the Commissioner must:
- establish that an opinion was given;
 - ascertain that it was given by a qualified person;
 - ascertain when the opinion was given; and,
 - consider whether the opinion was objectively reasonable and reasonably arrived at.

If the Commissioner decides that the exemption is engaged he must then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

24. The Commissioner has been guided by the Tribunal's decision in *Guardian & Brooke v ICO & the BBC* [EA/2006/0011 & EA/2006/0013] which indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, "does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."¹ Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted, focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition caused by disclosure.
25. During the course of the investigation the Commissioner asked the DfT for details of the decision taken by the qualified person, in order for him to ascertain that an opinion was given and also that it was given by an appropriate person at an appropriate time.
26. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown. In this case the Commissioner has established that the reasonable opinion was given by the Parliamentary Under-Secretary of State. The Commissioner is

¹ EA/2006/0011 & EA/2006/0013, para 13.

- satisfied that the Parliamentary Under-Secretary of State was a qualified person for the purposes of section 36 of the Act.
27. The DfT has advised that the decision to apply section 36(2)(b)(ii) was made by the qualified person on 7 August 2009. In addition to this, the DfT also confirmed that it had sought the opinion of the qualified person again on 1 March 2010 in order to seek his further views on the application of this exemption.
 28. The Commissioner notes that the qualified person's opinion was not sought until after the date of the refusal notice (12 January 2009) and the Internal Review (2 March 2009).
 29. In cases where a public authority seeks to rely upon a late exemption the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption into account if it is raised in the course of his investigation. In this instance the Commissioner notes that the DfT initially relied upon section 14 – and only sought to rely upon section 36 after it received his letter dated 22 June 2009. In this letter he had informed the DfT that he was not convinced that section 14 applied, and invited it to either disclose the previously withheld information, or to provide submissions as to what other exemptions it sought to rely upon in this case.
 30. In addition to this the Commissioner has also noted the contents of the withheld information. The email in question records a communication from an MP in regard to a matter affecting their constituency. The Commissioner has noted that this was a live issue at the time of the request, and that the email was sent the same day that the request for information was received (and related to a communication that had occurred on that day). The Commissioner has also considered the nature of the DfT's arguments to support its use of this exemption (see paragraphs 34, 37 and 47 below). Bearing all of these points in mind, the Commissioner has decided to exercise his discretion, and allow the application of this exemption in this case.
 31. The fact that the qualified person's opinion was not sought until during the Commissioner's investigation represents a flaw in the process followed to apply section 36. However, as the Commissioner has decided to allow the late application of this exemption, he has gone on to consider whether the qualified person's opinion is a reasonable one.
 32. In its submissions to support the application of section 36(2)(b)(ii), the DfT has provided the Commissioner with a copy of two memos that were provided to the qualified person, in order to seek his opinion on

- whether the exemption was engaged. These memos are dated 27 July 2009 and 1 March 2010. These memos set out the exemptions under consideration, and also discuss the public interest factors for and against disclosure. In addition to this the DfT has also provided the Commissioner with a detailed explanation as to why it considers the information to be exempt on the basis of section 36(2)(b)(ii).
33. The Commissioner notes that although these memos all postdate the request, the (albeit limited) factors and arguments given in them do not relate to matters or events that post dated the request. Despite the obvious fact that these memos were sent to the qualified person several months after the request was received, the contents are such that they could predate the request. Therefore the Commissioner is satisfied that the qualified person did not take into account factors that post dated the request.
34. However, the Commissioner also notes that the memos to the qualified person do not contain a detailed explanation of the factors that were taken into consideration when he formed the view that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. Instead, the memo of 1 March 2010 simply states that, "...when the MP phoned us on a matter relating to [their] constituency [they] had an expectation that our record of the conversation would be treated confidentially. If we disclosed the information it could lead to a loss of confidence on the part of MPs, which would have an inhibiting effect..." The memo also noted that, "...if Government does not respect the wishes of an MP for [their] communications with us to be treated confidentially, [that MP] and other MPs will be less willing in future to speak frankly about matters of concern to [their] constituents. This could undermine their effectiveness in terms of making the case for their constituents." In addition to this, the memo's both include a brief summary of the public interest factors in this case and why disclosure of the information is not in the public interest. Although there is clearly some connection between why the public interest may favour withholding the information and any inhibition or prejudice that may occur, the DfT's submissions do not clearly identify why the qualified person arrived at the position that he did in relation to section 36(2)(b)(ii). However, the letter from the DfT to the Commissioner dated 5 March 2010 does include more detailed reasoning as to why the information in question is exempt on the basis of section 36(2)(b)(ii).
35. This leaves the Commissioner in a somewhat difficult position; although the DfT's submissions give limited information as to why the qualified person reached the opinion he did, it is not explicitly clear that he considered the exemption contained at section 36(2)(b)(ii) to apply

on the basis of the more detailed reasoning also provided by the DfT to the Commissioner. In respect of this point the Commissioner has been guided by the Tribunal's comments in the case *McIntyre v ICO & the Ministry of Defence* [EA/2007/0068] in which the Tribunal explained that,

"...where the opinion is overridingly reasonable in substance then even though method or process by which that opinion is arrived at is flawed in some way need not be fatal to a finding that it is a reasonable opinion."²

Therefore the Commissioner has had to consider whether the qualified person's opinion in this case appears to be overridingly reasonable in substance.

36. Despite only being provided with very limited evidence that explicitly explains why the qualified person considered the information in question to be exempt under section 36(2)(b)(ii), the Commissioner is satisfied that the opinion appears to be overridingly reasonable in substance for the following reasons.
37. The basis for the qualified person's opinion, under section 36(2)(b)(ii), appears to be that disclosure would be likely to have a 'chilling effect' on MP's. MP's contacting the DfT on a matter affecting their constituency would do so with an expectation of confidentiality. If this was not supported, MP's would be less willing to speak frankly of these matters, "thereby jeopardising their relationship with the [DfT] and with their constituency, and accordingly the [DfT's] relationship with the general public as a whole." If MP's were to lose confidence in their ability to approach the DfT in confidence on matters affecting their constituency, this would have an inhibitory effect on them, and on the free and frank exchange of views. This would not only prejudice the interests of the communities that MP's represent, but also the ability of the DfT to learn about the effects of its policies on those communities.
38. After considering this, and the contents of the withheld information, the Commissioner is satisfied that the email relates to a matter that was live at the time of the request, and was a sensitive matter in relation to the MP's constituency. In addition to this, as noted at paragraph 30 above, the email was sent the same day that the request for information was received (and related to a communication that had occurred on that day).

² EA/2007/0068, para 31.

39. The Commissioner accepts that an MP's ability to contact a relevant government department on a matter relating to the impact its policies are having on their constituency is an important function of our democracy. He also accepts that an MP's ability to represent their constituents relies upon the free and frank exchange of views for the purposes of deliberation. Whilst he believes that the MP's actions will often have consequences which will lead to the MP's involvement (and the issues that they have raised) being made public, he believes the timing of the request in this case is crucial. This was a live issue, and the record of the communication was contemporaneous with the receipt of the request. He believes that it would be reasonable for an MP to expect that any contact that they had made of this nature (and the details of it) would not be put into the public domain on the day they contacted the department.
40. Therefore, the Commissioner is of the view that in this case the qualified person's opinion appears to be overridingly reasonable in substance. He is therefore satisfied that section 36(2)(b)(ii) is engaged in relation to the information that has been withheld.
41. The Commissioner has gone on to consider the public interest test.
42. In reaching a view on the public interest the Commissioner has noted the comments of the Tribunal in *Guardian & Brooke v ICO & the BBC*, which held that the application of the public interest test in section 36 cases entails a consideration of the following factors:
- (a) The lower the likelihood is shown to be that the free and frank exchange of views for the purposes of deliberation would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
 - (b) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
 - (c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.

- (d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the free and frank exchange of views for the purposes of deliberation.
- (e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.³

However, the Tribunal qualified the first of these factors by stating that it was for the qualified person to decide whether prejudice was likely, and thereby whether the exemption was engaged. However, in making a decision on the balance of the public interest, the Tribunal (and therefore the Commissioner) would need to make a decision as to the severity, frequency, or extent of any prejudice that would or might occur.

Public interest arguments in favour of disclosing the requested information

43. The DfT has recognised that there is a public interest in:
- promoting transparency, accountability and participation; and
 - enabling MP's constituents to see whether they are representing their interests, and if so, how.

In addition to this, it has also acknowledged that the public may have an interest in communications that expose actual or potential embarrassment to a public authority or an MP.

44. This latter point has also been somewhat argued by the complainant, who has stated that,

“If someone has described a matter as embarrassing, the public interest lies for us to see what they consider to be embarrassing and make our own decision as to whether or not they agree: if it is embarrassing, there is no public interest in withholding

³ EA/2006/0011 & EA/2006/0013, para 87.

something simply because a public authority thinks it is embarrassing."

45. The Commissioner is not wholly persuaded by this point. In particular, the Commissioner is not convinced that this request would enable what a public authority considers to be embarrassing to be found. He has particular doubts that a request for any emails in the email accounts of (admittedly senior) individuals within a government department which contain the word 'embarrassing' would, in itself, necessarily uncover matters that were, or were considered, embarrassing to that public authority.
46. In addition to this, whilst he accepts that the public may be very interested in knowing what a public authority considers to be embarrassing, the Commissioner notes that what the public may be interested in is not necessarily in the public interest. Whilst he believes that there are general public interests in promoting openness, transparency and accountability in relation to public bodies and decisions made by those bodies, he does not find the complainant's arguments in relation to such a widely defined request particularly convincing.

Public interest arguments in favour of maintaining the exemptions

47. The DfT has argued that:
- If the DfT does not respect the wishes of an MP for their communications with it to be treated confidentially, that MP (and others) will be less willing in future to speak frankly about matters of concern to their constituency. This could undermine their effectiveness in terms of making the case for their constituents. This would not be in the public interest.
 - This inhibitory effect would also undermine the effectiveness of MP's providing information which is relevant to effective decision making in Government. Again, this would not be in the public interest.
 - "...we believe that failure to respect confidential communications from MPs would have an inhibiting effect on their relations with Government, which, given the limited public interest in the disclosure of this information, is not outweighed by the benefits in releasing the information."
48. As noted above, the Commissioner accepts that an MP's ability to contact a relevant government department on a matter relating to the impact its policies are having on their constituency plays an important

role in government – both for an MP to be able to represent the interests of their constituents, and for a government department to be able to gain 'local intelligence' on the impact its policies are having at a local level. The Commissioner does not believe that prejudicing these functions would be in the public interest.

Balance of the public interest arguments

49. In considering the balance of the public interest in relation to section 36(2)(b)(ii) the Commissioner has again considered the nature of the withheld information – as described at paragraph 30 above.
50. Whilst the Commissioner believes that there is a weighty public interest in enabling MP's constituents to see whether they are representing their interests, and if so, how, this has to be balanced against the likely prejudicial effects argued by the DfT.
51. As noted above, the Commissioner believes that an MP's ability to contact a government department directly about a matter affecting their constituency in a free and frank manner, and for a government department to gain 'local intelligence' on the effect that their policies are having at a local level, is an important facet of our democracy.
52. Whilst the Commissioner accepts that these actions often have consequences which lead to the MP's involvement – and the issues that they have raised – being made public (if they are not public already), he also believes that these matters often become public knowledge over time, as policies develop or events unfold. As noted above, he believes that it is reasonable for MP's to expect that the details of any contact of this nature would not be put into the public domain on the day that they contacted the department. Given that MP's will often be contacting government departments in this way on matters of sensitivity for their constituency (or wider), the Commissioner believes that publication of the details of these contacts would potentially have an inhibitory effect on MP's in the future. The sensitivity of this information will often depend on the age of the information in question. In this case, given that the email, and the communication it refers to, was contemporaneous with the request, he believes that the disclosure of this email would be likely to have an inhibitory effect as argued by the DfT.
53. As he has noted at paragraph 42 above, in making a decision on the balance of the public interest, the Commissioner will take into account the severity, frequency, or extent of any prejudice that would or might occur.

54. In this instance the Commissioner believes it is reasonable to assume that MP's contact the DfT all the time about live issues affecting their constituency, that are live and sensitive at the time of the contact. If these communications were made public on the day that they were made, the Commissioner believes that it would be very likely that the inhibitory affect argued by the DfT would happen again, and that therefore this prejudice would be likely to occur fairly frequently. Therefore the Commissioner believes that were the information to be disclosed, the potential prejudice would be frequent and widespread – affecting the ability of MP's to represent the interests of their constituency directly to the relevant government department. The Commissioner does not believe that this would be in the public interest.
55. After balancing the public interest factors, the Commissioner believes that the public interest in maintaining section 36(2)(b)(ii) outweighs the public interest in disclosing this information. Therefore he believes that the email in question should be withheld under this exemption. In reaching this decision the Commissioner has been particularly mindful of the timing of the request, and the fact that the email was sent on the day that the request was received.
56. As he has come to the conclusion that all of the outstanding information should be withheld under section 36(2)(b)(ii), the Commissioner has not gone on to consider the application of sections 36(2)(b)(i) and 36(2)(c).

Other Exemptions

57. As he has decided that the outstanding information should be withheld under section 36(2)(b)(ii), the Commissioner has not gone on to consider the application of sections 40, 41 and 43.

Procedural Requirements

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

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

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

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

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

60. In this case, the DfT initially refused to disclose some of the information that fell under the scope of the request, as it believed that section 14 applied. However, during the Commissioner’s initial investigation of this case the DfT then disclosed some of the previously withheld information. As this information was not disclosed within 20 working days of receipt of the request the Commissioner believes that DfT failed to meet the requirements of section 10(1) in relation to this information.

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

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

62. During the course of the investigation the DfT sought to rely upon sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 40(3)(a)(i), and 41 to withhold some of the requested information – however, it did not cite any of these exemptions in the refusal notice or the internal review. For this reason the Commissioner believes that the DfT did not comply with the requirements of section 17(1).

63. In addition to this, section 17(5) of the Act states that,

“A public authority which, in relation to any request for information, is relying upon a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

64. In this case, the request was made on 3 September 2008. On 17 October 2008 the DfT confirmed that it held information, but stated that it required additional time in order to consider the public interest test in relation to sections 35 and 36. The DfT then contacted the complainant again on 17 November 2008, and stated that it needed additional time in order to consider the public interest test in relation to these emails. It did not issue a refusal notice stating that it was relying upon section 14 until 12 January 2009. Therefore the Commissioner

believes that the DfT did not comply with the requirements of section 17(5).

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

The Decision

66. The Commissioner's decision is that the DfT dealt with the request for information in accordance with the Act in that it correctly withheld the outstanding information under section 36(2)(b)(ii).

However, the Commissioner also believes that the DfT did not meet the requirements of sections 10(1), 17(1) and 17(5)

Steps Required

67. The Commissioner requires no steps to be taken.

Other matters

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

71. 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. In the Commissioner's opinion exceptional circumstances did not apply in this case, and he is therefore concerned that it took approximately 34 working days for an internal review to be completed.

Right of Appeal

69. 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 sent.

Dated the 27th day of May 2010

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

- (1)** Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2)** Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3)** Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4)** The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5)** A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6)** In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (1)** Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2)** Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3)** If, and to the extent that –
 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

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

- (4)** The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5)** Regulations under subsection (4) may –
 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6)** In this section –

“the date of receipt” means –

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

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the

Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17

- (1)** A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2)** Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3)** A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 36

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

- (2)** Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
 - (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3)** The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4)** In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".
- (5)** In subsections (2) and (3) "qualified person"-
- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
 - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
 - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
 - (d) in relation to information held by the House of Commons, means the Speaker of that House,

- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
 - (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
 - (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
 - (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
 - (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
 - (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
 - (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
 - (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
 - (m) in relation to information held by the Greater London Authority, means the Mayor of London,
 - (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
 - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6)** Any authorisation for the purposes of this section-
- (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.

- (7)** A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-
- (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1(1)(a) by either House,
- would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.