

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 August 2010

Public Authority: UK Financial Investments Ltd
Address: 2nd Floor
Oceanic House
1A Cockspur Street
London
SW1Y 5BG

Summary

The complainant requested copies of correspondence UK Financial Investments exchanged with RBS, Lloyds TSB/HBOS, Northern Rock and Bradford & Bingley concerning the claw back of pensions from senior directors and executives at these banks. By the time this notice is issued, UK Financial Investments has provided the complainant with some information. The remainder of information has been withheld on the basis that all of it is exempt from disclosure under section 42 of the Act and that some of the information is also exempt from disclosure on the basis of sections 41 and 43. The Commissioner has concluded that only some of the information is exempt from disclosure on the basis of section 42 although the remainder of the information is exempt on the basis of section 41.

The Commissioner's Role

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

Background

2. UK Financial Investments Limited (UKFI) was set up on 3 November 2008 to manage the government's investments in financial institutions including the Royal Bank of Scotland, Lloyds TSB/Halifax Bank of Scotland, Northern Rock and Bradford & Bingley.
3. HM Treasury is the sole shareholder in UKFI. Under the provisions of section 6 of the Act any company whose sole shareholder is a government department is considered to be a 'publicly-owned company' and thus a public authority for the purposes of the Act.

The Request

4. On 27 February 2009 the complainant submitted the following request to UKFI:

'I would like copies of any correspondence related to attempts by the UKFI to claw back any pension payments from senior executives/directors or chairmen in banks in which the UK government now holds a stake. This includes correspondence to the following institutions: RBS, Lloyds TSB/HBOS, Northern Rock and Bradford & Bingley.

The issue over the UKFI trying to "claw back" money was raised by Lord Myners in a publically released letter today:
<http://news.scotsman.com/uk/Lord-Myners39-letter-to-Sir.5022642.jp>

While I am requesting correspondence in relation to Sir Fred Goodwin, I am also interested in finding out if this issue is being pursued with any other senior figures. Correspondence is understood to include: letters, faxes, memos and emails.'

5. UKFI responded on 25 March 2009 and explained that although it held information falling within the scope of the request in respect of RBS and Lloyds TSB/HBOS ('Lloyds') it considered this information to be exempt from disclosure on the basis of exemptions contained at the following sections of the Act: 21, 41, 42 and 43(2).
6. The complainant contacted UKFI on 27 March 2009 and asked for an internal review to be conducted because he believed that the public interest favoured disclosure of the information he requested.

7. UKFI informed the complainant of the outcome of the review on 26 April 2009. The review confirmed that sections 42 and 43(2) had been applied correctly. The review did not mention the application of sections 21 and 41.
8. During the course of the Commissioner's investigation, on 6 May 2010, UKFI provided the complainant with the information which it originally withheld on the basis of section 21.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 28 April 2009 in order to complain about UKFI's refusal to provide him with the information that he requested. As noted above, during the course of the Commissioner's investigation the complainant was provided with the information that had previously been withheld on the basis of section 21. Therefore this notice only considers UKFI's reliance on sections 41, 42 and 43(2) to withhold the remaining information that the complainant has not been provided with.

Chronology

10. Although this complaint had yet to be allocated to a caseworker, the Commissioner wrote to UKFI on 18 May 2009 and asked to be provided with a copy of the withheld information and submissions to support its reliance on the various exemptions cited in the refusal notice.
11. UKFI provided the Commissioner with a response, which included copies of the withheld information, on 12 June 2009. In this response UKFI confirmed that it would be happy to provide the complainant with a copy of the information that it had withheld on the basis of section 21 of the Act.
12. Unfortunately due to a backlog of complaints about public authorities' compliance with the Act, there was a delay before this complaint was allocated to a caseworker. Once this complaint had been allocated, the Commissioner contacted UKFI again on 28 January 2010 and asked to be provided with further details as to why it had applied the exemptions in question and clarification as to which exemptions had been relied upon to withhold which parts of the requested information. The Commissioner asked also UKFI to provide the documents it was

- withholding on the basis of section 21 to the complainant, as it had indicated it was willing to do in its letter of 12 June 2009.
13. UKFI contacted the Commissioner on 19 March 2010 and clarified which exemptions it was relying on to withhold the various sections of the requested information.
 14. The Commissioner contacted UKFI once again on 30 March 2010 to clarify a number of outstanding issues. The Commissioner also asked UKFI to disclose to the complainant the documents it had withheld on the basis of section 21, copying him into these disclosures.
 15. UKFI responded to the Commissioner on 6 May 2010 and provided the clarification that had been sought as well as explaining that it had now disclosed to the complainant the information that it had previously withheld on the basis of section 21.

Analysis

16. There are 21 separate documents which fall within scope of this request. By the time this notice is issued, the complainant has been provided with 2 of these documents, i.e. the documents that were initially withheld on the basis of section 21 of the Act. UKFI has argued that all of the remaining documents are exempt from disclosure on the basis of section 42, some of these documents are exempt on the basis of section 41 and some are exempt from disclosure on the basis of section 43(2).
17. The Commissioner has initially considered the application of section 42(1).

Section 42 – legal professional privilege

18. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
19. There are two categories of legal professional privilege: advice privilege and litigation privilege.
20. Advice privilege is attached to documents exchanged between a client and its legal advisers, and any part of a document which evidences the substance of such a communication. 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. For advice privilege to apply, the dominant purpose of the documents in question must have been to obtain legal advice or provide it. For example, if a client sends a copy of an existing contract with a covering letter asking for advice, the letter itself will be privileged but the enclosed contract will not be as it was created for another purpose.

21. This approach is set out in the Commissioner's guidance on section 42 of the Act, the latest version of which was published in November 2008. For example, in respect of the 'dominant purpose test' in relation to advice privilege the guidance notes that:

'The dominant purpose of the communication must be to obtain legal advice, or to give it. This is a question of fact and you will need to look at the information itself to decide whether this is the case. For example, if a client sends a copy of a contract with a covering letter requesting advice, the letter itself will be privileged but the enclosed contract will not be, as it was created for another purpose. It will not be covered by LPP just because it has now been sent to a lawyer. In the same way, minutes of a meeting will not become privileged just because a lawyer was present, except any parts of the minutes that actually record legal advice being sought or given.'¹

22. Litigation privilege is attached to documents exchanged between a client and its legal advisers made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. There must be a reasonable prospect of litigation – a real likelihood, not just a fear or possibility.
23. As with advice privilege, for information to be covered by litigation privilege it must have been created for the dominant purpose of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.

¹ [The exemption for legal professional privilege'](#)

24. UKFI is relying on both types of privilege to withhold all of the remaining 19 documents.
25. The Commissioner has initially considered whether these documents attract advice privilege. For the **majority** of these documents the Commissioner accepts that this type of privilege applies because the dominant purpose of the communications is the seeking or giving or legal advice either between external lawyers and Lloyds or between UKFI and its legal advisers; or, are documents which summarise the substance of such communications.
26. In relation to the communications between Lloyds and its legal advisers, UKFI argued that the provision of these communications to it did not constitute a waiver of privilege because the information was only shared on a confidential basis, was limited in circulation and expressly used for the consideration of remuneration by UKFI as its role as a leading shareholder in Lloyds. The Commissioner accepts that privilege will not be waived if legal advice is disclosed to a specific party for a specific purpose with restrictions imposed on its further use. In such cases privilege can still be asserted in relation to anyone else seeking access to the information. Therefore in light of circumstances upon which the legal advice which Lloyds received was forwarded to UKFI, the Commissioner accepts that privilege has not been waived.
27. However, the Commissioner has established that there are a number of documents which constitute attachments to requests for legal advice or attachments to documents providing legal advice. Having considered these attached documents carefully the Commissioner does not accept that the dominant purpose for which such documents were created was the provision/seeking of legal advice. Rather, these attachments were pre-existing documents and created for a variety of purposes, none of which related to legal advice. These documents are those which UKFI numbered 7, 8, 11, 13, 14, 20 and 21 in the annex provided to the Commissioner on 19 March 2010.
28. The Commissioner recognises that his decision that the documents numbered 7, 8, 11, 13, 14, 20 and 21 do not attract legal professional privilege of either type because they were not created for the dominant purpose of seeking or providing legal advice, is one that may be inconsistent with decision notices previously issued by him. That is to say that in previous notices the Commissioner has accepted that attachments to a document which sought legal advice would attract privilege by virtue of being attached to this instructing document. This was on the basis that the instructing document and its attachments were taken to be one communication and this communication, albeit

not the composite parts, was created for the dominant or sole purpose of seeking legal advice. This was also the approach taken in respect of attachments to advice which was provided by a client to a lawyer.

29. The Commissioner has therefore considered whether just these documents – as opposed to the documents to which he accepts advice privilege does apply – attract litigation privilege.
30. The Commissioner accepts that these were exchanged for the purpose of providing or obtaining legal advice in relation to the claw back of pension payments made by the banks in question, and moreover that there was a realistic prospect that litigation would have been instigated if claw back had taken place.
31. However, the Commissioner has again concluded that these documents were not created for the dominant purpose of actually obtaining or seeking this advice, rather they were pre-existing documents created for another purpose. The Commissioner recognises that the dominant purpose test in terms of litigation privilege, as opposed to advice privilege, is somewhat broader: if a lawyer has exercised skill and judgement in selecting and compiling them they may attract litigation privilege, particularly if the selection of documents reveals the trend of the advice on the case. However, the Commissioner does not believe that the documents numbered 7, 8, 11, 13, 14, 20 and 21 meet these criteria.
32. In summary then, the Commissioner has concluded that section 42(1) is engaged in respect of all of the documents because they attract advice privilege, the exception being those documents numbered 7, 8, 11, 13, 14, 20 and 21 (in annex referenced above) because for the reasons set out above the Commissioner does not believe that they attract either type of privilege.

Public interest test

33. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test set out at section 2(2) of the Act and 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 maintaining the exemption

34. UKFI argued that there was a clear public interest in protecting the confidentiality of communications between lawyers and their clients in order to ensure that decisions are taken in a fully informed context.

35. UKFI noted the fact there was significant inbuilt weight in maintaining this exemption that had been accepted by a number of Information Tribunal decisions and also by the High Court, in particular in the case of *Department for Business Enterprise and Regulatory Reform v O'Brien and the Information Commissioner*. At paragraph 53 of his decision Williams J held that:

'The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.'

Public interest arguments in favour of disclosing the information

36. UKFI noted that there was a general public interest in transparency in order to inform debate and help public understanding. Furthermore, UKFI recognised that in the context of this request there was a specific public interest in knowing how such banks remunerate their staff in light of government shareholdings in them.
37. To these arguments, the Commissioner would add that disclosure could not only inform the public about how banks remunerate their staff, but also contribute to the public's understanding of what decisions and actions UKFI took to order to claw bank pension payments to senior managers and directors at particular banks. Furthermore, the Commissioner believes that disclosure of the information could improve the public's confidence in the decisions taken by UKFI, on behalf of government (and the taxpayer), in respect of this claw back of pensions.

Balance of the public interest arguments

38. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest built into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that

the advice which is given is comprehensive in nature. However, 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’. (Tribunal at para. 41).

39. 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.
40. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has used 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.
41. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Information 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 still be used as part of a decision making process.
42. 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.

43. The documents, to which the Commissioner accepts privilege applies, only date back a matter of weeks before the complainant submitted his request on 27 February 2009. The Commissioner therefore accepts that the advice was very recent. Given the recent date of the advice, the Commissioner therefore accepts that at the time of the request it would also be correct to describe the advice as live.
44. With regard to attributing weight to the public interest arguments in favour of disclosure, the Commissioner believes that the level of remuneration paid to those in the banking sector is, following the financial crisis, a matter of notable public policy. The Commissioner recognises the significant level of both political and press interest in the issue of 'claw back' around the time of this request, particularly in respect of Sir Fred Goodwin's pension. Therefore in the Commissioner's opinion it is reasonable to conclude that the public interest arguments in favour of disclosure should be given significant weight.
45. In the context of the criteria identified above, specifically relevant to an analysis of section 42, although the Commissioner obviously accepts that a significant amount of public money has been invested by the government into RBS and Lloyds, the legal advice upon which this decision relates does not relate directly to all aspects of this investment. This to say the legal advice does not relate to the decision by the government to actually invest in the various banks. Similarly, although all taxpayers arguably have an interest in decisions taken by UKFI, and ultimately the government owned banks themselves, in relation to the claw back of pension payments; the number of people **directly** affected by any such decisions is relatively low – arguably only those directors, executives or chairmen who have their pension payments clawed back.
46. In terms of transparency, UKFI highlighted the fact it is clear with investee banks that they must be at the forefront of any new corporate governance regulations in the sector. UKFI noted that Lloyds already reports on directors' overall, and individual, levels of compensation (including salary, pension entitlements, annual bonus payments and long term incentive awards) in its annual report. Furthermore, as noted in the request itself, the government has already published a significant amount of information relevant to this request, for example Lord Myners' letter to Sir Fred Goodwin. The Commissioner recognises that such steps reflect a commitment to transparency but they obviously do not extend to revealing the details of individual decisions about the claw back of individuals' pension entitlements.

47. Finally, the Commissioner is conscious of the fact that a key factor in assessing the balance of the public interest is the actual content of the requested information itself. Having reviewed the withheld information in question the Commissioner is confident that its disclosure could clearly further inform the public about the decisions taken by UKFI in respect of the claw back of pensions and thus could clearly serve the interests that have been identified above.
48. However, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege, and in particular the fact that this information is recent and live, the Commissioner believes that public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 41 – information provided in confidence

49. UKFI has also argued that the documents which the Commissioner has concluded are not exempt from disclosure on the basis of section 42(1) are also exempt from disclosure on the basis of section 41(1).

50. This section states that:

‘41-(1) Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.’

51. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.
52. UKFI has argued that the information in question that has been withheld was provided to it by Lloyds and therefore meets the requirements of section 41(1)(a). The Commissioner has reviewed the information in question and is satisfied that this is the case.
53. With regard to section 41(1)(b), in cases where the information is commercial in nature such as this present case (as opposed to say information of a personal nature), the approach adopted by the Commissioner in assessing whether disclosure would constitute an

actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

54. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

55. UKFI has provided the Commissioner with detailed submissions to support its position that the three criteria above are met. The Commissioner has considered these submissions and also set out his conclusions in relation to their merit below:

Does the information have the necessary 'quality of confidence'?

56. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible to the requestor, is more than trivial and is of importance to the confider. Information will not have the necessary quality of confidence if it is already in the public domain.

57. UKFI has argued that it is clear from the subject matter of the withheld information that it has the necessary quality of confidence not least because it constitutes commercially sensitive information. Having considered the content of the withheld information the Commissioner is satisfied that it has the necessary quality of confidence: it is clear that information is more than trivial and of significant importance to Lloyds. He is also satisfied that the information is not in the public domain.

Does the information have the necessary obligation of confidence?

58. The Commissioner recognises that an obligation of confidentiality may be expressed explicitly or implicitly. Whether or not there is an implied obligation of confidence may depend on the nature of the information itself, and/or the relationship between the parties.

59. In the circumstances of this case UKFI has argued that as the information in question was covered by a non-disclosure agreement between UKFI and Lloyds it was clear that there was an explicit obligation of confidence. In light of this fact, and moreover given the content of the information itself and the circumstances under which it

was provided to UKFI, the Commissioner accepts that UKFI holds this information under a clear obligation of confidence.

Would disclosure be detrimental to any party?

60. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for this limb of the *Coco* test to be engaged.
61. UKFI has explained that the information in question contains detailed information on levels of compensation (i.e. salaries and bonuses) for both individuals and groups within Lloyds and disclosure of this information would be likely to harm the commercial interests of Lloyds for a number of reasons. Given the sensitivity of the information in question the Commissioner is limited as to what he can include in this Notice, however he believes that he can summarise the ways in which the UKFI have argued that this prejudice will occur in the following ways.
62. Firstly, disclosure of this information could allow other banks and recruitment firms to poach Lloyds' staff more easily. Secondly, employees within banks are not usually aware of the remuneration details of their colleagues; disclosure of this could therefore create tension between employees within Lloyds and exacerbate recruitment and retention problems from which government investee banks are currently suffering. Such recruitment and retention problems would have a direct impact on Lloyds' performance. Thirdly, disclosure of the information, and dissemination of it within Lloyds could result in pressure to increase salaries to certain groups within the bank.
63. On the basis of these reasons, and the more detailed evidence that UKFI has provided to support the likelihood of them occurring, the Commissioner is prepared to accept that disclosure of this information would be likely to prejudice Lloyds' commercial interests. It follows that the Commissioner therefore accepts that disclosure of the information would be detrimental to the confider.

Would disclosure of the confidential information be actionable?

64. Although section 41 of the Act is an absolute exemption and thus not subject to the public interest test contained at section 2 of the Act, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner must

therefore consider whether the public interest in disclosing the information overrides the duty of confidence that is owed.

65. In *Derry v Information Commissioner* (EA/2006/0014) the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

Public interest in maintaining the confidence

66. UKFI explained to the Commissioner that in order to fully understand its reasoning behind the application of the various exemptions, including the reliance on section 41 of the Act, it was necessary to understand the nature of the relationship between it and the government's investee banks, which obviously include Lloyds.
67. UKFI explained it has some specific rights to work with the banks as set out in the recapitalisation agreements between HM Treasury and the government investee banks and in the Asset Protection Scheme conditions agreed between HM Treasury and the banks. The remainder of its remit is set out in its relationship framework document with HM Treasury which sets out its role as an engaged and active shareholder.² UKFI confirmed that this means that for most of its day-to-day work with the banks it does not have additional rights or powers over the banks over and above any other shareholder. For example, UKFI does not have policy making powers, regulatory powers or statutory rights to demand information from the government's investee banks.
68. Given this background, UKFI argued that if it disclosed the withheld information in this case there would be a significant reduction in the information that Lloyds would be prepared to share with UKFI in the future, especially in relation to commercially sensitive information. In order to support this assertion UKFI argued that logic and reason dictate that information volunteered to it and which has the effect of causing detriment to the bank concerned will cease to be made available in the future. Moreover, UKFI argued that disclosing information provided to it by Lloyds would also have a similar effect on the information which the other trustee banks provided it with in the future.
69. UKFI argued that such a reduction in the information it received from the banks would not be in the public interest for a number of reasons.

² <http://www.ukfi.co.uk/releases/UKFI%20Introduction.pdf>

This was because without access to commercially sensitive information held by the banks UKFI would be denied its ability to be an active shareholder and maintain its robust oversight of the banks. This would fundamentally undermine UKFI's ability and success in its objective of creating and protecting value for the taxpayer as a shareholder and devising an exit strategy.

Public interest in disclosing the information

70. The Commissioner believes that the public interest arguments in favour of disclosure of the information are similar to those identified above in relation to section 42 and therefore he has not repeated them here.

Balance of the public interest

71. With regard to the public interest factors in favour of disclosure, as explained above in the context of section 42 the Commissioner believes that they deserve to be given notable weight. Again, as with the information being withheld on the basis of section 42, the Commissioner believes that disclosure of the information being withheld on the basis of section 41 could genuinely serve these public interests.
72. However, the Commissioner believes that the consequences of disclosing this information in terms of affecting the voluntary supply of information to UKFI are ones that are very detrimental and clearly run directly contrary to the public interest for the reasons identified by UKFI. In the Commissioner's opinion the public interest arguments in favour of maintaining the confidentiality owed to Lloyds therefore need to be given particularly strong regard. In reaching this conclusion the Commissioner believes that it is vital to note that disclosure may not just affect the supply of remuneration information by Lloyds to UKFI but the supply of a variety of confidential and sensitive information from all government investee banks to UKFI. Given this fundamental impact on UKFI's working relationships, and the inverse nature of the public interest test under section 41, and despite the validity and strength of the public interest arguments in favour of disclosing the information, the Commissioner has therefore concluded that the public interest favours maintaining the confidence in respect of the remaining withheld information, UKFI would not have a valid public interest defence to any breach of confidentiality.
73. As the Commissioner has reached these conclusions in respect of section 41 and 42 he has not considered whether section 43(2) also provides a basis to withhold some of the information falling within the scope of the request.

The Decision

74. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The majority of the documents which UKFI withheld 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
 - The documents which the Commissioner has concluded are not exempt from disclosure on the basis of section 42(1) are exempt from disclosure on the basis of section 41.
75. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Commissioner has concluded that the documents which are numbered 7, 8, 11, 13, 14, 20 and 21 in the annex provided to the Commissioner in March 2010 are not exempt from disclosure on the basis of section 42(1).

Steps Required

76. The Commissioner requires no steps to be taken.

Right of Appeal

77. 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 12th day of August 2010

Signed

Steve Wood
Head of Policy Delivery

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"

Publicly-owned companies

"(1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if—

(a) it is wholly owned by the Crown, or

(b) it is wholly owned by any public authority listed in Schedule 1 other than—

- (i) a government department, or
- (ii) any authority which is listed only in relation to particular information.

(2) For the purposes of this section—

(a) a company is wholly owned by the Crown if it has no members except—

- (i) Ministers of the Crown, government departments or companies wholly owned by the Crown, or
- (ii) persons acting on behalf of Ministers of the Crown, government departments or companies wholly owned by the Crown, and

(b) a company is wholly owned by a public authority other than a government department if it has no members except—

- (i) that public authority or companies wholly owned by that public authority, or
- (ii) persons acting on behalf of that public authority or of companies wholly owned by that public authority.

(3) In this section—

“company” includes any body corporate;

“Minister of the Crown” includes a Northern Ireland Minister.”

Personal information

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of

the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Information provided in confidence

Section 41(1) provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

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."

Commercial interests

Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."