

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 October 2010

Public Authority: British Broadcasting Corporation
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Summary

The complainant requested the names of courts to which the BBC had applied for search warrants to determine the illegal use of a television receiver over a 5 year period. The BBC refused to disclose the information and relied on section 31(1)(a), (b), (d) and (g). The Commissioner decided that none of the exemptions at section 31 were engaged and that the information should be disclosed. The Commissioner also recorded a number of procedural breaches.

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. On 4 March 2009 the complainant made the following request to the BBC:

'Please could you provide me with the names of the Courts you have made applications for a search warrant over the last 5 years

to gain access to a property to determine the illegal use of a TV receiver'.

3. On 3 April 2009 the BBC responded to the complainant's request and confirmed that it did hold the requested information but was refusing to disclose it. The BBC told the complainant that it was relying on section 31(1)(a), (b), (c) and (g). The BBC advised the complainant that it had considered the public interest test as required by section 2(2) of the Act and was satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
4. The BBC told the complainant that they believed that disclosure of the information would or would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, the collection of the licence fee and the BBC's ability to discharge its public functions in respect of such matters.
5. On 5 April 2009 the complainant wrote to the BBC and requested an internal review of the decision not to disclose the information.
6. On 11 May the BBC advised the complainant of the outcome of the internal review. The BBC upheld its decision not to disclose the information as detailed in its refusal notice of 3 April 2009.

The Investigation

Scope of the case

7. On 27 May 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

'I do not understand why[sic] BBC is so reluctant to divulge the information regarding search warrants and feel that they are being oversensitive in doing so and that the real reason is that the general public will find it repugnant that their homes could be searched against their will just to search for an unlicensed television set'.

8. The complainant provided the Commissioner with supporting documents including a copy of the BBC Trust report '*Review of TV Licence Fee Collection*'. The complainant specifically drew the

Commissioner's attention to paragraph 178 of that report which outlined that the number of search warrants requested by TV Licensing officials from 2005/06 to 2007/08 had doubled:

'TV Licensing officials have no right of entry and will only enter a household with the consent of the occupier. The only exception is when TV Licensing obtains a search warrant where there is evidence of evasion and the householder refuses entry. The number of warrants requested by visiting officers has doubled from 2005/2006 to 2007/08. They are a last resort point in enforcement and TV Licensing does not have a specific strategy to increase the volume of search warrants obtained. However, the increase in the numbers of households withdrawing TV Licensing's right to visit is contributing to the increase in search warrant requests'.

9. The Commissioner notes in this section that the complainant has stated that he previously requested information from one particular Court on search warrant applications which was disclosed to him.
10. The Commissioner, in conducting his investigation into the BBC's reliance on section 31(1)(a),(b),(d) and (g) has also considered a number of relevant and well publicised resources about the investigation and enforcement procedures for collection of TV License fees in reaching his decision.

Chronology

11. The Commissioner began his investigation on 8 March 2010 by writing to the BBC to request a detailed explanation of its application of section 31. The Commissioner also asked for a copy of the withheld information.
12. The BBC responded on 7 April 2010 providing the Commissioner with further arguments to support its reliance on section 31 along with a copy of the withheld information.

Findings of Fact

13. The BBC's responsibility to enforce the licensing regime arises from its powers under the Communications Act 2003 and the powers of entry under search warrant specifically arise from section 366 of that Act which can be found at Annex A of this Notice.

14. 'TV Licensing' is a trade mark of the BBC and is used under licence by companies contracted by the BBC to administer the collection of the television licence fee and to enforce the television licensing system. The BBC is a public authority in respect of its television licensing functions and retains overall responsibility. TV Licensing list their role and responsibilities on their website as:

'TV Licensing has a number of roles and responsibilities. We process payments and respond to customer queries. We inform people when they need to buy a TV Licence and give information on the many ways they can pay. We're also responsible for identifying people who aren't correctly licensed and prosecuting people who evade paying their TV Licence. It's our aim to maximise licence fee revenue by collecting the fee in the most cost efficient way possible'.

15. The TV Licensing website¹ and other various BBC publications contain specific references to the processes employed by them in the collection of the fee. It is clear that applications for search warrants are a 'last resort' and only applied for when a senior manager and a legal adviser considers that there is a good reason or evidence to believe that an offence has been committed. They state that TV licensing enquiry officers do not have a legal right of entry to a person's home without a search warrant and that the home owner can refuse entry without such a warrant. It states that there are a number of steps that will be taken before a decision to apply for a search warrant is made. On the TV Licensing website the steps are outlined as follows:

- o *Key to the TV Licensing operation is the TV Licensing database. This lists all the addresses in the UK which hold a valid TV Licence as well as those addresses which don't. To a certain extent the database enables the automation of our enquiries and reminder letters.*
- o *Television retailers must by law notify TV Licensing every time they sell or rent television sets. When a retailer notification is received, TV Licensing checks its records to see whether a TV Licence is already held in the name and address of the purchaser. If not, a letter is sent to the purchaser reminding them to obtain a TV Licence.*
- o *For those addresses where we have no record of a TV Licence and no recent information about whether a Licence is needed, a letter is sent to the occupier enquiring about their situation.*

¹ www.tvlicensing.co.uk

Many recipients may not realise they are unlicensed or may hold a Licence for a previous address, while others may not use television or may be deliberately avoiding payment. Where an address is unoccupied, a temporary guard from enquiries is applied until the address becomes occupied. Those who do not obtain a Licence or do not reply will continue to receive enquiry letters. Enquiries will culminate in a visit from an enquiry officer.

- *If visiting proves unsuccessful, detection equipment may be deployed at the address.*
 - *In exceptional cases TV Licensing may consider applying to a magistrate (or sheriff in Scotland) for a search warrant to search the premises. This only happens when there is good reason to believe that unlicensed use of television is occurring and other enquiries are obstructed.*
16. The BBC Trust Publication *Review of Licence Fee Collection* was published in March 2009 and fulfils the BBC's duty under its Royal Charter 2006 (Article 24(2)(m)) to ensure that the arrangements for the collection of the licence fee by the BBC Executive are efficient, appropriate and proportionate through reviewing and approving the Executive's collection strategy on an annual basis.

Withheld information

17. The withheld information in this case is a list of the names of the Courts to which the BBC has made applications for a search warrant over the last 5 years. The complainant has not requested any other information, just the names of the Courts.
18. The Commissioner has examined the withheld information and identifies it as a simple list of court names ranging from small towns to large cities and district areas.

Analysis

Jurisdiction/derogation

19. The BBC accepts that the information is not held for the purposes of journalism, art or literature and has not sought to rely on the derogation at schedule 1, Part VI of the Act.

Section 31 – Law enforcement

20. Section 31 provides an exemption where disclosure of the requested information would, or would be likely to prejudice various functions relating to law enforcement. The full text of section 31 is set out at the legal annex at the end of this Notice.
21. Consideration of this exemption is a two stage process. Firstly, the exemption must be engaged through it being at least likely that prejudice would occur to the process specified in the relevant subsection(s). Secondly, the exemption is subject to the public interest test. The effect of this is that the information should be disclosed if the public interest favours this, regardless of how clear it is that the exemption is engaged.

Prejudice Test

22. The BBC specified the following subsections of section 31(1):
 - (a) *the prevention or detection of crime,*
 - (b) *the apprehension or prosecution of offenders,*
 - (d) *the assessment or collection of any tax or duty or of any imposition of a similar nature*
 - (g) *the exercise by any public authority of its functions for any of the purposes specified in subsection (2).*
23. The BBC did not provide separate arguments for each of the subsections (a), (b) and (d) of the exemption in respect of the nature, level or likelihood of prejudice, instead relying on a general view of the exemptions. Therefore the Commissioner has looked at all four exemptions together.
24. In relation to section 31(1)(g), the Commissioner considers that in order for a public authority to have a 'function' for one of the purposes listed under section 31(2), that public authority must have sufficient legal basis for the specified purpose it wishes to cite. The BBC cited 31(2)(a) in this case:

31(2)(a) – the purpose of ascertaining whether any person has failed to comply with the law.
25. In considering prejudice-based exemptions, the Commissioner is mindful of the decision of the Information Tribunal (now known as First-tier Tribunal) (Information Rights) in *Hogan v the ICO and Oxford City Council* (EA/2005/0005 and EA/2005/0030). In this case the Tribunal set out a three-stage test:

"The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption....Second, the nature of 'prejudice' being claimed must be considered.....A third step for the decision-maker concerns the likelihood of occurrence of prejudice. " (para 28 to 34).

26. The BBC identified the applicable interests generally as the prevention or detection of crime, the apprehension or prosecution of offenders, the collection of the licence fee and the BBC's ability to discharge its public functions in respect of such matters and as those set out at section 31(1)(a) – (d), and 31(2)(a). They said that the information contained details which could be useful to people attempting to evade the licence fee. Based on the submissions made by the BBC to the Commissioner he understands that the interest expressed by the BBC is one relating to evasion rates and increased costs of collecting the licence fee.

27. In considering the prejudice claimed the Commissioner has also considered the comments made in the *Hogan* Tribunal case at para 30:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoronton has stated "real, actual or of substance " (Hansard HL (VOL. 162, April 20, 2000, col. 827) If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. "

28. The BBC told the Commissioner that it was their view that disclosure of the information would prejudice the BBC in its role in determining whether individuals have failed to comply with the law because a person could use the information to evade the licence fee. The BBC provided the Commissioner with detailed arguments in support of its view that disclosure of the withheld information would be likely to prejudice the interests identified above. However, the Commissioner may not refer to these arguments in detail as to do so may reveal information about the BBC's licence evasion strategies and techniques.

29. The withheld information in this case indicates to which courts the BBC has applied in relation to search warrants. It does not show how many were granted. It merely indicates that at least one application was made to a particular court. Conversely, it can be assumed that no applications have been made to courts which do not appear on the list.

30. The Commissioner has considered whether disclosure of the list of names could prejudice the interests identified by the BBC, i.e. to assist individuals in evading the licence fee. For example, if it were to become public knowledge that no applications had been made to a particular court, could individuals living in that area become less likely to pay the licence fee? The Commissioner considers it conceivable because individuals could interpret the absence of search warrant applications as indicating a lack of enforcement activity in that area. Thus potentially individuals could choose to evade the licence fee as a result. Therefore the Commissioner is of the view that there is a potential causal link between the withheld information and the nature of prejudice claimed. The Commissioner also accepts that the prejudice described would be of substance.

31. In its refusal notice dated 3 April 2009 the BBC argued that disclosure of the withheld information would or would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, the collection of the licence fee and the BBC's ability to discharge its public functions in respect of such matters. In its internal review letter the BBC argued that prejudice would be likely to occur.

32. However, in correspondence with the Commissioner the BBC argued that disclosure would prejudice the interests cited above. Therefore the Commissioner has considered which level of prejudice is appropriate. The Commissioner is again assisted by the Tribunal's comments in *Hogan*:

"...the prejudice test is not restricted to "would be likely to prejudice". It provides an alternative limb of "would prejudice". Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge."

33. The Commissioner understands that for "would prejudice" whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not. Whichever level is claimed, the Tribunal expressed the view in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005):

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (para 15)

34. Given that the BBC claimed both levels of prejudice the Commissioner has considered the lower level of prejudice test of would be likely. This interpretation follows the judgement of Mr Justice Munby in *R (on the*

application of Lord) v Secretary of State for the Home Office [2003]. In that case, the view was expressed that,

"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

35. Whilst the Commissioner accepts the BBC's argument in relation to the nature of the prejudice described by the BBC, he considers that the likelihood would be very slight. Having inspected the withheld information and having considered the BBC's comments on the likelihood of the prejudice the Commissioner is of the view that disclosure of a list of court names would not be likely to assist or encourage evaders.
36. As indicated above the withheld information comprises a general list of names of courts identified by a town, city or district area to which the BBC has applied for a search warrant in the period from 2005/06 to the time of the request.

Is section 31 engaged?

37. Going through the *Hogan* test, the Commissioner is satisfied that the BBC has identified applicable interests, and has explained the nature of the prejudice. However the Commissioner is not satisfied that the BBC has provided robust arguments in relation to the likelihood of prejudice. The Commissioner is satisfied that there is sufficient information already in the public domain which explains the various steps that TV Licensing will go through before taking the step to apply for a search warrant. The BBC has been quite clear that search warrants are a last resort. The public are fully informed through various means that if all other attempts to collect the fee have failed, that they may be subject to a search of their premises under warrant and that this may lead to a prosecution. The BBC has failed to establish a direct and causal link between the release of the names of courts and the likely impact on evasion. The public is already well informed as to the BBC's enforcement procedures, including the steps that will be taken before a search warrant is considered. In the Commissioner's view the disclosure of the names of courts is unlikely to provide any basis for the public to predict which areas in the future would be more likely to escape search warrants and prosecutions as a result. As

indicated above the BBC has acknowledged that there has been an increase in search warrants attributable to public awareness of their rights about refusing entry to their homes.

38. The Commissioner believes that this decision does not contradict his decision in FS50215269, where he accepted information about search warrants could be withheld. If a more granular set of information about search warrants is disclosed section 31 is more likely to be engaged. Public interest would still be considered case by case. The Commissioner does not accept that it arguments about a mosaic effect from other requests are plausible, as each case has to be considered on its merits. The Commissioner is also wary of arguments about mosaic effects without clear and convincing arguments.
39. The Commissioner has also considered the complainant's argument that he has in fact applied for and received such information from one court already. The BBC's disclosure of the withheld information would be less likely to assist an evader if they can access this information through courts themselves.
40. The Commissioner is of the view that the likelihood of prejudice is remote, and that the test of "would be likely" has not been met. Therefore the Commissioner concludes that section 31(1) is not engaged, and he is not required to consider the public interest test.

Procedural Requirements

Section 1(1)(b): duty to provide information and section 10(1): time for compliance

41. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. Section 10 of the Act states that a public authority must comply with section 1(1) promptly, and in any event not later than twenty working days after the request has been received.
42. As the Commissioner has decided that the requested information was incorrectly withheld, the Commissioner believes that this information should have been provided by the BBC to the complainant at the time of his request. The BBC's failure to do this constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within twenty working days from the date of the request, the BBC also breached section 10(1).

Section 17 refusal notice

43. 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.”*

44. In its refusal notice the BBC cited section 31(1) and subsections (a), (b), (d) and (g), however it did not sufficiently specify the reasons why it was relying on those subsections and this is a breach of 17(1)(c).

The Decision

45. The Commissioner has determined that the following were not dealt with in accordance with the Act:

- The BBC incorrectly applied section 31(1)(a), (b), (d) and (g) to the withheld information.
- The BBC breached section 1(1)(b) and 10(1) as the information should have been disclosed to the complainant within the statutory time limit.
- The BBC breached section 17(1)(c) in that it failed to provide an adequate refusal notice to the complainant.

Steps Required

46. The Commissioner requires the following steps to be taken.

- To provide the complainant with the information he requested.

47. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

48. 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

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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

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

Dated the 25th day of October 2010

Signed

Steve Wood
Head of Policy Delivery

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

Annex A

Communications Act 2003

Section 366 Powers to enforce TV licensing

- (1) If a justice of the peace, a sheriff in Scotland or a lay magistrate in Northern Ireland is satisfied by information on oath that there are reasonable grounds for believing—
 - (a) that an offence under section 363 has been or is being committed,
 - (b) that evidence of the commission of the offence is likely to be on premises specified in the information, or in a vehicle so specified, and
 - (c) that one or more of the conditions set out in subsection (3) is satisfied,he may grant a warrant under this section.
- (2) A warrant under this section is a warrant authorising any one or more persons authorised for the purpose by the BBC or by OFCOM—
 - (a) to enter the premises or vehicle at any time (either alone or in the company of one or more constables); and
 - (b) to search the premises or vehicle and examine and test any television receiver found there.
- (3) Those conditions are—
 - (a) that there is no person entitled to grant entry to the premises or vehicle with whom it is practicable to communicate;
 - (b) that there is no person entitled to grant access to the evidence with whom it is practicable to communicate;
 - (c) that entry to the premises or vehicle will not be granted unless a warrant is produced;
 - (d) that the purpose of the search may be frustrated or seriously prejudiced unless the search is carried out by a person who secures entry immediately upon arriving at the premises or vehicle.
- (4) A person is not to enter premises or a vehicle in pursuance of a warrant under this section at any time more than one month after the day on which the warrant was granted.
- (5) The powers conferred by a warrant under this section on a person authorised by OFCOM are exercisable in relation only to a

contravention or suspected contravention of a condition of a TV licence relating to interference with wireless telegraphy.

- (6) A person authorised by the BBC, or by OFCOM, to exercise a power conferred by a warrant under this section may (if necessary) use such force as may be reasonable in the exercise of that power.
- (7) Where a person has the power by virtue of a warrant under this section to examine or test any television receiver found on any premises, or in any vehicle, it shall be the duty—
- (a) of a person who is on the premises or in the vehicle, and
 - (b) in the case of a vehicle, of a person who has charge of it or is present when it is searched,

to give the person carrying out the examination or test all such assistance as that person may reasonably require for carrying it out.

- (8) A person is guilty of an offence if he—
- (a) intentionally obstructs a person in the exercise of any power conferred on that person by virtue of a warrant under this section; or
 - (b) without reasonable excuse, fails to give any assistance that he is under a duty to give by virtue of subsection (7).
- (9) A person guilty of an offence under subsection (8) shall be liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.
- (10) In this section—
- “interference”, in relation to wireless telegraphy, has the same meaning as in the Wireless Telegraphy Act 1949 (c. 54); and
 - “vehicle” includes vessel, aircraft or hovercraft.
- (11) In the application of this section to Scotland, the reference in subsection (1) to information on oath shall have effect as a reference to evidence on oath.
- (12) In the application of this section to Northern Ireland, the reference in subsection (1) to a lay magistrate shall have effect, in relation to times before the coming into force of sections 9 and 10 of the Justice (Northern Ireland) Act 2002 (c. 26), as a reference to a justice of the peace

Legal Annex

Section 31 - Law enforcement

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
 - (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

- (2) The purposes referred to in subsection (1)(g) to (i) are—
 - (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

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."

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."

Section 17(2) states –

"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."

Section 17(3) provides that -

"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."