

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 September 2010

Public Authority: Higher Education Funding Council for Wales
Address: Linden Court
Ilex Close
Llanishen
Cardiff
CF14 5DZ

Summary

The complainant requested from HEFCW a report which it had commissioned into a particular university. HEFCW initially refused to disclose the information on the basis that it was exempt under sections 36 and 43 of the Act. Prior to the Commissioner's investigation, HEFCW disclosed a redacted version of the report, and relied on sections 40 and 41 in relation to the remaining withheld information. The complainant remained dissatisfied with the information which HEFCW had withheld under section 41 and the Commissioner's investigation has focussed on this information. After investigating the case the Commissioner has concluded that some of the information has been correctly withheld under section 41. However, he has also decided that some of the information withheld under section 41 was not exempt, and should therefore be disclosed. The Commissioner has also identified procedural shortcomings in the way HEFCW handled the complainant's request.

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. In May 2007, the Quality Assurance Agency for Higher Education ('QAA') carried out a review of the University of Wales Lampeter ('UWL'). QAA is an independent body funded by subscriptions from universities and colleges and through contracts with the higher education funding bodies. It carries out external quality assurance by visiting universities and colleges to review how well they are fulfilling their responsibilities.
3. The institutional review report on UWL issued by QAA in May 2007¹ concluded that "limited confidence can reasonably be placed in the soundness of the University's present and likely future management of the quality of its programmes and of the academic standards of its awards".
4. In May 2008, the Higher Education Funding Council for Wales ('HEFCW') commissioned an independent report into UWL. Haines Watts Corporate Finance were the consultants appointed to carry out the review and the terms of reference agreed covered the following areas:
 - Review UWL's strategic direction and business model, and assess their viability and ability to deliver a sustainable institution;
 - Review UWL's managerial capability
 - Advise on options for the future development of UWL; and
 - In carrying out the study, to take account of the economic and social significance of UWL to the town and the region.

The Request

5. On 30 April 2009, the complainant made a request to HEFCW for:

"a full copy of the report into the finances of the University of Wales Lampeter by the consultants Haines Watts".
6. HEFCW issued a refusal notice on 28 May 2009 stating that the information requested was exempt by virtue of sections 36 and 43 of the Act and the public interest favoured non disclosure.

¹ <http://www.qaa.ac.uk/reviews/reports/institutional/UoWLampeter/RG337%20Lampeter.pdf>

7. On 31 May 2009 the complainant requested an internal review of HEFCW's decision not to disclose the information requested.
8. HEFCW provided the outcome of its internal review on 26 June 2009 and upheld its decision not to disclose the information requested by virtue of sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) and 43(2) of the Act.

The Investigation

Scope of the case

9. On 1 July 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 whether the information he had requested should be disclosed.
10. On 11 December 2009, following the Commissioner's letter to HEFCW of 13 November 2009 confirming that the complaint had been deemed eligible for formal consideration under the Act, HEFCW advised the Commissioner it had reconsidered its position regarding disclosure and stated that a redacted version of the requested report would be published². HEFCW stated that it had reconsidered its position regarding disclosure following the announcement of an agreement in principle in relation to a planned merger between UWL and Trinity University Carmarthen. The information which HEFCW had redacted in the report consisted of 9 sections which were withheld under sections 40 and 41 of the Act.
11. On 30 December 2009, the complainant wrote to the Commissioner stating that he was dissatisfied with the information that HEFCW had redacted from the report under section 41 of the Act. The Commissioner's investigation was therefore limited to a consideration of the three sections of the Haines Watts report that HEFCW withheld under section 41. This information consists of the following:
 - Information relating to a document which was prepared by the Vice-President of UWL to inform a meeting held in November 2007 (referred to as Index 6 in the redacted version of the Haines Watts report).

²

http://www.hefcw.ac.uk/documents/working_with_he_providers/strategic_engagement/Review%20of%20UWL%20-%20Redacted.pdf

- Information relating to discussions that took place between Haines Watts and other higher education institutions to assess interest in a possible merger with UWL (referred to as Indexes 7 and 8 in the redacted version of the Haines Watts report).
12. On 26 April 2010, the complainant wrote to the Commissioner asserting that HEFCW knowingly and deliberately blocked release of the Haines Watts report to prevent the proper public scrutiny, consultation and debate about the merger between UWL and Trinity University College.
 13. The Commissioner is mindful of the fact that under section 77 of the Act a criminal offence may be committed where an authority deliberately alters, defaces, blocks, erases, destroys or conceals information which it knows an applicant is entitled to receive. The Commissioner therefore considered whether a criminal investigation was required in this particular case, and this is explained in more detail in the Other Matters section of this Notice. However, section 50(1) of the Act limits the scope of this Notice to considering whether HEFCW complied with Part I of the Act; namely whether it correctly handled the complainant's request for information.

Chronology

14. On 13 November 2009, the Commissioner wrote to HEFCW to confirm that the complaint had been deemed eligible for formal consideration and requested copies of the withheld information.
15. As explained above, HEFCW wrote to the Commissioner on 11 December 2009 advising that it had reconsidered the position regarding disclosure of the information requested. HEFCW maintained the view that at the time of the request and internal review, the information requested was exempt under sections 36 and 43 of the Act. HEFCW advised that, following discussions with a number of bodies, approval had been given for a merger between UWL and Trinity University Carmarthen, and it had concluded that a redacted version of the report could be released. HEFCW also confirmed that it would send a copy of the redacted report to the complainant.
16. As stated at paragraph 11 above, the complainant contacted the Commissioner on 30 December 2009 to advise that he was dissatisfied with the information which HEFCW had withheld under section 41 of the Act; namely indexes 6, 7 and 8 of the report.

17. The Commissioner wrote to HEFCW on 22 April 2010 and requested clarification of its reasoning behind its application of section 41 to the withheld information within the Haines Watts report.
18. HEFCW responded to the Commissioner on 21 May 2010 providing further representations in respect of its application of section 41.

Analysis

Exemptions

Section 41

19. All sections of the legislation are reproduced in the attached legal annex.
20. The Commissioner normally considers circumstances at the time a request is made. However he has exercised his discretion to adjudicate on an exemption (section 41 of the Act) applied outside the statutory time for compliance with the request. He has done so as the exemption was raised by HEFCW prior to the commencement of his investigation and therefore he does not believe any prejudice has arisen by virtue of the exemption having been applied late, particularly as a redacted version of the report has now been made available. The Commissioner has therefore considered whether the withheld information is exempt under section 41 of the Act.
21. HEFCW has applied section 41 to indexes 6, 7 and 8 of the Haines Watts reports, the content of which is described in more detail in paragraph 11, above.
22. Section 41(1) provides that information is exempt if it was obtained from any other person and disclosure of the information to the public by the public authority holding it would amount to a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not qualified by the public interest test set out in section 2 of the Act.

Was the information obtained from another person?

23. In deciding whether the information has been "obtained from any other person", the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.

24. In this case, the Haines Watts report was provided to HEFCW by Haines Watts, who had been commissioned by HEFCW to produce the report. HEFCW has explained that the redacted information was obtained by Haines Watts from third parties as a result of interviews and discussions which they undertook with those third parties as part of the review process. The report, in its entirety, was then passed to HEFCW.
25. The Commissioner's is satisfied that the information was obtained by HEFCW from a third party and that the first limb of the exemption is engaged.

Would disclosure give rise to an actionable breach of confidence?

26. Once it has been established that the requested information has been provided to the public authority by a third party, the Commissioner must assess whether an actionable breach of confidence would arise if the information were to be disclosed.
27. When considering whether or not a breach of confidence is itself actionable, the Commissioner has decided that it is appropriate in this case to follow the test set out by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 and cited by the Information Tribunal in *Bluck v the Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). Megarry J stated that:

‘...three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...’
28. In order to determine whether disclosure would give rise to an actionable breach of confidence, the Commissioner therefore considered whether the above three factors could be met in this case.

Does the information itself have the necessary quality of confidence?

29. Information will have the necessary quality of confidence if it is not trivial and otherwise accessible; in other words if it is not already in the public domain. According to Megarry J in *Coco v Clark*, “however confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge.”

30. It is not possible for the Commissioner to provide a high level of detail regarding the withheld sections of the report without disclosing the withheld information but he is satisfied that the majority is not information already in the public domain or trivial in nature. He has provided further detail in relation to his consideration of each section of the report which has been withheld under section 41 below.
31. Index 6 relates to a document which was prepared by the Vice-President of UWL to inform a meeting in November 2007. A copy of this document was provided in confidence to Haines Watts during the review. The majority of the redacted information in index 6 quotes from this document. The Commissioner considers that the information is of a sensitive nature and represents views and recollections of events of one individual. To the Commissioner's knowledge, it has not been widely circulated. The Commissioner therefore considers that the information has the necessary quality of confidence.
32. Index 7 comprises of two short paragraphs which the Commissioner considers is general information which "sets the scene" for the information contained within index 8. It provides some background information in relation to the context of the discussions which Haines Watts undertook with other higher education institutions to assess interest in a possible merger with UWL (index 8). The Commissioner is not persuaded that the confider would have expected this specific piece of information to be held in confidence as it does not, in the Commissioner's view, reveal anything which could reasonably be described as confidential. The Commissioner is also not persuaded that disclosure of index 7 would have constituted an actionable breach of confidence. In the Commissioner's opinion, the information is quite trivial and does not therefore possess the necessary quality of confidence. As such, the Commissioner has not gone on to consider the application of section 41 further in relation to index 7.
33. Index 8 consists of information provided on a confidential basis to Haines Watts by heads of other higher education institutions about the possible future of UWL. It also contains Haines Watts' reflections on these options. Bearing in mind the contents of this section of the report, the context in which the review was conducted and the report provided to HEFCW, the Commissioner is satisfied that the information possesses the necessary quality of confidence, as he is satisfied that it is not information which is already in the public domain nor is it trivial.

Was the information imparted in circumstances importing an obligation of confidence?

34. HEFCW has explained that the redacted information was originally communicated between a number of third parties (i.e. the Vice President of UWL and Heads of other higher education institutions) and Haines Watts. HEFCW advised that the appointment terms for Haines Watts who prepared the report contained a specific clause regarding the confidentiality of information received during the contract. This 'confidentiality clause' is set out below:

"CONFIDENTIALITY

- 25 The information gained and views expressed during the assignment will be treated in confidence by the contractor and the Council.

The contractor shall keep confidential all information connected with the business of HEFCW or which comes to the contractor's knowledge under or as a result of the contract and shall not disclose it to any third party or use it other than for performance of the services except: -

- with the prior written agreement of HEFCW, or;
- by requirement of law;

The provisions of the Clause above shall not apply to such information if it is: -

- in the public domain otherwise than by failure of the contractor to comply with the Clause above, or;
- in the possession of the contractor before these confidentiality obligations came into effect, or;
- obtained from a third party who is free to disclose the same"

35. HEFCW has also advised the Commissioner that, prior to publishing the redacted report, it consulted with Haines Watts in order to determine the information within the report it considered was provided in confidence and Haines Watts confirmed that it considered the information contained within indexes 6, 7 and 8 to have been provided in confidence.
36. The Commissioner notes that although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, in *Coco v Clark*, it was suggested that the 'reasonable

person' test may be a useful one; "If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

37. 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.
38. The withheld information was collected by Haines Watts in confidential interviews under contract to HEFCW. Having regard to the circumstances in which the information was imparted to Haines Watts by the third parties and the confidentiality clause contained within the terms of agreement between HEFCW and Haines Watts, the Commissioner is satisfied that the information contained within indexes 6 and 8 was imparted in circumstances that imported an obligation of confidence.

What would be the detriment?

39. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. Indeed the Information Tribunal in *Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust* EA/2006/0090 has taken the view that the loss of privacy is a sufficient detriment in itself.
40. The Commissioner's view is that in this case the withheld information relates to the personal information of individuals (although those individuals were interviewed as employees of UWL and other higher education institutions). Index 8 of the report also includes information about Haines Watts' reflections on the options for the future of UWL put forward by the Heads of other higher education institutions. These 'reflections' are intrinsically linked to the information provided on a confidential basis to Haines Watts by heads of other higher education institutions.
41. HEFCW believes that disclosure of the indexes 6, 7 and 8 of the report would give rise to a actionable breach of the duty of confidence owed by HEFCW and Haines Watts to the individuals who provided the information in confidence during the review. In HEFCW's opinion, the ability of Haines Watts to receive this confidential information and

- report the key points in their report was fundamental to its ability to fulfil its public role as a funding Council and find the best solution for maintaining higher education provision in Lampeter.
42. HEFCW believes that disclosure would be detrimental to the commercial interests of the higher education institutions and the professional reputation of the individuals who provided the information to Haines Watts. HEFCW also considers that disclosure would be detrimental to the commercial reputation of Haines Watts for failing to adhere to the terms under which the information was collected. In HEFCW's opinion, HEFCW itself would also suffer detrimental consequences for breaching the agreement of confidentiality under which the information was collected. This, it argues would in turn have considerable adverse effects on its relationships within the sector and thus would adversely affect its ability to carry out its public duties.
 43. HEFCW advised the Commissioner that when the contents of the Haines Watts report were reviewed and redacted, in December 2009, it was done in liaison and with the agreement of Haines Watts, who confirmed that the information contained within indexes 6, 7, and 8 was considered to be information provided in confidence.
 44. The Commissioner considers that there is potential detriment not only to the individuals who provided the information to Haines Watts in confidence, but also to the institutions that they represent. The Commissioner considers that the detriment in relation to the Vice President of UWL and the heads of other Higher Education Institutions is a potential loss of privacy, although he also recognises that these individuals are senior figures acting in a professional capacity. He considers that the opinions and information they provided to Haines Watts during the review were made in their capacity as such, but that they also reflect their own personal views and opinions, and to this extent the information was provided in a personal capacity. He also accepts that disclosure could damage the relationships between individual Higher Education Institutions within Wales.
 45. The Commissioner has considered the representations put forward by HEFCW, the withheld information itself and the circumstances under which the information was provided. He is also mindful of the explicit obligation of confidence set out in the clause relating to confidentiality contained in the terms of the contract between HEFCW and Haines Watts. Taking into account the other elements of the 'test of confidence' previously mentioned in this Notice, the Commissioner agrees that disclosure of the information contained within indexes 6 and 8 of the Haines Watts report would be to the detriment of the

individuals and institutions who provided the information during the review.

Is there a public interest defence to a breach of confidence?

46. The Commissioner is satisfied that the information was obtained from a person other than the public authority holding it and that disclosure would amount to an actionable breach of confidence. However, before the Commissioner can decide if the exemption is engaged he must consider whether a public interest defence to a breach of confidence could be established.
47. Although section 41 is an absolute exemption and thus not subject to the public interest test under section 2, 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.
48. The Commissioner's view is that, where there is an express obligation of confidence, then that confidence should not be overridden on public interest grounds lightly and that any reasons why the public interest favours disclosure should be clearly stated.

Public interest in disclosing the information v the public interest in protecting confidences

49. In HEFCW's view, the central tenet for the public interest in disclosure is the need for transparency and accountability of HEFCW in its decision and actions, which includes the spending of public money. HEFCW also accepts there is a public interest in disclosure of information which would highlight or inform issues of public debate. HEFCW recognises that in this case, there was, and remains considerable local, regional and national interest in the developments at UWL. HEFCW believes the public interest has been served by publication of the redacted report and it does not believe that disclosure of indexes 6, 7 and 8 would contribute to increased accountability.
50. The Commissioner recognises that there is a general public interest in furthering the understanding of and participation in the public debate on issues of the day. He also recognises the importance of promoting accountability and transparency with regard to the spending of public money. In this case, the Commissioner accepts that funding of higher education institutions involves the spending of large amounts of public money, which in turn raises concern about whether value for money has been obtained.

51. The Commissioner also considers there is a public interest in knowing whether higher education institutions have appropriate management structures and processes in place to deliver an effective service to the public. There is also a public interest in the public being able to contribute to any debate which would potentially affect the provision of higher education as this could have a significant economic and social impact on the local area.
52. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions. This argument has a particular strength in the case of information which has been provided under an explicit obligation of confidence, as in this case. The duty of confidence protects the necessary relationship of trust between the confider and the confidant, thereby operating to serve the public interest. The disclosure of confidential information may undermine that relationship.
53. HEFCW believes that the information would not have been provided to Haines Watts by the individuals unless they were satisfied that its confidentiality would be maintained. HEFCW believes that disclosure would have a detrimental affect on its ability to fulfil its own role, and it also believes that disclosure would adversely affect Haines Watts' commercial interests as its reputation would be damaged by the release of information collected in confidence.
54. In the case of *Bluck*, the Information Tribunal quoted from the Lords decision of *Attorney General v Guardian Newspapers [1990] 1AC109*:

'as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence...'
55. Historically, a duty of confidence has only been disapplied by the courts in very limited circumstances. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.
56. For the reasons given above the Commissioner has concluded that there would be no public interest defence to a breach of confidence in this case and that therefore any breach of confidence would be actionable. Consequently he considers the exemption under section 41 to be engaged in relation to indexes 6 and 8.

Procedural Requirements

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

57. As the Commissioner has decided that index 7 is not exempt from disclosure under section 41(1) the Commissioner believes this information should have been provided to the complainant in line with the duty at section 1(1)(b). HEFCW's failure to do this constitutes a breach of section 1(1)(b). Furthermore, by failing to provide index 7 within twenty working days of the date of the request, HEFCW also breached section 10(1).

Section 17 – refusal of a request

58. Where a public authority withholds requested information, section 17(1) of the Act requires it to provide the applicant with a refusal notice stating the basis upon which it has refused the information. This refusal should be issued within the time for complying with section 1(1) of the Act.
59. Following the initial complaint to the Commissioner on 1 July 2009, HEFCW disclosed some information relevant to the request, but withheld parts of the information by virtue of section 41 of the Act. This exemption was not cited by HEFCW in its initial refusal notice or its internal review. As a result, the Commissioner considers HEFCW breached sections 17(1)(a), (b) and (c) in its handling of this request.

The Decision

60. 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:

- It correctly applied section 41(1) of the Act to indexes 6 and 8 of the Haines Watts report.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- HEFCW incorrectly applied section 41(1) to index 7 of the Haines Watts report.
- HEFCW breached section 1(1)(b) for failing to provide index 7 by the completion of the internal review.

- HEFCW breached section 10(1) for failing to provide index 7 within 20 working days of the request.
- HEFCW breached sections 17(1)(a), (b) and (c) for late reliance on section 41.

Steps Required

61. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose index 7 of the Haines Watts report.

Failure to comply

62. 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.

Other matters

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

Section 77

64. As indicated in paragraph 12 above, the complainant suggested to the Commissioner that HEFCW inappropriately applied exemptions in order to deliberately withhold information and that in doing so, it committed an offence under section 77 of the Act.

65. Section 77 of the Act states that:

"Where –

- (a) a request for information has been made to a public authority, and
- (b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to

payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communications of which the applicant would have been entitled."

66. The Commissioner notes that in order to uphold a section 77 offence the he has to prove that there was a clear intention to prevent disclosure on the part of the public authority.
67. In this case, HEFCW originally withheld all of the information by virtue of sections 36 and 43 of the Act and it considered that the public interest in maintaining both exemptions outweighed the public interest in disclosure. HEFCW considered it appropriate to revisit the public interest test when an agreement in principle was announced on the planned merger of UWL with Trinity University College. In reviewing the public interest in December, prior to the Commissioner's investigation, HEFCW concluded that the information could be released, subject to a number of redactions.
68. HEFCW has advised the Commissioner that it had considered the entire report to be exempt under sections 36 and 43 of the Act and it was only when it revisited the public interest test in December 2009 that it had identified that individual sections of the Haines Watts report had been provided in confidence and therefore exempt under section 41 of the Act.
69. The Commissioner has considered all the circumstances of this case, but is not satisfied that there is any evidence to suggest it was HEFCW's intention to block disclosure of the information requested. The Commissioner also does not consider there to be any evidence to support the assertion that HEFCW initially claimed that all the information was exempt from disclosure under sections 36 and 43 of the Act with the deliberate intention of preventing disclosure under the Act. Therefore the Commissioner has not undertaken a criminal investigation in this case.

Right of Appeal

70. 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 2nd day of September 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

–

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

Time for Compliance

Section 10(1) provides that –

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

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."

Prejudice to effective conduct of public affairs

Section 36(1) provides that –

"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.

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-

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

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.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

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).”

Section 43(3) provides that –

“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 the interests mentioned in subsection (2).”