

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 November 2010

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information relating to communications between specific dates between Macfarlan Smith Limited (MSL) and the Home Office, particularly those relating to the policy on importing and exporting narcotics and narcotics products. The Home Office confirmed it held the requested information but refused to provide it on the basis that it was exempt from disclosure by virtue of sections 35(1)(a) (formulation of government policy) and 43(2) (commercial interests) of the Freedom of Information Act 2000. The Commissioner has considered the application of these exemptions and his decision is that the Home Office was incorrect to apply sections 35(1) and 43(2). The Commissioner also found that the Home Office had not met the requirements of sections 1(1)(b) and 10(1).

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. Oxycodone is a narcotic drug controlled under the Misuse of Drugs Act 1971. Similar to morphine, oxycodone is used to manufacture various pain relief medications used to treat moderate to severe pain.
3. The complainant told the Commissioner that, prior to 2008, the Home Office's policy was that, apart from the purposes of backup contingency planning, it would not permit the import of opiate derivatives, including oxycodone, from countries outside of the European Community (EC) if there was a source of supply available in the United Kingdom. This appears to have altered in February 2008, at which stage the Home Office did permit the import of oxycodone from outside the EC, provided the entire quantities imported were for the manufacture of product for re-export. This decision was apparently reversed in February 2009 and the original policy reinstated.
4. A Home Office consultation into the importation of oxycodone into the UK was published on 23 November 2009 with a closing date for submissions of 15 February 2010. The focus of the consultation was the Government's policy on the importing of oxycodone to the UK with particular reference to import for re-export.
5. According to the Home Office website:

"This consultation looked at how we should regulate imports of oxycodone, a narcotic drug controlled under the Misuse of Drugs Act 1971. In particular, it looked at whether imports should be allowed from outside the European Economic Area (EEA), and whether they should be allowed for re-export. The consultation paper also included matters related to oxycodone import policy: the availability of diamorphine, a clinically vital analgesic for the NHS, and competition issues in the UK pharmaceutical industry."

The Request

6. The complainant's agent wrote to the Home Office on 13 May 2009 requesting:

"(1) All communications, and records of any communications, from April 2008 to today's date between Macfarlan Smith and any Home Office representative or employee."

(2) In particular (but without prejudice to the generality of (1) above) we require sight of all communications and records of any communications with Macfarlan Smith relating to the policy on importing and exporting narcotics and narcotics products.

(3) Without prejudice to the generality of (1) above, we would ask you to ensure in particular that a search is made of documents created or received by the following existing and former Home Office personnel: Andy MacFarlane, Tracey Eaton and Michael Evans”.

7. The request was clarified on 3 June 2009 when the complainant wrote to the Home Office :

“For the avoidance of doubt, we wish to confirm that our 13 May 2009 letter includes a request for all communications and records of any communications relating to the following statement made in a letter from the Treasury Solicitor dated 28 May 2009:

‘On her appointment as Head of Drug and Compliance Unit of the Home Office on or about 31 October 2008, Ms [Tracey] Eaton became aware of the fact that as a result of Napp’s imports of oxycodone from the US, stockpiles of oxycodone were accumulating at MSL’.

In particular, we request to be provided with all communications and any record of communications relating to Ms Eaton’s above statement, including any communications recording (a) who told Ms Eaton of MSL’s stockpile, (b) what was the source of official knowledge as to the stockpile; and (c) who attributed the stockpile to Napps’ imports of oxycodone from the US”.

8. The Home Office responded on 11 June 2009, confirming receipt of the complainant’s correspondence of 13 May 2009. No reference was made at that stage to the complainant’s correspondence of 3 June 2009.
9. In its correspondence the Home Office explained that it was considering the exemptions at sections 35(1)(a) (formulation of government policy) and 43(2) (commercial interests) of the Act. It also said, in accordance with section 17(2) of the Act, that in order to consider the public interest test it needed to extend the 20 working day response period. It provided a revised response date of 8 July 2009.
10. The Home Office provided its substantive response on 25 June 2009 confirming that it held the information requested on 13 May 2009. However, it told the complainant’s agent that the information was exempt from disclosure, citing the exemptions at sections 35(1)(a) and 43(2) of the Act.

11. The complainant's agent requested an internal review on 16 July 2009, quoting both from the original request and subsequent clarification. The complainant put forward lengthy arguments as to why it disagreed with the Home Office's decision not to disclose the requested information.
12. Following the intervention of the Commissioner's office, the Home Office finally provided its internal review response on 4 December 2009. In this correspondence, it upheld its decision to withhold the information from disclosure.

The Investigation

Scope of the case

13. On 16 November 2009 the complainant's agent contacted the Commissioner about the delay with regard to the internal review in this case. At the same time, he complained about the way the request for information had been handled and, pending the outcome of the internal review, asked the Commissioner to consider the Home Office's application of exemptions. The complainant's agent specifically asked the Commissioner to consider both the Home Office's application of the exemptions and:

"the inordinate delay ... in dealing with our request for an internal review".

14. During the course of the Commissioner's investigation, the Home Office confirmed that it was relying on the exemption in section 35(1)(a) in relation to all the withheld information in this case. Additionally, it confirmed that it considered a subset of the information was also exempt from disclosure by virtue of the exemption in section 43(2) of the Act. The Commissioner has therefore focussed his investigation on the Home Office's application of these exemptions. He has also considered the timeliness of its handling of the request.

Chronology

15. Having already received a copy of the withheld information in response to earlier correspondence, the Commissioner wrote to the Home Office on 25 March 2010 asking it to provide further information about its decision to apply the exemptions cited and further arguments in relation to the public interest test. He also asked the Home Office to

- explain why he had been provided with 'withheld information' outside of the date range of the request.
16. The Home Office responded on 14 May 2010. The Commissioner notes that this correspondence acknowledges the complainant's letter dated 3 June 2009 which provided clarification to the request.
 17. With respect to the withheld information, the Home Office apologised that it had "*inadvertently included*" some material dated after 13 May 2009 and therefore outside the scope of the request.
 18. During the course of his investigation, the Commissioner told the Home Office that he considered some of the withheld information was in the public domain. As a result, the Home Office wrote to the complainant's agent on 14 September 2010, providing him with a copy of the three items concerned.
 19. The Commissioner considers his investigation was hindered by a lack of clarity as to the information that was considered to fall within the scope of the request. At a late stage of the investigation, the Home Office revised its view with respect to the information that it considered to be in scope.

Analysis

Exemptions

Section 35 Formulation of government policy.

20. Section 35(1) of the Act provides that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office".

21. In this case, the Home Office has confirmed it is relying on section 35(1)(a) in relation to all the withheld information.
22. Section 35 is a class based exemption, requiring no evidence of prejudice. As the Home Office is citing section 35(1)(a) in this case, in order for the exemption to be engaged, the withheld information must, as a matter of fact, relate to the formulation or development of government policy.

Does the information relate to the formulation or development of government policy?

23. The Home Office has confirmed that the policy in question in this case is that relating to the importation of oxycodone into the UK, and whether and how widely this should be permitted.

24. The Home Office told the complainant in its refusal letter:

"The information you request relates to an area of ongoing policy formulation, despite the papers you requested relating to an individual policy decision that has subsequently been quashed. A new consultation is now being taken forward which will reassess the issues previously under consideration, and therefore this policy issue remains very much alive".

25. In its internal review correspondence of 4 December 2009, the Home Office told the complainant that the requested information:

"was created whilst policy options were being discussed and contain discussions and advice pertaining to the development of that policy at that time";

and that it:

"constitutes free and frank discussion of views and advice for the purposes of developing drugs licensing policy".

26. It explained that the Drugs Licensing and Compliance Unit had recently launched a consultation paper on oxycodone importation policy which would seek to engage with businesses and organisations directly involved in the manufacture and/or trade of oxycodone.
27. In this respect, the Commissioner notes that a consultation paper entitled "*Oxycodone Import Policy*" was published on 29 November 2009. This was after the date of the request but, due to delays at the

Home Office, still during the timeframe in which the request was being handled.

28. The consultation summary described the scope of the consultation as follows:

"The Government is reviewing its existing policy on the import of oxycodone to the UK. The purpose of this consultation is to re-examine the policy from first principles and gather information and opinions from stakeholders. This consultation will focus on three key areas: the UK's obligations under the relevant UN conventions; the NHS's requirements for a secure supply of diamorphine; and competition issues in the UK pharmaceuticals market".

29. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action. It is unlikely to be about purely operational or administrative matters, or about a policy which has already been agreed or implemented.

30. In correspondence with the Commissioner, the Home Office argued that not only was the process of policy formulation "*not complete at the time of the request*", but also that it was not in a position to say when it will be complete. In support of this argument, it told the Commissioner:

"we have new Ministers in place and their views on this issue are not yet known".

31. The Commissioner understands that the consultation process is such that, once the deadline for responses to the consultation paper has passed, the responses need to be considered and the way forward agreed with Ministers.

32. Having viewed the withheld information, the Commissioner accepts that it relates to oxycodone. However, although mindful of the fact that the term '*government policy*' is not defined in the Act, the Commissioner is not satisfied that it all relates to the formulation or

development of government policy about the importation of oxycodone into the UK.

33. In reaching this decision, he has taken account of the content and context of the withheld information. In respect of the information for which he does not find the exemption engaged it follows that he requires disclosure unless the information is exempt under section 43.
34. With respect to the remainder of the information, the Commissioner is satisfied that it relates, in its broadest sense, to the formulation or development of government policy in relation to the importation of oxycodone into the UK. He therefore finds the exemption engaged.
35. In respect of this information, the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

36. In correspondence with the Commissioner, the complainant's agent argued that:

"in light of the ongoing oxycodone consultation, we believe that the public interest favours disclosure of these documents and will allow our client to engage fully in the consultation process".

37. The Home Office acknowledged that disclosure will allow the public to make a more informed contribution to public debate. In this respect, it said that:

"releasing the views of others in relation to this subject would allow other interested parties to respond more directly to them".

38. It also accepted that it could be argued that, by releasing some of the advice used in the formulation of a policy:

"the quality of subsequent advice supplied may improve as the weakness of current advice can be identified".

Public interest arguments in favour of maintaining the exemption

The chilling effect argument

39. The Home Office referred the complainant's agent to "*the strong argument put forward by the exemption itself*" that release may be prejudicial or harmful to the formulation or development of

government policies and could serve to prevent the provision of advice in the future or affect the quality of advice given to ministers.

40. It explained that the premise of this argument is that, if such guidance and supporting information was routinely released into the public domain whilst policies were still being developed:

"those who provide that guidance and advice may be less forthcoming in expressing their views and opinions, or come under pressure not to challenge or comment on advice relating to the formulation of policy".

41. Such arguments are described in *Scotland Office v the Information Commissioner* (EA/2007/0070) as arguments about *"the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause"*.

42. The Commissioner accepts that, in principle, the possibility of disclosure of information may have a 'chilling effect' on discussions. However, he also notes that the Information Tribunal has not always given significant weight to 'chilling effect' arguments. For example, in the case of the *Foreign and Commonwealth Office v The Information Commissioner* (EA/2007/0047) the Tribunal indicated that:

"we adopt two points of general principle which were expressed in the decision in HM Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential.... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity."

43. When considering the 'chilling effect', the Commissioner would expect public authorities to provide convincing arguments for each kind of impact being argued with reference to the particular disclosure being considered.
44. In this case, he considers the arguments put forward by the Home Office to be general in nature and lacking in any specific evidence. Accordingly, he considers that the weight that can properly be given to the 'chilling effect' of disclosure is slight.

The safe space argument

45. Another possible public interest factor concerns the 'safe space' argument, that is the need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement.
46. In this case, the Home Office argued that the formulation of government policy depends on the provision of broad-based advice and that:

"those who provide such advice have the space in which to consider the unconventional and 'think the unthinkable' without fear that their proposals will be held to ridicule".

47. In the Commissioner's view, the safe space argument exists separately to, and regardless of, any potential effect on the frankness and candour of policy debate that might result from disclosure of information under the Act (the 'chilling effect'). Even if there were no suggestion that those involved in policy development and formulation might be less frank and candid in putting forward their views, in his view there would still be a need for a 'safe space' for them to debate policy and reach decisions without being hindered by external comment.
48. The Commissioner considers that an important determining factor in relation to the 'safe space' argument will be whether a request for such information is received whilst a 'safe space' in relation to that particular policy-making process is still required.
49. In this respect, the Home Office argued that:

"comments previously raised by MacFarlane Smith may be raised again during this new consultation, particularly given that the policy decision to which this correspondence refers has since been quashed. Therefore releasing the copies of this correspondence may impact on the quantity, quality and content of advice that may be put forward by MSL as part of this new consultation as it may allow other parties to undermine their views and opinions".

50. Accordingly he considers that the argument in relation to the importance of preserving safe space is of relevance in this case.

Balance of the public interest arguments

51. Section 2(2)(b) of the Act states that where an exemption is qualified, information will only be exempt if the public interest in maintaining the exemption outweighs the public interest in disclosing it. This means that where a qualified exemption is engaged, the information must still be disclosed unless the public interest in maintaining the exemption is greater than the public interest in disclosing it. Where the public interest factors are equally balanced, the presumption is in favour of disclosure.
52. In this case, having considered all the factors, the Commissioner takes the view that there are strong public interest arguments both in favour of maintaining the section 35(1) exemption and in disclosing the information at issue. He is also of the view that the central question in every case is the content of the particular information in question.
53. In light of this, and the requirement to take account of all the circumstances of the case, he has given particular consideration to the specific nature of the information held by the Home Office.
54. Whilst acknowledging that the withheld information can be considered as comprising context and background as well as statements of fact and opinion, the Commissioner does not consider it represents a substantive debate over potential policy positions involving the exchange of views and advice. Nor is he persuaded that disclosure will have the detrimental effect described by the Home Office.
55. Having balanced the opposing public interest factors in this case, the Commissioner's conclusion is that the public interest in maintaining the exemption does not outweigh that in disclosing the information and that the withheld information should therefore be disclosed.

Section 43(2) Commercial Interests

56. The Home Office has also claimed the exemption at section 43(2) in relation to some of the withheld information. As the Commissioner has not found it exempt by virtue of section 35(1), he has next considered the citing of section 43(2) in relation to the information.
57. 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)."

Applicable interests

58. In this case, the Home Office told the complainant that the information withheld under this exemption comprises documents that include commercially sensitive information, the disclosure of which would damage Macfarlan Smith Limited's (MSL's) interests.
59. The Commissioner notes that at no stage has the Home Office indicated that its own commercial interests would, or would be likely to, be prejudiced by disclosure.

Does the information relate to, or could it impact on, a commercial activity?

60. The term 'commercial interests' is not defined in the Act. However, the Commissioner has considered his Awareness Guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".

61. The Commissioner has also referred, when considering this case, to guidance issued by the Scottish Information Commissioner in relation to commercial interests and section 33(1)(b) of the FOI (Scotland) Act 2002. This guidance states that:

"commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment".

62. In support of its decision to withhold the requested information, the Home Office told the Commissioner that disclosure in this case would involve disclosure of information "*relating to MSL's commercial operations*" and that this would "*destabilise the open and competitive market position*".
63. Having viewed the withheld information, the Commissioner is satisfied that the withheld information relates to commercial interests and therefore potentially engages the exemption contained in section 43(2).

The nature of the prejudice

64. The Information Tribunal in *Hogan* (EA/2005/2006 and EA/2005/0030) commented:

"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 Thoroton has stated 'real, actual or of substance' (Hansard HL (VOL. 162, April 20, 2000, col. 827))".

65. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
66. In support of its reason for withholding the information under section 43, the Home Office argued the importance of its stakeholders having the assurance *"that this sort of information will not be passed on to other commercial organisations"*.
67. The Commissioner is satisfied that, with respect to detriment to the principle of competition, there are commercial interests that are capable of being prejudiced. He has therefore gone on to consider whether the disclosure of the information in question in this case would cause such a prejudice.

Likelihood of prejudice

68. To engage the section 43(2) exemption it is necessary for the public authority to demonstrate that disclosure of the information would, or would be likely to, cause some relevant prejudice. In this case, the Home Office has confirmed that it is claiming that disclosure *"would"* be prejudicial on the basis that it would give other companies in the same industry an unfair advantage. In the Commissioner's view, when considering the 'would prejudice' limb of the test, the prejudice must be at least more probable than not.

Evidence of prejudice – would prejudice

69. Importantly, when considering prejudice to a third party's commercial interests, the Commissioner's view is that the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect: the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself. This approach has been confirmed by

the Information Tribunal in the case of *Derry City Council v ICO* (EA/2006/0014).

70. When requesting an internal review of the decision to withhold the requested information, the complainant argued that the Home Office had failed to indicate whether it had sought MSL's views on disclosure. During the course of his investigation, the Commissioner also raised this issue with the Home Office.
71. In line with the Information Tribunal decision in the *Derry* case, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary explicitly to consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
72. In response to his questioning, the Home Office confirmed to the Commissioner that it had not corresponded with MSL about the request for information. Nor did it provide any evidence that it had prior knowledge of the third party's concerns.
73. In correspondence with the Commissioner, the Home Office explained that stakeholders involved in consultations should be confident that their views and evidence submitted for consideration in a consultation are not released until such time as the formal (and where appropriate anonymised) findings and outcomes are published.
74. Conversely, the complainant argued that:

"as oxycodone is a controlled drug, its manufacture, export and import is closely controlled and a great deal of information relating to the levels of imports and exports and the qualities of drugs manufactured is published".
75. The Commissioner acknowledges that, in other circumstances, the arguments put forward by the Home Office in relation to its citing of section 43(2) could be described as robust. However, having given due consideration to the Home Office's arguments in relation to the 'would prejudice' test in this case, the Commissioner does not find them compelling. In particular, he notes the absence of any evidence in relation to third party concerns regarding disclosure.
76. Furthermore, having viewed the copy of the withheld information provided by the Home Office, he is not persuaded that the public authority's arguments relate to the withheld information.

77. However, the section 43(2) prejudice test is not restricted to 'would prejudice'. It provides an alternative limb of 'would be likely to prejudice'.
78. Clearly, this second limb of the test places a lesser evidential burden on the public authority to discharge and the Commissioner has therefore gone on to consider whether, in this case, the lower threshold is met.

Evidence of prejudice – would be likely to prejudice

79. Where the issue is that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), "*the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk*".
80. As the Home Office has not put forward discrete arguments specifically in relation to the test of 'would be likely to prejudice' the Commissioner has considered its arguments in relation to the 'would prejudice' test (described above) when determining whether or not the lower prejudice threshold is met.
81. Having considered the arguments against the lower threshold, the Commissioner is not persuaded that the Home Office has demonstrated a real and significant risk of prejudice to the commercial interests of any person, including the public authority holding it, through the disclosure of the information in question. He is therefore not persuaded that the exemption in section 43(2) is engaged in this case.
82. As the Commissioner has concluded that the exemption is not engaged, he has not gone on to consider the public interest test in this case.

Procedural Requirements

Section 1 – General right of access

83. Section 1(1) states:

"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”.

84. As the Commissioner considers that the withheld information should have been disclosed, he finds the Home Office in breach of section 1(1)(b) of the Act in that it failed to provide disclosable information by the time of the completion of the internal review.

Section 10 Time for compliance

85. 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.”

86. As the Commissioner has found that the information was incorrectly withheld, he takes the view that the Home Office breached section 10(1) of the Act in that it failed to provide the information within the statutory time limit.

The Decision

87. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the Act:

- it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review; and
- it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request.

Steps Required

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

- disclose the requested information to the complainant. Details can be found in the Confidential Annex which is available to the Home Office but not to the complainant.
89. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

90. 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

91. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
92. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over four months for an internal review to be conducted, despite the publication of his guidance on the matter.
93. The Code of Practice issued under section 46 of the Act (the "Code") provides guidance to public authorities as to desirable practice in connection with the keeping, management and destruction of records. In relation to decisions about what records should be kept in order to meet corporate requirements, paragraph 8.1(d) recommends that authorities should take the following into account:

" The need to explain, and if necessary justify, past actions in the event of an audit, public inquiry or other investigation. For example, the Audit Commission will expect to find accurate records of expenditure of public funds. Or, if an applicant complains to the Information Commissioner's Office (ICO) about the handling or outcome of an FOI request, the ICO will expect the authority to provide details of how the request was handled and, if applicable, why it refused to provide the information."

94. The Commissioner notes that, in this instance, the Home Office did not keep a copy of the withheld information it provided to the Commissioner during the course of the section 50 investigation. As a result, in order to confirm the scope of the withheld information, and to review whether any further information could be disclosed, the Home Office needed to repeat the initial compilation exercise it undertook; a time consuming process. The Commissioner wishes to refer the Home Office to the Code and expects that it will have due regard to its recommendations in its future handling of requests.

Right of Appeal

95. 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 30th day of November 2010

Signed

**Jon Manners
Group Manager**

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

Legal Annex

Section 35 Formulation of government policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 43 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).”