

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 August 2011

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Summary

The complainant requested copies of correspondence concerning Powys Fadog and negotiations relating to the River Lodge Hotel, Llangollen. The Welsh Government provided some information, but withheld other information under sections 31, 40, 42 and 43. During the Commissioner's investigation the Welsh Government disclosed some information but maintained its reliance on sections 40, 42 and 43. The Welsh Government also introduced its reliance on section 36 of the Act. The Commissioner has investigated and found that some of the withheld information was correctly withheld under sections 36, 40 and 42. The Commissioner has also concluded that section 43 is not engaged in relation to some of the withheld information. The Commissioner has ordered disclosure of the parts of the requested information which he does not consider to be covered by any of the exemptions cited by the Welsh Government. The Commissioner has also identified a number of procedural shortcomings in the way the Welsh Government handled the complainant's request but requires no steps to be taken.

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. The request in this case relates to a property known as the River Lodge Hotel, which was purchased by the Welsh Government in March 2007.

The Welsh Government subsequently entered into negotiations with Powys Fadog, a local social enterprise with a view to developing the property to secure an acceptable community use for the building.

3. In June 2009 the Welsh Government and Powys Fadog entered into an Agreement for Lease for the property. This lease was subject to a number of conditions including that Powys Fadog undertake remedial and improvement works to bring the property back into a good state of repair. A pre-condition to the lease being granted was that Powys Fadog was required to demonstrate that it had secured funding to cover the cost of remedial works.
4. The Welsh Government has conducted an internal review into the River Lodge project, to ascertain whether or not the purchase and options to subsequently sell/lease the property had been undertaken in accordance with relevant policies and procedures and professional good practice. The Welsh Government has also undertaken an options appraisal assessment in order to consider the alternative options for future use of the site.

The Request

5. The complainant contacted the Welsh Assembly Government ('the Welsh Government') on 26 March 2010 and requested:

"Any e mails or paperwork either to or from, or on behalf of, Sharon Linard (Director Operations & Invest Wales) concerning Powys Fadog, Pennaf and Assembly negotiations with regard to the River Lodge Hotel, Mill Street, Llangollen. I would like to request any information/communication that has taken place since 21st of December 2009 until the present".
6. Various exchanges took place between the complainant and the Welsh Government in relation to the delay in responding to the request. The Welsh Government finally responded to the request on 20 May 2010 stating that the information requested was exempt under sections 40(2), 42 and 31(2)(b) of the Act.
7. On 21 May 2010, the complainant requested an internal review of the Welsh Government's decision not to release the information requested.
8. The complainant contacted the Welsh Government to chase a response on a number of occasions between June and September 2010.
9. On 14 October 2010 the Welsh Government provided the outcome of its internal review. It disclosed some information falling within the scope of

the request but upheld its decision that the remaining information was exempt under sections 40(2), 42, 43(2) and 31(2)(b) of the Act. In its internal review, the Welsh Government also stated that:

“Whilst a formal opinion has not yet been reached...it is considered to be highly likely that exemptions provided under section 36 FOIA (prejudice to the effective conduct of public affairs) would apply to some of all of the information presently under review”.

The Investigation

Scope of the case

10. On 22 September 2010 the complainant contacted the Commissioner to complain about the delays he had experienced in obtaining the Welsh Government's internal review outcome.
11. The Commissioner contacted the complainant by telephone on 29 November 2010 to confirm whether, having received the outcome of the Welsh Government's internal review, he still wished to pursue his complaint. The complainant confirmed that he wished the Commissioner to investigate whether the information he had requested should be disclosed, and the delays he had experienced obtaining responses from the Welsh Government, to his initial request, and his internal review request.
12. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The Welsh Government withdrew its reliance on section 31(2)(b) and disclosed the information it had originally withheld under this exemption, apart from information which was also considered exempt under another exemption.

Chronology

13. On 29 October 2010, the Commissioner wrote to the Welsh Government to confirm that the complaint had been deemed eligible for formal consideration and requested copies of the withheld information.
14. The Welsh Government responded to the Commissioner on 11 November 2010 providing copies of the withheld information.
15. On 30 November 2010 the Commissioner wrote to the Welsh Government and requested clarification of the reasons behind its application of the exemptions it was relying on. The Commissioner also

asked the Welsh Government to consider whether any additional information relevant to the request could be disclosed given the passage of time since the original request, by way of informal resolution.

16. The Welsh Government contacted the Commissioner on 23 December 2010 requesting an extension in the deadline for response to his letter of 30 November 2010. The Commissioner agreed an extension to 21 January 2011.
17. On 25 January 2011 the Commissioner contacted the Welsh Government to chase a response to his letter. He advised that any further delays may result in an Information Notice being issued in accordance with section 51 of the Act.
18. The Welsh Government provided a substantive response to the Commissioner on 28 January 2011. The Welsh Government confirmed that, with the passage of time, it had revisited its position in relation to the request and, whilst it considered that section 31(1)(g), together with section 31(2)(b) was correctly applied at the time of the request, it was no longer relying on this exemption. As a result, it disclosed information originally withheld under section 31(2)(b), unless any other exemption was considered applicable to the information. The Welsh Government maintained its reliance on sections 40(2), 42 and 43(2) and provided further arguments to support its application of these exemptions. The Welsh Government also confirmed that it was now seeking to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) in relation to parts of the withheld information, and provided representations in support of its application of these exemptions.
19. On 20 April 2011 the Commissioner wrote a further letter to the Welsh Government regarding its application of section 36. The Welsh Government provided a substantive response on 11 May 2011.

Findings of fact

20. The withheld information consists of four classes of information. These are as follows:
 - (i) A briefing and submission prepared for Ministers regarding the River Lodge Hotel – withheld in their entirety under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c), and various sections of the two documents withheld under sections 40(2), 42 and 43 as well.
 - (ii) An internal review report into the River Lodge project, and various annexes attached to this report – some information has been disclosed and other information withheld under sections 40(2), 42 and 43

- (iii) Emails between officers in the Welsh Government and its legal advisors relating to the River Lodge Hotel – withheld under section 42
- (iv) A PERMIS extract report – (PERMIS is an electronic system used by the Welsh Government to record and review projects for approval by the relevant Delegated Authority Holder) - sections redacted under section 40(2) and 43.

Analysis

Exemptions

21. The Commissioner is obliged to consider all exemptions that are raised by the public authority in the course of his investigation. This is the result of the Upper Tribunal (Information Rights)' decision in the linked cases *DEFRA v Information Commissioner and Simon Birkett* [2011] UKUT 39 (AAC) and *Information Commissioner v Home Office* [2011] UKUT 17 (AAC)¹.

Section 36

22. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. These exemptions can only be cited where the reasonable opinion of a specified qualified person is that these exemptions are engaged. All sections of the legislation are reproduced in the attached legal annex.
23. The Welsh Government is relying on section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) in relation to information outlined at paragraph 20(i) of this Notice. The withheld information comprises a briefing prepared for Ministers regarding the River Lodge Hotel dated 15 January 2010 and a submission to Ministers about the River Lodge Hotel dated 4 February 2010. The Welsh Government has claimed that parts of these two documents are also exempt under sections 40(2), 42 and 43.

¹ This decision can be found at the following link:
<http://www.osspsc.gov.uk/judgmentfiles/j3160/GIA%201694%202010-01.doc>

24. The Commissioner considers it acceptable to claim more than one limb of section 36(2) in relation to the same information, as long as arguments can be made in support of the claim for each individual subsection. The Welsh Government provided detailed arguments in relation to each limb claimed, so the Commissioner has looked first at sections 36(2)(b)(i) and (ii). If the Commissioner finds that neither of these limbs is engaged in relation to any of the withheld information he will go on to examine section 36(2)(c). The Commissioner will only go on to consider other exemptions applied to parts of the withheld information if he finds that section 36 does not apply.
25. When investigating cases involving the application of section 36, in order to establish whether the exemption has been applied correctly the Commissioner considers it necessary to:
- Ascertain who is the qualified person or persons for the public authority in question;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion given was reasonable
26. If the Commissioner finds that the exemption is engaged he will then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

The opinion of the qualified person

27. During the course of the investigation the Commissioner asked the Welsh Government for details of the decision taken by the qualified person, in order for him to ascertain that an opinion was given and also that it was given by an appropriate person at an appropriate time.
28. The Welsh Government confirmed that, under section 36(5) of the Act the qualified person was the First Minister. The Welsh Government stated that the First Minister was asked on 27 January 2011 to consider the application of section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c). The opinion was given on 28 January 2011. The Commissioner is satisfied that the First Minister was a qualified person under section 36(5) of the Act.
29. In determining whether or not the opinion is reasonable, the Commissioner will take into account the information that was provided to the qualified person when he formed his opinion. The Welsh Government provided the Commissioner with a copy of its detailed submission to the qualified person in order for him to form his opinion that the documents in question were exempt under section 36. The submission contains detailed recommendations relating to each limb of

section 36 being claimed. The qualified person was also provided with copies of the withheld information with this submission. The submission stated that disclosure would be likely to cause the relevant prejudice under each limb of section 36 claimed by the Welsh Government.

30. In reaching a view on whether the qualified person's opinion is a reasonable one the Commissioner has been guided by the view of the Tribunal in *Guardian & Brooke v ICO & the BBC* [EA/2006/0011 & EA/2006/0013]. This found that a qualified person's opinion under section 36 is reasonable if it is both reasonable in substance and reasonably arrived at. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.²
31. The Commissioner has also been guided by the Tribunal's further comments in *Guardian & Brooke* at paragraph 91, in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
32. The Commissioner first notes that although the Welsh Government alluded to the fact that it considered section 36 applied to some of the withheld information in its internal review, it did not formerly claim its reliance on these exemptions until after he had commenced his investigation into this complaint. He further notes that the opinion of the qualified person was not sought until 27 January 2011, some 10 months after the request was submitted. However, based on the submission provided to the qualified person, and the representations which the Welsh Government has provided to the Commissioner, he is satisfied that the qualified person's opinion only took into account factors that

² Found at http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf

existed exist at the time of the request, and sufficient weight was given to the circumstances that existed at the time of the request.

33. The Commissioner notes that the qualified person signed his agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of “would be likely”. The Commissioner is of the view that “would be likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. However, it requires a lesser evidential burden than “would prejudice”.
34. Although the request for information itself was not supplied to the qualified person, the submission to the qualified person included a background section outlining how the section 36 exemption operates, and details of the two limbs of prejudice – “would” and “would be likely”. The submission also provided the qualified person with background information about the two documents in question, including the circumstances in which they were produced. The documents in question were drafted for the purpose of advising and seeking a decision from Ministers in relation to the River Lodge Hotel. The Welsh Government referred to its internal routine practice by which it consults with Ministers. This process requires an official integrally involved in a particular issue to draft a paper for Ministers, which is circulated to senior colleagues to quality assure prior to circulation to Ministers. The Welsh Government believe this process is crucial to ensuring good quality advice is provided to Ministers and depends upon officials drafting documents which reflect very clear and full explanations for decisions and proposals.
35. In the submission to the qualified person, separate statements were made in relation to the application of each limb of section 36 claimed. Referring to section 36(2)(b)(i), the Welsh Government claim that disclosure would be likely to inhibit the future free and frank provision of advice by staff to senior management or Ministers. It believes that disclosure would be likely to affect the provision of such advice in the future, and deter officials from preparing such written advice for senior managers. The Welsh Government believe that disclosure would be likely to result in both senior managers and Ministers being less well informed of important issues, for which they are responsible, and damage its established practice for formulating advice to Ministers. The Welsh Government advise that the withheld information in this case alerted senior management to a number of issues surrounding the acquisition and proposals for the River Lodge Hotel, which in turn resulted in an internal investigation into the issues.

36. With reference to section 36(2)(b)(ii), the Welsh Government believe that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation between managers and staff and engaging Ministers appropriately in sensitive matters. It argued that the prospect of disclosure would be to lead to managers and staff being less frank in recorded communications, which could in turn lead to less effective decision making. The Welsh Government believe that its internal process of advising and seeking decisions from Ministers, as outlined in paragraph 34 above, is crucial to the effective and efficient administration of business, whilst providing checks and balances which are essential to good governance.
37. In relation to section 36(2)(c), the Welsh Government state that the information contained within the documents was not approved by senior managers and resulted in an internal investigation being undertaken. It believes that the withheld information could be misleading in a number of respects and “would be likely to distort understanding of the matters and distract focus from the issues which it is important for the Assembly Government to resolve at the earliest opportunity”. The Welsh Government are of the view that, even with an accompanying explanation, disclosure of the two documents would be likely to lead to speculation about Ministers’ and senior management’s knowledge of and involvement in matters relating to the River Lodge Hotel. The Welsh Government believe this would seriously inhibit its ability to administer issues in an effective and appropriate way and affect its ability to achieve the best possible outcome for the River Lodge Hotel.
38. The Commissioner has considered whether the qualified person’s opinion was reasonable in substance. In reaching his view the Commissioner has taken into account the fact that the two documents were intended for a limited audience within the Welsh Government and were not intended for wider dissemination. Having examined all the relevant information the Commissioner is satisfied that the qualified person’s opinion was reasonable. The Commissioner considers it reasonable for the qualified person to have formed the opinion that disclosure of the information would be likely to have some inhibitive effects as defined by sections 36(2)(b) (i) and (ii) and therefore in relation to these exemptions he is satisfied the qualified person’s opinion was reasonable in substance.
39. The Commissioner has identified some weaknesses in the process by which the qualified person’s opinion was arrived at. In particular, the Welsh Government did not formally claim reliance on section 36 until after the Commissioner’s involvement, and as such the opinion was not sought until ten months after the request was submitted. However, the Commissioner has followed the approach set out by the Information Tribunal in *McIntyre v Information Commissioner EA/2007/068*; “...where the opinion is overridingly reasonable in substance then even

though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion....". In this case, despite weaknesses in the process by which the qualified person's opinion was arrived at, the Commissioner is satisfied that that the submission to the qualified person was sufficiently detailed to allow him to reasonably arrive at his opinion and that the opinion was given after taking into account only relevant factors and the circumstances that existed at the time of the request. The Commissioner is therefore considers that the qualified person's opinion was overridingly reasonable in substance.

40. In light of the above the Commissioner is satisfied that the exemptions under sections 36(2)(b) (i) and (ii) are engaged in relation to the information withheld under those subsections. The Commissioner believes, having perused the withheld information, that the information withheld under the section 36 exemption is covered entirely by the section 36(2)(b) (i) and (ii) exemptions. Therefore, he has not gone on to consider whether or not the section 36(2)(c) exemption is engaged.

Public interest test

41. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
42. Section 36(2)(b)(i) and (ii) are qualified exemptions and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice."

43. The Commissioner agrees with the Tribunal's approach. The fact that it is *"not for the Commissioner to form an independent view..."* does not prevent him from considering the severity, extent and frequency of any

prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by disclosure of the information withheld under section 36 and any relevant subsections.

Public interest arguments in favour of disclosing the withheld information

44. The Welsh Government believes that the public interest arguments in favour of disclosure are the same for each limb of section 36 it has claimed. The Welsh Government acknowledge that there is a public interest in it being as transparent and accountable as possible in the way that it operates, particularly in terms of efficiency, effectiveness and in the management of projects like the River Lodge Hotel. It also acknowledges disclosure would increase public awareness about how the Welsh Government handled the River Lodge Hotel project.
45. The Welsh Government believe that the public interest in disclosure is weakened by the fact that the briefing to Ministers was withdrawn, and the submission was not completed, as both documents were considered to be in need of review by senior management and advisors. As such, the information does not represent the concluded view of officials and could be misleading to the public.

Public interest arguments in favour of maintaining the exemption

46. The Welsh Government's arguments in favour of maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) are similar in that it in essence, it believes disclosure would lead to poorer decision making, which could lead to less effective use of public money.
47. Specifically in relation to section 36(2)(b)(i), the Welsh Government are of the view that it is in the interest of good government that officials familiar with the detailed aspects of a particular project, such as the River Lodge Hotel, prepare detailed advice for Ministers and senior management. If such detailed advice is not prepared, it could lead to a lack of awareness of such important issues and remove the opportunity for senior managers to intervene in such projects and correct or rectify issues. This in turn could lead to less effective use of public money and less favourable outcomes for such projects.
48. In relation to section 36(2)(b)(ii), the Welsh Government argue that disclosure of the withheld information would be likely to stifle the free and frank exchange of views between managers and/or staff who have

responsibility for sensitive issues and engaging Ministers appropriately in matters requiring consideration. The Welsh Government are of the opinion that a free and frank exchange of views is essential in order to identify the best solution to complex problems or issues, such as the River Lodge project.

49. The Welsh Government believe it is important, for the process of effective government, that officials be allowed freedom to develop their views and give free and frank advice to Ministers and not be inhibited by the possibility of publication. Further, the Welsh Government believe that its internal process for consulting and advising Ministers, and in particular the checks built in to the process which allow for senior management to quality assure any advice is crucial to support efficient administration and good governance. Disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of such deliberation.
50. The Welsh Government consider that the prospect of disclosure would be likely to result in officers being less frank in their recorded communications for fear that they might face public criticism. This would in turn be likely to adversely affect the decision making process by senior management and Ministers, who would not be in full possession of the facts or opinions of the officials integrally involved in any project or matter, particularly those involving the use of public money, as in this case. The Welsh Government do not believe that this is in the public interest.

Balance of the public interest arguments

51. The Commissioner's view is that the Welsh Government's public interest considerations in relation to maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) are sufficiently similar for him to be able to reach an appropriate opinion on conflated arguments.
52. The Commissioner acknowledges that there is a strong public interest in openness and transparency in relation to government activities. In this case disclosure of the withheld information would inform the public about the River Lodge Hotel project, which is an asset purchased using public money. Disclosure would also inform the public about the proposals for the River Lodge Hotel. However, the Commissioner accepts that this argument is weakened to an extent by the fact that the documents do not represent the concluded view of officials and were withdrawn prior to being formally considered by Ministers. The Permanent Secretary, in her position as Accounting Officer initiated an internal audit review of the propriety and value for money relating to the project shortly after these documents were produced.

53. The Commissioner notes that the Welsh Government has communicated information about the River Lodge Hotel to members of the local community (including local Assembly Members). This includes an options appraisal report which outlined the options open to the Welsh Government in respect of its land holding at River Lodge. In the Commissioner's view, this goes some way to satisfying the public interest
54. In weighing the public interest factors, the Commissioner has taken into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which opinions or options are expressed. The Commissioner notes that the issue was still "live" at the time of the request and the subject of considerable political and media debate.
55. The Commissioner gives weight to the Welsh Government's argument that there is a strong public interest in officials and advisers retaining the ability to communicate between themselves freely, frankly and in confidence. Similarly, he gives weight to the argument that it is in the public interest that decisions are made based on the best advice available and with full consideration given to all the options available.
56. In relation to any inhibition of the frankness of future advice and exchange of views by officials, the Commissioner believes that the guiding principle is the robustness of those officials, i.e. they should not be easily deterred from carrying out their functions properly, in order to manage projects like the River Lodge Hotel effectively. However, such arguments must be considered on a case by case basis, and in this case the Commissioner accepts that an inhibiting effect would be likely as the issues under consideration were "live" at the time of the request and weight must be given to protecting the process in question so that relevant parties involved in the discussions can continue to contribute to them with frankness and candour.
57. Having considered the opposing public interest factors in this case, the Commissioner concludes that the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information. As the Commissioner finds that the information was correctly withheld under sections 36(2)(b)(i) and (ii), he has not considered the other exemptions claimed by the Welsh Government in respect of this information.

Section 42

58. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege. The full text of section 42 can be found in the Legal Annex to this Notice.

59. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and their client. The Information Tribunal has defined LPP in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* as:

“...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)

60. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

61. The information which the Welsh Government has withheld under section 42 in this case consists of legal advice requests and responses between the Welsh Government and its legal advisers, and other documents or parts of documents which reveal or record discussions between the Welsh Government and its legal advisers

62. After reviewing the requested information which was withheld in this case under section 42, the Commissioner is satisfied that all of the information falls within the scope of this exemption. It is clear to the Commissioner that advice sought by the Welsh Government and received from its legal advisers constitutes communications between a lawyer and a client. In addition, the Commissioner's view is that as certain documents and parts of documents which the Welsh Government has withheld under section 42 refer to legal advice which has passed between a lawyer and a client they are also covered by this exemption.

63. Information will only be privileged so long as it is held confidentially. As far as the Commissioner can see, the legal advice was not publicly known at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner is persuaded that the withheld information is legally privileged and therefore exempt under section 42.

64. As section 42 is qualified exemption and therefore subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

65. The Welsh Government acknowledge that there is a public interest in individuals being able to exercise their rights under the Act to enhance their understanding of the reasons for decision or actions taken by a public body.
66. The Welsh Government also accept that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of decision making. In this case, disclosure of the withheld information would assist the public in ascertaining whether there was any incompatibility between the advice provided and the decisions taken and whether any advice provided had been followed.

Public interest arguments in favour of maintaining the exemption

67. The Welsh Government maintains there is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts. It argues that government departments need high quality, comprehensive legal advice for the effective conduct of their business. Without such advice, the quality of the Welsh Government's decision-making would be considerably reduced as it would not be able to make fully-informed decisions on the basis of the best advice available, and with a full appreciation of relevant facts.
68. The Welsh Government believe that it is of vital importance that it is able to obtain full and frank legal advice in confidence. The purpose of legal advice is to set out the strengths and weaknesses of a case so that the client can be fully informed of what options are available before a decision can be taken. If legal advice was routinely disclosed it would potentially place the Welsh Government in a weakened position compared to other persons or organisations not bound by the provisions of the Act. The Welsh Government consider there is a strong public interest in ensuring that legal professional privilege applies equally to all parties to ensure they are on a level footing.
69. The Welsh Government argue that disclosure of legal advice has a significant potential to prejudice its position to defend its legal interest – both directly, by unfairly exposing its legal position to challenge, and indirectly by “diminishing the reliance it can place on the advice having been fully considered and presented without fear of favour”.

Balance of the public interest arguments

70. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

“The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption” (Tribunal at para. 41).

71. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people, the timing of the request and the status of the advice.
72. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.
73. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to matters relating to publicly owned assets, as in this case. The Commissioner also notes that disclosure of the information may reassure the public that decisions had been made about the River Lodge Hotel on the basis of good advice and information and thus increase public confidence in how the Welsh Government will deal with similar matters in the future.
74. The Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exemption. In the case of

Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052) the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. Whilst the Commissioner notes that there has been considerable local attention in issues associated with the River Lodge Hotel he does not believe that in this case the subject matter of the request affects a substantial number of people.

75. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Welsh Government and its legal advisors and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
76. The Welsh Government argued that it needs to be able to obtain free and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Welsh Government's ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. The Commissioner believes that there must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be. In the case of *Kitchener v Information Commissioner and Derby City Council* (EA/2006/0044) the Information Tribunal stated:

"if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered."
77. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the timing of the request and the status of the advice. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested

information would harm the candour between the Welsh Government and its legal advisors. The advice related to a live matter in that at the time of the request, the Welsh Government was considering options for the property in question. The Welsh Government was undertaking an internal audit review into the River Lodge Hotel, and conducting an options appraisal assessment to consider future proposals for the site.

78. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight, he has determined that in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exemption under section 42. He therefore determines that the exemption at section 42 has been applied correctly by the Welsh Government.

Section 40(2)

79. Section 40(2) of the Act provides an exemption for information that is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied. In this particular case the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles, as set out in Schedule 1 to the Data Protection Act 1998 ('the DPA').
80. The information which the Welsh Government has withheld under section 40(2) comprises names of officers involved in the River Lodge Hotel project and details relating to their involvement in the project contained within the internal review report, various annexes to this report, and the PERMIS extract report relating to the River Lodge Hotel. The Welsh Government considers that the withheld information constitutes the personal data of those officers, that disclosure would be unfair and would therefore breach the first data protection principle. The Commissioner agrees that the relevant principle here is the first principle; the requirement that any processing should be fair and lawful.
81. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this Notice about the Welsh Government's submissions to support its position in respect of its application of this exemption and the Commissioner's consideration of those arguments is limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exemption. This annex will be provided to the Authority but not, for obvious reasons, to the complainant.

Is the information personal data?

82. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
83. In considering whether the information requested is “personal data”, the Commissioner has also taken into account his own guidance on the issue³. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.
84. The withheld information in this case comprises; the names of officers who were involved in the River Lodge project and, in some cases, details of their involvement in the project. The Welsh Government acknowledge that some parts of the withheld information, if read in isolation, may not constitute personal data. However, the Welsh Government believe that disclosure of parts of the withheld information could lead to identification of the individuals concerned.
85. The Commissioner accepts that a living individual can be identified from their name and is satisfied that the names which have been redacted constitute personal data. In relation to details relating to various officers’ involvement in the River Lodge project, the Commissioner is satisfied that where this information identifies the individual, it also constitutes the personal data of the individual as, he/she is clearly the focus of the withheld information. The Commissioner also accepts that, even if just the names of the officers were withheld, there is a reasonable prospect that they could be identified if other information withheld under section 40(2) were to be disclosed.
86. However, there are some sections of the internal review report, which do not relate directly to officers or their involvement in the River Lodge project. In addition, there are other sections of the report, where if the names of the individuals alone were redacted, the information would not

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

constitute personal data, as a living individual could not be identified through disclosure. These sections of the report are detailed in the confidential annex. As this information does not relate directly to an individual the Commissioner does not consider it to be personal data. As such, in respect of these parts of the withheld information, section 40 does not apply and the Commissioner considers that this information should not have been withheld by the Welsh Government.

87. The Commissioner is satisfied that, other than the information referred to in paragraph 86 above, living individuals can be identified from the withheld information and that the information relates to those individuals. The Commissioner therefore accepts that the information in the context of this request is personal data as defined by the DPA.

Would disclosure contravene any of the principles of the DPA?

88. Having concluded that some of the withheld information falls within the definition of "personal data" the Commissioner has gone on to consider if disclosure of this information would breach the requirements of the first data protection principle. As stated above, the Welsh Government claimed that disclosure of the withheld information in this case would breach the first data protection principle.

The first data protection principle

89. The first data protection principle has two main components. They are as follows:
- the requirement to process all personal data fairly and lawfully; and
 - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
90. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle. The Commissioner's general approach to cases involving personal data is to consider the fairness element first. Only if he believes that disclosure would be fair would he move on to consider the other elements of the first data protection principle.

Would disclosure of the information be fair?

91. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He

has then balanced these against the general principles of accountability, transparency and legitimate public interest.

92. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.
93. However, expectations are also shaped by a society where transparency and the Freedom of Information Act's presumption in favour of disclosure of information form part of its culture. This was recognised by the Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016) where it was said that:

"...The existence of the FOIA [Freedom of Information Act] in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money". (para 43)

94. The Commissioner's Awareness Guidance on section 40 suggest that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned".

95. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (ie their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (ie their public life).
96. As stated in paragraph 81 of this notice, for reasons of confidentiality, the Commissioner's consideration of the Welsh Government's position in relation to information which has been withheld from this document has been discussed in the confidential annex attached to this Notice.
97. Based on the nature of the withheld information and the submissions provided to the Commissioner by the Welsh Government, the

Commissioner is satisfied that the individuals would have had a reasonable expectation that their information would be kept confidential and not passed onto third parties without their explicit consent.

98. In assessing the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. Based on the withheld information, and the Welsh Government's representations, the Commissioner considers that any disclosure would cause unnecessary and unwarranted interference into the rights and freedoms of the individuals in this case.
99. The Commissioner has identified some legitimate interest which could be considered to favour disclosure; including the transparency and accountability of public authorities in relation to decisions and assessment of projects such as the River Lodge Hotel, which is a publicly owned asset.
100. Taking into account the arguments outlined in the confidential annex, and the nature of the withheld information, the Commissioner does not consider that the legitimate interests of the public in accessing this information are sufficient to outweigh the individuals' right to privacy. The Commissioner considers that the individuals had a reasonable expectation of privacy in relation to the withheld information and that to release this information would be unfair and likely to cause damage or distress to them.
101. In conclusion, the Commissioner finds that disclosure of the information requested would be unfair and would therefore contravene the first data protection principle. The Commissioner upholds the Welsh Government's application of section 40(2) to this information.

Section 43

102. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The full text of the exemption can be found in the Legal Annex at the end of this Notice.
103. In order for the Commissioner to agree that section 43 of the Act is engaged, the Welsh Government would need to demonstrate that prejudice would or would be likely to occur to the Welsh Government/or the business concerned if the information were disclosed, and that the prejudice claimed is real and of substance. This view is taken from the Information Tribunal in the case of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/005)* and its decision, which outlined the Tribunal's interpretation of "*likely to prejudice*". The Tribunal confirmed that "*the chance of prejudice being suffered should*

be more than a hypothetical possibility; there must be a real and significant risk". Once the prejudice test is satisfied, the Welsh Government would then need to apply the public interest test weighing up the arguments for and against disclosure.

104. When considering the application of a prejudice-based exemption, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (Appeal no EA/2005/0026 and EA/2005/0030). In that case the Tribunal stated that:

"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 consideredA third step for the decision-maker concerns the likelihood of occurrence of prejudice. "(para 28 to 34).

105. The Commissioner has followed the test set out above when considering the representations put forward by the Welsh Government.

Applicable interests

106. The Welsh Government argued that disclosure of the withheld information would be likely to prejudice its own commercial interests. As stated in paragraph 2 of this Notice, the Welsh Government purchased the River Lodge Hotel in March 2007. In June 2009 the Welsh Government and Powys Fadog entered into an Agreement for Lease for the property with a view to developing it to secure an acceptable community use for the building. Under the terms of the Agreement to Lease, if Powys Fadog is unable to satisfy the financial preconditions by June 2011, the agreement will come to an end. At that point the Welsh Government would need to consider its proposals for the site, which would include either entering into a new lease agreement or selling the property. The Welsh Government believe that disclosure would be likely to prejudice its ability to secure the best value in any negotiations to dispose of the land/building.
107. The Welsh Government also consider that some of the withheld information, if disclosed, would be likely to prejudice the commercial interests of Clwyd Alyn Housing Association ('Clwyd Alyn'). This information relates to a proposal which was being considered for Clwyd Alyn to be involved in the development of the River Lodge Hotel. The Welsh Government has not provided the Commissioner with any documentary evidence that it has consulted with Clwyd Alyn, but stated that this view was reached after consultation with Clwyd Alyn who felt

that disclosure would “reveal their approach to undertaking key calculations which would provide their competitors with an advantage”.

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

108. The term ‘commercial interests’ is not defined in the Act. However the Commissioner has considered his Guidance the application of section 43. This states that:

109. ‘...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’.

110. The withheld information relates to the purchase of a particular property, and the subsequent entering into an Agreement for Lease with a third party. The withheld information includes figures in relation to purchase values of the property, projected rental values (valuation figures) and refers to rental rates applicable to the lease agreement. If the terms of the lease are not satisfied, the Welsh Government will need to consider its options for the property, which could include re-marketing the property for sale, or entering into a new lease agreement. In this case, therefore, the Commissioner is satisfied that the withheld information does relate to a commercial activity.

Nature of prejudice

111. When considering the nature of the prejudice, the Commissioner has noted the Tribunal’s comments in *Hogan v the ICO and Oxford City Council* (paragraph 30):

112. “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 that the prejudice is, as Lord Falconer of Thoroton 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. There is therefore effectively a *de minimis* threshold which must be met.”

113. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.

114. The Welsh Government argued that disclosure of the withheld information would “be likely to substantially harm its ability to secure best value in any negotiations to dispose of the land”. Further, it argues

that disclosure would also “be likely to substantially harm the commercial interests of Clwyd Alyn” because some of the withheld information relates to a proposal that was being considered for Clwyd Alyn to be involved in the development of the River Lodge Hotel.

115. When considering prejudice to a third party’s commercial interests the Commissioner considers that the public authority should have evidence that this does in fact represent or reflect the view of the third party. The public authority should not speculate in this respect; the prejudice should be based on evidence provided by the third party, whether during the time of compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself.
116. The Commissioner notes that the Welsh Government has not provided evidence of discussions with Clwyd Alyn concerning any possible commercial harm that it would suffer if the information were released. This in itself does not exclude the use of section 43 but the Commissioner considers that this omission seriously weakens the Welsh Government’s argument in relation to potential prejudice to Clwyd Alyn’s commercial interests.
117. The majority of information relating to Clwyd Alyn and the proposal for them to be involved in the development of the River Lodge Hotel is contained within the documents identified in paragraph 20(i) of this Notice. The Welsh Government considered that this information, in its entirety, was exempt under section 36 and the Commissioner’s decision in relation to these documents is provided earlier in this Notice. The Commissioner concluded that Section 36 is engaged and the public interest in maintaining the exemption outweighed the public interest in disclosure. As such, the Commissioner has not considered the Welsh Government’s application of section 43 in relation to this information.
118. Having viewed the remaining information relating to Clwyd Alyn contained within the annexes to the internal review report, the Commissioner does not consider the withheld information reveals Clwyd Alyn’s approach to undertaking key calculations which would provide their competitors with an advantage. Based on this, and the Welsh Government’s representations, the Commissioner is not satisfied that disclosure would be likely to prejudice Clwyd Alyn’s commercial interests.
119. In relation to prejudice likely to be caused to the Welsh Government’s own commercial interests, the Commissioner asked the Welsh Government for detailed arguments in relation to its application of section 43, and evidence to demonstrate a clear link between disclosure of the actual withheld information and any prejudice which may occur.

Other than the arguments outlined at paragraph 114 above, the Welsh Government has not submitted any further representations to support engagement of this exemption.

120. The withheld information broadly comprises of the purchase price of the property in 2007, various valuations and rental receipt figures relating to the property (throughout the period 2005 to 2009), and the terms of the Agreement to Lease entered into with Powys Fadog in 2009. Based on the Welsh Government's arguments, the prejudice it considers would be likely to arise would only occur, if Powys Fadog failed to meet the terms of the lease agreement. The Welsh Government would then need to consider alternative proposals for the site, including entering a new lease agreement or selling the property. At the time of the request, there was some speculation as to whether Powys Fadog would be able to secure the necessary funding in order to cover the cost of remedial works, which was a condition of the lease.
121. The Commissioner agrees that, at the time of the request, there was a strong possibility that the Welsh Government would need to consider alternative options for the site, should the conditions of the lease not be fulfilled by June 2011. The Commissioner considers that any decision to the sell the property, or any other lease agreement which the Welsh Government entered into with a third party would need to reflect the market conditions at that time. In addition, any purchase price or agreement to lease would be likely to be affected by the general condition of the property, which may have improved, or deteriorated since it was purchased in 2007, or since the lease was agreed in 2009. The Commissioner is not persuaded that disclosure of the actual withheld information in this case would be likely to prejudice the Welsh Government's ability to secure the best value for the River Lodge Hotel, in the event that the terms of the lease are not fulfilled and it has to consider alternative proposals for the site. This is primarily because he considers that any alternative proposals for the site would need to take account of the circumstances that exist at that time, ie June 2011 at the earliest when the current Agreement to lease could come to an end.
122. The Commissioner has seen no evidence that significant prejudice would result, or any evidence of a causal link between disclosure of the information and the prejudice identified by the Welsh Government.
123. It is the Commissioner's view that the Welsh Government has not, to date, submitted any convincing arguments to demonstrate how disclosure of the requested information in this case would be likely to prejudice its own or Clwyd Alyn's commercial interests, or any evidence of the likelihood of a real and significant risk of prejudice being caused to either party's commercial interests. For this reason, the Commissioner has concluded that section 43(2) is not engaged.

124. The Commissioner notes, however, that some of the information which the Welsh Government has withheld under section 43(2) contains the names of officers involved in the River Lodge project. The Commissioner is the regulator of both the DPA and the Act. The wording of the Act ensures that the rights provided under it cannot prejudice or take precedence over a data subject's rights under the DPA. As the Commissioner has concluded within his analysis of section 40 above that the names of individuals involved in the River Lodge project are exempt, he has used his discretion as a responsible regulator to apply section 40(2) on the Welsh Government's behalf to the names of individuals contained in information which has been withheld solely under section 43(2).
125. As the Commissioner has concluded that section 43(2) is not engaged in this case, there is no need to go on and consider the public interest test.

Procedural Requirements

Section 1/Section 10

126. The original request was made on 26 March 2010. The Welsh Government responded on 20 May 2010, stating that all of the information held was considered exempt. At the time of its internal review on 14 October 2010, the Welsh Government disclosed some information relevant to the request. In failing to provide this information within 20 working days of the request, the Welsh Government breached section 10(1) of the Act.
127. The Commissioner also notes that during his investigation the Welsh Government released additional information relevant to the request. As the Welsh Government did not release this information (information to which the complainant was entitled) to the complainant within 20 working days of his request, he has found the Welsh Government in breach of sections 1(1)(b) and 10(1) of the Act.
128. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under sections 40 or 43(2), the Commissioner believes this information should have been provided to the complainant in line with the duty at section 1(1)(b). By failing to provide this information within 20 working days of the request the Board breached section 10(1) of the Act. Full details of the information which the Commissioner considers should be disclosed are provided in the confidential annex.

Section 17

129. The initial request was made on 24 March 2010 and the Welsh Government did not issue a refusal notice until 20 May 2010. In failing

to respond to the request with a valid refusal notice within twenty working days of receipt, the Welsh Government did not comply with the requirements of section 17(1) of the Act.

The Decision

130. 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 36(2)(b)(i) and (ii) to parts of the withheld information.
- It correctly applied section 42(1) to parts of the withheld information.
- It correctly applied section 40(2) to parts of the withheld information.

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

- The Welsh Government incorrectly applied section 40(2) to parts of the withheld information.
- The Welsh Government incorrectly applied section 43(2) to parts of the withheld information.
- The Welsh Government breached section 10(1) for failing to provide the information disclosed at the time of its internal review on 14 October 2010 within 20 working days of the request.
- The Welsh Government breached sections 1(1)(b) and 10(1) of the Act for the elements of the request that were informally resolved during the Commissioner's investigation following its decision to disclose this additional information.
- The Welsh Government breached section 17(1) of the Act for failing to provide a valid refusal notice within 20 working days of receipt of the request.

Steps Required

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

- To disclose the information as listed in the confidential annex to the complaint.

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

Failure to comply

134. 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

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

136. 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.

137. 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.

138. The Commissioner is concerned that in this case, it took over 100 working days for an internal review to be completed, despite the publication of his guidance on the matter. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the Welsh Government fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Welsh Government of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of Appeal

139. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

140. 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.

141. 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 23rd day of August 2011

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."

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 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.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that:

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

- (a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act

(data subject's right of access to personal data).”

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines

the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means data which relate to a living individual who can be identified —

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data

Schedule 1

The first data protection principle

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data:

“1. The data subject has given his consent to the processing. 2. The processing is necessary-

- (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary-
- (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
- (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Section 42(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."

Section 43 – Trade Secrets and Commercial Interests

Section 43 (1) provides that –

“Information is exempt 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).”