

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 June 2012

Public Authority: Ministry of Justice
Address: 102 Petty France
London SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information relating to the salary review conducted for the post of Information Commissioner towards the end of Richard Thomas' tenure in that post. The public authority ("MoJ") made a substantial disclosure but withheld a small portion of the requested information. It cited section 42 (legal professional privilege), section 36 (effective conduct of public affairs), section 40 (unfair disclosure of personal data) and section 35 (ministerial communications) as its bases for doing so. During the course of the Commissioner's investigation, MoJ made a further disclosure.
2. The Commissioner's decision is that the MoJ is entitled to withhold the remainder based on the exemptions it has cited.

Request and response

3. On 12 April 2011, the complainant wrote to the MoJ and requested information in the following terms:

"Copies of all correspondence between March 2007 and December 2008 relating to:

1. *The pay increase of Richard Thomas, the Information Commissioner, in or around November 2008 from £98,000 to £140,000*
2. *The back dating of this pay increase to November 2007*

3. *Richard Thomas' agreement to continue in the post as Information Commissioner in or around November 2007*
4. *A copy of the independent review regarding his salary".*

4. The MoJ responded on 12 May 2011. It stated that it would exceed the costs limit referred to in section 12 of the Act to provide confirmation that it held the requested information.
5. The complainant requested an internal review on 17 May 2011. There was a protracted delay on the MoJ's part and, following the Commissioner's intervention, it eventually responded on 19 December 2011.
6. MoJ revised its position and made a disclosure to the complainant. However, it withheld certain information citing a series of exemptions as its basis for doing so. These were:
 - Section 42(2) (legal professional privilege),
 - Section 35(1)(b) (Ministerial communications),
 - Section 36(2)(b)(ii) (prejudice to the free and frank exchange of views),
 - Section 36(2)(c) (prejudice to effective conduct of public affairs);
 - and
 - Section 40(2) (personal data)
7. In the light of the MoJ's disclosure, the Commissioner invited the complainant to consider withdrawing their complaint. There was a further exchange of correspondence between all parties where the complainant indicated on 13 January 2012 that they wished to proceed with their complaint.

Scope of the case

8. The Commissioner's investigation has focussed on whether the MoJ is entitled to rely on the exemptions it has cited as a basis for refusing to disclose the requested information which remains withheld. During the course of that investigation, the MoJ made a further disclosure of information having acknowledged a number of inconsistencies in the way it had previously redacted the requested information. The information which was disclosed during the course of the Commissioner's investigation was not considered further.

Reasons for decision

9. Section 42(1) of FOIA 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."

10. There are two categories of legal professional privilege; those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
11. The MoJ has confirmed that, in this case, the category of privilege it is relying upon is advice privilege. As noted above, this privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore, the information must be communicated in a professional capacity.
12. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
13. The MoJ identified five items containing information which was, in its view, exempt under section 42. It explained that the information attracted this exemption because it was created by professional legal advisers in response to specific requests from a client; it was created for the sole purpose of providing or obtaining legal advice; and it was communicated in a legal adviser's professional capacity.
14. Having looked at the withheld information and the submissions provided by the MoJ, the Commissioner considers that the information is exempt under section 42(1) of FOIA.

Section 42 – The Public Interest Test

15. Section 42 is a qualified exemption. Information which is exempt by virtue of a qualified exemption can only be withheld from disclosure under FOIA if the public interest in maintaining that exemption outweighs the public interest in disclosure.

Arguments favouring maintaining the exemption

16. The Commissioner is mindful of the Information Tribunal's decision in *Bellamy v Information Commissioner (EA/2005/0023)* which gave considerable weight to the public interest in withholding information which attracts legal professional privilege.

"it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (paragraph 35).¹

17. The Commissioner considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional. The Commissioner has also noted the comments of the Tribunal in *Calland v Information Commissioner (EA/2007/0136)* that the countervailing interest in disclosure must be *"clear, compelling and specific"* (paragraph 37).²
18. The public authority's arguments broadly covered these points and also made specific reference to the withheld information.

Arguments favouring disclosure

19. The public authority recognised there is a public interest in disclosing the information in order to let the public know that decisions have been made on the basis of good quality legal advice. It also recognised a public interest in allowing the public to see whether this advice was followed in the decision-making process.
20. The complainant did not make specific arguments about the legal professional privilege exemption. However, it submitted detailed arguments focussing on both general and specific points which, in its view, add weight to the public interest in disclosure. These will be set out at this point in the Notice and will be referred to and considered in relation to each exemption (where applicable).

¹

http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>

21. The complainant identified the following as factors in the background of the issue that were significant:
- The increase to basic pay for the Commissioner amounted to 42% of the previous figure and was highly unusual.
 - A mechanism for increases already existed in Statute.
 - The increase was backdated to Nov 2007 adding yet further to the cost to the public purse.
 - Richard Thomas had already accepted the role at a statutory salary since 2002 which, in 2007, was approximately £98,000
 - In its view, Richard Thomas seemed generally to be in agreement with a pay increase to £120,000 in late 2007.
 - Richard Thomas was due to end his term as Information Commissioner with a full pension.
 - At the same time that this salary negotiation was taking place. Richard Thomas had been commissioned to publish the highly sensitive Data Sharing Review with Mark Walport.³
22. The complainant argued that, in the light of the above factors, there was a compelling public interest in increasing the public's understanding of the rationale for the unusual pay increase.
23. The complainant also raised concerns about the extent of the MoJ's disclosure and drew attention to particular redactions that seemed illogical or contradictory. These redactions marked information which was, in the MoJ's view, exempt under the provisions of section 36 and section 40. This point will be addressed in the sections of this notice which deal specifically with those exemptions.

Section 42 – Balance of public interest

24. The information to which this section has been applied clearly attracts advice privilege. As such, particular weight must be given to protecting the space in which any person (including the MoJ) seeks and obtains legal advice. The Commissioner notes the complainant's arguments as to the compelling need to understand the rationale for the pay review. He agrees that disclosure of the

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<http://tna.europarchive.org/20081112112613/http://www.justice.gov.uk/docs/data-sharing-review-report.pdf>

information to which section 42 has been applied would go some way to increasing the public's understanding of the MoJ's decision making process in this regard. However, he has concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure. The complainant's countervailing arguments as to the public interest in disclosure, while very compelling, do not carry the same or greater weight in relation to the discrete part of the withheld information to which section 42 has been applied.

Section 40 – personal data exemption

25. The relevant provisions of section 40 are section 40(2) and section 40(3)(a)(i). These are somewhat complex provisions and can be accessed in full via a website which is delivered by the National Archives.⁴
26. However, they can readily be summarised as follows: the relevant exemption in section 40 is engaged where disclosure under FOIA of requested information would breach any of the eight data protection principles of the Data Protection Act (DPA).⁵
27. The data protection principles of the DPA only apply to personal data. Personal data is information which relates to a living and identifiable individual and is biographically significant about them.
28. The personal data exemption can therefore only apply to information that:
 - satisfies the definition of personal data set out in the DPA; and
 - cannot be disclosed without breaching one of the data protection principles of the DPA.

Is the information personal data?

29. The withheld information to which this exemption has been applied can be divided into two categories. The first is the names of junior officials and their work contact details. The second is information about Richard Thomas.

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/contents>

⁵ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

30. The Commissioner is satisfied that information showing where a person works, how they can be contacted there and what projects they were involved with at work is information which relates to them and is biographically significant about them. The Commissioner is satisfied that first category of information is therefore personal data about the junior officials in question.
31. The Commissioner is also satisfied that the information about Richard Thomas is his personal data. The information in question relates to him and is biographically significant about him.
32. The complainant has queried how information which apparently refers to Richard Thomas can be exempted under section 36 in one part of a document and section 40 in another part of the same document. The complainant has also queried why some information relating to Richard Thomas has nevertheless been disclosed. The complainant argues that this is evidence of MoJ's inconsistent and therefore unreliable use of exemptions.
33. There are two points to note here. Firstly, section 40 only applies to personal data where disclosure of that personal data would be unfair. Secondly, even though it may not be unfair to disclose certain personal data, that personal data, along with other information around it, may be exempt for other reasons because the terms of those other exemptions apply. In the majority of cases, the MoJ has applied section 36 to this type of information. It may not have been satisfied that the information was exempt under section 40. However, it was satisfied that the information was exempt under section 36. The Commissioner will address the application of section 36 later in this Notice.
34. In addition, the Commissioner notes that MoJ has drawn a distinction between information which relates directly to Richard Thomas as an individual and information which relates more to the salary review and the post to which it relates. In other words, the Commissioner acknowledges that there can be a difference between information about a post and information relating to the incumbent post-holder.
35. Having reviewed the information, the Commissioner is satisfied that the second category of information to which the MoJ has applied section 40 is Richard Thomas' personal data. That is not to say that he agrees it is exempt under section 40; only that he agrees that it is Richard Thomas' personal data.

Would disclosure breach any of the data protection principles of the DPA?

36. When considering the personal data exemption under FOIA, the Commissioner normally looks at whether disclosure would accord with the first data protection principle. This principle requires personal data to be processed fairly and lawfully and in accordance with at least one of the conditions for processing listed in Schedule 2 of the DPA.
37. This means, in summary, that if disclosure under FOIA would be unfair, unlawful *or* would not be in accordance with any relevant conditions, that disclosure would contravene the first data protection principle. The information in question would, therefore, be exempt under the personal data exemption.
38. In considering the fairness of disclosure the Commissioner has taken into account the following factors:
 - The expectations of the individuals
 - The possible consequences of disclosure
 - Whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects
39. This analysis also takes into account the factors which underpin the most relevant condition in Schedule 2 of the DPA, namely condition 6.

Would disclosure of the names of junior officials be fair?

40. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed. The rationale for this is that the more senior a person is the more likely it is that they will be responsible for making influential policy decisions.⁶ In this case, the information shows that certain individuals were involved in the email exchanges conducted during a salary review

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http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx&src=IE-Address

for the role of Information Commissioner when Richard Thomas was in post.

41. The Commissioner is satisfied that the individuals concerned are junior officials and were not themselves responsible for conducting the salary review. Before reaching this conclusion (and as noted above), the Commissioner double checked with the MoJ whether all of the individuals whose names had been redacted under section 40, were, in fact, junior officials – he had noted some anomalies. The MoJ reviewed the matter and identified certain individuals who did not fall within that category. It then disclosed their names to the complainant in context, i.e. by disclosing the information in the form of document copies with those previous redactions restored to show where individuals' names appear.
42. The Commissioner is satisfied with the assurances of the MoJ that the remainder, whose names are still withheld are, in fact, junior officials.
43. The Commissioner's view is that, in these circumstances, the junior officials concerned would have a reasonable expectation that this personal data about them would not be disclosed. The names of officials who did have an active role in the decision-making process have already been disclosed to the complainant.
44. Disclosure of the names of junior officials here would add very little to the information that has already been disclosed. Whilst it could be argued that there is a legitimate interest in promoting transparency and accountability in relation to the personal information, the Commissioner's view is that this has already been served by the disclosure of the names of senior officials.
45. The complainant has argued that, at present, they have emails without knowing who sent them and to whom they were sent. It has argued that the public authority could provide information showing where the sender or recipients work or some other information which shed light on who sent what to whom and when without necessarily revealing identities. The Commissioner has some sympathy with this view. However, FOIA does not require public authorities to create new information in response to requests under section 1. He also notes that when the MoJ made a further disclosure during the course of the Commissioner's investigation, it made efforts to show the place of employment of

the sender where that appeared in the email address, for example "[name redacted]@justice.gsi.gov.uk".

46. The Commissioner has decided that disclosure of the names of junior officials would contravene the first data protection principle. Disclosure would be unfair because it would be outside the reasonable expectations of the junior officials in question. Further, it would not increase the public's understanding of the MoJ's rationale for the review (that is served by disclosure of the substantive content of the emails).
47. Consequently, the Commissioner has found that the names of junior officials are exempt under section 40(2).

Would disclosure of Richard Thomas' personal data be fair?

48. Richard Thomas' personal data, which has been withheld in this case, is connected with his employment as Information Commissioner. This post is a high-profile role at the heart of information access law in the UK. The incumbent should reasonably expect a considerable degree of transparency about the detail of that role, including the cost of the role from the public purse. The outcome of the salary review was a considerable uplift to Mr Thomas' salary. The salary was backdated such that it would have had a significant impact on calculations for his final salary pension, the cost of which continues to be met from the public purse. This uplift was out of kilter with public sector pay deals at the time.
49. There is, therefore, a compelling and wholly legitimate interest in disclosing information which would shed further light on the decision-making process and the rationale which led to a salary uplift that appeared to be out of kilter with other public sector pay negotiations.
50. The public authority has already made significant and extensive disclosures of information about the salary review to the complainant (including correspondence from Mr Thomas to the MoJ about the subject). However, MoJ drew a line at what it believes is information which is more personal to Mr Thomas and more deserved of protection from disclosure.
51. As noted above, the MoJ disclosed more of Richard Thomas' personal data during the course of the investigation of this case. The disclosure included information related to Mr Thomas' salary.

This decision notice deals solely with that personal data which remains withheld.

52. The Commissioner's view is that although senior public figures should expect a greater degree of exposure about their remuneration packages and related discussions, it is wholly reasonable that they should expect limits to this exposure. The information which has been withheld here is personal to Richard Thomas even though it relates to the review of his salary which is funded at public expense. For obvious reasons, the Commissioner cannot set out detail of that personal data on the face of this Notice – to do so would circumvent the Act. The Commissioner has concluded that disclosure would have a negative impact on Mr Thomas' privacy and that this negative impact would be unwarranted. Any official, even the most senior, should be afforded a degree of privacy around the most detailed elements of discussions they might have about their salary. This is particularly the case where the outcome has been made public, as has a considerable amount of detail about the rationale behind that outcome. The Commissioner recognises that, at the time of the request, over two years had passed since the events covered in the requested correspondence. He also acknowledges that Richard Thomas' term as Commissioner had ended by the time of the request. However, he does not think that this weakens the reasonableness and legitimacy of Mr Thomas' expectation that the information would remain private.
53. The complainant has hinted that the timing of the review may have been significant. They have drawn attention to the Walport-Thomas review which is referred to above and which was published towards the end of Mr Thomas' tenure. The complainant appears to be hinting that Mr Thomas may have been influenced by personal factors (that is, the review of his salary) when participating in the Walport-Thomas review. The Commissioner would characterise this hint as speculative and has not seen any evidence from the complainant to show the basis for this speculation. Had the complainant been able to point to any evidence (or even to any informed contemporaneous commentary) which suggested that Mr Thomas, in some respect, "pulled his punches" in the Walport-Thomas Review, the Commissioner would have been prepared to consider the point in more detail. In the Commissioner's view, a public authority should not be required to disclose information simply to prove a negative arising from unfounded speculation. The Commissioner has

therefore not considered the complainant's suggestion about the significance of the timing of the Walport-Thomas review any further.

54. In light of the above, the Commissioner has concluded that disclosure of Richard Thomas' personal data which remains withheld would be unfair. He recognises the compelling legitimate interests of the public in learning as much as possible about the decision-making process in question. However, he does not believe that these legitimate interests can be served without giving rise to an unwarranted and negative impact on Mr Thomas' legitimate expectation of confidentiality. In reaching this conclusion, he has also taken into account the extensive disclosure made by MoJ and the small amount of Richard Thomas' personal data to which section 40 has ultimately been applied.
55. The Commissioner has decided that the MoJ has correctly relied upon section 40(2) in relation to Richard Thomas' personal data where this exemption has been applied to it. Disclosure of this personal data would contravene the first data protection principle. Disclosure would be unfair because it would be outside Mr Thomas' reasonable expectations and would not be warranted in order to serve the public's legitimate interests. These interests are already served by the extensive disclosure that MoJ made at the time of the request and during the Commissioner's investigation.

Section 36 – Effective conduct of public affairs

56. The MoJ applied section 36(2)(b)(ii) and (2)(c) to some of the withheld information.
57. Section 36(2)(b)(ii) and (c) are engaged where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation or would otherwise, or would be likely otherwise, to prejudice the effective conduct of public affairs.
58. In order to determine whether section 36 has been correctly applied the Commissioner has:
 - (i) ascertained who the qualified person is for the public authority;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.

59. In support of the application of section 36, the MoJ has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that section 36 should be applied, and a copy of the qualified person's opinion.
60. The Commissioner is satisfied that the MoJ has sought the opinion of the appropriate person, in this case, Lord McNally, Minister of State at the MoJ. MoJ provided a copy of the relevant correspondence to and from Lord McNally's office. In these submissions, the MoJ seeks to rely on the higher threshold of likelihood in relation to both exemptions, namely that disclosure "would" give rise to the prejudice described in those exemptions. This contrasts with the lower threshold of "would be likely to".
61. The Commissioner's understanding of 'reasonable' is based on the plain meaning of the word. The definition in the Shorter Oxford English Dictionary is as follows: "*in accordance with reason; not irrational or absurd*".
62. When considering whether an opinion is reasonable the Commissioner looks at whether the opinion is one that a reasonable person could hold. It does not have to be the *only* reasonable opinion that could be held, or the 'most' reasonable opinion. Furthermore, the Commissioner is not obliged to agree with the opinion.
63. The public authority set out the following points for the complainant regarding the application of the two section 36 exemptions that it had cited:

Section 36(2)(b)(ii) – inhibition to the free and frank exchange of views

- disclosure of some of the information would harm the willingness of officials and external organisations to engage in frank discussions with the Department in the future if details of those discussions were likely to be disclosed into the public domain.

Section 36(2)(c) - disclosure would be likely to prejudice the effective conduct of public affairs

- Disclosure of some of the withheld information would cause harm to the effective running of appointment processes and salary negotiations with senior appointees, and other similar work;

- Where there is a lack of candour in identifying issues, this would result in these types of processes and other similar workstreams being less effective.
64. In its submissions to the Minister, it expanded on these points with specific reference to the withheld information.
65. Having considered the information itself and the correspondence to and from the Minister about the application of exemptions, the Commissioner agrees that both exemptions of section 36 are engaged. He is satisfied that the Minister's opinion is a reasonable one: it is an opinion that a reasonable person could hold. In consequence, he is satisfied that disclosure of certain of the withheld information would inhibit the free and frank exchange of views for the purposes of deliberation. He is also satisfied that disclosure of other parts of the withheld information, disclosure would otherwise prejudice the effective conduct of public affairs.

Section 36 – Balance of public interest

66. All the exemptions within section 36 are qualified by a balance of public interests test. As with section 42, the exemptions within section 36 can only be maintained where the public interest in maintaining them outweighs the public interest in disclosure.
67. Taking into account the comments of the Information Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Commissioner agrees that "*when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*'(paragraph 88).⁷
68. In the Commissioner's opinion, whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation as claimed under section 36(2)(b)(ii). Similarly, for section 36(2)(c) he can consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

69. Although the Commissioner cannot describe the detail of the withheld information on the face of this notice, he notes that the MoJ has sought to put the information into two categories. There is information which shows internal discussions at the MoJ on the subject of the pay increase. Section 36(2)(b)(ii) has, on the whole, been applied to this information. There is other information which relates more to the negotiations themselves and the MoJ's approach to the negotiations. Section 36(2)(c) has, on the whole, been applied to information of this type.
70. The MoJ explained that that it had made a substantive disclosure because it recognised the public interest in doing so. Such disclosure would, in its view, help foster a greater public understanding of the workings of Government. It would also demonstrate what it described as the "*professional and thorough approach that is taken to making decisions on such important issues*".
71. However, it took the view that there were stronger public interest arguments in favour of withholding some of the information. It provided separate arguments for the two exemptions within section 36 that it sought to rely on. It stressed the importance of allowing its officials to participate in free and frank discussions on important issues in an environment free from public scrutiny. It also stressed the harm that would result to the candour of such discussions. It argued that there was a strong public interest in ensuring that pay and recruitment processes for senior posts in public service were run effectively and that disclosure would impact negatively on this interest. Expanding on this point in correspondence with the Commissioner, it explained that some of the information related specifically to the handling of the pay negotiations for the Information Commissioner. It was concerned that disclosure of this information might affect the pay negotiations for other senior public posts.
72. The complainant provided clear and detailed arguments as to why the public interest favoured disclosure of all the material within the scope of their request. These are set out above. As also noted above, the complainant pointed out what they saw as inconsistencies in the MoJ's approach to redaction in relation to section 36.
73. The Commissioner notes that the information to which section 36(2)(b)(ii) has been applied contains candid observations and analysis recorded during the review process. In the

Commissioner's view, civil servants and other public officials charged with giving advice are expected to be impartial and robust in discharging their responsibilities and not to be deterred from expressing their views by the possibility of future disclosure. However, the subject matter covered in the withheld information relates to discussions about the appropriate salary for a particular role. This is, inevitably, a topic which requires sensitive handling.

74. The Commissioner notes that information to which section 36(2)(c) has been applied focuses in particular on the detail of the negotiation and the MoJ's approach. Inevitably it also includes candid observations and analysis but it also relates to MoJ's overall approach to the negotiations. The Commissioner recognises that there is a compelling public interest in protecting the detail of MoJ's approach because of the frequency with which it is likely to be conducting such negotiations with other senior officials.
75. The Commissioner notes the complainant's compelling arguments as to why the public interest favours disclosure. He agrees that a considerable amount of transparency is required to maintain public confidence in a process which, in this case, gave rise to an unusually large salary uplift for a particular role. However, he takes the view that a line should be drawn to protect a safe space around such discussions so that all parties can take part without inhibition.
76. There is continued public focus on pay levels for senior officials in the climate of severe pay restraint for more junior officials and in the context of widespread reductions in public spending that affect the public as a whole. While this adds considerable weight to the public interest in transparency about decisions made on public sector pay, it also lends weight to the public interest in protecting the safe space around which the most detailed discussions on this subject can be held. Decisions as to pay must be made with appropriate rigour to ensure value for money. In the Commissioner's view, this is more likely to arise where matters are discussed within a safe space for frank discussion and exchange of views. However, it remains incumbent upon any public authority to explain its rationale regarding senior pay awards as far as it is able to do so, in the interests of fairness, openness and accountability for public expenditure.

Section 36(2)(b)(ii) and Section 36(2)(c) - Conclusion

77. Having considered the severity, extent and likely frequency of inhibition to the free and frank exchange of views for the purposes of deliberation which disclosure of the withheld information would pose, the Commissioner is satisfied that the MoJ drew a line around protecting a safe space for discussion at the correct point. He agrees that there is a real risk that disclosure of the withheld information would affect the openness and candour in relation to future exchanges of views in this area. As a result the Commissioner considers that the public interest in maintaining the exemption under section 36(2)(b)(ii) outweighs the public interest in disclosure of the information in question and that the MoJ was correct to withhold it on this basis.
78. Having reviewed the withheld information to which section 36(2)(c) has been applied, he also considers that the public interest in maintaining this exemption outweighs the public interest in disclosure. In reaching this view, he has given particular weight to the fact that MoJ must negotiate regularly with senior officials on the subject of their pay.

Section 35(1)(b) – Ministerial Communications

79. Section 35(1)(b) states that information that is held by a government department is exempt information if it relates to Ministerial communications. This is a class based exemption and if the information relates to a Ministerial communication, this exemption is engaged.
80. The Commissioner is satisfied that the information to which section 35(1)(b) has been applied relates to a Ministerial communication. The information in question is either a communication sent directly from one minister to another or it is one sent from one minister's office to another's office and communicates that minister's comments to the other minister.
81. Having concluded that the information in question falls within the class of information described in section 35(1)(b), the Commissioner went on to consider the balance of public interest.

Section 35(1)(b) – Balance of public interest

82. The complainant's arguments as to the public interest in favour of disclosure are set out above.

83. The public authority's arguments in favour of disclosure are as follows:
- There is a public interest in greater transparency in the area of pay rises for senior public officials. This increases Government accountability as well as trust in the Government.
 - Disclosure would lead to a better public understanding of how Government formulates and develops policy and ensures consistency in the area of senior salaries. This can help inform public debate and increase public confidence that decisions are properly made.
 - There would be a public interest in knowing how public funds are being spent, and the views of Ministers on the salaries of senior public officials, in this case the Information Commissioner.
84. The Commissioner would note that the second point on this list relates more closely to the exemption at section 35(1)(a) (Formulation and development of government policy). As such, he does not consider it carries particular weight in considering the balance of public interest in the context of the information at issue in this case.
85. The public authority set out the following arguments in favour of maintaining the exemption at section 35(1)(b).
- It is important to maintain a safe space within which the formulation and development of Government policy and Government decision-making can proceed to ensure that the salaries of senior public appointments are set at an appropriately proportionate and consistent level.
 - There may be an adverse effect on ministerial candour in future, particularly on sensitive subjects such as this one.
 - It also argued that the disclosure of interdepartmental consideration and communications between ministers may undermine the collective responsibility of the Government.
86. As above, the Commissioner considers that the first point relates more to the application of section 35(1)(a) rather than section 35(1)(b) and carries less weight for that reason in the context of the information at issue in this case.

87. The Commissioner is satisfied that the MoJ arguments as to the importance of preserving the convention of collective cabinet responsibility carry particular weight. Preserving this convention allows the Government to be able to engage in free and frank debate in order to reach a collective position. It also allows it to present a united front after a decision has been made. There is a public interest in allowing free and frank communication between ministers in order to agree a collective position, in that it serves to improve the quality of the final decision.
88. The Commissioner recognises that this issue (the proposed uplift of the Commissioner's salary) is no longer live. He also recognises that the Government that decided this particular issue is no longer in power (replaced by a Coalition Government following the General Election of May 2010). However, the question of salary packages for senior public officials remains a live topic that is hotly debated on a regular basis. Ministers in the present Government should be confident that they too can discuss the issues freely and frankly and then agree a collective position. The collective position can then be challenged and tested in Parliament and elsewhere.

Section 35(1)(b) - Conclusion

89. The Commissioner has concluded that the public authority is entitled to rely on section 35(1)(b) as a basis for withholding the information to which this exemption has been applied. He notes the complainant's compelling public interest arguments in disclosing as much detail as possible about the process which lead to this unusual decision. However, he has concluded that the public interest in protecting the convention of collective cabinet responsibility carries greater weight. He is satisfied that disclosure would undermine that convention in this case. He has given particular weight to the fact that the rate at which senior public officials' salaries should be set remains a live issue that is hotly debated. The public interest in maintaining the exemption therefore outweighs that in disclosing the information.

Right of appeal

90. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

91. 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.
92. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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