



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 4 May 2006

Public Authority: The National Assembly for Wales
Address: Cathays Park
Cardiff
CF10 3NQ

Summary Decision and Action Required

The Commissioner's decision in this matter is that the public authority has dealt with the complainant's request in accordance with Part I of the Act, in that it has applied the exemption at section 42 of the Act appropriately.

1. Freedom of Information Act 2000 – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

2.1 The complainant has advised that on 21 January 2005 the following information was requested from the public authority in accordance with section 1 of the Act:

2.2 *“Disclosure of all information relating to the consideration of whether the free breakfast initiative could be made compulsory so far as the participation of primary schools is concerned.”*

2.3 The public authority responded on 23 February 2005 by stating that it held two documents considered relevant to the request. However, it refused to release these documents, citing the exemptions at section 35(1)(a) and section 42(1) of the Act. This decision was upheld on 12 May 2005 following an internal review.

3. Relevant Statutory Obligations under the Act

3.1 **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.”

3.2 **Section 35(1)(a)** states:

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

- (a) the formulation or development of government policy”

3.3 **Section 42(1)** states:

“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.”

4. Review of the case

The Complaint

4.1 The complainant has not disputed that the two documents in question relate to the formulation or development of government policy and also constitute legal advice which attracts privilege. However, the complainant believes that there is a strong public interest in the information that has been withheld, particularly as it relates to

the implementation of a key policy in the Labour Party's manifesto for the Assembly elections in 2003.

- 4.2 The complainant believes that the public authority has applied the Act incorrectly in concluding that the public interest in maintaining the exemptions outweighs the public interest in disclosure.

The Public Authority's view

- 4.3 The public authority does not dispute that there is a public interest in the release of the documents in question, stating that greater transparency makes government more accountable to the electorate and increases trust. It also acknowledges a public interest in assessing the quality of advice given to Ministers and the process of decision-making.
- 4.4 However, the public authority concludes that the public interest in maintaining the exemptions cited outweighs these public interest arguments in favour of disclosure. In particular, the public authority believes there is a very strong argument for protecting the confidentiality of communications between lawyers and their clients. This confidentiality allows free and frank exchanges between lawyers and clients that ultimately lead to good decision-making. The public authority argues that the quality of its decision-making would be reduced by disclosure of this information.

The Commissioner's investigation

- 4.5 The Commissioner has viewed the information withheld in this case. The exemptions at sections 35(1)(a) and 42(1) of the Act are both 'class-based'. It is therefore necessary only to show that, as a matter of fact, the information requested falls within the definitions set out in those sections of the Act for the exemptions to be triggered.
- 4.6 As there is essentially no dispute between the parties as to whether the exemptions are triggered in this case, the Commissioner has concentrated primarily on the detailed public interest arguments set out by the complainant and the public authority.
- 4.7 During his investigation the Commissioner has looked at the possibility of resolving the complaint informally. In particular, he has explored the possibility of the public authority releasing the documents in redacted form, and whether the public authority would consider releasing a summary of the advice received. He has also considered the issue of timing, and whether the passage of time would enable the public authority to consider releasing the information.
- 4.8 The Commissioner notes that the public authority has already given a significant amount of background information to the complainant in relation to this request. He also recognises that it would render the documents meaningless if they were to be released in a redacted form. Accordingly, the Commissioner was unable to resolve the complaint informally.

5. The Commissioner's Decision

- 5.1 The Commissioner's decision in this matter is that the public authority has dealt with the complainant's request in accordance with the requirements of Part I of the Act, because it applied the exemption at section 42(1) of the Act appropriately.
- 5.2 The Commissioner has viewed the two documents in question and believes that the exemptions at sections 35(1)(a) and 42(1) are triggered in this case. However, as both exemptions are 'qualified', it is necessary to consider the public interest test in order to determine whether the exemptions were applied correctly.
- 5.3 In reaching a decision in this case, the Commissioner has looked carefully at the public interest arguments put forward by both the complainant and the public authority.

Section 42

- 5.4 The Commissioner acknowledges that there is a significant public interest in the information requested. He has taken particular note of the fact that the free breakfast scheme was a key part of the Labour Party's manifesto for the 2003 Assembly elections. He also recognises the obvious public interest in improving the understanding of decision-making by public authorities.
- 5.5 However, the Commissioner believes that there is a particularly strong generic public interest in maintaining the section 42 exemption. The concept of legal professional privilege has developed to ensure that clients are able to receive advice from their legal advisors in confidence. This is a central concept in the justice system and there is a strong public interest in maintaining that confidentiality.
- 5.6 The Commissioner concurs with the Information Tribunal's recent decision in relation to the section 42 exemption (EA/2005/0023), which stated that, "... there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest." Whilst there is a public interest in disclosure in this case, the Commissioner does not believe it to be sufficiently strong to override the public interest in maintaining the section 42 exemption.
- 5.7 Accordingly, the Commissioner believes that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure.

Section 35

- 5.8 The Commissioner has looked at the public interest arguments put forward by both the complainant and the public authority in relation to the use of the section 35 exemption. He notes that the public interest arguments are finely balanced.
- 5.9 However, as the Commissioner has concluded that the information is exempt by virtue of section 42 of the Act, he has not determined whether the public interest in

disclosure outweighs the public interest in maintaining the section 35 exemption in this case.

6. Action Required

6.1 In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he does not require any remedial steps to be taken by the public authority.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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

Dated the 4th day of May 2006

Signed

**Graham Smith
Deputy Commissioner**

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