



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 25 July 2006

Public Authority: The Ministry of Defence

**Address: MoD Main Building
Whitehall
London
SW1A 2HB**

Summary Decision and Action Required

The Commissioner's decision in this matter is that the MoD has correctly applied the exemptions at section 36 and section 40 of the Act relating to prejudice to the effective conduct of public affairs and personal information respectively. He is satisfied, therefore, that it was justified in refusing the complainant's request for information. At the same time, the Commissioner finds that other exemptions cited by the public authority were not relevant in this case.

In view of the matters set out below, the Commissioner does not require the public authority to take any steps to ensure compliance with the requirements of Part 1 of the Act.

1. Freedom of Information Act 2000 (the 'Act') – Application 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- the application has been withdrawn or abandoned,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 25 July 2005 the following request for information was submitted to the MoD in accordance with section 1 of the Act:

“...My request relates to the meeting between Whitehall Advisers and Lord Drayson (under-secretary of state for defence and minister for defence procurement (Paul Drayson) which occurred on June 23 2005. Under the act, I am also requesting complete copies of all documents such as briefing material, letters, reports, memos, emails, memorandums of conversations, faxes etc) held by the Ministry of Defence which were prepared for, submitted to, or connected with, this meeting, either before or after the event.”

- 2.2 In addition the complainant requested “a schedule of documents relevant to this request,” including a brief description of the document, its date and an indication of whether the document is to be released or not.
- 2.3 The MoD responded to the request on 22 August, indicating the broad nature of the discussion on 23 June, informing the complainant of a follow up telephone call that had taken place on 28 June, and advising that no formal minute had been taken although a manuscript note had been taken by a private secretary. The letter also advised that the only briefing provided was “a short background note.”
- 2.4 The letter went on to cite exemptions at sections 27 (International Relations), 35 (Formulation of Government Policy), 36 (Prejudice to the Effective Conduct of Public Affairs) and 43 (Commercial Interests) of the Act and explain that the MoD required until 5 September 2005 to consider whether the public interest required disclosure of the exempt information or maintenance of the exemptions. The complainant was advised of the right to seek an internal review of the refusal of his request and of the right, if still dissatisfied, to complain to the Commissioner.
- 2.5 The MoD wrote to the complainant on 5 September 2005, providing an explanation as to why is considered that the public interest required the maintenance of the exemptions cited in its letter of 22 August. In addition, the MoD stated that part of the background note was exempt by virtue of section 40 (Personal Information) of the Act.
- 2.6 The complainant requested an internal review of the refusal of his request. The results of this were communicated to the complainant on 25 November 2005.



Some additional information was provided including, in particular, the name of the member of the House of Lords who attended the meeting and an indication of where the complainant might obtain the name of the Minister's private secretary. Reliance upon the exemption at section 27 of the Act was withdrawn. However, the MoD reiterated its reliance upon the exemptions at sections 36 (or, in the alternative, section 35), 40 and 43 of the Act. In addition the MoD also referred to section 41 of the Act (Information Provided in Confidence). The MoD explained in some detail why it considered that these exemptions applied to particular sections of the requested information.

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) provides that –

“Information held by a government Department ... is exempt information if it relates to –

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

3.3 Section 36 applies to –

“(a) information which is held by a government department ... and is not exempt information by virtue of section 35...”

and 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 ...

- (b) would or would be likely to, inhibit –
 - (i) the free and frank provision of advice ... “

3.4 Section 40 provides –

“... (2) 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.



(3) 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.

3.5 **Section 41** provides that –

“Information is exempt information if –

- (a) it was obtained by the public authority from another person, and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority would constitute a breach of confidence actionable by that or any other person.”

4. Review of the case

- 4.1 The complaint case was allocated to an Assistant Commissioner. On 16 February 2006, he wrote to the MoD to request copies of the information that had been withheld from the complainant and for confirmation that no information other than that indicated to the complainant was held. He also requested information as to the identity of the “qualified person” who had given the opinion that disclosure of the requested information would be prejudicial to the effective conduct of public affairs and asked to be provided with any other background information that has been generated as a result of the request.
- 4.2 The MoD responded on 8 March, providing copies of the withheld information, confirming that no additional information was held and advising that the “qualified person” had been the Rt. Hon. Adam Ingram MP who had given his opinion on 26 August 2005. (The MoD also supplied copies of its letters to the complainant which had previously been supplied to the Commissioner by the complainant himself.)



4.3 The copies of the withheld information supplied to the Commissioner were, as the MoD had previously explained to the complainant, two brief manuscript notes of the meeting with Whitehall Advisers and the subsequent telephone call, and taken by a Private Secretary and a short background note on Whitehall Advisers. As the MoD had stated, the background note contained information about one of the participants in the meeting. The information copied to the Commissioner included helpful indications of which exemptions had been considered to apply to which pieces of information. In brief, the handwritten notes made by the Private Secretary were considered to be exempt by virtue of section 35 or 36. The background note was considered to be exempt by virtue of section 40 and 41.

5. The Commissioner's Decision

5.1 In its response to the request for an internal review, the MoD drew attention to some relatively minor contraventions of the procedural requirements of the Act, offering an apology to the complainant. It made clear that the name of the member of the House of Lords, previously withheld, who attended the meeting between Whitehall Advisers and Lord Drayson was Lord Hoyle. It also stated that reliance was no longer placed on section 27 of the Act. Although it was maintained in principle that s.43 (Commercial Interests) applied to two lines of the withheld information, it stated that s.36 was equally applicable and that no additional consideration had been given to the former exemption. The procedural matters and the reliance made on s.27 and 43 were therefore not considered by the Commissioner in making his decision in this case.

5.2 In addition to requesting copies of documents created in connection with the meeting with Whitehall Advisers, the complainant had requested "a schedule of documents relevant to this request." The Commissioner recognises that since that complainant was not in a position to know whether extensive information was held or, as proved to be the case, only a small amount of information and that it may have been reasonable to conclude that a schedule would have been created. The Commissioner is satisfied that the information held is not extensive and that no schedule is held.

5.3 It could be argued that the MoD had failed to comply with the duty to inform the complainant that the requested information (i.e. a schedule of documents) was not held. However, the Act creates a right of access to information rather than to specific documents and the Commissioner is satisfied that the information which would have been held in a schedule of documents was in fact supplied to the complainant in the form of a refusal notice and in the response to his request for an internal review of the refusal of his request.

5.4 The Commissioner has therefore focused upon the two manuscript notes stated to be exempt by virtue of s.35 and 36 of the Act and the background note, stated to be exempt by virtue of s.40 and 41.



5.5 Section 35(1)(a) as an alternative to 36(2)(b)(i)

5.5.1 The MoD states that it considers the withheld information to be exempt by virtue of section 36(2)(b)(i) and, “in the alternative” by section 35(1)(a).

5.5.2 The Commissioner considers that this is a mistaken approach. Section 36 “applies to ... information which is held by a government department ... and is not exempt information by virtue of section 35.” Given that the Act strongly suggests that the two exemptions are mutually exclusive the Commissioner would expect a public authority to be able to explain why, in any particular case, both applied.

5.5.3 In this particular case, the Commissioner has examined the information that has been withheld, is not satisfied that it is held for the formulation of government policy. The notes of the meeting and telephone call have clearly been prepared as an aide-memoire for the Minister as to points made in the meeting and follow-up call. It is quite unlikely that they would make any coherent sense to a person who had not been present at the time the notes were taken and it is difficult to see how the notes themselves relate to the development or formulation of policy.

5.6 36(2)(b)(i)

5.6.1 The Commissioner is, however, satisfied that disclosure of the notes would or would be likely to prejudice the effective conduct of public affairs. In particular he takes the view that if notes such as those taken in this case were routinely disclosed it would fundamentally change the character of meetings such as those between Lord Drayson and Whitehall Advisers. The Commissioner thinks that it is likely that those providing advice, comment or background information to Ministers would be inhibited in doing so and that those taking notes of meetings would be much more selective about what was recorded.

5.6.2 In making this judgment, the Commissioner distinguishes between the aide-memoire produced in this case and more formal minutes of meetings which form part of the official record.

5.6.3 Section 36 is subject to the public interest test. The exemption recognises that there is always a public interest in the effective conduct of public affairs. The public interest test, as set out in section 2 of the Act requires the release of information if the public interest in disclosure is equal to or stronger than the public interest in maintaining the exemption.

5.6.4 In his published guidance, the Commissioner identifies a number of public interest factors favouring the disclosure of information. These include:



- furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government ...
- promoting accountability and transparency by public authorities for decisions taken by them. By placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration ...

5.6.5 Although the disclosure of the requested information may contribute to a greater public understanding of how government operates, of the sources of advice and of the pressures that may be brought to bear upon it, the Commissioner is satisfied from an inspection of the information that the public benefit to be gained from disclosure would be slight and that the public interest in maintaining the exemption is significantly stronger.

5.7 Section 40

5.7.1 The background note contains information both about Whitehall Advisers as a company and about its representative at the meeting with Lord Drayson.

5.7.2 The Commissioner notes that it was not argued that s.36 applied to this information although in his opinion such an argument could reasonably have been made.

5.7.3 The Commissioner is satisfied that the note does consist of personal information about the representative of Whitehall Advisers. It is also obvious from the note itself that by no means all the information is in the public domain. Although the information is by no means an adverse opinion of the individual concerned, the Commissioner is satisfied that disclosure would be unfair to that individual and that the disclosure would, in other words, constitute a breach of the first data protection principle. This requires that personal data are processed fairly and lawfully.

5.7.4 Although it may have been helpful had the MoD referred to the fact that other background information about both the company and the individual is in the public domain, in this particular case it would have been reasonable for the MoD to assume that the applicant would have had access to this information.

5.7.5 The note relates to both the company and its representative. The Commissioner is satisfied that in this particular case it would not be possible to separate the information about the two. He does not consider, in other words, that redaction of the document would have been a practicable option in this case.

5.8 Section 41

5.8.1 The MoD argues that since the information contained in the background note had been produced by officials from non-public source that it is therefore confidential



information and exempt by virtue of s.41. In particular the MoD states that the background note “was based on information supplied in confidence by members of staff (not published data) which places the information within the scope of s.41 of the Act (Information provided in confidence.)”

- 5.8.2 The Commissioner does not accept that when, in s.41, the Act refers to “information obtained from another person,” this can generally be construed as including information which a government department has obtained from its own officials. (The Commissioner accepts, of course, that there are special cases where an official, acting in a personal capacity, provides information to a department for official purposes, for instance where an official provides personal information for a personnel purpose. However, the Commissioner has no reason to think that this is such a case.)
- 5.8.3 Moreover, the Commissioner is not persuaded that were the background note to be disclosed, the MoD would be open to legal action by a member of staff for breach of confidence.
- 5.8.4 Although the Commissioner is not satisfied that s.41 applies to the background note, since he is satisfied that s.40 does apply, this does not lead him to the conclusion that the information contained in the note should be released.

6. Action Required

- 6.1 In the light of the above considerations, the Commissioner does not require any steps to be taken by the MoD.

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.

Reference: FS50102714



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Dated the 25th day of July 2006

Signed

**Graham Smith
Deputy Commissioner**

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