

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 October 2007

Public Authority: Scotland Office
Address: Dover House
Whitehall
London
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Summary

The complainant asked the public authority for information about proposals to establish a dedicated Gaelic television channel. The public authority withheld the information citing the exemptions in sections 21(1), 35(1)(a), (b) and (c), 40(2)(a), 41(1)(a) and (b), and 43(2) of the Freedom of Information Act 2000 ('the Act'). Following an internal review it released some information on the grounds that the public interest now favoured disclosure. The Commissioner decided that, in explaining the public interest test, the public authority had breached section 17(3) by: failing to explain how the general factors identified applied to the specific information requested in this case; inadequately weighing up against each other the factors in favour and against disclosure; and applying an incorrect balance test. Finally, the Commissioner decided that, while some of the withheld information was exempt, the Scotland Office had inappropriately withheld other parts of it by reference to sections 35, 40, 41 and 43, and that this amounted to a breach of section 1(1). The Commissioner required the Scotland Office to disclose the information unjustifiably withheld.

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.

The Request

2. The complainant made a request to the Scotland Office by email on 24 February 2005 for the following information:

'any information held by the Scotland Office relating directly or indirectly to any proposals to establish a dedicated Gaelic television channel, including information relating to Gaelic broadcasting in relation to (a) the implementation of Article 11 of the European Charter for Regional or Minority Languages, (b) the establishment of the Gaelic Media Service, (c) the report of the Gaelic Broadcasting Task Force (the Milne Report) and (d) the Communications Act 2003'.

3. The Scotland Office replied on 24 February 2005. It advised that it was withholding the information as falling under the exemptions in sections 21(1), 35(1)(a), (b) and (c), 40(2)(a), 41(1)(a) and (b), and 43(2) of the Act. In relation to section 21(1), the Scotland Office referred the complainant to a range of material available on the European Charter for Regional and Minority Languages, the passage of the Communications Act 2003, and the Milne Report. It identified some of the websites on which this information was available. It advised the complainant of his right to an internal review.
4. On 7 April 2005 the complainant requested that the Scotland Office conduct an internal review.
5. The Scotland Office replied on 17 June 2005, apologising for the delay in responding. It upheld its original decision. However, in light of a statement by Ofcom on 9 June 2005 it concluded that the balance of the public interest now justified releasing a number of papers documenting meetings and discussions of the Gaelic Broadcasting Working Group, which it enclosed (details relating to discussions of a commercial nature with external interests were redacted by reference to section 43 of the Act).

The Investigation

Scope of the case

6. On 28 July 2005 the complainant sent a complaint to the Commissioner. He expressed his view that the section 35(1)(a) exemption should no longer be operative once definitive decisions had been made, and that the balance of the public interest in any event favoured disclosure. The complainant also explained that he believed that sections 40, 41 and 43 were largely irrelevant, and few documents would be covered by section 35(1)(b) and (c), and he was therefore prepared to accept that these exemptions applied. However, having considered the information which was withheld, the Commissioner believes that the exemptions were not properly applied to some of it. He has therefore assessed the application of the exemptions below.
7. The withheld information, which the Scotland Office has supplied to the Commissioner, comprises eight lever arch files. However, the Commissioner notes that some of this information was generated after the complainant's request on 24 February 2005. The Commissioner's view is that the Scotland Office was not under an obligation to consider disclosing this information, and he has therefore not included it in his consideration of the exemptions below.

Chronology

8. The Information Commissioner's Office wrote to the Scotland Office on 18 October 2006 asking for clarification of various issues and for a copy of the withheld information.
9. The Scotland Office provided the information in batches. It made detailed comments on the issues raised by the Commissioner on 20 November 2006. It also pointed out that, because of the time which had elapsed, a number of policy developments had occurred in relation to Gaelic Broadcasting which might have meant a new request from the complainant '*being handled on a slightly different basis from our exchange with him in 2005*'.
10. On 1 December 2006 the Information Commissioner's Office asked the Scotland Office to identify the information which it considered might now be released owing to these policy developments.
11. The Scotland Office replied on 5 December 2006 that:

'commercially confidential negotiations...have not yet been concluded. It is hard to judge from this point but I would have thought that once the negotiations are formally over and plans announced for the new digital service, including its starting date and budget, we could reconsider release of additional information.

...The position may be considerably clearer by Spring next year'.

12. On 24 January 2007 the Commissioner obtained from the complainant a copy of his original request and request for internal review.
13. Subsequently the Commissioner asked the Cabinet Office to provide further information, which was forthcoming on 11 September 2007.

Findings of fact

14. The complainant asked the public authority for information about proposals relating to Gaelic broadcasting. The relevant aspects of the history of Gaelic broadcasting are as follows.
 - The Broadcasting Act 1990 devolved responsibility for funding Gaelic broadcasting to Scottish Ministers. Finances were administered by the Gaelic Television (subsequently Broadcasting) Committee.
 - In 1998 Scottish Ministers set up the Milne Committee to consider the future of Gaelic broadcasting, and it reported in September 2000.
 - A White Paper followed in December 2000.
 - In May 2002 a draft Communications Bill was published, in July a Joint Committee reported, and the revised Bill then passed through the two Houses of Parliament.
 - On 17 July 2003 the Communications Act received Royal Assent.
 - A Working Group had been established to provide expert guidance and some members of this group issued a final report in December 2003.
 - The Communications Act provided for the Gaelic Broadcasting Committee to be replaced by a Gaelic Media Service, and this body's powers commenced on 1 January 2004.
 - On 23 March 2007 the Culture Minister of the Scottish Executive announced that the Gaelic Media Service would receive substantial extra funding to establish a Gaelic digital channel, with the launch of the channel timetabled at that time for late Autumn 2007.

Analysis

15. The Scotland Office provided the Commissioner with the large volume of information which it was withholding with each document marked according to the exemption which it was applying. There was. There were multiple drafts of some documents, and duplicate copies of others. The Commissioner notes that the Scotland Office was not always consistent in the exemptions which it applied to similar or identical versions of the same documents. He also notes that the

Scotland Office applied inappropriate exemptions to some documents, which are identified in the analysis which follows.

Exemption – section 35(1)(a), (b) and (c)

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

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

(a) the formulation or development of government policy,

(b) Ministerial communications,

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

Section 35(1)(a) – formulation/development of government policy

17. The Commissioner takes the view that the 'formulation' of government policy focuses on the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy – piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, the Commissioner considers that government policy-making is about the development of options and priorities for Ministers, who determine which options should be translated into political action. It is unlikely to be about purely operational or administrative matters which involve the application rather than the formulation of policy.
18. Furthermore, for information to fall within section 35 it must relate to 'government' rather than 'departmental' or any other type of policy. The Commissioner takes the view that government policy is therefore likely to be a political process which requires Cabinet input, or applies across government, or represents the collective view of ministers.
19. The Commissioner has obtained and considered the requested information. He notes that the information to which the Scotland Office has applied section 35(1)(a) includes drafts and final versions of reports, briefing papers, minutes, letters, and press releases which constitute the policy-making process for developments in Gaelic broadcasting which culminated in legislative changes enacted in the Communications Act 2003. (For the purposes of identification of the specific information, further details have been provided to the public authority in a Schedule associated with this Decision Notice.) The Commissioner has concluded that these documents do indeed deal with the formulation and development of government policy, and that section 35(1)(a) is therefore engaged by this information.

20. Since section 35(1)(a) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*. In its refusal notice of 24 February 2005 and its letter to the Commissioner dated 20 November 2006 the Scotland Office provided its comments on the public interest test.
21. It provided a pro forma table identifying *'Factors for disclosure'* and *'Factors for withholding'*. The factors in favour of disclosure were identified as assisting public understanding of both issues subject to debate and the policy-making process in general. In favour of maintaining the exemption it noted that:
- *'Ministers and officials need to be able to conduct rigorous and candid risk assessments of their policies and programmes'*;
 - *'Disclosure of interdepartmental consideration and communications between ministers may undermine the policy making process'*;
 - *'The Government is entitled to receive frank and confidential advice from its principal legal advisers'*.

The Scotland Office concluded that: *'The public interest in disclosure does not outweigh the potential harm caused by the release'*.

22. The Commissioner does not consider that this explanation of the public interest test was adequate. Section 17(3) of the Act states that:

'A public authority which...is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must...state the reasons for claiming - ...

... (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

In this case the Scotland Office failed to explain in its refusal notice how the general factors, which it identified in favour of and against disclosure, applied to the specific information requested by the complainant. It also made no attempt to assess the relative weight of the factors. In the view of the Commissioner, this inadequate assessment of the public interest test was a breach of section 17(3)(b) of the Act. Furthermore, the Commissioner notes that the Scotland Office concluded that *'The public interest in disclosure does not outweigh the potential harm caused by the release'*. In fact, section 2(2)(b) of the Act states that information need not be disclosed if *'the public interest in maintaining the exemption outweighs the public interest in disclosing the information'*. The Scotland Office therefore applied an incorrect balance test by giving the benefit of parity to non-disclosure.

23. During his investigation the Commissioner obtained a more detailed explanation from the Scotland Office on 20 November 2006 of its application of the public

interest test. In favour of disclosure it acknowledged the strong public interest in understanding how government formulates policy and in ensuring that there is well informed public debate on important issues. On the other hand, it claimed that there should be appropriate private space for officials and Ministers to discuss policy and debate issues, whereas the release of information would inhibit the candour of future discussions of policy.

24. However, the Scotland Office also made two claims which the Commissioner does not accept. The first claim was:

- *'It is important that all options, and their merits and demerits, are fully considered when formulating policy advice...it is not in the best interests of the policy making process, and consequently in the public interest, that every stage of the policy making process should be exposed to public scrutiny.'*

This implies that there are certain categories of policy-making about which information can never be disclosed. The Commissioner does not agree; while the public interest may be more likely to favour withholding information about some parts of the policy-making process, there must always be a balancing of the public interest, and in principle all categories of information may be disclosable.

25. The second claim was that:

- *'certain topics within the ambit of the Communications Act and the related Gaelic broadcasting developments were still very much a matter for policy elaboration after the passage of the legislation. Many of the options assessed or possibilities discussed in earlier papers could be seen to have a bearing upon the possible future arrangements for the handling of Gaelic broadcasting in Scotland. It was not therefore a question of information relating exclusively to settled policy.'*

In opposition to this, the complainant asserted that section 35(1)(a) should no longer be operative once definitive decisions had been made. He noted that the Milne Report had been published almost five years earlier, and that information relating to Gaelic broadcasting in the Communications Act 2003 should also be considered a matter of history rather than active policy, not least because a General Election had intervened. He accepted that the implementation of Article 11 of the European Charter for Regional or Minority Languages, which related to minority language broadcasting, was different, in that it was an ongoing process with proposals submitted by Ofcom since his request, and any documents prepared by the Scotland Office subsequently could fall within the exemption. However, he stated that *'the exemption cannot extend to documents relating to old debates or decisions long since taken and implemented'*.

26. The Commissioner has weighed up the public interest factors in favour of disclosing and withholding the part of the information generated prior to 17 July 2003. Having considered the nature and content of the information, the Commissioner considers that the factors in favour of disclosing the information, other than its historical nature, are:

- encouraging good practice and increasing public confidence that decisions have been taken properly and on the basis of the best available information;
 - promoting policy-makers' accountability to the public;
 - facilitating public understanding of how government formulates policy generally;
 - facilitating a well-informed public debate on the issues;
 - encouraging public participation in the development and formulation of future government policy;
 - broadening policy input beyond individuals or groups with an undue privileged position of influence in policy-making processes.
27. He believes that the factors that have a bearing on whether the information should be withheld are:
- facilitating the free and frank exchange of views (including 'thinking the unthinkable' without the restraint of having to defend controversial ideas);
 - reducing the temptation to keep inaccurate or incomplete records;
 - encouraging effective meetings of the same sort in the future.
28. Generally, the Commissioner takes the view that it is unlikely that the public interest will favour withholding information relating to the formulation and development of policy once a policy decision has been taken, even if that information may subsequently be used to inform further policy debate. This is a view that has been supported by the Information Tribunal in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), in which the Information Tribunal laid down eleven principles for assessing the public interest in cases involving the section 35 exemption. The Tribunal stated that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy... will normally mark the end of the process of formulation'*. Having viewed the information in this case, the Commissioner has decided that the policy-making process continued up until the Communications Act received Royal Assent on 17 July 2003, since the Bill was subject to amendment by Parliament until that point. He takes the view that the requested information which was generated up to that point is essentially 'historical', and that there is accordingly a strong public interest in its disclosure.

29. In the further case of *The Secretary of State for Work and Pensions v The Information Commissioner* (EA/2006/0040) the Information Tribunal stated that section 35(2) '*seemed to envisage policy formulation as a series of decisions rather than a continuing process of evolution*'. In that case, at the time of the request a Bill had been presented to Parliament which established the principle of introducing identity cards and paving the way for secondary legislation to establish the details of the scheme. The Tribunal took the view that the process of policy formulation could be split into two stages: the high level decision to introduce identity cards, followed by policy decisions on the details of the scheme. The Tribunal considered that the public interest in maintaining the exemption for information relating to the high level policy process was reduced, even though the information could be used to inform the more detailed policy issues that were still being considered, because that high level decision had already been taken. In the same way, the Commissioner considers that the high level decision-making in this case can be regarded as having been concluded when the Communications Act received Royal Assent on 17 July 2003. The further formulation and development of policy after that date was of the same nature as the policy decisions on the details of the identity cards scheme in the *Department of Work and Pensions* Tribunal case; in other words, that later policy-making was now active and not historical. As the Information Tribunal made clear in the *Evening Standard* case recounted above, while policy is in the process of formulation it is highly unlikely that the public interest will favour disclosure, and ministers and officials are entitled to develop policy without the '*threat of lurid headlines*'.
30. In weighing up the public interest factors, the Commissioner notes some further points that the Tribunal made in the *Evening Standard* case referred to above. The Tribunal declared that the public interest in maintaining the exemption provided by section 35(1)(a) is in protecting, from compromise or unjust public criticism, civil servants rather than ministers. The Tribunal asserted that it is not unfair to politicians to release information that allows the policy decisions they took to be challenged after the event.
31. The Tribunal indicated that it was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that '*we are entitled to expect of [civil servants] the courage and independence that...[is]...the hallmark of our civil service*', since civil servants are '*highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions*' and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make officials who are responsible for providing advice and recording information less likely to perform their duties properly. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including the Scotland Office, to ensure that officials continue to perform their duties according to the required standards.

32. The Tribunal also declared that it did not consider that it:

'should be deflected from ordering disclosure by the possibility that minutes will become still less informative. ... Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency'.

The Commissioner agrees that the possibility of disclosure of information should not in general have the effect of deterring officials from recording their discussions, and he does not consider that there are any special factors in this case that would have that effect.

33. The Commissioner's view is that there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by disclosure under the Act. Having particular regard to the historical nature of the information, and also considering the other public interest factors, the Commissioner has concluded that the information generated up to 17 July 2003 which the Scotland Office withheld by reference to section 35(1)(a) should be disclosed, on the basis that the public interest in maintaining the exemption does not exceed the public interest in disclosure.
34. There is some information which has been withheld by the Scotland Office under section 35(1)(a) which was generated after 17 July 2003. Of the information generated after 17 July 2003 and up to 24 February 2005, when the complainant made his request, much the same considerations apply in relation to the public interest test as those considered above. However, the Commissioner considers that the crucial difference is that this information is not 'historical', since it is clear from the 'Findings of fact' section above that further policy is being formulated and developed in respect of Gaelic broadcasting. For example, on 23 March 2007 the Culture Minister of the Scottish Executive announced that the Gaelic Media Service would receive substantial extra funding to establish a Gaelic digital channel, with the launch of the channel timetabled at that time for late Autumn 2007.
35. Having considered the information withheld by the Scotland Office, and weighed up the public interest factors that favour maintaining the exemption and disclosing the requested information, the Commissioner has concluded that, at the time when the complainant made his request on 24 February 2005, the balance of the public interest test favoured maintaining the exemption under section 35(1)(a) in respect of that information which was generated after 17 July 2003.

Section 35(1)(b) – Ministerial communications

36. The Scotland Office claimed that a number of the documents which it had withheld were Ministerial communications. Ministerial communications are written correspondence in any form. Section 35(5) identifies the relevant communications as those between Ministers of the Crown, between Northern Ireland Ministers, or between Assembly Secretaries. Communications between civil servants on behalf of their Minister are also likely to be included.

37. Having considered the information, the Commissioner is satisfied that a large number of the documents which the Scotland Office claimed were Ministerial communications did not in fact satisfy the definition. Among those that did not were:
- communications between the Scotland Office and Ministers of the Scottish Parliament – section 35(5) of the Act does not include communications with (or between) Ministers of the Scottish Parliament;
 - drafts of letters from the Scotland Office to other government departments – the Commissioner considers that only correspondence that is actually communicated can engage section 35(1)(b);
 - briefing notes for the Secretary of State at the Scotland Office concerning meetings with Ministers of government departments or the Scottish Parliament – briefing notes do not constitute communications.
38. The Commissioner considers that the Scotland Office erred in applying section 35(1)(b) to this information. However, having considered the information to which section 35(1)(b) was incorrectly applied, the Commissioner is satisfied that in fact it falls within section 35(1)(a) of the Act, since it deals with the formulation and development of government policy. Having applied the public interest test he takes the view that the balance of that test in relation to this information is the same as the balance of the test regarding the information to which the Scotland Office correctly applied section 35(1)(a). Accordingly, he has decided that the information to which Scotland Office incorrectly applied section 35(1)(b) up to 17 March 2003 should be disclosed; for the information which was generated after that date, the Scotland Office would have been justified in withholding it by reference to section 35(1)(a), and the Commissioner therefore considers that on that basis the information should not be disclosed.
39. For the remaining information to which section 35(1)(b) was applied, properly, by the Scotland Office, the Commissioner has also considered the public interest test. The balance of this test for information which engages section 35(1)(b) is very similar to that for the information which engaged section 35(1)(a): there is value in protecting a private space for policy discussion and the provision of advice – except where information is essentially ‘historical’ – while disclosure of information may adversely affect future discussions; on the other hand, there is a strong public interest in understanding policy formulation, encouraging public participation, increasing public confidence and promoting policy-makers’ accountability. In addition, the mere fact that the information comprises communications between Ministers does not of itself weigh in favour of maintaining the exemption, and the Commissioner takes the view that the possibility of embarrassment to an individual Minister from disclosure carries little (if any) weight in assessing the public interest. The Information Tribunal made some relevant comments in the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006). It stated that ‘No information within s35(1) is exempt from...disclosure simply on account of its status’. The fact that the information relates to the deliberations of very senior officials or government Ministers does not of itself dictate that the information is sensitive, and ‘To treat

such status as automatically conferring an exemption would be tantamount to inventing within s 35(1) a class of absolutely exempt information'. It also declared that the public interest in maintaining the exemption provided by section 35(1)(a) is in protecting, from compromise or unjust public criticism, civil servants rather than Ministers. The Tribunal asserted that it is not unfair to politicians to release information that allows the policy decisions they took to be challenged after the event. Although the Tribunal was referring to section 35(1)(a), the Commissioner considers that the conclusion is also applicable to section 35(1)(b).

40. As with the public interest test in relation to the information withheld under section 35(1)(a), the Commissioner has had particular regard to the fact that the element of the information which was generated up to 17 July 2003 is essentially 'historical', whereas that generated from that date onwards is still a live issue contributing to further policy-making. As a result, he has decided that, at the time when the complainant made his request on 24 February 2005, the balance of the public interest test favoured maintaining the exemption under section 35(1)(b) in respect of that information which was generated after 17 July 2003, but releasing the information which was generated prior to that date.

Section 35(1)(c) – Law Officers' advice

41. A small amount of the requested information was withheld by the Scotland Office as falling under section 35(1)(c) of the Act. The Law Officers are listed in section 35(5) of the Act as being the Attorney General, Solicitor General, Advocate General for Scotland, Lord Advocate and Attorney General for Northern Ireland. Section 35(1)(c) is limited to the provision of advice, ie guidance or recommendations offered with regard to future action.
42. The information which has been withheld by the Scotland Office in this case comprises requests for advice from the Scotland Office, and advice from the Office of the Solicitor to the Advocate General, about various matters. The Commissioner notes that the information in this case relates to requests for advice to, and advice provided by, officials at the office of the Advocate General for Scotland. While the Advocate General is a Law Officer, the exemption does not cover all the activities of his office and the Commissioner is satisfied that none of this information can be characterised as "the provision of advice by...[the Advocate General]...or any request for the provision of such advice". Accordingly, the Commissioner takes the view that this information cannot be exempt by virtue of section 35(1)(c).
43. In addition, information has been withheld concerning queries to the Treasury Solicitors (acting as legal advisers to the Department for Culture, Media and Sport); and deliberations about provisions of the Communications Act 2003. The Commissioner notes that, while some of this information relates to legal advice, it is not advice from a Law Officer. Accordingly, this information too does not engage the section 35(1)(c) exemption.
44. While the Commissioner does not accept that section 35(1)(c) is engaged in respect of any of the information to which the Scotland Office applied it, he considers that this information does engage section 35(1)(a), since it relates to

the formulation and development of government policy regarding Gaelic broadcasting, both in respect of the Communications Bill and subsequent policy development.

45. Accordingly, the Commissioner has applied the public interest test to this information. For the information generated up to 17 June 2003, the Commissioner takes the view that the public interest factors are similar to those identified in the section of this Decision Notice dealing with section 35(1)(a). The Commissioner acknowledges the value of a private space for officials and Ministers to discuss policy, debate issues and provide advice, and he also accepts that the disclosure of information may affect future policy debate. On the other hand, he recognises that there is a strong public interest in understanding how Government formulates policy, encouraging public participation in the development and formulation of government policy, increasing public confidence and promoting policy-makers' accountability to the public. He also notes that the Information Tribunal has decided that for section 35 the timing of a request is of paramount importance, and that policy formulation and development generally comes to an end once a policy decision has been taken, even if that information may subsequently be used to inform further policy debate (in relation to the information which was generated up to 17 July 2003, the Commissioner considers that the policy-making process ended when the Communications Act received Royal Assent on that date). The Tribunal also decided that the section 35(1) exemption did not exist to protect ministers, and that civil servants could be expected to resist pressure to give inadequate advice or keep inadequate records.
46. Having weighed up all these factors, the Commissioner has decided that the balance of the public interest favours disclosure of that withheld information which was generated prior to the enactment on 17 July 2003. This information is specified in the Schedule associated with this Decision Notice. In addition, there is a small amount of information comprising deliberations at the end of July 2003 about commencement dates of the provisions of the Communications Act 2003 dealing with Gaelic broadcasting. Although this was generated after 17 July 2003, the Commissioner considers that it was so intimately bound up with the implementation of the Communications Act that the balance of the public interest favours disclosure.
47. The Commissioner notes that the information generated after 17 July 2003 is not 'historical' and that further policy is being formulated and developed in respect of Gaelic broadcasting. Having considered the information incorrectly withheld under section 35(1)(c), and weighed up the public interest factors which are appropriate to section 35(1)(a), the Commissioner has concluded that the balance of the public interest favours maintaining the section 35(1)(a) exemption in respect of this information, which is identified in the associated Schedule.

Exemption – Section 21(1)

48. The Scotland Office withheld some information from the complainant on the grounds that it was exempt under section 21 of the Act. Section 21(1) states that:

'Information which is reasonably accessible to the applicant otherwise than

under section 1 is exempt information.'

The Commissioner notes that the complainant has not objected to the Scotland Office's application of this exemption. Furthermore, the Scotland Office has provided the complainant with details of websites on which he can access a range of material on the European Charter for Regional and Minority Languages, the passage of the Communications Act 2003 and the Milne Report. The Commissioner takes the view that such information is indeed exempt from disclosure.

Exemption – Section 40(2)(a)

49. Section 40(2)(a) of the Act states:

'Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data...'

and it would breach any of the Data Protection Principles. In this case the Scotland Office claimed that disclosure of the information would breach the First Data Protection Principle, which states:

'Personal data shall be processed fairly and lawfully...'

50. The Scotland Office told the Commissioner in its letter of 20 November 2006 that it was applying this exemption to information in its files:

'about individuals particularly in the lead up to the appointment of the Gaelic Media Services Board. The recruitment and appointment process including evaluation of candidates contained personal information which came fully within the scope of the exemption. We do not think that it would be fair on individuals to release such information.'

51. The Commissioner has considered the information to which the Scotland Office applied section 40. It includes some emails relating to the recruitment of members of the Board of the Gaelic Media Service (these are identified in the Schedule which has been provided to the Scotland Office). The Commissioner believes that this is information which falls within the definition of 'personal data', as set out in section 1(1) of the Data Protection Act 1998. In considering whether disclosure would breach the First Data Protection Principle, the Commissioner notes that the information was obtained by the public authority for the sole purpose of assessing the suitability of candidates in a recruitment exercise. He recognises that information provided in such circumstances is not necessarily particularly sensitive, bearing more on professional than personal capacities. However, he believes that there is a risk that individuals may suffer detriment to their privacy as a result of disclosure of such information. Further, it would be reasonable to assume that those involved would not have expected this personal information to be disclosed to a wider audience. The Commissioner has therefore concluded

that it would be a breach of the First Data Protection Principle to disclose this information, and that it is therefore exempt by virtue of section 40.

52. The withheld information also includes emails addressing various points related to the Gaelic Media Service, including appointments to the Board. Having considered this, the Commissioner takes the view that none of the information in fact comprises personal data. However, much of it relates to the formulation and development of government policy on Gaelic broadcasting and therefore falls within section 35(1)(a). Since it postdates 17 July 2003 the Commissioner has concluded that the public interest favours maintaining the section 35(1)(a) exemption in respect of this information. However, there are also elements of the emails which relate to the appointment of Gaelic Media Service Board members and to commencement issues which the Commissioner does not believe relate to the formulation and development of government policy. He has concluded that this information, which is identified in the associated Schedule, should therefore be disclosed on the basis that it does not engage either section 40 or section 35.
53. There is some further information which the Scotland Office withheld under section 40(2)(a) relating to the Gaelic Media Service: advertisements for posts, appointments, and draft press releases about the appointment of the Chairman, further details of which are in the associated Schedule. The Commissioner notes that the draft press release is marked 'Confidential' and contains personal data, but takes the view that that data was provided to the Scotland Office precisely for the purpose of being disclosed in a press release. Indeed, a version of the press release was presumably issued at some point, and the personal data was therefore put into the public domain. In the circumstances, the Commissioner does not consider that it would be unfair to disclose the information in the draft press release, that the First Data Protection Principle is therefore not breached, and that section 40 is consequently not engaged. The rest of the information about advertisements and appointments does not contain any personal data. Consequently, the Commissioner considers that all of this information should be disclosed on the grounds that section 40(2)(a) is not engaged.
54. The Scotland Office also withheld emails concerning appointments to Ofcom's Advisory Committee for Scotland. Again, the Commissioner takes the view that this information does not contain any personal data and should therefore be disclosed because section 40(2)(a) is not engaged.
55. In addition to the information which the Scotland Office claimed fell within the section 40 exemption, the Commissioner has uncovered a number of other documents in which personal data is an issue but which were not identified by the Scotland Office as falling within section 40. These are identified in the associated Schedule. The Commissioner notes that the information comprises personal travel and accommodation arrangements and contact details of individuals who were not officials of the Scotland Office. The Commissioner has concluded that this is information which falls within the definition of 'personal data', as set out in section 1(1) of the Data Protection Act 1998. He has also considered whether disclosure would breach the First Data Protection Principle that data must be processed fairly and lawfully. At the heart of the matter is the issue of fairness. Personal travel and accommodation arrangements are not particularly sensitive

information, but the individuals involved in this case were not members of staff of the public authority. Regarding the contact details, the Commissioner takes the view that these do amount to sensitive information, particularly when the individuals to which they applied were not staff of the public authority. He believes that there is a risk that individuals may suffer detriment to their privacy as a result of disclosure of such information. The Commissioner does not believe that it would be reasonable to assume that those involved would have expected their personal information to be disclosed to a wider audience. Having considered the information involved and the purposes for which it was generated, the Commissioner has concluded that it would be unfair and therefore a breach of the First Data Protection Principle to disclose it. Accordingly, he has decided that the information should not be disclosed by virtue of section 40.

Exemption – section 41(1)(a)&(b)

56. Section 41(1) of the Act states:

‘Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.’

57. The Commissioner asked the Scotland Office to identify what information it had applied this exemption to, clarify the person from whom it had been obtained and explain why there was an actionable breach of confidence. The Scotland Office's reply was that the relevant information was submissions from the broadcasting and media sector in Scotland, which tended to overlap with the section 43 exemption. It explained that:

‘Various papers and estimates or analyses undertaken by media interests were prepared as part of the process for taking forward developments on a proposed Gaelic Digital Service...In essence this touched upon business analyses of disaggregated cost and human resources that would go into the setting up of a new TV service. It focused on costed schedules by type of programming plus technical data about transmission. This would include information about the make up of expenditure associated with development of digital services.’

58. Unfortunately, the Scotland Office did not seek to explain why it considered that there was an actionable breach of confidence. It did state that the information *‘could have been used to expose cost data of a broadcaster which might not otherwise be in the public domain and potentially damaging and or beneficial to business competitors’*. However, the Commissioner considers that the fact that disclosure might be prejudicial to the broadcaster providing the information is not sufficient to demonstrate an actionable breach of confidence. To do that a public authority must be satisfied that the information in question is in fact ‘confidential’ –

that the information has the necessary quality to be confidential, and the circumstances in which it was provided gave rise to an obligation of confidence. In relation to most of the information in this case, the Scotland Office does not appear to have obtained an opinion about that from the organisations affected. Furthermore, a breach of confidence must be 'actionable', in the sense that an aggrieved party would have the right to take the Scotland Office to court as a result of the disclosure. As well as giving rise to a detriment to the broadcaster to whom the duty of confidence was owed, such an action would have to be capable of defeating any public interest defence justifying disclosure.

59. Having considered the information which was withheld, the Commissioner takes the view that there is insufficient evidence to justify the Scotland Office's invocation of the exemption under section 41. Some of the documents to which that exemption was applied are emails, letters and draft letters, briefing papers and minutes which relate to internal and external discussions on the future of Gaelic broadcasting. The Commissioner has concluded that no evidence has been produced to show that this information was provided in confidence or that disclosure of it would give rise to an actionable breach of confidence.
60. However, having considered the contents of the information he is satisfied that the information does in fact relate to the formulation and development of Gaelic broadcasting policy, and that it therefore engages section 35(1)(a) of the Act. The information was generated after 17 July 2003 and the Commissioner has therefore reached a similar conclusion with respect to the public interest test as he did in that preceding part of this Decision Notice dealing with section 35(1)(a): at the time of the complainant's request, the balance of the public interest favoured maintaining the exemption in relation to this information.
61. There were some further documents withheld under section 41 which comprised prospectuses from broadcasters and related documents offering future broadcasting services. Again, no evidence has been provided that this information was either provided in confidence or that disclosure of it would give rise to an actionable breach of confidence. However, an issue does arise as to whether this information is commercially sensitive, and the Commissioner has therefore considered below whether this information is in fact exempt by virtue of section 43.
62. Finally, there are letters and emails dealing with the details of future meetings with external bodies. There is no evidence that this information was provided in confidence or that it is actionable, and having regard to the fact that it deals mainly with the administrative task of arranging meetings the Commissioner considers that it is highly unlikely that it could engage the section 41 exemption. Furthermore, the Commissioner does not believe that any other exemption is applicable, and he has therefore concluded that this information, which is identified in the associated Schedule, should be disclosed.

Exemption – Section 43(2)

63. Section 43(2) of the Act states:

'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).'

To engage the exemption it is necessary for the public authority to demonstrate that disclosure of the information would prejudice some party's commercial interests. Furthermore, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

64. The Commissioner asked the Scotland Office to give details of which part of the requested information it considered that this exemption applied to, and clarification of its assessment of the prejudice and public interest tests. In its response of 20 November 2006 the Scotland Office stated:

'[I]n our joint working with media and broadcaster interests a certain amount of commercially sensitive material was made available in order to help access the costs of setting up and operating a Gaelic Digital Service. Although some of the aggregate figures may have been quoted in the public domain, the breakdown into different elements of expenditure has remained commercially sensitive. It is all the more important to safeguard this information as no final decisions have yet been taken by the broadcasting interests on exactly how and when the new digital service will start.

We had received comments from broadcasters that they would not at that time [of the request] be prepared to see such information going into the public domain.'

65. In the view of the Commissioner, those contracting with public authorities must expect a robust approach to the issue of commercial sensitivity, and be prepared for a greater degree of openness than prior to the advent of the Act. The exemption is engaged in relation to prejudice, not merely because of "sensitivity". The benefits of disclosure for the public interest are in furthering debate about issues of the day; facilitating the accountability and transparency of public authorities for decisions taken by them; and allowing individuals to understand decisions made by public authorities affecting their lives. However, the Commissioner takes account of the Scotland Office's point that at the time of the complainant's request no final decision had been taken on the establishment of a new digital service, so that there remained the possibility of the sources of the commercially sensitive information subsequently tendering for business. He also notes the Scotland Office's statement that it had received comments from the broadcasters that they wanted information to be kept from the public domain.

66. In respect of all the information to which the Scotland Office applied section 43, the Commissioner has considered the engagement of the exemption by reference to different categories (further details are to be found in the Schedule associated

with this Decision Notice). He has then gone on for each category to assess the closely-related factors in favour of maintaining the exemption and the more general public interest arguments in favour of disclosure. For the bulk of the relevant information, he has concluded that the exemption is indeed engaged and that there are persuasive public interest arguments for maintaining the exemption. His detailed conclusions are as follows:

- A large part of the withheld information relates to emails between the Scotland Office, on the one hand, and broadcasters and the Department for Culture, Media and Sport on the other, concerning licensing costs and legal obligations. One document is marked 'COMMERCIAL – IN CONFIDENCE', and in another the Scotland Office refers to the information being *'treated by us as commercially sensitive and used solely to update Ministers'*. The Commissioner takes the view that section 43 is engaged in respect of this information with persuasive public interest arguments for maintaining the exemption, on the grounds that there is a likelihood of prejudice to the commercial interests of the broadcasters should information about their costs and legal obligations regarding licences be disclosed, and because there was an expectation that the information would not be disclosed for that reason.
- There is some information which relates to trade mark issues for the Gaelic Broadcasting Committee, including advice about legal implications for that body. The Commissioner takes the view that section 43 is engaged in respect of this information with persuasive public interest arguments for maintaining the exemption, on the grounds that there is a likelihood of prejudice to the commercial interests of the Gaelic Broadcasting Committee should potential commercial benefits and liabilities arising from trade mark protections and breaches be disclosed. (The Commissioner notes that the Scotland Office withheld some of this information under section 35(1)(c) instead of section 43, and this has been addressed in a preceding section of this Decision Notice.)
- Further material deals with agenda items of a meeting between the Scotland Office and the Gaelic Broadcasting Committee. Some of the items relate to Gaelic broadcasting contracts for various broadcasters and funding for the Gaelic Media Service, which the Commissioner considers fall within the section 43 exemption because of potential prejudice to the commercial interests of broadcasters and the Gaelic Media Service. The public interest arguments in favour of maintaining the exemption arise because the meeting discussed commercial information which, at the time of the request, was still sensitive and 'active'. However, one item concerns policy issues rather than section 43, and the Commissioner has decided that it therefore engages section 35(1) of the Act. Part of it is exempt because it postdates 17 July 2003; the rest deals with commencement issues, and is therefore disclosable for the reasons identified in the section of this Decision Notice entitled *'Section 35(1)(c) – Law Officers' advice'*.
- There are documents relating to a visit to the Gaelic Television Training Trust. The Commissioner considers that section 43 is engaged by this

information with persuasive public interest arguments for maintaining the exemption, since disclosure of commercial information about funding and proposed future courses at the time of the complainant's request would still be likely to prejudice the Trust's commercial interests.

- Material generated for and arising from a meeting with the Gaelic Broadcasting Committee about the future of Gaelic broadcasting. The Commissioner considers that – apart from some minor elements of the information which relate to commencement issues and are therefore disclosable for the reasons given in a preceding section of this Decision Notice – this information engages section 43 with persuasive public interest arguments for maintaining the exemption, since there is a likelihood of prejudice to the commercial interests of the broadcaster should information about its plans be disclosed. Furthermore, the Commissioner considers that the information also engages section 35(1)(a), and for the reasons already addressed in this Decision Notice the public interest favours maintaining that exemption.
 - Material generated arising from a meeting at the end of 2004 about the creation of a Gaelic television channel. One of the correspondents was a senior executive of a broadcasting company and an email sent by him was marked 'STRICTLY P&C – for discussion group only'. The Commissioner considers that this information engages section 43 with persuasive public interest arguments for maintaining the exemption, since there is a likelihood of prejudice to the commercial interests of those attending the meeting, and comments from one of the correspondents indicated an expectation that the information would not be disclosed to the wider world. In any event, were section 43 not to apply, the Commissioner believes that the information would be exempt by virtue of section 35(1)(a).
 - An undated paper submitted by a company advising on the likely costs and start-up schedule for creation of a new channel for Gaelic broadcasting. The Commissioner considers that there is a possibility that the company could tender to provide such a project itself in the future and that disclosure of its projections could prejudice its commercial position. This paper engages section 43 with persuasive public interest arguments for maintaining the exemption.
67. For each of the above categories (except for the element identified above where the information is disclosable), the Commissioner has considered the more general public interest arguments in favour of disclosure, but has taken the view that the public interest in maintaining the exemption under section 43(2) outweighs the public interest in disclosure of this information. The associated Schedule identifies the information which is to be withheld.
68. There is one final piece of information which the Commissioner does not consider engages the section 43 exemption. This is an email between the Scotland Office and the Department for Culture, Media and Sport mentioning a request to a licence holder for data about viewing figures. The Commissioner notes that this email deals with the possibility of making a request for information which might be

commercially sensitive. He does not consider that that is sufficient to engage the exemption, since there is no possibility of any commercially sensitive information being revealed from disclosure of a reference to the possibility of making such a request.

The Decision

69. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. In explaining the public interest test the Scotland Office breached **section 17(3)** by: failing to explain how the general factors identified applied to the specific information requested in this case; inadequately weighing up against each other the factors in favour and against disclosure; and applying an incorrect balance test. In inappropriately withholding some of the requested information under section 35(1)(a), (b) and (c), section 40, section 41 and section 43 the Scotland Office breached **section 1(1)**.

Steps Required

70. The Commissioner requires the public authority to take steps to ensure compliance with the Act, by disclosing to the complainant the information identified in the associated Schedule. This relates to information which the Scotland Office withheld by reference to the exemptions under sections 35(1)(a), (b) and (c), section 40, section 41 and section 43 of the Act.
71. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

72. 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

73. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern in relation to the Scotland Office's application of section 21. He notes that the Scotland Office did not clearly specify what information was reasonably accessible and where it could be accessed, instead referring to websites '*such as*' and information '*including*'. The Commissioner does not consider that this constituted a sufficiently clear response

to the complainant's request, particularly in light of the public authority's obligation to provide advice and assistance to the complainant under section 16 of the Act. Section 16(1) provides that:

'It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it'.

The Commissioner takes the view that in this case the Scotland Office should have advised the complainant precisely what information was available and where it could be obtained.

Right of Appeal

74. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 29th day of October 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

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.”

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

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.”

Section 17(2) states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Section 35(1) provides that –

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

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

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive

Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."

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)."

Section 40(5) provides that –
“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act.

Section 41(1) provides that –

“Information is exempt information if-

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

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”