

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 25 November 2008

Public Authority: National Offender Management Service (an executive agency of the Ministry of Justice)
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainants requested information about the awarding of a contract for the provision of healthcare at HMP The Mount. The public authority initially refused to disclose any information as it believed this information to be exempt by virtue of section 21(1). At internal review stage the public authority located additional information falling within the scope of the request. The majority of this information was disclosed, with the remainder withheld under section 36(2)(b)(ii). The information previously withheld under section 21(1) was also disclosed at that stage. The Commissioner finds that section 36(2)(b)(ii) was applied correctly to the majority of this information. In relation to the remainder of this information, the Commissioner concludes that the opinion of the qualified person that disclosure would result in inhibition to the free and frank exchange of views is not reasonable and the public authority is required to disclose this information.

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 information request was made on 12 May 2006 and was for the following information:

"1. Correspondence, documentation and attendance notes on the issue of awarding the Contract [for the provision of healthcare at HMP The Mount] passing between the Governor or his staff and Dacorum and Watford & Three Rivers Primary Care Trusts;

- 2. Correspondence, documentation and attendance notes passing between the Governor and his staff or between members of the staff relating to the awarding of the Contract.”*
3. The public authority responded initially to state that section 43 (prejudice to commercial interests) was considered to apply and that it required an extension beyond 20 working days in order to consider where the balance of the public interest lay. The public authority responded substantively on 26 June 2006. It refused the request, stating that all information falling within the scope of the request had previously been provided to the complainants in response to an earlier information request made to Dacorum and Watford & Three Rivers Primary Care Trust (the “PCT”). No grounds under the Act for refusing the request were given and no reference, indirect or otherwise, was made to section 43, despite the public authority having extended the time for its response on the basis of section 43.
 4. The complainants contacted the public authority again on 13 July 2006 and asked for an internal review of the handling of the request. The complainants stressed that the second part of the request above related to communications internal to HMP The Mount (“the prison”) and that they did not believe that the PCT could be certain to have copies of all information held by the prison that fell within the scope of the request. The complainants also referred to section 21 (information reasonably accessible to the applicant by other means) as they assumed that this was the basis within the Act for refusing the request.
 5. Following a lengthy delay and the involvement of the Commissioner, the public authority communicated the outcome of its review by letter dated 21 August 2007. The public authority confirmed that section 21 was the relevant provision and maintained that this had been applied correctly in relation to the information previously disclosed by the PCT, albeit that the refusal notice should have referred to section 21 specifically. Whilst it continued to maintain that section 21 had been applied correctly, the public authority disclosed to the complainant all information previously withheld under this provision.
 6. The public authority went on to state that a further search of the prison for information relevant to the request had been conducted and that further information falling within the scope of the request, in the form of meeting minutes, had been located. The majority of this information was disclosed to the complainant. However, from one set of minutes a small portion of information was withheld and another separate set of minutes was withheld in its entirety under section 36(2)(b)(ii) (inhibition to the free and frank exchange of views for the purposes of deliberation). The public authority also believed that the public interest favoured the maintenance of the exemption.

The Investigation

Scope of the case

7. The complainants' representatives contacted the Commissioner initially on 15 December 2006. At this stage the central issue was the failure by the public authority to complete the internal review within a reasonable period. The initial contact between the Commissioner and the public authority concerned the failure to carry out the internal review promptly.
8. Following the completion of the internal review, the earliest stage at which the public authority cited section 36, the complainants confirmed that they wished the Commissioner to consider whether section 36 had been cited correctly. The chronology section of this notice concerns the investigation of this case from the point at which the public authority cited section 36. The analysis section of this notice also covers the procedural aspects of the handling of this request.

Chronology

9. The Commissioner contacted the public authority initially in connection with its citing of section 36 on 2 October 2007. The public authority was asked to respond supplying un-redacted copies of the information withheld from the complainants, confirmation of the name and position of the qualified person (QP) in whose opinion section 36(2)(b)(ii) was engaged, the date on which the reasonable opinion was given and, if any record had been retained of the QP's opinion, a copy of this record.
10. The public authority responded to this by letter dated 9 November 2007, stating that a submission had been provided to the QP on 25 July 2007 to assist in the formulation of their reasonable opinion. On 15 August 2007, Bridget Prentice, Parliamentary Under Secretary of State approved the citing of section 36(2)(b)(ii).
11. The public authority stated that the submission had sought the approval of the QP to the citing of section 36 on the grounds that disclosure of the information in question, which the public authority stated fully recorded candid and frank discussions, would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. The public authority went to state why it believed that the public interest favoured the maintenance of the exemption here.
12. The public authority recognised that there is a public interest in openness on the grounds of the transparency and accountability that would be brought to the decision making process about the spending of public money on prison healthcare contracts. The public authority also believed that disclosure would assist the public in understanding the issues involved in the awarding of prison healthcare contracts.
13. However, the public authority went on to state that the deliberative process in relation to the awarding of prison healthcare contracts would be harmed through disclosure. This harm would result through adverse affect to the candour of

discussions and in the recording of such discussions and this would adversely affect the quality of decision making.

14. The Commissioner contacted the public authority again on 1 February 2008 and asked it to provide a copy of the submission prepared for the QP referred to in its previous response. If a copy of this submission had not been retained, the public authority was asked to describe in detail what had been included in this submission.
15. The public authority responded to this on 6 February 2008. In this response, the public authority referred to its previous response of 9 November 2007 and stated that it believed that providing a copy of the submission would add nothing to the answers that were given in that response.
16. The Commissioner contacted the public authority again on 12 February 2008. The public authority was advised that the content of its response of 9 November 2007 had been considered and taken into account, as it had prior to the correspondence of 1 February 2008, and that the further information requested was required in addition to the answers provided by the public authority in its response of 9 November 2007. The Commissioner went on to stress that if the public authority did not wish to provide to the Commissioner a copy of the submission prepared for the QP, it would be necessary for it to provide the following:
 - A description of the contents of the submission provided to the QP, e.g. did this contain a copy of the withheld information? What else did the QP take into account when formulating their opinion?
 - An explanation as to why the QP believed that disclosure would or would likely result in inhibition to the free and frank exchange of views for the purposes of deliberation.
17. The public authority responded to this on 29 February 2008. The public authority stated that the QP had been provided with "...all the facts, including our opinion" necessary to enable the QP to reach an opinion on whether section 36(2)(b)(ii) was engaged. The public authority stated that it was not in a position to provide to the Commissioner with the "*Ministerial analysis*" as to why section 36(2)(b)(ii) was engaged.
18. The Commissioner contacted the public authority again on 9 April 2008 and stated that the public authority had yet to provide sufficient explanation for the citing of section 36(2)(b)(ii). The public authority was advised that the Commissioner intended to exercise his powers under section 51 of the Act and issue an Information Notice unless the following information was provided within 10 working days:
 - A detailed description of what was taken into account by the QP when formulating their opinion. This should include confirmation of whether the QP viewed the withheld information and of what other factors contributed to the opinion of the QP.
 - A detailed description of how inhibition to the free and frank exchange of views would be caused and why this inhibition would or would be likely to

result from disclosure of the requested information. This description should be with specific regard to the contents of the information withheld in this case.

19. The public authority responded to this on 21 April 2008. With this correspondence, the public authority provided a copy of a document prepared by an employee of the public authority whilst conducting the internal review of the handling of the complainants' request. It was at the internal review stage that the public authority located the additional information that it believed to be exempt by virtue of section 36(2)(b)(ii). The public authority believed that providing to the Commissioner the document setting out why at the time of the location of this information it was considered necessary to refer this information to the QP with a view to citing section 36(2)(b)(ii) would provide to the Commissioner sufficient explanation about the basis for citing this exemption.

20. The document prepared during the internal review stated the following about the set of minutes that were withheld in their entirety:

"...a very detailed – apparently largely verbatim – record of a one off meeting requested by the prison Governor about the APMS process. Clearly relevant to the request given Hempsons' aforementioned reference to the Governor's opinions about this process, I consider that this information (subject to the approval of the relevant Qualified Person) is exempt under s.36(2)(b)(ii) on the basis that disclosure would be likely to prejudice the effective exchange of views for the purpose of deliberation, and furthermore that the balance of the public interest favours withholding the information. The record is of such a candid and full nature that there is a very strong likelihood that discussions such as this might not occur, or more likely, not be adequately recorded, if disclosure was considered likely."

21. In relation to the small portion of another set of minutes that was withheld, the internal review document stated the following:

"In addition one paragraph from item (a) is not factual in its nature, but records discussion relating to expressed concerns about the timings involved in the APMS process. Although not as frank as item (d), the risk of this information not being properly recorded for fear of disclosure is also very real and therefore for the same reasons I contend that, subject to the agreement of the Qualified Person, that this information should also be withheld under section 36(2)(b)(ii)."

"...in relation to certain other information (predominately containing opinion rather than fact) it is recommended that sufficient prejudice would currently be caused to engage the section 36 exemption and cause the balance of the public interest test to favour its application."

22. This document stated the following on why the public interest was considered to favour the maintenance of the exemption:

"...we need to balance the harm to the deliberative process in relation to the contracts process which could be caused by disclosure. It is important that officials do not feel inhibited from providing entirely free contributions to debate;

and that such contributions, when made, are properly recorded. Any fear of unwarranted disclosure is likely to adversely affect the candour of discussion and its recording, and this would adversely affect the quality of decisions taken now and in the future.”

23. In its cover letter the public authority confirmed that the QP had viewed the withheld information as part of the process of considering whether in their reasonable opinion section 36(2)(b)(ii) was engaged.
24. The Commissioner contacted the public authority again on 21 April 2008 to verify precisely what information had been withheld. The public authority responded on 22 April 2008 and confirmed that the following information had been withheld:
 - One paragraph from a minute of the Prison Health Partnership Board held on 12 December 2005, and
 - the minute titled “Notes from a meeting held in the Governor’s office at HMP The Mount on Wednesday 25 January 2006 at 1010 hours” in its entirety.

Findings of fact

25. As a government department, the QP for the public authority is defined by section 36(5)(a) as any Minister of the Crown.

Analysis

Procedural matters

Section 17

26. Section 36(2)(b)(ii) was not cited until the internal review stage. Neither was section 21 specified until the internal review stage. In failing to cite these exemptions within 20 working days of receipt of the request, the public authority did not comply with the requirements of section 17(1). The public authority also failed to cite the relevant subsection of section 21 (21(1)) and in so doing failed to comply with the requirement of section 17(1)(b).

Exemption

Section 36

27. The role of the Commissioner when considering whether section 36 is engaged is to consider whether the opinion of the QP that the inhibition described in the exemption would or would be likely to occur is reasonable. Where the conclusion is that this opinion is reasonable, the exemption is engaged. Having established that section 36 is engaged, it is necessary to then go on to consider whether the balance of the public interest favours the maintenance of the exemption. The effect of section 36 being subject to the public interest is that where the arguments in favour of maintaining the exemption are not sufficient to outweigh

the public interest in disclosure, the information should be disclosed regardless of how clear it is that the opinion of the QP is reasonable.

Opinion of the qualified person

28. Section 36(2)(b)(ii) is engaged where in the reasonable opinion of the QP, disclosure would or would be likely to lead to inhibition to the free and frank exchange of views for the purposes of deliberation. When considering whether section 36(2)(b)(ii) is engaged, the Commissioner will take into account:
- whether an opinion was given;
 - whether the person who gave that opinion is the QP for the public authority in question;
 - when the opinion was given;
 - whether the opinion is reasonable.
29. The public authority has stated that the opinion was given by Bridget Prentice, Under Secretary of State on 15 August 2007. Section 36(5)(a) provides that the QP for a government department will be any Minister of the Crown. It has been established, therefore, that an opinion was given, that this opinion was given by the QP for the public authority and that this opinion was given on 15 August 2007.
30. Part of the process of establishing whether an opinion is reasonable is to consider whether the opinion was reasonably arrived at. The Commissioner reaches a conclusion on this issue by reference to the process undertaken by the QP in forming their opinion. The public authority has stated that the QP was provided with a copy of a submission setting out the issues raised by the request and with a copy of the withheld information. The public authority did not, however, provide to the Commissioner a copy of the submission provided to the QP. Without sight of this submission, the Commissioner is not aware of the factors taken into account by the QP when forming their opinion and so cannot verify that these were relevant. Without this verification, the Commissioner is not able to conclude that the opinion was reasonably arrived at. However, even where the Commissioner does not find that the opinion of the QP was reasonably arrived at, he may conclude that the exemption provided by section 36(2)(b)(ii) is engaged where the opinion is overridingly reasonable in substance. This approach is supported by the Information Tribunal in *McIntyre v the Information Commissioner* (EA/2007/0068), where it stated:
- “where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion”* (paragraph 31)
31. When considering whether section 36 is engaged, it is not for the Commissioner to reach a conclusion as to likelihood of the inhibition resulting through disclosure, but to conclude whether the opinion of the QP that this inhibition would or would be likely to occur is reasonable. In the internal review response the public authority specified that its position was that inhibition would be likely to result through disclosure. When considering whether inhibition is likely, the possibility of inhibition must be real and significant, rather than hypothetical or remote. Where it is clear to the Commissioner that it was not reasonable for the QP to conclude

- that inhibition would be a likely result of disclosure, he will conclude that section 36 is not engaged.
32. In relation to whether the opinion as to the likelihood of inhibition is overridingly reasonable, the Commissioner has reached separate conclusions about the two items withheld from the complainants. Firstly, in relation to the minute of the Prison Health Partnership Board held on 12 December 2005, from which one paragraph has been withheld, the reasoning of the public authority for the applicability of section 36(2)(b)(ii) to this information is given above at paragraph 21.
 33. The public authority has indicated that it believes that sufficient prejudice (presumably in the form of inhibition) would be likely to result through the disclosure of this information for the QP to reasonably conclude that this information should not be disclosed. The public authority has provided to the Commissioner no explanation, however, as to why the QP believed that this inhibition would be likely to occur. For example, no evidence has been put forward to suggest that other disclosures have resulted in a reduced level of candour or more limited detail within meeting minutes. Neither has the public authority provided evidence to show that the parties had a reasonable expectation that their input would not be put into the public domain, such that they would be impeded from contributing similar views in the future. It should be noted that the public authority was asked to provide either a copy of the submission provided to the QP, or to explain fully the basis of the QP's opinion.
 34. Neither is it clear from the content of this information why disclosure would be likely to inhibit future free and frank exchanges. Whilst the public authority has stated that this information is opinion rather than fact, it is not clear how the public authority has reached this conclusion as, on the contrary, this information appears to record fact. Aside from this, information recording opinion would not automatically be subject to this exemption without consideration having been given to why inhibition would likely result through disclosure.
 35. As noted above, this information consists of one paragraph of a meeting minute. When providing this withheld information to the Commissioner the public authority has also provided part of the remainder of the meeting minute. The Commissioner notes that included within the remainder of the minute, which was disclosed to the complainants, is information that appears to cover similar ground to that which has been withheld. No explanation has been provided to the Commissioner as to how the withheld information differs so significantly from the remainder of this minute that it should be withheld.
 36. The public authority has stated that disclosure is likely to lead to meetings not being properly minuted. The Commissioner does not consider this argument compelling; accurate minute keeping is required for the purposes of effective administration and should not be influenced by the nature of discussion within a meeting.
 37. Importantly, the information withheld here does not appear to constitute a record of what could be fairly characterised as a free and frank exchange. This exemption does not cover all information recording exchanges carried out for the

purposes of deliberation; rather, it applies only to information the disclosure of which would be likely to inhibit future free and frank exchanges. Any argument that disclosure of information that does not record a free and frank exchange would be likely to inhibit future exchanges of this kind is unlikely to be convincing.

38. The conclusion of the Commissioner in relation to this information is that the opinion of the QP that disclosure would be likely to result in inhibition to the free and frank exchange of views for the purposes of deliberation is not reasonable. Section 36(2)(b)(ii) is not, therefore, engaged and it is not necessary to go on to consider the balance of the public interest in relation to this information.
39. The Commissioner now turns to the minute titled "Notes from a meeting held in the Governor's office at HMP The Mount on Wednesday 25 January 2006 at 1010 hours", which has been withheld in its entirety. This is a record of a meeting between delegations from the prison and Watford & Three Rivers Primary Care Trust. The Commissioner notes that this meeting appears to have been held for the purpose of deliberating about the issue of the future of health care provision at the prison and that the contents of this minute record what could be accurately characterised as a free and frank exchange.
40. Without having seen the content of the submission provided to the QP, the Commissioner has been unable to conclude that the opinion was reasonably arrived at and, therefore, has also been unable to conclude that the opinion was objectively reasonable. However, the content of the withheld information can be fairly characterised as a record of a free and frank exchange of views for the purposes of deliberation and it is reasonable to conclude that disclosure of this information would be likely to inhibit future exchanges of this nature. The Commissioner concludes, therefore, that the opinion of the QP was overridingly reasonable in substance and that the exemption provided by section 36(2)(b)(ii) is engaged in relation to this minute.
41. The Commissioner is aware that these different conclusions in relation to the two items of withheld information may appear contradictory. In response to this he would stress that this decision is based on the content of the two items of withheld information and that whilst the arguments put forward by the public authority were supported by the content of the minute titled "Notes from a meeting held in the Governor's office at HMP The Mount on Wednesday 25 January 2006 at 1010 hours", these arguments did not carry sufficient weight in relation to the excerpt from the minute of the Prison Health Partnership Board.

The public interest

42. Having concluded that this exemption is engaged, the Commissioner has considered whether the public interest in maintaining this exemption outweighs the public interest in disclosure. It was the opinion of the QP that disclosure in this case would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. In accepting that the opinion of the QP is reasonable, the Commissioner has accepted that disclosure here would be likely to inhibit free and frank exchanges in future. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs these concerns.

43. In the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal acknowledged that the application of the public interest test to the s36 exemption, *“involved a particular conundrum”* noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, *“it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice”* (para 88).
44. In the Tribunal's view, the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, *“does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant”* (para 91).
45. This means that whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition to the free and frank exchange of views for the purpose of deliberation.
46. In this case, the withheld information consists of the minutes of a discussion between the public authority and the local NHS Trust about changes to the provision of healthcare at the prison identified in the request. The stance of the public authority is that the disclosure of the requested information is likely to inhibit the degree to which individuals participating in such discussions are prepared to be free and frank with their contributions.
47. In considering the severity, extent and frequency of inhibition resulting from disclosure, it is necessary to consider the contents of the information itself. It is apparent from the record in question that staff within the prison perceived there to be a number of issues relating to the change in healthcare provision and it appears that the working relationship between the public authority and the PCT may have suffered as a result. The content of the withheld information records a discussion in which these issues were covered freely and frankly. It is reasonable to conclude that the participants in this discussion may have been inhibited from contributing in a fully free and frank manner had they been aware that the record of this discussion may later be disclosed.
48. In terms of the frequency of the inhibition resulting from disclosure, there is an ongoing relationship between the prison and the healthcare provider and the issue of whether discussions as part of this ongoing relationship could be inhibited through disclosure is relevant here. If disclosure here was likely to impact negatively on the free and frank exchange of views between the prison and the healthcare provider during discussions undertaken as part of their ongoing relationship this would indicate that the frequency of inhibition would be likely to be high and this is a valid argument in favour of maintenance of the exemption.
49. When considering the severity and extent of the inhibition, the impact that this inhibition would have on the public authority is an issue of importance. That the

public authority is able to discuss issues freely and frankly is clearly important to its ability to conduct itself effectively. Whilst the staff of the public authority would no doubt remain aware of their responsibility to address problems and issues thoroughly and to discuss these freely and frankly where necessary, the Commissioner recognises that inhibition to discussion would be significantly more likely to occur in a case where disclosure is a recognised possibility than it would be in a situation where confidentiality is assured.

50. The Commissioner further recognises that inhibition to discussions could result in a severe and extensive impact on the public authority if this results in it being unable to respond to issues effectively. In this case, for example, if the public authority had not dealt with the issues effectively, this may have led to problems in the provision of healthcare within the prison. Also, if future issues concerning healthcare within the prison are not raised due to inhibition resulting through disclosure in this case this could lead to future problems in the provision of healthcare within the prison. As well as the severe and extensive impact that may result through the public authority being unable to respond to issues effectively in general, problems in the provision of healthcare within the prison resulting through disclosure would constitute a severe impact. Preventing this severe impact is a valid argument in favour of maintenance of the exemption.
51. Turning to arguments favouring disclosure over maintenance of the exemption, it is apparent from the content of the withheld information that the issue of the provision of healthcare in the prison was the subject of discussion and possibly some controversy. Disclosure would improve transparency and understanding about how these issues were handled by the public authority and the reasoning behind the decisions made and this is a valid argument in favour of disclosure in the public interest.
52. The wording of the request refers to the contract for healthcare at the prison having been awarded on 1 April 2006, indicating that the discussions and decision making process had been finalised at the time that the request was made on 12 May 2006. As this process was complete at the time of the request, disclosure would not have had any impact on this. The Commissioner considers that this enhances the arguments in favour of disclosure as it indicates that the severity of the impact of disclosure would be reduced.
53. However, as noted above there is an ongoing relationship between the prison and the healthcare provider and inhibition resulting in prejudice to this relationship must also be taken into account here. The weight given to the argument that the public interest would favour disclosure as the contract for healthcare at the prison had been finalised at the time of the request is reduced as a result of the likelihood of prejudice to the ongoing relationship between the prison and the healthcare provider.
54. As noted above, the public authority disclosed to the complainant other information falling within the scope of the request. It could be argued that the inhibitory impact of releasing the withheld information is reduced following the disclosure of this related information. However, despite the disclosure of this information, the public authority maintains that the withheld information should not be disclosed and the Commissioner accepts that the QP is best placed to judge

whether inhibition would be likely to result from the disclosure of this information even having taken into account that related information was disclosed.

55. The public authority is publicly funded. The withheld information makes reference to the financial aspects of the provision of healthcare within the prison and provides some background to the decisions made about the allocation of public funds to healthcare within the prison. That disclosure would enhance understanding about the decisions made for the expenditure of public funds on healthcare within the prison adds weight to the argument that disclosure would be in the public interest.
56. The public authority has argued that disclosure in this case would discourage proper minute keeping in future. The Commissioner does not accept this argument. Public authorities should keep proper minutes of meetings for the purposes of effective administration and the argument that disclosing minutes in one case may discourage proper minute keeping in the future is not compelling.
57. The complainants in this case may argue that the extent to which disclosure would serve their personal interests would be a valid argument in favour of disclosure in the public interest. This could be, for example, if the complainants have a personal interest and stake in the business of the provision of healthcare within prisons. On this point, the Commissioner would note firstly that disclosure under the Act means that the information in question becomes, in effect, publicly available, rather than being available solely to the applicant. Secondly, the Commissioner has accepted the opinion of the QP as overridingly reasonable in substance. Inherent in this and in the concept of a “qualified person” within section 36 is that this person is best placed to judge the potential impact of disclosure on the public authority. In this case, this means that the Commissioner accepts that the QP is better placed to judge the impact of disclosure on the public authority than are the complainants.

Conclusion

58. The Commissioner has recognised arguments in favour of disclosure here. Specifically, these are that public knowledge and understanding about the decisions made on the provision of healthcare in the prison and the expenditure of public funds in this area would be enhanced through disclosure. Also, the likelihood of inhibition resulting through disclosure would be somewhat reduced as a result of the contract having been finalised at the time of the request.
59. However, the Commissioner has recognised factors in favour of maintenance of the exemption on the grounds that the inhibition likely to result through disclosure would have an extensive, severe and frequent impact on the public authority. Specifically, those factors are that frequency of inhibition to exchanges between the healthcare provider and the prison is likely to be high as the relationship between these organisations will be ongoing for the length of the contract and that the impact of the public authority being unable to respond to issues in general and specifically in the area of the provision of healthcare within the prison as a result of inhibition to exchanges would be likely to be severe and extensive.
60. In addition to the specific public interest arguments applicable in this case, the

Commissioner also recognises that disclosure of the details of an internal discussion within any public authority is in the public interest where this will further the understanding of the work and improve the openness and accountability of the public authority. Further to this, inherent in the Act is a presumption in favour of disclosure.

61. The Commissioner's view is that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. As noted previously, the opinion of the QP must be given appropriate weight when considering where the balance of the public interest lies in connection with section 36, but for the public interest to favour maintenance of the exemption, the arguments in favour of this must outweigh those in favour of disclosure. Whilst the Commissioner has recognised arguments in favour of disclosure in this case, he does not consider these to be of sufficient weight to favour disclosure due to the severity, extent and frequency of inhibition likely to result through disclosure.

The Decision

62. The Commissioner finds that the public authority complied with the Act in that it applied section 36(2)(b)(ii) correctly in withholding the document titled "Notes from a meeting held in the Governor's office at HMP The Mount on Wednesday 25 January 2006 at 1010 hours" and that the public interest favours the maintenance of the exemption. However, the Commissioner also finds that the public authority did not apply section 36(2)(b)(ii) correctly in withholding one paragraph from the minute of the Prison Health Partnership Board held on 12 December 2005.
63. The Commissioner further finds that the public authority failed to comply with the procedural requirements of section 17 as covered above at paragraph 26.

Steps Required

64. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
65. Disclose to the complainant the information withheld from the minute of the Prison Health Partnership Board held on 12 December 2005.

Other matters

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

The public authority cited section 43 at the stage of extending the time within

which it would respond to the request, but did not later rely on this at the time of the substantive refusal. In accordance with his powers under section 48(1), the Commissioner has previously issued a Practice Recommendation to the public authority. Extending the period within which to respond to a request on the basis of an exemption not later relied upon is an issue covered in this Practice Recommendation.

67. Failing to carry out internal reviews within a reasonable period is also an issue highlighted in this Practice Recommendation. The Commissioner notes the very lengthy delay to the internal review in this case, in excess of 13 months, and would stress to the public authority that he considers this to be grossly excessive. The Commissioner believes that a public authority should complete internal reviews within a maximum of 40 working days.
68. At the internal review stage the public authority stated that additional information falling within the scope of the request had been located and the majority of this was disclosed to the complainant. The remainder of this information is that withheld under section 36(2)(b)(ii). That the public authority located further information of relevance to the request at the internal review stage indicates that it did not take adequate steps at the time of the request to verify what information it held that fell within the scope of the request. As this was remedied at the internal review stage no breach in connection with the failure to identify all information falling within the scope of the request by the refusal notice stage is recorded in this notice.

Failure to comply

69. 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.

Right of Appeal

70. 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@tribunals.gsi.gov.uk

71. 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 25th day of November 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 17

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 21

Section 21(1) provides that –

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

Section 36

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

Section 43

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

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holding it).”