

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 9<sup>TH</sup> October 2008

**Public Authority:** National Audit Office  
**Address:** 157-197 Buckingham Palace Road  
Victoria  
London  
SW1W 9SP

### Summary

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The complainant made a freedom of information request to the National Audit Office for details of hospitality it had provided including information on hospitality attended by its head, the Comptroller and Auditor General. The public authority provided some information on hospitality costs but withheld further details under section 36 of the Act (prejudice to effective conduct of public affairs). The public authority subsequently released some further information outside of the twenty working day deadline but continued to withhold the names of the individuals in receipt of hospitality under section 36 of the Act. The Commissioner has investigated the complaint and has concluded that whilst the section 36 exemption is engaged the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The Commissioner also considers that section 40 of the Act would not prevent the disclosure of the names of the people in receipt of hospitality and has ordered this information to be disclosed within 35 calendar days of the date of this notice. By failing to disclose the information to the complainant the Commissioner has found the public authority in breach of both section 1(1)(b) and section 10(1) of the Act.

### The Commissioner's Role

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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

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2. The complainant wrote to the public authority on 20 July 2007 to request the following information.

- *The costs of running the NAO dining rooms each year from 01/04/04 to 31/03/07 with a list of guests and NAO personnel (including C&AG) attending*
  - *Dates and venues of entertaining at other locations which the C&AG has attended from 01/04/04 to 31/03/07 showing the guests and staff attending and the costs.*
3. The public authority responded to the complainant on 17 August 2007. In response to the first element of the request it explained that it does not hold information on NAO dining rooms in the form requested by the complainant. Therefore it said that it would not provide this information, in accordance with section 12 of the Act, because the cost of doing so would exceed the appropriate limit of £600. However, it did say that as part of its regular monitoring of costs it had compiled some information on hospitality provided. It informed the complainant that for the period in question 180 events had been hosted at an average cost per event of £92.
4. It said that the information it holds in relation to the second element of the request falls into two categories: international events hosted by the Comptroller and Auditor General (C&AG) and the public authority normally held for senior staff from overseas audit offices; and the C&AG's hospitality to key UK and public and private sector business contacts.
5. As regards international events hosted by the C&AG, the public authority explained that over the three year period the C&AG hosted 20 meals for overseas delegations at a cost of £1,287 per event. It also explained that the C&AG had hosted three international conferences the cost of which was £41,817. However, it said that the identities of delegates who attended the functions comprises personal data and as such were being withheld under sections 40(2) and 40(3) of the Act.
6. The public authority disclosed some information on hospitality provided by the C&AG to UK contacts, explaining that there were 160 occasions within the three year period when hospitality was provided at an average cost per occasion of £154. It said that to provide further detail would impede the C&AG's ability to engage freely with external stakeholders and therefore it was unable to disclose further information as this was exempt under section 36(2)(b) and 36(2)(c). It recognised that there was a general public interest in disclosing the information but said that that this was outweighed by the public interest in maintaining the exemption. It added that the identities of the individuals are personal data and therefore exempt under section 40(2) and 40(3).
7. The complainant wrote to the public authority on 29 August 2007 to ask the public authority to carry out an internal review of its handling of his request. The complainant asked the public authority to bear in mind the following points.
- The complainant asked the public authority if it was sure that it did not hold information on the costs of its dining rooms or who attended.

- The complainant argued that individuals' identities are not automatically exempt from disclosure. He highlighted previous decisions by the Information Commissioner and the Information Tribunal in support of his position.
  - The complainant questioned the public authority's application of the section 36 exemption and advanced arguments as to why the disclosure of further information on hospitality provided by the C&AG would be in the public interest.
8. The public authority wrote back to the complainant on 11 October 2007. At this point it informed the complainant that it had decided to release further information on hospitality that it and the C&AG had provided. It explained that this extra information had been added to its website and it provided the complainant with an internet address where this information could be found.
9. This extra information included, firstly, details of overseas trips made by the C&AG during the period in question. This included the date and destination of the visit, the purpose of the visit and a breakdown of the costs involved. The public authority also disclosed whether or not the C&AG was accompanied by his wife.
10. Secondly, the public authority provided details of the 160 occasions when the C&AG provided hospitality for contacts within the UK during the period in question. This included the date and location of when and where the hospitality was provided. The cost of the hospitality was also provided for each occasion. The public authority listed the number of people present on each occasion and stated the purposes of the hospitality which in effect amounted to describing whether the hospitality was for "lunch" or "dinner". The public authority continued to withhold the names of the individuals in receipt of hospitality but for each occasion those in attendance were described as falling within one of the following categories:
- Representing or employed by a firm supplying services to government
  - Senior Government Official
  - Representing or employed by a firm supplying services to the public authority
  - Representatives of other organisation
  - Parliamentarians
11. The public authority said that because it had now disclosed most of the information requested by the complainant its internal review would focus on the decision not to release the names of people in receipt of hospitality.
12. The public authority presented the findings of its internal review on 8 November 2007. As it had indicated, the internal review focused on the remaining information that had so far not been disclosed i.e. the names of people in receipt of hospitality. At this point the public authority added that it had also concluded

that information regarding the cost of its dining rooms and those attending during the 3 years in question could not be provided within the appropriate limit.

13. On the issue of the names of the UK contacts who had received hospitality from the C&AG on the 160 occasions referred to above, the public authority upheld its earlier decision not to disclose this information. The public authority confirmed that the names were being withheld under section 36(2)(b) of the Act. In explaining its application of the exemption it said that the C&AG, the qualified person for the public authority, had concluded that in his reasonable opinion the disclosure of the names of people in receipt of hospitality would prejudice the effective conduct of public affairs. It believed the exemption applied because disclosure would restrain the willingness of others to engage in an open and honest dialogue about the public authority and its work. It identified public interest arguments in favour of both withholding and disclosing the information but concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

## The Investigation

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### Scope of the case

14. On 16 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant said that whilst he had wider reservations about the way in which the public authority had handled his request, he only wished to pursue the public authority's decision to withhold the names of the UK contacts in receipt of hospitality provided by the C&AG between 01/04/04 and 31/03/07. This is the only aspect of the complaint the Commissioner has considered.

### Chronology

15. The Commissioner wrote to the public authority with details of the complaint on 3 June 2008. The Commissioner noted that in its initial response the public authority had claimed that the names of people in receipt of hospitality comprised personal data and was therefore exempt under section 40(2) of the Act. However, the Commissioner said that it appeared to him that, in withholding this information, the public authority was now only relying on section 36(2)(b) of the Act. The Commissioner invited the public authority to let him know if his understanding was incorrect.
16. The Commissioner asked the public authority the following questions regarding its application of the section 36 exemption:
  - The Commissioner asked the public authority to confirm whether, in considering the application of the section 36 exemption, it had sought the opinion of the qualified person.
  - The Commissioner asked the public authority to confirm when the opinion was

given.

- The Commissioner asked the public authority to confirm whether the opinion was given verbally or in writing. The Commissioner asked for a copy of the qualified person's opinion if indeed it was given in writing.
17. The Commissioner invited the public authority to make any further representations in support of its decision to refuse to disclose the names of individuals in receipt of hospitality provided by the C&AG between 1 April 2004 and 31 March 2007.
  18. The public authority responded to the Commissioner on 23 June 2008. It said that in withholding the names of people in receipt of hospitality it was relying solely on the exemption in section 36(2)(b) of the Act. In answer to the questions posed by the Commissioner, it said that upon receiving the complainant's request for information it had sought the opinion of the C&AG who is the qualified person for the public authority. It said that it was the opinion of the C&AG that disclosure of the information would prejudice the effective conduct of public affairs. It said that the opinion was given verbally but it confirmed that the opinion was given before it responded to the complainant on 17 August 2007. It said that it could not be sure of the precise date because the C&AG had been consulted on this matter on more than one occasion.
  19. The Commissioner wrote to the public authority on 10 July 2008 to say that he intended to draft a decision notice based on the information it had provided.

### Findings of fact

20. The information referred to above in paragraphs 8 – 10 is available on the public authority's website at:

[http://www.nao.org.uk/Publication\\_Scheme/travel\\_disclosure.htm](http://www.nao.org.uk/Publication_Scheme/travel_disclosure.htm)

21. For the purposes of the Act, the qualified person at the public authority is the C&AG. At the time the complainant made his request the C&AG was Sir John Bourn KCB. Sir John Bourn KCB announced his retirement in October 2007.
22. According to its website, the role of the public authority is:  
  
*"...to audit the accounts of all government departments and agencies as well as a wide range of other public bodies, and report to Parliament on the economy, efficiency and effectiveness with which these bodies have used public money."*

### Analysis

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23. A full text of the relevant statutes referred to in this section is contained within the legal annex.

## Exemption

### Section 36(2)(b)

25. The public authority has refused to disclose the names of people in receipt of hospitality provided by the C&AG between 1 April 2004 and 31 March 2007 relying on section 36(2)(b). Section 36(2)(b) provides that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. The public authority has confirmed that it was the opinion of the qualified person that in this case disclosure of the requested information would inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
26. In order for section 36 to be engaged the Commissioner must:
- Establish that an opinion was given
  - Establish that the opinion was given by the qualified person
  - Ascertain when the opinion was given
  - Consider whether the opinion was reasonable
27. The public authority has confirmed that it was the C&AG who provided the opinion on whether disclosure of the requested information would have the effect outlined in section 36(2)(b). Therefore the Commissioner is satisfied that the public authority correctly sought the opinion of the qualified person.
28. The public authority has explained that it cannot be certain of the exact date on which the qualified person provided his opinion because he was consulted on the matter on more than one occasion. Whilst the Commissioner would have preferred it if the public authority had been able to identify the date on which the opinion was given, he is satisfied with the public authority's assurances that it the qualified person gave his opinion before it decided to apply the section 36 exemption.
29. In *Guardian Newspapers and Heather Brooke v Information Commissioner and British Broadcasting Corporation* (EA/2006/0011 and EA/2006/0013; 8 January 2007) the Information Tribunal considered the meaning of 'reasonable opinion'. It concluded that:

*"...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at."*

Regarding the first point, the Tribunal stated that,

*"...we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable."*

30. The public authority has said that it believes the exemption applies because if the names of people in receipt of hospitality were disclosed then other people would be less willing to engage in an “open, honest and complete dialogue” about the work of the public authority. Having considered the matter the Commissioner accepts that this opinion is an objectively reasonable one and that disclosure of the requested information could have the effect suggested by the public authority. In reaching his decision on the reasonableness of the qualified person’s opinion the Commissioner recognises that it is possible that there may be different opinions on this matter that could also be considered reasonable.
31. As regards whether the opinion was reasonably arrived at, the Commissioner notes that the qualified person was consulted on this matter on more than one occasion. The Commissioner feels that this at least suggests that the public authority did not take a snap decision to apply the section 36 exemption and considered the possible effects of disclosure before reaching a conclusion on the suitability of this exemption. The Commissioner is not aware of any evidence or other materials being placed before the qualified person to help him arrive at his decision. In most cases the Commissioner would expect to see evidence of the process by which the qualified person reached their opinion and this would normally include the briefing papers that were placed before the qualified person to assist him in reaching his opinion as well as the withheld information itself. However, in this case the Commissioner feels that the lack of such evidence does not mean that the qualified person’s opinion is therefore unreasonable. This is because the qualified person attended the events that are the subject of the request and could therefore be expected to have a good knowledge of the positions of the people who attended the events and the inhibitory effects of releasing their names, without the need to be provided with briefing materials. In short, the qualified person would not need to be provided with briefing materials because in the circumstances of this case the best person to brief the qualified person was the qualified person himself. Equally the Commissioner would not expect to be provided with a list of the withheld names as this would not add anything to his investigation.
32. The Commissioner is satisfied that the qualified person’s opinion was both reasonable in substance and reasonably arrived at and therefore finds that the exemption in section 36(2)(b) of the Act is engaged in this instance.

### **Public Interest Test**

33. Section 36 is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act. This provides that the exemption will only apply if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Therefore, the Commissioner has undertaken a public interest test in respect of the requested information.
34. The public authority has argued that disclosure of the names that have been withheld would deter others from engaging in a free and frank discussion about its work. It has said that such free and frank discussion helps to strengthen its work

and improve public accountability and therefore disclosure would not be in the public interest.

35. The Commissioner agrees that there is a public interest in ensuring that the public authority is able to strengthen its work through free and frank discussion and that therefore there is a public interest in maintaining the exemption. Whilst the Commissioner gives due weight to the opinion of the qualified person, when considering where the public interest lies in a particular case he must consider the severity, extent and frequency of the prejudice or inhibition that may be caused to the effective conduct of public affairs.
36. The public authority has already disclosed to the complainant the positions of the individuals whose names it has withheld. As described in paragraph 10 above, the individuals include senior government officials and parliamentarians as well as individuals representing organisations supplying goods or services to the government or the public authority. The Commissioner is of the opinion that the individuals are likely to be senior people who are meeting the C&AG in a professional or public capacity. The Commissioner feels that they should not be easily discouraged from their role of engaging with the public authority about its work in a free and frank manner and that therefore the severity and extent of any prejudice or inhibition caused is reduced.
37. In reaching his decision on this matter the Commissioner wishes to highlight the decision of the Information tribunal in the case of Department of Education and Skills v Information Commissioner and the Evening Standard (EA/2006/0006; 19 February 2007). In this case the Information Tribunal, made the following observations:
- “...we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service”.*
38. It went on to describe civil servants as:
- “...highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.”*
39. In short, the Tribunal concluded they should not easily be discouraged from doing their job properly. Given the fact that senior government officials were present at many of the 160 occasions when hospitality was provided he believes that the comments of the Tribunal are relevant when considering the extent or severity of the prejudice that may be caused through disclosure in this particular case. The Commissioner is also of the opinion that this principle can be applied to the other individuals whose names have been withheld and certainly takes the view that like the government officials they should not be easily discouraged from their responsibility of engaging with the public authority about its work in a free and frank manner.
40. Furthermore, the Commissioner feels that the extent of any inhibition to the ability of the public authority to engage with stakeholders in a free and frank manner is



very much reduced in light of the fact that only the names of individuals are being disclosed. The content of what has been discussed at the occasions on which hospitality has been provided has not been requested.

41. The Commissioner believes that perhaps a more likely consequence of disclosing individuals' names is that those individuals, rather than being restrained in engaging with the public authority, may be more restrained when deciding whether or not to accept hospitality. Additionally, the public authority may give greater consideration to the circumstances in which hospitality should be provided, and the cost of that hospitality. The Commissioner finds that this is very much in the public interest and is a compelling argument in favour of disclosing the information.
42. There is a general assumption in the Act that disclosure of information is in the public interest because it promotes accountability and transparency in the work of a public authority. The Commissioner is of the opinion that, given the public authority's role in ensuring public money is spent properly, there is a clear public interest in the public authority being as transparent as possible in how it spends taxpayers' money. The Commissioner takes the view that this would help maintain public confidence in the work of the public authority. Indeed the public authority has itself acknowledged that transparency about the work of a public authority and about the range of contacts it has provides reassurance about the work of an authority. The Commissioner is minded to agree.
43. The Commissioner accepts that there is a public interest in avoiding inhibiting the public authority's ability to engage in free and frank discussions with stakeholders about its work. However, in this case the Commissioner has found that the severity, extent and frequency of any inhibition that may be caused is insufficient to warrant maintaining the exemption and finds the arguments in favour of disclosure more compelling.
44. The Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

#### **Section 40 – Personal Information**

45. The public authority initially cited section 40 as well as section 36 as grounds for refusing the request because it considered the names of people in receipt of hospitality to be personal data. However, in the internal review it explained that in withholding this information it was now relying solely on the exemption in section 36(2)(b) of the Act. In response to the Commissioner the public authority confirmed that it was no longer seeking to rely on section 40.
46. The Commissioner will not proactively seek to consider exemptions in all cases, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the Data Protection Act are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information without having considered these rights,

even if the public authority has not sought to rely on the exemption. Therefore, the Commissioner wishes to make clear, for the avoidance of any doubt, that he considers that disclosure of the names of people in receipt of hospitality would not breach the data protection principles and consequently would not breach section 40 of the Act.

### **Procedural Matters**

47. By failing to provide the complainant with the names of the UK contacts in receipt of hospitality provided by the C&AG between 01/04/04 and 31/03/07 the public authority breached section 1(1)(b) of the Act. Furthermore, by failing to provide the information to the complainant within 20 working days of receiving the request the public authority also breached section 10(1) of the Act.

### **The Decision**

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48. The Commissioner's decision is as follows:

- The public authority breached section 1(1)(b) of the Act by incorrectly applying section 36 of the Act to the names of the UK contacts in receipt of hospitality provided by the C&AG on the 160 occasions between 01/04/04 and 31/03/07.
- By failing to provide this information to the complainant within 20 working days the public authority also breached section 10(1) of the Act.

### **Steps Required**

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49. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose to the complainant the names the UK contacts in receipt of hospitality provided by the C&AG on the 160 occasions between 01/04/04 and 31/03/07.

50. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Other matters**

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

52. On 29 August 2007 the complainant asked the public authority to conduct an internal review of its handling of his information request. The public authority did not present the findings of the internal review until 8 November 2007. Section VI of the *Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000* issued under section 45 of the Act says that it is good practice for a public authority to have a procedure in place to deal with complaints about the manner in which a request for information is handled. As he made clear in his *Good Practice Guide No 5*, the Commissioner considers that these reviews should be completed as soon as possible. Whilst no explicit timescale is laid down by the Act, the Commissioner is of the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take up to 40 days. In this case the public authority took over 2 months to carry out the internal review and as such the Commissioner considers that the authority has failed to conform to part VI of the section 45 Code of Practice.

### **Failure to comply**

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53. 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

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54. 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](mailto:informationtribunal@tribunals.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 9<sup>th</sup> day of October 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

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### **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 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

### **Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Section 36(1)** provides that –

“This section applies to-

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

### **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 36(5)** provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-

- (i) the public authority, or
- (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”