

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 September 2009

Public Authority: Northern Ireland Office
Address: 11 Millbank
London
SW1P 4PN

Summary

The complainant requested information relating to the decision to disband the three Home Service battalions of the Royal Irish Regiment. The Northern Ireland Office (the NIO) refused the request in reliance on the exemptions under sections 21, 35 and 36 of the Act. During the Commissioner's investigation the NIO also sought to rely on the exemptions under section 26 and section 38 and section 40 of the Act, although it later withdrew reliance on section 26. Following the Commissioner's intervention, the NIO released most of the requested information to the complainant.

The Commissioner finds that the NIO correctly withheld some personal information under section 40 of the Act. The Commissioner further finds that all of the remaining withheld information is exempt under sections 35(1)(a) and (b). The Commissioner's decision is that the public interest favours maintaining the exemption in relation to some of the information, but that some information should be provided to the complainant. The Commissioner also finds that the NIO breached section 1(1)(b) and section 10(1) in that it failed to provide this information to the complainant in response to his request. The Commissioner also finds that the NIO's refusal notice failed to meet the requirements of sections 17(1), (2) and (3).

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.

Background

2. On 1 August 2005, the then Secretary of State for Northern Ireland (Mr Peter Hain MP) announced plans for the normalisation of the security profile across Northern Ireland. This programme had first been outlined in the Joint Declaration of April 2003 when the UK government had set out proposals for normalisation subject to an 'enabling environment'. The government had responded to an IRA statement of 28 July 2005 by promising a swift move towards normalisation.
3. Mr Hain set out the detailed steps needed to ensure this within a two year period including the disbandment of the three Home Service battalions of the Royal Irish Regiment (the RIR) comprising 3,000 personnel. Within eight months a structured plan for the reduction in troops to peacetime levels was to be produced by government. On the same day the then Secretary of State for Defence (Mr John Reid MP) pledged support for the programme, announcing plans for the end of Operation Banner by 1 August 2007. Operation Banner was the name given to the routine military support given to the Police Service of Northern Ireland which the armed forces had provided for thirty years in Northern Ireland.

The request

4. The complainant made the following request to the NIO on 17 August 2005:
 - “1. Provide details of discussions between the Northern Ireland Office, including the Secretary of State's Office and the Ministry of Defence about the decision to disband three Battalions of the RIR circa 2007. (Prior to the decision and announcement of same being made).
 2. Provide details of liaison/discussions between NIO officials and MOD officials to effect the decision and contacts and details of discussions between NIO and MOD officials to effect the announcement of the decision and the timing of that announcement and the method of that announcement on Monday 1st August.
 3. Advise what considerations were taken within the Northern Ireland Office to involve or not involve the Secretary of State Peter Hain in the announcement of that decision.
 4. Advise when the Secretary of State was told that it was the intention of the MOD to disband the three RIR Battalions.
 5. Advise of the Secretary of State's response to the 'advice' from the MOD.
 6. Advise when the Secretary of State advised the Cabinet that it was the intention of the MOD to disband the three RIR Battalions.
 7. Advise what 'bids' for the Secretary of State were received and accepted from broadcasting outlets for him to comment on the announcement and when the bids were received and when they were accepted or rejected.

8. Advise what knowledge the NIO had of arrangements made by the MOD to announce the decision.
9. Had the NIO no knowledge or intimation from the MOD that the RIR decision had been made before the announcement was broadcast on 1st August 2005?"
5. The NIO acknowledged the complainant's request on 19 August 2005. On 20 September 2005 the NIO advised the complainant that it needed to extend the time limit for responding to his request. The NIO explained that it was at that time considering several exemptions in relation to some of the requested information, although it did not specify any exemptions. The NIO advised that some of the exemptions were "non-absolute, which means that we have a duty to carry out a public interest test".
6. On 29 September 2005 the NIO provided the complainant with some information in relation to part 7 of his request. The NIO advised that it was still considering the other parts of the request. On 25 October 2005 the NIO advised the complainant that it had now finished considering the exemptions. Again, the NIO did not specify the exemptions in question but advised that it now needed additional time to consider the public interest arguments in relation to the outstanding parts of the request.
7. On 10 November 2005 the NIO wrote to the complainant to advise that all of the outstanding information was being withheld. The NIO advised of its view that the information was exempt by virtue of sections 21, 35 and 36 of the Act, and that the public interest favoured maintaining the exemptions.
8. Section 21 of the Act provides an absolute exemption if information is already accessible to the applicant. The NIO advised the complainant that the information falling under this exemption included "media reports from UTV, and the Press Association. Other documents comprising of statements released by the GOC and the Chief Constable can be found on the websites of the Police Service of Northern Ireland, www.psn.police.uk, and the Defence Press Office, www.mod.uk/dlo/news/pressoffice.htm".
9. Section 35 of the Act provides an exemption for information which is held by a government department and which relates to government policy, ministerial communications, provision of advice by the Law Officers, or the operation of ministerial private offices. The NIO advised the complainant that some of the information related to the formulation of government policy, and that disclosure may prejudice the government policy-making process. The NIO explained that it had consulted with a wide range of stakeholders and opinion formers during the formulation of the policy regarding the future of the RIR. The NIO argued that disclosure of the requested information would "prohibit such exchanges" in the future, and undermine the quality of the policy-making process. The NIO also advised the complainant that some of the information comprised details of communications between government and ministers, and that in its view the release of this information could inhibit the level of detail included in future correspondence. The NIO considered it "vital" that exchanges between ministers were not routinely released into the public domain.

10. Section 36 of the Act provides an exemption where, in the reasonable opinion of the “qualified person”, disclosure of the requested information would, or would be likely to, prejudice the effective conduct of public affairs. The “qualified person” is set out at section 36(5) of the Act (see the legal annex at the end of this Notice). Section 36 can only apply to information which is not exempt by virtue of section 35 of the Act, and the NIO confirmed to the complainant that the two exemptions had been applied to different pieces of information. In relation to the information considered exempt under section 36, the NIO advised that the disclosure of correspondence and advice provided by ministers and officials would, or would be likely to, jeopardise the future sharing of information between them. The NIO was of the view that officials and ministers needed space to consider all options and advice, in order to carry out an effective decision making process. Further, the NIO advised that if the outstanding information were released, advice might be less forthcoming in the future.
11. The complainant was dissatisfied with this response, and wrote to the NIO on 23 November 2005.
12. The complainant referred the NIO to section 35(2) of the Act, which relates to any statistical information used to provide an informed background to the decision making process. Section 35(2) provides that, once a decision as to government policy has been taken, this type of statistical information cannot be considered exempt under section 35(1)(a) or (b) of the Act. The complainant asked to be provided with any statistical information held by the NIO which was relevant to his request.
13. In relation to the section 36 exemption, the complainant asked the NIO to confirm whether a “qualified person” had in fact made the decision to withhold the information, as this was not addressed in the NIO’s response. Finally, the complainant alleged that the NIO had wrongly withheld the requested information from him, and advised that he wished to challenge its decision in this respect.
14. The NIO responded to the complainant on 23 December 2005. The NIO advised the complainant of its view that it had responded appropriately to his request of 17 August 2005. The NIO also clarified its response to each part of the request (see paragraph 4 above):
 1. Exempt under sections 35(1)(a) and (b), and 36(2)(b)(ii)
 2. Exempt under sections 35(1)(a) and (b), and 36(2)(b)(ii)
 3. Exempt under sections 35(1)(a) and (b)
 4. Exempt under sections 35(1)(a) and (b)
 5. No relevant information held
 6. No relevant information held
 7. All relevant information provided to the complainant on 29 September 2005
 8. Exempt under sections 35(1)(a) and (b), and 36(2)(b)(ii)

15. The NIO also confirmed to the complainant that it held no statistical information which was relevant to his request. Finally, the NIO offered the complainant an internal review of its decision.
16. The complainant remained dissatisfied, and wrote to the NIO again on 4 January 2006. The complainant reminded the NIO that in his letter of 23 November 2005 he had sought to challenge the NIO's decision to withhold information from him. The complainant advised the NIO that he thought this would have been sufficient for the NIO to conduct an internal review, and he asked that one be conducted now.
17. The NIO acknowledged the complainant's request for an internal review on 8 February 2006, and provided a substantive response on 30 March 2006. The NIO advised the complainant that an internal review had been carried out on 7 March 2006, and that the NIO's original decision to withhold the information had been upheld.
18. However, the NIO also advised the complainant that the internal review panel had recommended that a fuller explanation be provided to the complainant in response to his request of 17 August 2005. The NIO provided the complainant with a brief explanation of some of the circumstances surrounding the communication of the decision to disband the three battalions of the RIR.

The Investigation

Scope of the case

19. On 21 April 2006 the complainant contacted the Commissioner to complain about the way his request of 17 August 2005 had been handled. The complainant asked the Commissioner to decide whether or not the requested information had been correctly withheld under sections 35 and 36 of the Act.

Chronology

20. The Commissioner contacted the NIO on 21 September 2006 to request copies of the withheld information before investigating the way the request was handled. The NIO responded on 17 October 2006, advising that the information was of a sensitive nature. The NIO agreed to provide some of the information to the Commissioner, but asked that the more sensitive information be inspected at NIO premises. However, the NIO did not provide any information to the Commissioner, and he wrote to the NIO in December 2006, January 2007 and February 2007 to pursue this issue.
21. The NIO did not provide any information to the Commissioner, but an initial inspection of all the withheld information took place on 5 and 6 June 2007. During the inspection, the Commissioner expressed his view that much of this information could be disclosed, and asked the NIO to consider releasing further information to the complainant.

22. At this time the NIO did not release all the information identified by the Commissioner, but did release two documents to the complainant on 15 June 2007. The NIO redacted the names of NIO officials below Director level from these documents, claiming reliance on the exemptions under sections 38 and 40 of the Act. The NIO also advised the complainant that it was considering the application of the exemption under section 36 of the Act. The NIO advised the complainant that it was in the process of consulting a “qualified person” in relation to the public interest test.
23. The Commissioner wrote to the NIO on 18 June 2007 expressing disappointment that so little information had been released. The Commissioner also requested supporting information in relation to the NIO’s reliance on the exemption under section 36 of the Act, and requested a further inspection of the withheld information. The NIO wrote to the Commissioner on 16 and 19 July 2007, providing detailed submissions in relation to its public interest considerations. At this stage the NIO clarified that it was seeking to rely on the exemptions under sections 35(1)(a) and (b), and sections 36(2)(b)(i) and (ii) of the Act. In addition, the NIO now advised the Commissioner that it also sought to rely on the exemption under sections 26(1)(a) and (b) in relation to some of the remaining withheld information. This exemption applies where disclosure of the information would or would be likely to prejudice defence. The Commissioner noted that this was the first time that the NIO had claimed that section 26(1)(a) and (b) applied to the withheld information. In any event, having considered the NIO’s arguments the Commissioner advised the NIO of his view that these exemptions were not engaged in relation to any of the withheld information.
24. A subsequent inspection took place on 20 July 2007. At this meeting the Commissioner identified further information which in his view ought to be disclosed to the complainant. On 10 August 2007 the NIO disclosed some information to the complainant. However, the Commissioner noted that this disclosure did not include all of the information he had identified to the NIO during the inspection.
25. On 17 August 2007 the NIO released further information comprising three documents to the complainant. The NIO also provided another submission to the Commissioner in relation to the public interest considerations.
26. The Commissioner wrote to the NIO on 14 January 2008 setting out his view that most of the outstanding withheld information was in fact exempt under section 35(1)(a) of the Act, rather than the other exemptions claimed. However the Commissioner considered that the balance of the public interest lay in favour of disclosing a substantial amount of this information. Following a short meeting between the Commissioner and a senior NIO official on 1 February 2008, the NIO released further information to the complainant. The Commissioner met with the NIO on 14 October 2008 to discuss the NIO’s application of the exemptions to the remaining withheld information.

Findings of fact

27. The information held by the NIO relating to the request includes the following broad groups of information:

- i) Communications between government officials
- ii) Communications between government ministers
- iii) Communications between officials and ministers

The information spans a six month time period leading up to the Secretary of State's announcement on RIR disbandment of 1 August 2005, referred to at paragraph 3 above.

28. As the NIO has now disclosed a substantial portion of the requested information to the complainant, the Commissioner's decision in this case relates to the remaining withheld information.

Analysis

Procedural issues

Section 1(1)(b): duty to provide information

29. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out below the Commissioner is of the view that some of the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the NIO failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

30. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received.

31. As the Commissioner is of the view that the NIO wrongly withheld some information from the complainant, it follows that the NIO failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the NIO failed to comply with section 10(1) in relation to this information.

Section 17: refusal notice

32. Where a public authority refuses a request for information it is required under section 17(1) of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon (see the legal annex for more details).

This notice must be provided within the timescale set out in section 10(1), no later than twenty working days following the date the request was received. Section 17(2) provides that a public authority may take additional time to consider the public interest in relation to a qualified exemption, if the authority is satisfied that the exemption is engaged. However the refusal notice issued under section 17(1) must still contain the following elements:

- i) an explanation as to which exemptions are being applied, and why
 - ii) confirmation that the public interest test is still under consideration
 - iii) an estimate of the date by which the authority expects to reach a decision in relation to the public interest test
 - iv) details of the applicant's right of appeal under section 50 of the Act.
33. The NIO acknowledged the complainant's request on 19 August 2005, but did not communicate with the complainant again until 20 September 2005 (see paragraph 5 above). The 20 September refusal notice advised that several exemptions were being considered in relation to some of the information, but did not explain which exemptions were being considered, or the reasons for this. In addition, although the NIO confirmed that it required extra time to consider the public interest, it gave no indication as to when this process would be completed.
34. The Commissioner is of the view that the NIO's refusal notice of 20 September 2005 does not comply with the requirements of section 17(1), 17(2) and 17(3) as it did not contain the elements referred to in paragraph 32 above. In addition, the NIO sought to extend the time for response in order to consider exemptions, whereas such extension is only permitted in order to consider the public interest. The Commissioner concludes that the refusal notice inadequately communicated the NIO's position to the complainant. However, the Commissioner is mindful that this request was made in 2005, and he expects that the NIO will have revised its procedures in light of his guidance on refusal notices and the time for compliance.

Exemptions

Section 35(1)(a): formulation or development of government policy

35. Section 35(1)(a) provides an exemption for information held by a government department which relates to the formulation or development of government policy.
36. 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. Moreover, 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy.
37. In consideration of this case the Commissioner has been assisted by the Information Tribunal decision in the case of *DFES v Information Commissioner &*

*the Evening Standard*¹ in which the Tribunal commented on the term 'relates to' contained in section 35(1). The Tribunal suggested that the term 'relates to' could be interpreted broadly, and although this approach has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which causes no significant harm to the public interest. The Tribunal's approach also demonstrates that where the majority of the information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be considered as relating to section 35(1)(a).

38. Having considered the withheld information in detail, the Commissioner is satisfied that the issue of disbandment of the RIR should be considered government policy for the purposes of the Act. The Commissioner is further satisfied that the withheld information relates to the development and formulation of the disbandment policy, and therefore falls within the scope of the exemption under section 35(1)(a).

Section 35(1)(b): ministerial communications

39. Section 35(1)(b) exempts information which relates to ministerial communications. The NIO argued to the Commissioner that some of the withheld information fell within this category and was therefore exempt. Section 35(1)(b) is also a class-based exemption, so again it would be sufficient for the NIO to demonstrate that the information did relate to ministerial communications.
40. "Ministerial communications" is defined at section 35(5) of the Act (see legal annex). Having inspected the relevant information, the Commissioner is satisfied that some of it does relate to communications between government ministers (see paragraph 27), and as such falls within the scope of the exemption under section 35(1)(b).

Public interest test

41. Under section 2(2)(b) of the Act, exempt information must still be disclosed unless, in all the circumstances of the particular case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner must therefore consider the arguments for and against disclosure of the information, and must decide how the public interest is best served in this case.
42. The Commissioner has considered the interaction between subsections 35(1)(a) and 35(1)(b) and how the public interest test applies between the two subsections. In the Commissioner's opinion there will be occasions where there will be some crossover between the two exemptions, particularly in the context of this case where the withheld information includes policy discussions between government ministers. The Commissioner has considered the public interest in favour of maintaining each limb of the exemption. He has outlined below the public interest factors in favour of disclosing the information under one heading

¹ Appeal no EA/2006/0006

and he has considered separately the factors in maintaining each exemption.

Public interest factors in favour of disclosing the information

43. The NIO has recognised that there is a general public interest in transparency regarding how the government operates and increasing the public's understanding of issues of the day. In this particular case the Commissioner is of the view that there is a legitimate public interest in understanding the roles of the NIO and the MOD in the decision making process.
44. It is also important for the public to be adequately informed as to how the issue of consultation was approached by the government. The NIO has acknowledged the public interest in the transparency of the advisory processes of central government.
45. The decision provided for a major and fundamental change to a security structure that had been in place for a considerable period of time. The disbandment of the RIR was a decision that affected many people in terms of their employment, and there is a substantial public interest in understanding how the decision was reached. The Commissioner considers that there is a clear public interest in the government being accountable for decisions it has taken.

Public interest factors in favour of maintaining the section 35(1)(a) exemption

46. The NIO argued to the Commissioner that government officials required 'safe space' to discuss options, exchange views and develop ideas on policy making. The NIO expressed concern that, if the withheld information were to be released, officials may be less forthright in their views, and less able to produce effective written briefing materials. The NIO considered that this would harm the decision making process.
47. The information withheld in reliance on the exemption under section 35(1)(a) is information which relates to the development of government policy on the disbandment of the RIR. As explained at paragraph 45 above, the decision to disband had been taken and publicly announced by the time of the complainant's request, so the Commissioner is of the view that the public interest in providing 'safe space' for this specific policy would have diminished significantly (although not entirely for other related policy developments). The Commissioner is also mindful of the High Court judgment in *Office of Government Commerce v the Information Commissioner*, which related to the Government's Gateway Review into the introduction of an Identity Cards Bill. Mr Justice Burnton commented that:

*"I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished."*²

² *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008) at para 101

48. The timing of the request, although reducing the need for 'safe space', does not remove it entirely, and the Commissioner is mindful that the withheld information did relate to wider and connected policy in Northern Ireland. He has therefore afforded some weight to protecting a safe space in relation to other policies connected to the peace process in Northern Ireland.
49. The NIO also argued that, if such information were to be disclosed as a matter of course, this could potentially affect the candour of submissions made on related policy issues in Northern Ireland (such as policing and the devolution of justice). The NIO argued that this in itself would have a detrimental effect on the ability of officials to contribute effectively to future policy debates. These arguments are often characterised as the 'chilling effect'.
50. The Commissioner considers that 'safe space' arguments are about the need for a 'safe space' to formulate policy, debate 'live issues', and reach decisions without being hindered by external comment and/or media involvement. They are related to, but not the same as 'chilling effect' arguments, and the Commissioner is mindful that care should be taken to differentiate between these two concepts. The Commissioner's view is that, whilst part of the reason for needing a 'safe space' is to allow free and frank debate, the need for a 'safe space' exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under the Act. 'Chilling effect' arguments are directly concerned with the argued loss of frankness and candour, in debate or the process of obtaining advice, which it is said would result from disclosure of information under the Act.
51. Particularly noting the nature of the political situation in Northern Ireland, the Commissioner accepts that disclosure of the withheld information would have the potential to affect the candour of submissions made on related policy issues, and has taken this argument into account. However, he has drawn upon the Tribunal's decision in *Foreign and Commonwealth Office v The Information Commissioner*:
- "we adopt two points of general principle which were expressed in the decision in HM Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity."*³
52. The Commissioner also draws support from the Tribunal's comments in *Scotland Office v the Information Commissioner* in relation to policy discussions by Ministers:

³ Appeal no EA2007/047 (para 26)

“No evidence has been put before us to show that because of the potential for disclosure under FOIA, Ministers have changed the way in which they communicate, to have taken less robust positions in debate or have been less candid in expressing their views in writing. In other words, there is no evidence that the “chilling effect” feared has actually materialised. This is of course as it should be. In line with the views expressed by the Tribunal in DFES, we consider that we are entitled to expect of our Ministers, as elected politicians, a degree of robustness and for them not to shy away, in cabinet discussion, from taking positions and expressing those positions candidly, for fear that their views may, in certain circumstances, become public.”⁴

53. In addition, the Commissioner notes that in *O’Brien v the Information Commissioner and BERR*, a witness for the public authority conceded in cross-examination that:

“he could not identify any actual instance of a disclosure made under the freedom of information Act having affected the quality of any advice given or the way they performed their duties in general... He accepted that since the freedom of information regime was obligatory disclosures made under it would not damage the necessary trust between ministers and civil servants and that there was no reason to be concerned that ministers would be led to disengage from their officials as a consequence of it. He accepted that his concerns about the risk to the quality of government decision-making resulting from cumulative disclosures under the Act were speculative.”⁵

54. Having had sight of the withheld information and considered the circumstances of the case, particularly the timing, the Commissioner is not satisfied that its disclosure would have the significant and severe impact ascribed to it by the NIO. However, the Commissioner has afforded some weight to the impact that disclosure would be likely to have on the candour and quality of the advice, particularly in light of the circumstances of the issues in this case. He accepts the importance of maintaining an environment in which frank and frank advice may be provided on such sensitive policy issues.

Public interest factors in favour of maintaining the section 35(1)(b) exemption

55. The NIO has highlighted to the Commissioner the importance of the convention of collective cabinet responsibility, which allows ministers to be able to express and argue their views in private whilst maintaining a united front. The NIO advised the Commissioner that the disbandment of the RIR was seen as highly controversial, which made communications between ministers particularly sensitive.
56. The NIO also drew the Commissioner’s attention to the intense speculation regarding the disbandment of the RIR, both from the media and various political parties. The NIO maintained there is a clear public interest in protecting ministers from “the pressures of public political debate”, which if allowed may inhibit the provision and discussion of ministers’ views. In addition, the NIO advised the

⁴ Appeal no EA/2007/0070 (para 89)

⁵ Appeal no EA/2008/0011 (para 35)

Commissioner that senior officials kept records of ministerial comments to assist with their briefing duties, and that these records may be less complete if this type of information were to be routinely disclosed.

57. In considering whether collective responsibility is engaged in relation to the withheld information covered by section 35(1)(b), the Commissioner is assisted by the factors set out by the Information Tribunal in the *Scotland Office*⁶ case, including:
- the context of the information
 - whether it deals with issues that are still 'live'
 - the extent of public interest and debate in those issues
 - the specific views of ministers it reveals
 - the extent to which the ministers are identified and whether they are still in office or in politics the wider political context.
58. The Commissioner has carefully considered the NIO's arguments in relation to collective cabinet responsibility, and the concept of collective responsibility itself. The Commissioner is of the opinion that there is a strong public interest in allowing free and frank debate in order to agree a collective position, in that it serves to improve the quality of decisions made. In addition, the Commissioner recognises the public interest in the government being able to present a united front, thus reducing the impact on good government of publicly debating individual views rather than government positions.
59. The Commissioner has considered the NIO's representations in regard to the actual content of the ministerial communications, as well as the fact that all the ministers involved were still actively involved in wider policy issues at the time of the request. With this in mind the Commissioner accepts that there was a strong public interest in protecting the communications in question from public debate and discussion at the time of the request.

Balance of the public interest considerations

60. In balancing the competing arguments under section 35(1)(a), the Commissioner considers that, with particular regard to some of the withheld information, there is a compelling public interest in openness and transparency surrounding the decision making process. This is particularly so in respect of a highly sensitive decision which impacted significantly on the lives of individuals and on the political situation within Northern Ireland. The Commissioner is of the view that, given the political sensitivities, there is an increased public interest in understanding the policy thinking and policy formulation processes in this instance. The Commissioner believes that the disclosure of such information would promote public debate on how such politically sensitive issues should be handled in the future.
61. The Commissioner is of the view that the NIO's arguments surrounding record keeping as set out at paragraph 56 above are not persuasive. Therefore the

⁶ Appeal no EA/2007/0070

Commissioner is inclined to attach little weight to these arguments, particularly as the NIO appears to have identified a clear business need to record this type of information.

62. Having considered all the arguments, it is the Commissioner's opinion that disclosure of some of the information would not be likely to exacerbate political sensitivities to the extent claimed by the NIO. Rather, the Commissioner believes that disclosure would place the debate on the basis of valid information rather than conjecture. The Commissioner concludes that, with particular regard to the information withheld solely under section 35(1)(a), the public interest factors are evenly balanced. However, the Commissioner finds that the balance of the public interest lies in favour of disclosure of most of this portion of the withheld information. The information to be disclosed is listed in a confidential annex attached to this Notice.
63. For the reasons set out above, the Commissioner accepts the importance of protecting collective cabinet responsibility in this particular case. The public interest in maintaining the exemption under section 35(1)(b) of the Act does outweigh the public interest in disclosing the ministerial communications. The Commissioner is satisfied that disclosure of this portion of the withheld information would not inform the debate, or the public's understanding of the decision making process, to the same extent as the information withheld solely under section 35(1)(a). However the Commissioner wishes to stress that his decision relates solely to the information in this particular case: the concept of collective responsibility does not provide an absolute or "blanket" exemption, and the Act requires careful consideration of the circumstances of each case. The information that can be withheld is listed in a confidential annex attached to this Notice.

Section 40(2): personal information

64. The exemption under section 40(2) of the Act may be applied to personal information relating to third parties, ie people other than the applicant.
65. The personal information withheld by the NIO in this case comprised the names of a number of NIO officials. The NIO initially advised the Commissioner that it sought to rely on the exemptions under section 36 and section 38 of the Act in relation to this information, however the Commissioner is of the view that personal information should generally be considered under section 40 of the Act.
66. The exemption under section 40(2) is engaged if disclosure of third party personal information would breach any of the data protection principles as set out in Schedule 1 to the Data Protection Act 1998 (the 'DPA'). Alternatively, the exemption may be engaged if disclosure of the information would contravene a 'Section 10' notice, issued by an individual who felt that disclosure would cause damage or distress.
67. In its letter to the complainant of 15 June 2007, the NIO advised that it was withholding officials' names because these individuals may be subject to perceived or actual pressure, threats or intimidation, should this information be

disclosed into the public domain. The NIO argued that disclosure of the information would be unfair to those individuals, and would therefore breach the first data protection principle (that personal data must be processed fairly and lawfully).

68. Following the Commissioner's intervention the NIO released further information to the complainant on 7 February 2008. At this stage, the Commissioner notes, the NIO sought to withhold only the names of junior officials who did not operate in public facing roles. The Commissioner considers this approach to be acceptable, given the Information Tribunal's view in the case of *DWP*⁷. In this case the Tribunal found that it was not necessary to release the name of a junior civil servant who had signed off a decision because he was "acting largely on behalf of others" and was "not personally responsible". The Commissioner has also produced guidance on disclosure of personal information relating to public authority staff.⁸
69. For the reasons outlined above, the Commissioner finds that the NIO was right to distinguish between junior and senior officials when considering what information ought to be disclosed. The Commissioner is satisfied that it would be unfair to disclose the names of junior officials, as such disclosure would breach the first data protection principle.

Other exemptions claimed

Section 38: health and safety

70. The NIO initially claimed to the Commissioner that the identities of NIO officials were exempt under section 38(1) of the Act. This exemption may be applied if the disclosure of the requested information would, or would be likely to, endanger the physical or mental health or safety of any individual.
71. However, the NIO later withdrew its reliance on section 38(1) in relation to officials' names. The NIO indicated to the Commissioner that it wished instead to rely on the exemption under section 36 in relation to this information. Therefore the Commissioner has not considered this exemption further in this Notice.

Section 36: prejudice to the effective conduct of public affairs

72. The NIO argued to the Commissioner that the exemption under section 36(2)(b) of the Act could be applied to information not exempt under section 35. This is because information cannot be exempt by virtue of both exemptions (see legal annex). The exemption under section 36 is engaged if, in the opinion of the "qualified person" as set out at section 36(5), disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
73. The NIO did not provide the Commissioner with evidence of the qualified person's opinion, or how it was reached. However, the Commissioner finds that the

⁷ Appeal no EA/2006/0040

⁸ http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/whenshouldnamesbedisclosed.pdf

withheld information is exempt under section 35 of the Act, and as such this information cannot be exempt under section 36. In addition, the remaining personal information is exempt under section 40(2) of the Act (see paragraph 69 above). Therefore the Commissioner has not addressed this exemption further in this Notice.

The Decision

74. The Commissioner's decision is that the NIO dealt with the following elements of the request in accordance with the requirements of the Act:
- The NIO correctly withheld some information in reliance on the exemption under section 35(1)(a) and (b) of the Act.
 - The NIO correctly withheld the names of junior officials, albeit that the NIO relied on section 36 when it ought to have relied on section 40(2).
75. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Section 17(1), (2) and (3) in that the NIO failed to provide an adequate refusal notice to the complainant.
 - The NIO wrongly withheld some information in reliance on the exemption under section 35(1)(a) of the Act, thereby breaching section 1(1)(b).
 - The NIO failed to communicate this information to the applicant within the time limit set out at section 10(1).

Steps Required

76. In accordance with its duty under section 1(1) of the Act the Commissioner requires the NIO to disclose some of the withheld information to the complainant. The withheld information to be disclosed is detailed in a confidential annex to this Notice.
77. The NIO must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

78. 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

79. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

The internal review

80. The complainant wrote to the NIO on 23 November 2005 to complain about the NIO's refusal of 10 November 2005. However, the NIO's response of 23 December 2005 merely reiterated its original refusal to provide the requested information.
81. Paragraph 38 of the Section 45 Code of Practice (the Code) states that:
- Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint, as should any written communication from a person who considers that the authority is not complying with its publication scheme. These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application.*
82. The complainant's letter of 23 November 2005 clearly challenged the NIO's refusal to provide the requested information, yet the NIO did not treat it as a request for internal review as required by the Code. The complainant was wrongly required to request a review following the NIO's response of 23 December 2005. In addition, although the NIO confirmed that the internal review was completed on 7 March 2006, the complainant was not advised of the outcome until 30 March 2006. The Commissioner sees no reason for this delay, and is of the view that the outcome of internal reviews ought to be communicated to the applicant promptly.
83. The Commissioner notes that this request was made in 2005, and would therefore have been one of the earliest requests handled by the NIO. The Commissioner has received assurances from the NIO that it has reviewed its procedures, and would expect that any future expressions of dissatisfaction with a response would automatically trigger the internal review process.

Right of Appeal

84. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 14th day of September 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

(1) 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.

2. **Section 10** provides that:

(1) ... 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.

3. **Section 17(1)** provides that:

A public authority which ... 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(3) provides that:

A public authority which ... is to any extent relying on a claim 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 public authority holds the information, or on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim 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 public 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.

5. **Section 21(1)** provides that:

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

6. **Section 26(1)** provides that –

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces.

7. **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,

8. **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.