

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 February 2010

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

Summary

The complainant made a freedom of information request to the National Audit Office for documents relating to a report it issued into the handling of staff grievances at the Foreign & Commonwealth Office. The public authority disclosed a quantity of information falling within the scope of the request but refused to disclose additional information by relying on the exemptions section 33(2) (Audit functions), section 36(2)(b)(ii), (Free and frank exchange of views), section 40(2) (Personal information) and section 43(2) (Commercial interests). The Commissioner has investigated the complaint and has found that that the exemptions section 33(2), section 36(2)(b)(ii) and section 40(2) are all engaged. However the Commissioner found that for some of the information withheld under section 33(2) and all of the information withheld under section 36(2)(b)(ii) the public interest in maintaining the exemption did not outweigh the public interest in disclosure. The Commissioner requires the public authority to release this information to the complainant within 35 calendar days of the date of this notice. The Commissioner also found that in its handling of the request the public authority breached section 17(1) and section 17(1)(b) (Refusal of request).

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. On 25 April 2007 the complainant wrote to the public authority to request 'documents and/or information from the beginning of 2005 to date relating to the report on handling of staff grievances at the Foreign & Commonwealth Office'.
3. On 25 May 2007 the public authority wrote to the complainant to say that a qualified exemption applied to some of the requested information and it needed further time to balance the public interest in maintaining the exemption against the public interest in disclosure. The public authority said that the qualified exemption being applied was section 33 (Audit functions) and it estimated that it would take an additional 10 working days to make a decision on the public interest. Therefore it said that it planned to respond to the complainant by 8 June 2007. In addition the public authority said that some of the information was exempt under section 40 (personal information) because it contained personal details relating to specific grievance cases at the Foreign & Commonwealth Office.
4. On 22 June 2007 the public authority wrote to the complainant and disclosed a quantity of information falling within the scope of the request. The public authority said that whilst this information fell within the scope of the section 33 exemption it considered that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. The public authority said that some of the information was exempt under section 33 and could not be released. It also now said that some information could not be disclosed as it was exempt under section 43 (Commercial interests). For both exemptions the public authority outlined its reasons for concluding that the public interest favoured maintaining the exemption.
5. The public authority went on to say that for one piece of information – draft lines to take with the press – it was still considering the application of the section 36 exemption (Prejudice to the effective conduct of public affairs). It said that it intended to have completed its consideration of this within the next five days.
6. On 5 July 2007 the public authority wrote to the complainant to say that it had concluded that the 'draft lines to take with the press' information was exempt under section 36 and the public interest in maintaining the exemption outweighed the public interest in disclosure.
7. On 14 August 2007 the complainant wrote to the public authority to ask that it carry out an internal review of its handling of his request. In particular the complainant asked the public authority to consider the following:
 - As regards section 33, the complainant questioned whether the audit functions would in fact be impaired by disclosure of the information given that the audited bodies have a statutory duty to respond to issues raised by the public authority.

- The complainant asked which part of section 36 was being applied, and whether the information was a joint press line between the public authority and the Foreign & Commonwealth Office.
 - For section 40 the complainant asked if the personal details could be redacted.
8. The complainant also referred to an earlier letter he wrote to Sir John Bourn, the Comptroller and Auditor General (“the C&AG”), in which he had made a number of comments about the report.
9. The public authority presented the findings of its internal review on 7 February 2008 at which point it upheld its decision to refuse to disclose requested information in reliance on the exemptions: section 33, section 36, section 40 and section 43.

The Investigation

Scope of the case

10. On 4 April 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to review the public authority’s decision to refuse to disclose some of the information he requested. In particular the complainant said that he was concerned about the public authority’s decision to apply section 36 on the grounds that disclosure would prejudice its ability to ‘conduct the clearance process efficiently and effectively based on free and frank exchange of views’.
11. During the course of the Commissioner’s investigation the complainant confirmed that he did not wish to challenge the public authority’s application of section 43 and therefore the Commissioner has not considered this exemption as part of the decision notice. No other exemption was applied to the information withheld under section 43 of the Act.

Chronology

12. On 9 June 2009 the Commissioner wrote to the public authority with details of the complaint. The Commissioner now asked for copies of the withheld information, clearly marked to show where an exemption was being applied. The Commissioner also asked the public authority to explain why each of the exemptions were being applied and asked it to elaborate on its reasons for concluding that the public interest in maintaining each exemption outweighed the public interest in disclosure.
13. The Commissioner also said that, as regards section 36, it was his understanding that the specific exemption which the public authority was seeking to rely on was section 36(2)(b)(ii) and asked the public authority to let him know if this was

correct. The Commissioner also asked the public authority the following questions regarding the application of this exemption:

- The Commissioner asked the public authority to confirm if it had sought the opinion of the qualified person when applying the exemption.
 - The Commissioner asked the public authority to confirm when the opinion was sought.
 - The Commissioner asked the public authority if the opinion was given verbally or in writing. If given in writing, the Commissioner asked for a copy to be sent to him.
 - The Commissioner asked the public authority to explain what information was placed before the qualified person to allow him to reach a decision on the application of the exemption.
14. The Commissioner also asked the public authority to comment on the complainant's suggestion that disclosure would be unlikely to prejudice its audit functions because government departments are under a statutory duty to co-operate with the public authority. Finally, the Commissioner asked the public authority if any personal information could be redacted so as to avoid the application of section 40.
15. The public authority responded to the Commissioner on 7 July 2009 at which point it provided copies of all of the information it had identified as falling within the scope of the request together with an accompanying schedule. The schedule outlined what information had already been disclosed to the complainant and what information or documents were being withheld. For each piece of information being withheld the public authority explained which exemption(s) were being applied and why. The public authority also responded to each of the Commissioner's specific questions regarding the application of the various exemptions.

Findings of fact

16. The public authority's report – 'Handling staff grievances at the Foreign and Commonwealth Office', was issued in December 2006 and contained the following statement:

'The Comptroller and Auditor General is a prescribed person under the Public Disclosure Act 1996 for the receipt of disclosure relating to the proper conduct of public business, fraud, value for money and corruption in the provision of centrally-funded public services. Under this legislation the National Audit Office operates a "whistleblowers hotline". In 2005 we received three complaints from employees of the Department related to the handling of grievances. Under this legislation we are not prescribed to investigate or resolve personal grievance cases. However, the complainants also raised issues related to the Department's use of resources with potential value for money implications. We have therefore reviewed the Department's procedures for handling grievances.'

17. The public authority's website states that its role is to:
- 'Audit the accounts of all government departments and agencies as well as a wide range of other public bodies.
 - Report to Parliament on the economy, efficiency and effectiveness with which these bodies have used public money.'

18. The public authority's website also includes the following description of the methods which may be used as part of a Value for Money (VFM) audit.

'Typically, each study will use a mixture of quantitative and qualitative methods. Each has strengths and weaknesses, but are necessarily complimentary approaches to unravelling the nature of institutional processes, programmes, activities and working life. Typical methods include:

- interviews
- surveys
- focus groups
- benchmarking
- cost benefit analysis
- case studies
- analysis of financial and performance data
- multi-criteria decision analysis.

'The fieldwork stage of a VFM study must be well planned. It is very important that the data collected is robust, necessary and sufficient to answer the questions raised at the start of the study, and to support the conclusions and recommendations in the report. If too little data is collected it is unlikely that it will be possible to support conclusions and recommendations appropriately. If too much data is collected, time and resources will be unnecessarily wasted.'

19. The C&AG is a prescribed person under the Public Interest Disclosure Act 1998 to whom external disclosures can be made "relating to the proper conduct of public business, fraud, value for money and corruption in relation to the provision of centrally-funded public services".

Analysis

Exemptions

Section 33(2) – Audit functions

20. Section 33 applies to public authorities who have functions in relation to:
- (a) the audit of the accounts of other public authorities, or
 - (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
21. Under section 33(2) information will be exempt if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to above.
22. The Commissioner is satisfied that section 33 applies to the work of the public authority, given its role as described at paragraph 17. However, for the exemption to be engaged the public authority would need to demonstrate that disclosure would, or would be likely to, prejudice its audit functions.
23. In this case the public authority made the following argument as to why disclosure of the requested information would prejudice its audit functions:
- 'Although the C&AG has statutory access rights to documents and explanations from audited bodies, our audit reports also benefit from the free and frank engagement of audited bodies in the audit process. This is particularly so with their engagement in the 'clearance' process when we confirm the accuracy of facts and the way they are presented in our report. A clearance process which involves a free and frank exchange of views is essential to the production of accurate and timely audit reports. If the free and frank nature of the clearance process were inhibited, as it would be if the details of these exchanges were disclosed, this would ultimately weaken the audit and accountability process, thereby prejudicing the audit function.'
24. The public authority has not explicitly said whether disclosure of the requested information would, OR would be likely to, prejudice its audit functions. Therefore the Commissioner considers that in the circumstances it is appropriate to apply the lesser test, that is to say the exemption will be engaged where disclosure would be likely to prejudice the public authority's functions in relation to the matters mentioned in section 33(1)(a) and (b). This approach has found support in the Information Tribunal when it stated:

‘We consider that...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.’¹

25. The Information Tribunal has also considered the meaning of ‘would be likely to prejudice’ and found that for this to apply:

‘the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.’²

26. This in turn follows the judgement of Mr Justice Munby in the High Court in which the view was expressed that:

‘Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.’³

27. The Commissioner recognises that the public authority has statutory powers to request information from audited bodies. However, he also considers that an audit is most effective when the public authority is able to engage in a free and frank exchange of views with the body being audited within the context of an open and effective relationship. Indeed, it is clear to the Commissioner that, as shown at paragraph 17 above, informal methods of information gathering and research, such as interviews, focus groups and surveys, are very important to the audit process. Therefore it is reasonable to conclude that the public authority’s audit functions would be prejudiced if public authorities were to become more reluctant to engage in these processes.

28. In this case the Commissioner is prepared to accept that the Foreign and Commonwealth Office would be inhibited from engaging in a free and frank manner with the public authority if the requested information were disclosed. This is because the withheld information was produced in the context of the clearance process where the public authority and the audited body confirm the accuracy of facts and the way they are presented in the report. The clearance process specifically provides for a period of free and frank discussion and therefore both audited bodies and auditors may reasonably expect that information related to this stage of the audit would not routinely be disclosed. Therefore the Commissioner is satisfied that the disclosure of the withheld information would, on the balance of probabilities, be likely to prejudice the public authority’s ability to conduct future audits of this particular body.

29. In addition, the public authority has claimed that some of the requested information is internal communications which if disclosed would be likely to inhibit its auditors from expressing their views about relations with the audited body and the implementation of audit recommendations. The public authority has argued that this would prejudice the audit function. The Commissioner recognises that

¹ McIntyre v Information Commissioner & the Ministry of Defence [EA/2007/0068], para. 45.

² John Connor Press Associates Ltd v Information Commissioner [EA/2005/0005], para. 15.

³ R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

the ability of the public authority to produce effective and valuable reports is based to a certain extent on both auditors and audited bodies being able to engage in a free and frank exchange of views and to make recommendations without being constrained by the prospect that these discussions may be disclosed. The Commissioner has considered the likelihood of auditors being deterred from expressing themselves freely and frankly were this information to be disclosed. He believes it is reasonable to conclude that there would be an inhibitory effect on auditors expressing their views given the candid nature of this particular information and the fact that it relates to a sensitive part of the audit process where the public authority seeks to get the audited body to agree the report. The Commissioner is satisfied that, whilst the risk of prejudice occurring may not be probable there is at least a risk of the public authority's auditors being discouraged from engaging in a free and frank exchange of views which would therefore prejudice the audit function by undermining the robustness of the public authority's reports. The Commissioner considers that this meets the test of 'would be likely to prejudice'.

30. For the reasons given above the Commissioner has decided that section 33(2) is engaged.

Public interest test

31. Section 33(2) is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that information to which a qualified exemption applies may not be disclosed only where the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

32. The complainant has argued that the public interest would be served by disclosure as it would help to further understanding about the rationale behind some of the recommendations contained within the report into staff grievance procedures at the Foreign and Commonwealth Office.
33. The complainant has also alleged that the Foreign & Commonwealth Office sought to have a particular recommendation removed from the report. The complainant has argued that a public body that is the subject of an enquiry by the public authority should not seek to change recommendations made by the public authority. The complainant said that it was his understanding that this is an important principle and a matter of public interest if breached.
34. The Commissioner would add that there is also a general public interest in transparency and accountability, and disclosure in this case would shed further light on the way in which the public authority conducts value for money audits of this kind.

Public interest arguments in favour of maintaining the exemption

35. The public authority outlined its reasons for concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure as follows:

'Disclosure of the detail of these exchanges would prejudice the NAO's ability to conduct the clearance process efficiently and effectively based on a free and frank exchange of views, and would impair our ability to secure the Committee of Public Accounts' objective of an effective hearing based on agreed information'.

'The public interest in safeguarding the integrity of the audit process and ensuring that we can continue to secure agreed information which facilitates improvements to the management and performance of a particular aspect of a Department's work outweighs the general public interest in releasing the correspondence, which can instead be addressed by the release of the draft report.'

Balance of the public interest arguments

36. The Commissioner accepts that there is a strong public interest in avoiding prejudice to the public authority's audit functions. The public authority provides a valuable service by identifying areas of improvement in the performance of public bodies which raise value for money implications. Ultimately this benefits the taxpayer as the public authority's reports, in conjunction with reports issued by the Public Accounts Committee, help to save money and promote greater efficiency.
37. On the other hand, the Commissioner has also given consideration to the extent and severity of any prejudice that would be likely to be caused to the public authority's audit functions. Given that the public authority, via the C&AG, has extensive statutory powers to compel public authorities to engage with auditors the extent of the prejudice is never going to be so severe that it would actually prevent the public authority from undertaking its work. Additionally, the Commissioner is reluctant to accept that any prejudice caused to the public authority's ability to secure the co-operation of audited bodies would extend beyond the department concerned as a result of the disclosure of the requested information in this case.
38. However, for most of the information the Commissioner is of the view that there is only a general public interest in disclosure. Also, the public authority has already released a copy of the draft report which provides further details about the work undertaken by the public authority. Therefore the Commissioner considers that the public interest in greater transparency and accountability is somewhat reduced. In these circumstances the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure for the majority of the information falling within the scope of the exemption.
39. For some information the Commissioner considers that the public interest is more finely balanced as the information is not especially candid or free and frank but would shed further light on the level of engagement between the public authority and the FCO regarding recommendations contained within the report, and help to reveal the rationale behind one of the recommendations which the complainant argued the report did not adequately explain. The Commissioner is mindful of the

presumption in favour of disclosure and has decided that for this information public interest in maintaining the exemption does not outweigh the public interest in disclosure. The public authority had provided the Commissioner with a schedule of the information which it considered was exempt from disclosure. It is documents 3, 4 and 5 for which the Commissioner considers the public interest favours disclosure.

Section 40(2) – Personal information

40. A significant amount of the information has been withheld under section 40(2) of the Act. Section 40(2) provides that information is exempt if it constitutes personal data of which the applicant is not the data subject and satisfies one of the conditions in section 40(3) or section 40(4). In this case the relevant condition is contained within section 40(3)(a)(i) which applies where the disclosure of personal data would contravene any of the data protection principles.

Is the information personal data?

41. In investigating the application of the exemption it is first necessary to establish if the information is personal data. Personal data is defined in the Data Protection Act 1998 (DPA 1998) as:

‘data which relate to a living individual who can be identified-

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.’

42. In this case the information withheld under section 40(2) relates to details about personal grievance cases at the Foreign and Commonwealth Office. The information relates to named, living individuals and the Commissioner is entirely satisfied that this constitutes personal data. He is also of the opinion that it would not be possible to redact the names of the individuals concerned because, given the level of detail regarding the personal grievance cases, disclosure of the redacted information would still allow for individuals to be identified.

The first data protection principle

43. In this case the public authority has said that it believes that disclosure would contravene the 1st, 2nd and 6th data protection principles, however, the Commissioner considers that it is the 1st data protection principle which is most relevant in this case. The first data protection principle provides that:

‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.'

44. The public authority has explained that the information in this case relates to details of personal grievance cases that were obtained through its whistleblowing hotline. The Commissioner has first considered whether disclosure of this information would be 'unfair' and in doing so has taken into account the expectation of the individuals concerned.
45. The information in this case was provided to the public authority in order to establish if there were any value for money implications arising from the Foreign and Commonwealth Office's staff grievance procedure. The Commissioner believes that the individuals involved would have passed their information to the public authority in good faith and would have expected it only to be used in order to establish the basis of any report to be undertaken.
46. The Commissioner has also considered the likely impact of disclosure on the individuals concerned and notes that the information on specific grievances includes sensitive details such as the effect that the events relating to a particular grievance have had on both the individuals and their families. Disclosure under the Freedom of Information Act is often described as 'disclosure to the world' and the Commissioner considers that this would be distressful to the individuals concerned when there would be little legitimate interest in the information being made publicly available through . The Commissioner is also mindful of the fact that the grievances featured in the withheld information are still recent and therefore any distress caused by disclosure is likely to be more severe.
47. Furthermore, the Commissioner considers that disclosure would be unfair in the particular circumstances of this case as the information was provided through the public authority's whistleblowing process which culminated in a report which criticised certain aspects of the public authority's staff grievance procedures. Disclosure in this context could have a detrimental affect on the individuals' careers as they may be viewed, however unreasonably, as 'troublemakers' either at the Foreign and Commonwealth Office, for those staff still employed there, or in future employment. For these reasons the Commissioner has decided that disclosure would be unfair.
48. The Commissioner has decided that the information constituted personal data of which the applicant was not the data subject and disclosure would contravene the 1st data protection principle. Consequently section 40(2) is engaged. The Commissioner has not undertaken a public interest test as section 40(2) confers absolute exemption from the Act.
49. The public authority has claimed that some information to which section 40 applies is additionally exempt under section 33. The Commissioner has not considered whether section 33 would apply to this information as he is entirely satisfied that it is exempt on the basis of section 40.

Section 36(2)(b)(ii) – Prejudice to the free and frank exchange of views

50. The public authority has applied section 36(2)(b)(ii) to one piece of information falling within the scope of the request which specifically relates to the development of draft lines to take with the press. Section 36(2)(b)(ii) provides that information shall not be disclosed where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

51. In investigating whether the section 36 exemption is engaged the Commissioner will undertake the following:

- Ascertain who is the qualified person for the public authority
- Establish that an opinion was given
- Ascertain when the opinion was given
- Consider whether the opinion was reasonable in substance and reasonably arrived at.

52. In this case the public authority has provided the Commissioner with a record demonstrating that the proper qualified person, the C&AG, gave his opinion on the application of the exemption. The public authority had first cited the exemption on 22 June 2007. However, the record indicates that the qualified person only gave his opinion on the exemption on 28 June 2007. Notwithstanding the fact that the exemption was claimed outside of the 20 working days, section 36(2)(b)(ii) should not have been applied at this point as the exemption is only engaged once the qualified person has given his/her opinion. Nevertheless, by the time the public authority wrote to the complainant again on 5 July 2007 the qualified person's opinion had been obtained and the fact that the opinion was obtained after the exemption was cited does not necessarily undermine the public authority's application of the exemption. Indeed the Information Tribunal has made it clear that the Commissioner is entitled to still consider exemptions in such cases when it said that:

'even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review'.⁴

53. Having satisfied himself that the public authority did obtain the opinion of the qualified person the Commissioner has gone on to consider whether the opinion was reasonable. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal considered the sense in which the qualified person's opinion under s.36 is required to be reasonable. It concluded that:

'...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at'.⁵

⁴ McIntyre, para. 31.

⁵ *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0013], para. 64.

54. The Commissioner notes that the qualified person has not explicitly said whether disclosure would OR would be likely to cause the prejudice outlined in section 36(2)(b)(ii). Therefore the Commissioner, mindful of the findings of the Information Tribunal referred to at paragraph 24, has decided that the lesser test should be applied.
55. The Commissioner has first considered whether the qualified person's opinion was reasonably arrived at and notes that the qualified person was provided with a copy of the information in question together with guidance from the then Department of Constitutional Affairs on the section 36 exemption. The qualified person was also provided with a submission from his own officials detailing the request and recommending that the information be withheld. The Commissioner is satisfied, having reviewed the withheld information and the submission given to the qualified person, that the qualified person was provided with sufficient information to allow him to give his opinion and only took into account relevant factors.
56. In considering whether the opinion was reasonable in substance the Commissioner has taken into account the fact that the information is a draft document which was only circulated internally within the public authority. The Commissioner considers that it is reasonable for the qualified person to conclude that a possible effect of disclosure is that officials preparing responses for the media would be likely to be inhibited from engaging in a free and frank exchange of views. In reaching his view the Commissioner recognises that the qualified person's opinion is just one opinion and that on the facts of this case an opposite conclusion may also have been reasonable.
57. The Commissioner has decided that section 36(2)(b)(ii) is engaged in respect of the one piece of information to which the public authority applied this exemption.

Public interest test

58. Section 36(2)(b)(ii) is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act.

Public interest arguments in favour of disclosure

59. As in the case of the information withheld under section 33, there is a general public interest in transparency and accountability in the work of the public authority. There is also a public interest in disclosure of this particular information as it would help to shed light on how the public authority deals with the media in addition to its statutory functions.

Public interest arguments in favour of maintaining the exemption

60. The public authority has argued that there is a public interest in officials being able to develop, share and discuss freely appropriate responses to be given to the media.

Balance of the public interest arguments

61. In balancing the public interest in relation to the section 36 exemption the Commissioner is guided by the findings of the Information Tribunal which stated that in its view the reasonable opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It argued that the reasonable opinion:
- ‘does not necessarily imply any particular view as to the severity or extent of such inhibition 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.’⁶
62. This means that whilst the Commissioner will give due weight to the qualified person’s opinion he will in this case go on to consider the severity, extent and frequency of the inhibition on the ability of the public authority’s officials to engage in a free and frank exchange of views when developing responses to the media.
63. In reaching his decision the Commissioner has firstly taken into account the fact that the information in question is a collection of lines to take with the press, albeit in draft form, and therefore they have ultimately been produced with a view towards publication. In this context the severity of the prejudice or inhibition to official’s free and frank exchange of views is likely to be reduced in this case. This is because the information was prepared in such a way that it would be suitable for disclosure and the officials responsible must have had an expectation that the information would eventually have been released in one form or another, subject to any changes made during the drafting process. This particular information differs from other cases where information is more candid and where there is likely to be a greater inhibition on officials as a result of disclosure.
64. The Commissioner has also considered the timing of the request, which the complainant submitted on 25 April 2007. The withheld information dates from late 2005 and therefore when the request was received the report had already been finalised and published on the intranet of the Foreign and Commonwealth Office. Consequently the extent of any inhibition on officials would have been reduced as information regarding the report had already been made widely available and the sensitivity of the issues discussed had declined as a result.
65. The Commissioner also considers that the extent of any inhibition resulting from disclosure is likely to be reduced because it is in the interest of the public authority to ensure that the media have an accurate picture of the work it is undertaking and its reasons for doing it. Therefore, whilst the Commissioner is prepared to accept that disclosure would be likely to inhibit its officials when preparing press lines to take it would seem unlikely that any inhibition would result to any great extent in a lasting failure to issue effective responses to give to the media in future cases.
66. The Commissioner has not found the public authority’s arguments in favour of the maintaining the exemption to be particularly compelling but at the same time

⁶ Guardian & Brooke, para. 91.

accepts that the arguments in favour of disclosure are limited and more general in nature. The public interest is finely balanced but the Commissioner is mindful of the Act's presumption in favour of disclosure, and therefore is of the opinion that the information should be disclosed. In all the circumstances of the case, the Commissioner has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Procedural Requirements

67. The complainant submitted his request to the public authority on 25 April 2007. The public authority responded to the request on 25 May 2007 when it explained that section 40 and section 33 applied to the requested information and that as regards section 33 it needed further time to consider the public interest test. It subsequently wrote to the complainant on 22 June 2007 at which point it said that two further exemptions, section 36 and section 43, also applied to some of the requested information. By failing to cite these two exemptions within 20 working days of receiving the request the public authority breached section 17(1) of the Act.
68. In its initial refusal notice the public authority said that section 33 and section 40 applied to some of the information falling within the scope of the request. The public authority subsequently cited section 36 and 43 as well. Whilst the public authority provided a description of each exemption it failed to properly cite the specific sub-sections of the exemptions it was relying on which constitutes a breach of section 17(1)(b) of the Act.
69. By failing to disclose the information which the Commissioner has decided is not exempt by virtue of section 33(1) and section 36(2)(b)(i) the public authority breached section 1(1)(b) of the Act. Consequently the public authority also breached section 10(1) by failing to make the information available to the complainant within 20 working days.

The Decision

70. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld requested information under sections 33(2) and section 40(2).
71. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The public authority breached section 1(1)(b) of the Act by failing to disclose the information which the Commissioner has decided is not exempt by virtue of section 33(2) and section 36(2)(b)(ii).

- The public authority breached section 10(1) by failing to disclose the information which the Commissioner has decided is not exempt by virtue of section 33(2) and section 36(2)(b)(ii), within 20 working days.
- The public authority breached section 17(1)(b) by failing to specify which particular sub-section it was relying on for each of the exemptions it cited.
- The public authority breached section 17(1) by failing to cite section 36(2)(b)(ii) and section 43(2) within 20 working days of receiving the request.

Steps Required

72. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The public authority shall disclose to the complainant documents 3, 4, and 5, where the Commissioner has decided that the information is exempt by virtue of section 33(2) but the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
 - The public authority shall disclose to the complainant document 14 where the Commissioner has decided that the information is exempt by virtue of section 36(2)(b)(ii) but the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
73. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

74. 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

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

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its

handling of requests for information. As he has made clear in his '*Good Practice Guidance No 5*⁷', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers 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 longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his requests on 14 August 2007 yet the internal review was not completed until 7 February 2008. The Commissioner is concerned that the public authority took over 5 months to complete the internal review and the Commissioner considers this a significant failure to conform to the Code of Practice.

⁷http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

76. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 11th day of February 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 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 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 33(1) provides that –

“This section applies to any public authority which has functions in relation to-

(a) the audit of the accounts of other public authorities, or

- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

Section 33(2) provides that –

“Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”

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 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 43(1) provides that –

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

Section 43(2) provides that –

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