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Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 August 2010

Public Authority: The Office of Gas and Electricity Markets
Address: 9 Millbank
London
SW1P 3GE

Summary

The complainant requested a paper submitted to Ofgem's governing body, the Authority, which concerned an electricity distribution price control review. Ofgem refused to provide this information on the basis that it was exempt from disclosure under section 35(1)(a) of the Act and the public interest favoured maintaining the exemption. Having considered the circumstances of this case the Commissioner agrees with Ofgem's decision to withhold the requested paper.

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. The Office of Gas and Electricity Markets (Ofgem) regulates the gas and electricity industries in Great Britain.

3. It operates under the direction and governance of the Gas and Electricity Markets Authority (the Authority) which makes all major decisions and sets policy priorities. The Authority's powers are provided under the Gas Act 1996, the Electricity Act 1989, the Competition Act 1998, the Utilities Act 2000 and other statutes.

4. In March 2008 Ofgem launched its fifth electricity distribution price control review (DPCR5) for the period 2010-2015 with the publication of its first consultation document. The price control sets the revenues distribution companies (DNOs) can collect from customers.

5. In October 2008 Ofgem published its proposals in respect of the pricing methodology and governance arrangements that it believed should be adopted by DNOs from April 2010 as part of DPCR5.[1] Ofgem favoured a common pricing methodology based upon a long run cost model (LRIC) for extra high voltage (EHV) distribution. Ofgem sought input from DNOs with regard to how this pricing methodology would be implemented and confirmation from DNOs that they were prepared to accept the necessary proposed licence modifications.

6. On 19 February 2009 the Authority met to discuss, amongst other issues, the electricity distribution structure of charges project. At the meeting it was noted that the LRIC formula for EHV level had been rejected by two companies and thus introduction of a common methodology had fallen for EHV. At the meeting the Authority suggested that progress in respect of licence modifications for EHV may be best made by requiring DNOs to implement either LRIC or, alternatively, a modified Forward Cost pricing (FCP) methodology. However in light of the Authority's concern about whether the FCP model was sufficiently cost reflective, companies adopting this approach should face an ex post review of the efficiency of their capital expenditure at the end of the next price control review process.

7. On 7 December 2009 Ofgem published its final proposals in respect of DPCR5.

8. On 6 January 2010 all of the DNOs accepted the Authority's decision on DPCR5.

[1] 'Delivering the electricity distribution structure of charges project'

9. On 1 April 2010 the DPCR5 licence conditions came into force.

The Request

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10. The complainant submitted the following request to Ofgem on 21 August 2009:

> 'Paragraph 18 of the Minutes of the Meeting of the Gas and Electricity Markets Authority held on 19th February 2009 refers to a briefing paper presented to the Authority on the Electricity Distribution Structure of Charges project. Under the Freedom of Information Act I request a copy of this paper, or those parts of the paper not required to be withheld because of the confidentiality restrictions under the Utilities Act 2000'.

11. The complainant's letter also stated: 'In particular, I would request any material relating to the evidence or otherwise for the views expressed by OFGEM regarding the cost reflectivity of the LRIC methodology.'

12. Ofgem responded on 7 September 2009 and confirmed that it held the briefing paper requested; this was entitled 'A09/15 – Next steps in delivering the electricity distribution structure of charges project'. However, Ofgem explained that it believed that this information was exempt from disclosure on the basis of section 35(1)(a). In relation to the complainant's second request, Ofgem explained that it considered that 'material relating to the evidence or otherwise for the views expressed by Ofgem of the LRIC methodology' was contained in the document entitled 'Delivering the electricity distribution structure of charges project' which was available on its website and provided the complainant with a link to this document. Ofgem therefore explained that it was refusing to provide the information falling within the scope of the second request on the basis of section 21 of the Act as it was reasonably accessible to the complainant.

13. The complainant contacted Ofgem on 14 September 2009 and asked for an internal review to be conducted into the decision to refuse to disclose the paper he had requested on the basis of section 35(1)(a). (The complainant's letter also made reference to Ofgem's citing of section 21 of the Act although it was not clear whether he wished Ofgem to formally review its reliance on this exemption.)

14. Ofgem informed the complainant of the outcome of the internal review on 25 November 2009. This review upheld the decision to withhold the

requested briefing paper on the basis of section 35(1)(a) of the Act. Ofgem's response did not make any reference to the second request or its reliance on section 21 of the Act.

The Investigation

Scope of the case

15. The complainant contacted the Commissioner on 3 December 2009 in order to complain about the way in which his requests had been handled. The complainant highlighted a number of reasons as to why he considered Ofgem's decision to withhold the paper he requested to be incorrect. (The Commissioner has set out this reasoning in the Analysis section below.) The complainant also suggested that he was dissatisfied with Ofgem's reliance on section 21 of the Act.

16. The Commissioner contacted the complainant on 9 April 2010 in order to clarify whether, in addition to considering the application of the section 35(1)(a), he also wished the Commissioner to consider Ofgem's reliance on section 21 in respect of his second request.

17. On 12 April 2010 the complainant responded to the Commissioner and explained that he was satisfied that the website document to which Ofgem had referred him to was likely to contain all of the evidence which it relied on to reach its opinion that the LRIC methodology is cost reflective. Whilst the complainant did not consider it necessary for Ofgem to undertake a detailed or widespread search in order to indentify any further relevant information, he suggested that he would like Ofgem to confirm that the document in question contained an accurate reflection of the information it considered in reaching its views on LRIC.

18. In its letter to the Commissioner of 8 June 2010 (which was sent in response to the Commissioner's earlier letter of 23 April 2010) Ofgem confirmed that the website document to which it referred the complainant was a 'definitive reference for the issues, evidence and pros and cons considered at the time' in respect of this issue. Although Ofgem confirmed that it held additional papers which were examined and taken into account in drafting this document they did not provide any additional information beyond that contained in the document itself.

19. The Commissioner subsequently communicated the details of Ofgem's response to the complainant and the complainant confirmed that he

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was happy with Ofgem's explanation. In light of this, the Commissioner has agreed with the complainant that this decision notice need only to consider Ofgem's handling of the first request and its reliance on section 35(1)(a) of the Act. For clarity, the Commissioner wishes to note that in considering the application of any exemptions, his remit is limited to considering the circumstances as they existed at the time of the request.

Chronology

20. Having received this complaint, and prior to the allocation of a case officer, the Commissioner contacted Ofgem on 18 December 2009 and asked to be provided with a copy of the information requested by the complainant and submissions to support its reliance on section 35(1)(a).

21. Ofgem provided the Commissioner with a substantive response on 5 February 2010. As part of this response the Commissioner was provided with the briefing paper falling within the scope of the complainant's first request along with a Power Point presentation linked to this paper. Ofgem also provided the Commissioner with detailed arguments to support its reliance on section 35(1)(a) of the Act.

22. Following the allocation of this complaint to a case officer, the Commissioner contacted Ofgem again on 23 April 2010 in order to clarify a number of issues in relation to the application of section 35(1)(a), in addition to a number of points concerning the application of section 21.

23. The Commissioner received a response addressing all of his queries on 8 June 2010. In this response Ofgem also explained that it had reconsidered, in light of the fact that as of 1 April 2010 DPCR5 was now in operation, whether it would be prepared to release the requested information. Ofgem explained that although it would no longer seek to rely on section 35(1)(a) of the Act to withhold this information because it believed that the formulation of the policy was complete, it would seek to rely on section 36 of the Act to withhold the information.

Findings of fact

24. The information which falls within the scope of the complainant's first request (the requested information) consists of a briefing paper entitled 'Next steps in delivering the electricity distribution structure of charges project' and an associated set of presentational slides.

Analysis

Exemptions

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

25. Ofgem has argued that the information which falls within the scope of the first request is exempt from disclosure on the basis of section 35(1)(a) of the Act. This section states 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'

26. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes. (As Ofgem is a non-ministerial governmental department it has the capacity to cite this exemption.)

27. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers (for the purpose of this case, such decision makers are the Authority). 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.

28. Ofgem has explained to the Commissioner that the policy to which it considers this information relates is DPCR5 and moreover that the

information in question relates to the formulation and development of this particular policy, as opposed to its implementation.

29. The complainant has suggested that the minutes of the Authority meeting of 19 February 2008 imply that a decision in relation to pricing methodologies for EHV had in fact been taken, i.e. the option of two different pricing methodologies but with a review only being undertaken in respect of FCP. Therefore in the complainant's opinion the information he requested related more to the implementation of this policy rather than its formulation or development.

30. Having reviewed the withheld information the Commissioner agrees with Ofgem that it clearly relates to the formulation and development of DPCR5 rather than its implementation. This is because although the paper sets out a number of developments relating to DPCR5 which had already taken place, it also sets out a number of options by which it could be pursued in the future; in effect a number of different policy options. Furthermore, the Commissioner notes that the paper was compiled prior to the Authority meeting referenced by the complainant and thus predates any decision that may have been taken by the Authority. (The Commissioner also notes that Ofgem's final proposals in respect of DPCR5 were not published until 7 December 2009.)

31. The Commissioner is therefore satisfied that the requested information is exempt from disclosure on the basis of section 35(1)(a) of the Act.

Public interest test

32. However section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

33. Ofgem indentified the following three arguments in favour of disclosing the requested information:

34. It is desirable that those affected by a particular matter are confident that decisions are taken on the basis of the best available information.

35. Knowledge that papers submitted to the Authority relating to DPCR5 will be disclosed could improve the quality of arguments presented and the prospect of disclosure would enhance the quality of advice.

36. More open consideration of policy related issues could result in better policy formulation and better decisions being made as wider range of views and opinions, including expert knowledge, is canvassed.

37. The complainant argued that the information should be disclosed for the following reasons:

38. Some economists had raised concerns about the application of the LRIC methodology as proposed by Ofgem and as a result Ofgem was, in the complainant's opinion, in a position of committing itself to an economic theory without sufficiently considering objective and substantive criticisms about this theory. The complainant also argued that there was inconsistency in Ofgem's decision to potentially impose undefined penalties on DNOs who chose to implement the FCP methodology but companies selecting the LRIC methodology would be exempt.

39. The complainant suggested that the information already placed in the public domain by Ofgem did not provide a rational basis upon which these decisions could be understood. Therefore, the complainant argued that in order for there to be a full and complete understanding of how Ofgem had reached its decision in respect of the pricing methodologies for EHV, the paper he requested needed to be disclosed.

40. The complainant also highlighted the fact that in some organisations which include a quorum of independent directors, the directors in question are not, in practice, able to effectively monitor specialist aspects since they are almost totally reliant on briefings provided by management or specialists chosen to support their particular case. The complainant suggested that the Authority appeared to be in such a position in this case.

Public interest arguments in favour of maintaining the exemption

41. Ofgem argued that there was a strong public interest in it retaining a 'safe space' in which it could freely and frankly discuss and develop its thinking and explore policy options in respect of DPCR5 before its final decisions were placed into the public domain.

42. Ofgem also argued that disclosure of the requested information would have a detrimental chilling effect upon the advice recorded in papers submitted to the Authority in the future. This would have the effect of reducing the quality of the advice recorded and endangering the completeness of the audit trail and potentially the decision making itself.

Balance of the public interest arguments

43. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) which considered the application of section 35(1)(a).

44. In particular the Commissioner has considered two key principles outlined in the *DFES* decision. The first was the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

> 'Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the "...threat of lurid headlines depicting that which has been merely broached as agreed policy.'

45. The second being:

> 'The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.' (Para 75(i)).

46. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:

47. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop **live** policy. Ofgem has argued that at the time of the complainant's request in August 2009 its policy formulation and development with regard to DPCR5 was still ongoing. As noted above, in the complainant's opinion the Authority's decision at its meeting of 19 February 2009, was intended to be a final decision about the framework in which the implementation was to be carried forward, although he acknowledged that many of the details remained to be clarified for both LRIC and FCP in respect of EHV as well as a common methodology for both the high voltage and low voltage networks.

48. The Commissioner is also satisfied that at the time of the request Ofgem was still in the process of formulating and developing its approach to DPCR5; in his opinion although the Authority may have taken some decisions in respect of DPCR5 by August 2009, including the over arching approach to charging methodologies, it is clear that many further and finer details concerning DPCR5 were still under development. This is evidenced by the fact that Ofgem only published its final proposals in respect of DPCR5 in December 2009.

49. In line with the comments of the Tribunal quoted at paragraph 44, the Commissioner believes that significant and notable weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. As the Tribunal noted, in such scenarios the public interest is very unlikely to favour disclosure unless for example it would expose some level of wrongdoing. Furthermore in the Commissioner's opinion, it is clearly in the public interest that Ofgem was able to candidly discuss the different policy options for DPCR5 away from external scrutiny. In attributing such weight in this case, the Commissioner notes that the information in question is of a genuinely free and frank nature and includes a candid discussion of the pros and cons of a number of policy options.

50. However, the Commissioner is conscious of the comments of the Tribunal in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) in which it suggested that the weight which should be attributed to safe space arguments diminishes as the policy becomes more certain. In the circumstances of this case, as the Commissioner accepts that some decisions in respect of DPCR5 had been taken by the Authority by August 2009, to a small degree this offsets the weight that should be given to the safe space arguments.

51. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:

- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
- The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy

(even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.

52. Clearly, in this case as the policy formulation and development was ongoing at the time of the request, the third scenario is not relevant to this case. In its submissions to the Commissioner, Ofgem suggested that the disclosure of the requested information would have a chilling effect on future papers submitted to the Authority. By this the Commissioner understands that Ofgem was suggesting that there would be a chilling effect not simply on future papers submitted in relation to DPCR5 but also to the submission of other unrelated papers in the future. In other words it is the first two scenarios that are particularly relevant to this case.

53. In considering the weight that should be attributed to these two scenarios the Commissioner has taken into account the scepticism with which numerous Tribunal decisions have treated the chilling effect arguments when they have been advanced by other public authorities. The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner* (EA/2007/0047) accurately summarises these views:

> '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.' (para 26).

54. However, the Commissioner has also taken into account the comments of Mr Justice Mitting when hearing a Tribunal decision which was appealed to the High Court. Whilst supporting the view of numerous Tribunal decisions that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

> 'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior;

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they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

55. In light of the various pieces of case law above, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.

56. As noted above, the Commissioner accepts that the withheld information contains genuinely free and frank comments and therefore accepts that some weight should be attributed to the suggestion that those who authored the paper or are closely involved in this policy area may be less candid when producing similar submissions to the Authority in the future (i.e. the first chilling effect scenario). However, in the Commissioner's opinion this weight is limited to some extent because as the Tribunal has argued it is reasonable to expect civil servants to continue to provide independent and robust advice: 'we are entitled to expect of [civil servants] the courage and independence that … [is]…the hallmark of our civil service' as they are 'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.'[2] Therefore in respect of the first type of chilling effect, although the Commissioner is prepared to accept that contributors to Authority papers may be less candid in the manner in which they describe particular policy options, he does not accept that contributors would leave out entire policy options in submissions made to the Authority.

57. Furthermore the Commissioner does not believe that any particular weight should be given to the second, broader type of chilling effect.

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[2] See EA/2006/0006 paragraph 75(vii).

This is because Ofgem has not identified any particular evidence which would demonstrate why there would be a chilling effect on different policy makers when making submissions to the Authority on different policy issues beyond making an assertion that this would be likely to occur.

58. With regard to attributing weight to the public interest factors in favour of disclosure the Commissioner recognises that they are ones which are regularly relied upon, i.e. they focus on openness, transparency, accountability and improving the decision making process. However, this does not diminish their importance as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances, again the key ones being the content of the information and the timing of the request.

59. In the Commissioner's opinion disclosure of the withheld information in this case would provide the public with an insight into Ofgem's decision making process regarding DPCR5. Thus disclosure could genuinely contribute both to the aims of transparency and accountability but could also reassure the public that due process had been followed, or indeed expose potential flaws in Ofgem's decision making processes. Disclosure would also clearly serve the complainant's desire to more fully understand the issues taken into account by the Authority at their meeting of 19 February 2009.

60. In attributing this weight, the Commissioner notes that Ofgem has argued it has openly and constructively engaged with stakeholders on the structure of charges project and has placed information about its decisions into the public domain. It has also argued that disclosure of the requested paper would not add to the information already disclosed. Whilst the Commissioner accepts that disclosure of requested information may not result in the disclosure of further factual information or details of decisions that Ofgem had taken by the time of the request, he does believe disclosure would provide the public with further details about why such decisions had been taken, or at the very least evidence of Ofgem's candid discussions surrounding these decisions. Moreover, the Commissioner believes that there will always be a public interest in disclosing all information about a policy making process to ensure that the public is provided with the fullest possible picture.

61. With regards to the timing of request, the complainant argued that in order for the public interests both he and Ofgem identified to be fully met the requested information had to be provided prior to the

implementation of DPCR5. The complainant argued that there was little value in this information being disclosed in five years' time – i.e. after DPCR5 had been completed – as this could only lead to an academic discussion of how this particular pricing review had been implemented and operated. The Commissioner is sympathetic to the complainant's line of argument and agrees that the public interest arguments identified in favour of disclosure would be most fully served by disclosure of the information at the point requested by the complainant rather than by some point in the future, be it April 2010 once DPCR5 has come into effect, or indeed in 2015 once DPCR5 has been completed.

62. Finally in attributing weight to the arguments in favour of disclosure, the Commissioner also recognises the fact that the sums of money involved in the DPCR5 project are very significant, as are the number of individuals potentially affected, i.e. both private and business customers of the DNOs. In the Commissioner's opinion such factors add to the public interest in favour of disclosing the requested information.

63. In conclusion however the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information because of two reasons: firstly, the strong weight that should be attributed to safe space arguments specific to this case identified by Ofgem and secondly the weight (albeit less significant) that should be attributed to the chilling effect arguments. In reaching this conclusion the Commissioner is not dismissing the significance of the arguments in favour of disclosure. However, he is reluctant to attribute as much weight to these arguments as the complainant does. This because although the Commissioner recognises the fact that there are those who strongly disagree with Ofgem's approach in respect of DPCR5 and cannot fully understand the rationale for its decisions, in this case this does not equate to a sufficient to reason for this information to be disclosed. If the Commissioner were to fully accept the complainant's arguments this could potentially lead to situations where whenever there was disagreement with and/or lack of understanding about how a public authority was formulating live policy, the public interest would favour disclosure of information relating to such decision making. As the Tribunal in the *DFES* has suggested the threshold for disclosing information whilst policy is in the process of formulation is much higher.

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The Decision

64. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

65. The Commissioner requires no steps to be taken.

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Right of Appeal

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66. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). 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 sent.

Dated the 31st day of August 2010

Signed ………………………………………………

Graham Smith
Deputy Commissioner

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

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 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Effect of Exemptions

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"

Information Accessible by other Means

Section 21(1) provides that –

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

Section 21(2) provides that –

"For the purposes of subsection (1)-

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

Formulation of Government Policy

Section 35(1) provides that –

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

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

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

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

Section 36(2) provides that –

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

(a) would, or would be likely to, prejudice-
    (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.