

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 23 February 2011

**Public Authority:** Nottingham City Council  
**Address:** Loxley House  
Station Street  
Nottingham.  
NG2 3NG

### Summary

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The complainant requested information relating to the delegation of decision making powers within the public authority. The request was refused on the grounds that it was information intended for future publication, under section 22 of the Act. The Commissioner finds that the public authority has failed to show that, at the time of the request, there was a settled intention to publish the requested information and consequently section 22 of the Act is not engaged. He finds breaches of section 10, 17 and 22 of the Act and requires the public authority to provide the complainant with a response which complies with the requirements of section 1 of the Act within 35 calendar days.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 15 May 2010 the complainant submitted a request to Nottingham City Council (NCC) for:

*"1) A list of all officers who have been granted 'A' delegated decision making powers as described in Appendix 6D of NCC's constitution. Please note I am not asking for names of officers, just the job titles.*

*2) Details of which committee/council meeting etc granted those powers and when."*

3. NCC replied on 16 June 2010, disclosing a document, titled '*10-7082 Delegations of Powers to Officers.pdf*'.
4. The complainant requested an internal review of this response on 16 June 2010. He pointed out that the document disclosed is dated October 1998 and many of the posts, committees or departments referred to in the document no longer exist. He requested that a review be carried out and an up to date list be provided.
5. NCC wrote to the complainant on 14 July 2010. The internal review upheld its original response because the document provided was the most up to date document available.

## The Investigation

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### Scope of the case

6. On 14 July 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The council was confusing 'documents' with 'information'. The information it had provided was not the most up to date information it holds.

### Chronology

7. On 8 September 2010 the Commissioner contacted NCC to discuss the case. He pointed out the apparent error in the public authority's approach – the document disclosed was not the information held by NCC, it was simply the most up to date *compilation* of the information. A full response to the request would require the information currently held by the council about 'A' delegated decision making powers to be compiled and disclosed. The public authority indicated that, now that it understood the point being made by the complainant, it would prefer to resolve the complaint informally, if possible. The Commissioner confirmed the points in a letter later the same day, inviting NCC to indicate its view as to whether the proposed informal resolution would be possible.

8. The Commissioner also wrote to the complainant on 8 September 2010. He explained that he had spoken to the council, explained the nature of the complaint and was satisfied that it now understood what it may have got wrong – NCC appeared to have misinterpreted his request as a request for a copy of the list it already held, instead of as a request for a list of the current posts and committees/meetings where the delegation was granted. As those details will be recorded in the council's records (but not necessarily compiled into a current list) it seemed unlikely that the information would not be held by NCC. The Commissioner explained that the council had indicated that it would prefer to deal with his complaint informally, by compiling and disclosing an up-to-date list if that would be an acceptable resolution to his complaint.
9. The complainant replied on 9 September 2010, explaining that he would prefer the Commissioner to serve a Decision Notice as he believed that it is necessary to hold public authorities to account and *"there is a strong public interest in the public knowing that NCC has no idea who it has delegated powers to"*. He also commented that the disclosed document contained a statement that the list is now held on the City Secretary's computer system and invited enquiries for 'the most up to date entries' or 'automated searches' and he therefore queried why NCC could not have done this in response to his request.
10. The Commissioner wrote again to NCC on 10 September 2010, explaining the complainant's position and asking it to consider whether it would still be minded to make any disclosure of information during the course of his investigation. He drew its attention to the complainant's comments about the list being held on the City Secretary's computer system, as a possible means for it to quickly locate the requested information.
11. The public authority wrote to the complainant on 1 October 2010, also providing a copy to the Commissioner. Its letter informed the complainant that:

*"The document that we have provided to you previously is currently our sole **collated** record of delegations of powers to officers. Other delegations have indeed been made since October 1998 when the document was compiled, and the details of other delegations are set out in the minutes of various council committees and boards dating from that period. A detailed piece of work has commenced to address this issue (and this will update the Council's delegations not only in terms of addressing revised structures and post details, but in ensuring that any new or withdrawn powers are reflected in the revised scheme of delegation). This piece of work is intended to form part of a review of the constitution which will be considered by the Council next year."*

12. NCC went on to provide the complainant with a list of posts which should be substituted in the list it had previously provided, in order to update it. It explained, however, that due to various restructurings which had taken place, it was unable to confirm whether the substitutions were entirely accurate, and that work was being undertaken to bring the delegations up to date. This work would require examination of all the minutes of relevant *"committees, boards etc since 1998"* to see if they contained information on the power to delegate. It estimated that this would require the examination of the minutes of approximately 2000 meetings, which would equate to approximately 160 hours work. It therefore refused the requested information on the grounds of the provisions of section 22 of the Act, that the information was intended for future publication. It issued a fees notice in the sum of £4075.00, which it explained would be payable if the complainant wished it to undertake this work in order to provide the requested information.
13. On 4 October 2010 the Commissioner wrote to NCC to request confirmation that there had been a settled intention to publish the requested information at the time of the request.
14. The Commissioner wrote to the complainant on 4 October 2010, to check whether he accepted NCC's response, or whether he intended to further pursue his complaint. The complainant replied later the same day, indicating that he did not accept the response.
15. The Commissioner has also discussed various other matters with the parties during the course of his investigation, corresponding with both parties during October and November 2010 and early into 2011. That correspondence will not be summarised further but has been taken into account in his investigation and analysis, below.

### **Findings of fact**

16. The Commissioner has been provided with an extract from the council's constitution. It is explained that 'A' delegated powers relate to specific authority delegated to an officer in the council by a specific board or committee. These differ from 'B' delegated powers which are a broader definition, permitting Corporate Directors to take decisions which fall within the remit of their specific department's responsibilities (subject to agreed financial limits).
17. The (out of date) list of 'A' delegated powers provided to the complainant contains over 400 such delegated powers. The council estimates that the current number of such delegated powers considerably exceeds this figure.

## Analysis

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### Substantive Procedural Matters

#### Section 1

18. It is not disputed by the public authority that it will hold the information about 'A' delegated decision-making powers, therefore the Commissioner is satisfied that NCC holds the information requested. Its position is that the information has not yet been collated into a current list and the disclosure provided in 16 June 2010 was simply the most recent, collated list the public authority had compiled which, it accepts, is out of date.

#### Section 10

19. The complainant's request was submitted on 15 May 2010 and information comprising the public authority's response was disclosed on 16 June 2010. As stated in the Section 1 analysis, above, that disclosure did not provide all the information held by the public authority, consequently, in failing to disclose all the information it held, within 20 working days, the public authority has also breached section 10(1) of the Act.

#### Section 13 and section 17

20. On 1 October 2010, during the Commissioner's investigation, the public authority provided a further response to the complainant which, firstly:
- refused to disclose the information held, on the basis of the exemption provided at section 22 of the Act, that the information was intended for future publication; and, secondly
  - issued a fees notice for that information.

In itself, this response constitutes a refusal notice, issued under section 17(1) of the Act. By its failure to issue a refusal notice within 20 working days of the request, the public authority therefore breached section 17(1) of the Act.

21. In its estimate of costs, the public authority states that its Democratic Service department estimates that to compile and disclose the information requested would equate to approximately 160 hours' work. This would appear to indicate that the public authority intended to rely on the provisions of section 12 of the Act, that the costs of compliance with the request exceeded the statutory limit (which, in this case, is £450 or 18 hours' work). The public authority did not, however, state

22. The public authority issued its fees notice, informing the complainant that it did so under the provisions of section 13 of the Act, stating:

*"Section 13 of this act permits authorities to charge a fee for any requests which would exceed the appropriate limit for Local Authority's of £450 which is requests that would require more than 2.5 days' continuous work to provide a response."*

**Section 13(1) provides that –**

"A public authority may charge for the communication of any information whose communication –

(a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12(1) and 12(2)"

23. In issuing a Fees Notice, under section 13, therefore, it is implicit from the wording of section 13(1)(a), above, that the public authority intends to refuse the information on the grounds of the cost for compliance under section 12(1). The complainant has not been provided with a notice which explains this, however, and the public authority has therefore also breached section 17(5) of the Act.

**Section 12**

24. The public authority has explained that it estimates, conservatively, that there are approximately 2000 meetings which may relate to the delegations of powers subsequent to the last compiled list, and whose minutes will require review in order to compile the updated list requested by the complainant. It further explains that these minutes vary in length, some may be only two pages long, others are known to be 18 pages long. Allowing a reasonable average of five minutes, per meeting to review the minutes, that gave it its estimate of over 160 hours.
25. The Information Tribunal in the case of *Alasdair Roberts v IC* (EA/2008/0050)<sup>1</sup> stated, at paragraph 9:

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<sup>1</sup> Available online at [http://www.informationtribunal.gov.uk/DBFiles/Decision/i275/Roberts%20v%20IC%20\(EA-2008-0050\)%20Decision%2004-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i275/Roberts%20v%20IC%20(EA-2008-0050)%20Decision%2004-12-08.pdf)

*"Section 12 does not require the public authority to make a precise calculation of the costs of complying with a request. Only an estimate is required. That estimate, however, must be a reasonable one and may only be based on the activities covered by Regulation 4(3)."*

26. Regulation 4(3) is found in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004<sup>2</sup> and states:

*"In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in–*

- (a) determining whether it holds the information,*
- (b) locating the information, or a document which may contain the information,*
- (c) retrieving the information, or a document which may contain the information, and*
- (d) extracting the information from a document containing it."*

27. The tribunal in Roberts continues, at paragraph 10:

*"It is not sufficient for a public authority simply to assert the appropriate limit has been exceeded. As was made clear in Randall (EA/2007/0004) an estimate has to be 'sensible, realistic and supported by cogent evidence'"*

And, at paragraph 12:

*"[...] the word "estimate" itself provides some guidance. It points to something more than a guess or an arbitrarily selected figure. It requires a process to be undertaken, which will involve an investigation followed by an exercise of assessment and calculation. The investigation will need to cover matters such as the amount of information covered by the request, its location, and the hourly cost of those who will have the task of extracting it (in this case a rate imposed by the Regulations). The second stage will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information. Clearly the whole exercise must be undertaken in good faith and, as the Regulation provides, involve an element of reasonableness."*

28. The Commissioner recognises that such a process has been undertaken in this case, and that the public authority's estimate of the time required

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<sup>2</sup> Available online at <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

(based on the number of sets of minutes which would require scrutiny, the average length of those minutes and therefore the average time required to examine each set of minutes), appears to have been reasonably arrived at.

29. The public authority has acknowledged the interrelationship between section 13 and section 12 during the Commissioner's investigation, but did not rely on the provisions of section 12 of the Act in refusing the request. Therefore, while the Commissioner has examined the estimate of costs provided by the public authority in this case, he makes no finding in relation to section 12 of the Act. He notes, however, the associated breach of section 17(5) described at paragraph 19, above.

## **Exemptions**

### **Section 22**

30. The public authority explains that it is in the process of conducting a review of its constitution with the intention of approving that review in May 2011. As part of that process, the information requested by the complainant would be updated and published.
31. The Commissioner noted that the evidence submitted by the public authority post-dates the complainant's request for information, albeit only by a few days in the case of some of the evidence submitted. Nevertheless, the public authority has been unable to show conclusively that there was a settled intention to publish the information, at the time of the request.
32. He put this to the public authority, which responded that, while it conceded that the dates of the documents submitted as evidence did not show the intention pre-dated the complainant's request, it nevertheless maintained its position that it was always its intention to publish the information and the plans for the review of its constitution pre-date the request for the information. It offered to search for further evidence of this fact, but none has been provided.
33. The Commissioner accepts that a decision to review a council's constitution is not a minor matter, and is not one which would be taken lightly or casually. He also accepts the council's explanation that this process would necessitate a review of the council's 'A' delegated decision making powers and that the list provided to the complainant would therefore have been updated during the course of the wider review.
34. Nevertheless, the public authority has not provided any evidence to show, conclusively, that the decision to review its constitution was settled at the time of the request. Nor is there any conclusive evidence



to show that, following the review of the council's constitution, the information requested by the complainant would necessarily have been published. The public authority anticipates that, once the amended constitution has been approved (expected in June 2011), the current scheme of delegations will no longer exist.

35. The Commissioner accepts that the information relating to 'A' delegated powers would have been updated during the process of any review of NCC's constitution, but he has not located anything in the information provided to him which conclusively shows that there was a settled intention to publish any list of 'A' delegated decision making powers following the completion of that review. Furthermore, the information which will be published after the review will be most unlikely to comprise the same information as would have been contained in a compilation of 'A' delegated powers which were extant at the time of the complainant's request.
36. For this reason, the Commissioner does not find that the public authority correctly applied section 22 of the Act in refusing the requested information and concludes that this exemption is not engaged. He has therefore not found it necessary to consider the balance of the public interest in withholding the information under section 22 of the Act.

## The Decision

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37. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
  - By its failure to provide the complainant with information it held, within 20 working days, the public authority has breached section 10(1) of the Act.
  - By its failure to provide the complainant with a refusal notice within 20 working days, the public authority has breached section 17(1) of the Act.
  - By issuing a Fees Notice under section 13(1)(a) of the Act, but failing to state within its refusal notice that this a refusal of the request on the grounds of cost, under section 12(1) of the Act, the public authority has breached section 17(5) of the Act.
  - In refusing the request under section 22 of the Act, but failing to show a settled intention to publish the requested information, at the time of the request, the public authority breached section 22(1) of the Act.

## **Steps Required**

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38. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide the complainant with a response to his request for information which complies with the requirements of section 1 of the Act.
  - If the public authority estimates that the costs for compliance with the request will exceed the statutory limit, it must provide him with a notice which states that fact and, so far as it will be reasonable to expect, provide advice and assistance to help the complainant to refine his request in order to enable a response to be provided within the cost limit.
39. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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40. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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41. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

42. 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.
43. 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 23<sup>rd</sup> day of February 2011**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### General Right of Access

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#### **Section 1(1) provides that -**

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

- (b) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (c) 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."

#### **Section 1(3) provides that –**

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

#### **Section 1(4) provides that –**

"The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

**Section 1(5) provides that –**

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6) provides that –**

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

## **Time for Compliance**

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**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 10(2) provides that –**

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3) provides that –**

“If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4) provides that –**

"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

**Section 10(5) provides that –**

"Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

**Section 10(6) provides that –**

"In this section –

"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

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**Exemption where cost of compliance exceeds appropriate limit**

**Section 12(1) provides that –**

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

**Section 12(2) provides that –**

"Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

**Section 12(3) provides that –**

"In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

**Section 12(4) provides that –**

"The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."

**Section 12(5) – provides that**

"The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated."

**Fees for disclosure where cost of compliance exceeds appropriate limit**

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**Section 13(1) provides that –**

"A public authority may charge for the communication of any information whose communication –

(a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12(1) and 12(2), and

(b) is not otherwise required by law,

(c) such fee as may be determined by the public authority in accordance with regulations made by Secretary of State."

**Section 13(2) provides that –**

"Regulations under this section may, in particular, provide –

(a) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and

(b) that any fee is to be calculated in such a manner as may be prescribed by the regulations.”

**Section 13(3) provides that –**

“Subsection (1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.”

## **Duty to provide Advice and Assistance**

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**Section 16(1) provides that -**

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

**Section 16(2) provides that –**

“Any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

## **Refusal of Request**

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**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 17(2) states –**

“Where–



(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

1. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

**Section 17(3) provides that -**

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) 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 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."

**Section 17(4) provides that -**

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5) provides that -**

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6) provides that –**

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7) provides that –**

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

**Information intended for future publication**

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**Section 22(1) provides that –**

"Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

**Section 22(2) provides that –**

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1)."