

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 13th June 2007

**Public Authority:** Office of Government Commerce  
**Address:** Trevelyan House  
26-30 Great Peter Street  
London  
SW1P 2BY

### Summary

---

The complainant requested the RAG status of any government projects currently under Gateway Review and the name of the projects. The RAG status refers to a projects status i.e. Red, Amber or Green. The OGC confirmed it held two stage zero and one stage one Gateway Review in relation to the Government ID Card Project but refused to disclose the RAG status of the project as the information requested was subject to section 33 'Audit Functions' and section 35 'Formulation of government policy' of the Act and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner's review of the application of sections 33 and 35 found that the exemption under section 33 was engaged as the OGC has demonstrated that release of the information would, or would be likely to prejudice the exercise of any of its audit functions but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. The Commissioner found that section 35 was engaged but that the public interest in maintaining the exemption did not outweigh the public interest in disclosing the information. The Commissioner's decision is to uphold the complaint and order the OGC to disclose the requested information within 35 calendar days from date of this notice.

### 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. The Complainant has advised that on the 2 December 2005 the following request for information was made to the OGC:

*“My FOI request is ONLY to the red, amber, or green status of ALL gateway reviews. I do NOT want the recommendations.”*

3. On the 4 December 2006 the complainant further clarified his request stating that his request was only for the red, amber or green status of all gateway reviews and the identity of the projects involved and that he did not want any recommendations.
4. On the 11 January 2006 the OGC responded to the complainant confirming that it held gateway reports on the ID Cards Programme, two at stage 0 and one at stage 1 but that no projects were associated with the programme at present. The OGC explained that it considered that there was a direct correlation between the key findings in the gateway reviews, the final recommendations and the red, amber or green (RAG) status of a project. They stated that effectively the recommendations determine the RAG status and as such the RAG status is key Gateway information. The OGC explained that a RAG status is awarded to a project at the end of each stage of the gateway review process: Amber means the project should go forward with some action recommended; Green means the project is on target to succeed and Red indicated that there is immediate action necessary to achieve success. The OGC stated it was withholding the information requested under sections 33(1)(b) and 35(1)(a) of the Act.
5. Under section 33(1)(b) the OGC asserted that disclosure of the information would prejudice its functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions in so far as the Gateway review process is such a function.
6. The OGC stated that the ID card programme is still being developed and that the Gateway review is a key part of this policy development, informing areas for further development and ensuring that the development of the policy is on track and therefore section 35(1)(a) applies to the information requested.
7. In applying the public interest test the OGC acknowledged that there is considerable public interest in both understanding the programme and also ensuring its success. Additionally it acknowledged that there is considerable public interest in ensuring its successful delivery within budget to ensure value for public money. The OGC also stated that there is a strong public interest in transparency of the gateway process to allow public scrutiny of the process and in public authorities being robustly audited and examined. However, the OGC also argued that there is an overriding public interest in withholding information to the extent that disclosure of the information could inhibit the candour amongst future interviewees. The OGC suggested that it was important that gate interviewees are able to be candid about matters that could lead to serious recommendations being made to those responsible for the project. The OGC suggested that if reviewers felt the RAG statuses of reports were to become public they may feel pressure to change the status they would otherwise give, rendering the RAG status a less useful indicator. Further the OGC explained that gateway reports are drafted without any regard for public disclosure and are intended to be speedy

and private documents purely for the attention of those responsible for the project. Disclosure of the information, it argued would result in the report being less prompt and there was no public interest in delays. In conclusion the OGC found there is an overriding public interest in maintaining the exemptions.

8. The complainant requested that the OGC carry out an internal review of its decision on the 17 January 2006. Specifically the complainant asked the OGC to consider that the only information requested was the RAG status of the project.
9. The OGC carried out an internal review at the complainant's request on the 10 February 2006 but maintained its decision to withhold the requested information.

## The Investigation

---

### Scope of the case

10. On 20 March 2006 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 that his request was limited just to the RAG status and no other information.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The complainant specifically asked the Commissioner to check whether there was any Home Office involvement in the decision whether or not to disclose and whether the OGC gave under weight to any suggestions. Section 50 of the Act allows the Commissioner to investigate whether a request has been dealt with in accordance with the requirements of Part 1, it does not allow the Commissioner to investigate if a public authority obtained advice from other departments in making their decision.
12. The Commissioner's investigation focused on whether the OGC was justified in relying on the exemptions under sections 33(1)(b) and 35(1)(a) of the Act as its basis for withhold the RAG status of the ID card project.

### Chronology

13. On the 3 April 2006 the Commissioner began his investigation by writing to the OGC to inform it that a complaint had been received and asking for a copy of the information being withheld.
14. The OGC replied on the 10 May 2006 confirming that the documents considered for disclosure at the time of the complainant's request were two gate 0 reports of June 2003 and January 2004, and one gate 1 report of July 2005. The OGC also confirmed that there were no projects associated with the identity card programme at the time of the request. The OGC pointed out to the Commissioner that the gate 0 reports were already held by the Commissioner in relation to another complaint, but enclosed the gate 1 report. The OGC explained that whilst

- the request was only for the RAG status of the report they have provided the whole report as it considers the RAG status is inextricably linked to the recommendations. The OGC also attached a letter sent to the Commissioner on a separate case, the complainant in this case had requested copies of the gate zero reviews on the ID Card Programme, as the arguments set out in this letter have a read across to the OGC's decision on what to release in this case and provides helpful background to the Gateway process.
15. The Commissioner wrote again on the 23 October 2006 asking the OGC to explain in more detail why it believed the exemption was engaged.
  16. The OGC replied on the 20 November 2006 explaining why it felt the information should not be disclosed in relation to the exemptions under section 33(1)(b) and 35(1)(a). The OGC stated it wished to rely on the arguments put forward in relation to two other cases. In the other two cases the complainants had requested respectively, copies of the ID card stage zero gateway review and the RAG status of the ID Card programme. At the time these requests were made a stage 1 gateway review had not been completed. However, at the time this request was made the stage 1 gateway review had been completed and so was also considered for disclosure, for this reason OGC wished to put forward further arguments for withholding the stage 1 review. The OGC has considered that the RAG status of the ID card programme is inextricably linked to the gateway reviews themselves so in considering what is covered in the scope of the complainant's request has considered all gateway reviews held at the time of the request.
  17. The OGC pointed out that as regards the two other cases, the Commissioner had already made a decision, and these decisions were awaiting determination at the Information Tribunal and suggested to the Commissioner that there was merit in awaiting the outcome of this before taking further action.
  18. In his letter of 28 November 2006 the Commissioner informed the OGC that he intended to continue to investigate of the complaint and where necessary issue a decision notice.
  19. The Commissioner at a later stage thought it prudent to await the outcome of the Tribunal decision EA/2006/0068 and 0080 '*Office of Government Commerce and Information Commissioner*' which has now been determined as this investigation had been structured with reference to the findings of that decision.

### **Findings of fact**

20. The OGC has explained that the Gateway review process examines the progress of high to medium risk governmental projects at five critical stages of their life-cycle. Reviews are mandatory for projects which are classed as high or medium risk. Each gateway review is assigned a gate number which refers to the type of review being conducted, for example gate zero reviews comprise a strategic assessment of a programme and are intended to support future reviews however, gateway reviews do not necessarily progress in chronological succession. A Traffic Light Status (RAG) status is awarded to the project at the end of each

stage. Red status means the project team should take immediate action in order to achieve success. Amber status means the project should go forward, with action to be carried out or recommendations to be acted on before the next OGC Gateway review of the project. Green means the project is on target to succeed but may benefit from the uptake of recommendations.

21. The complainant believes that the information withheld should be provided to him and does not accept that the exemptions are engaged in respect to the information or that the public interest favours maintaining the exemption and therefore withholding the information.

## Analysis

---

### Exemption

#### Section 33 – audit functions.

22. The OGC has explained that one of its functions is to examine and review government projects, at critical stages of a project's life-cycle, to assess whether it can progress successfully and to make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied that the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that the OGC is a public authority to which section 33 may apply.
23. Section 33(1)(b) allows a public authority to refuse to disclose information if disclosure would, or would be likely to prejudice the exercise of the public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
24. The OGC have argued that releasing the RAG status of a particular project would remove the confidentiality of Gateway reports; if the reports were altered from confidential peer reviews to reports subject to public scrutiny then this would inhibit the frankness, candour and voluntary cooperation of the interviewees and discourage future cooperation. They consider that disclosure could also result in gateway reviews being written with disclosure in mind and so result in the reviews being less robust, less prompt and narrower in coverage. They argue this would weaken the Gateway process and therefore prejudice OGC's ability to carry out necessary examinations of efficiency, effectiveness and economy.
25. In reaching a decision as to whether in this case, disclosure of the information would or would be likely to prejudice the exercise of the OGC in its audit functions, the Commissioner has considered the Tribunal decisions EA/2006/0068 and 0080 '*Office of Government Commerce vs. Information Commissioner*'. The tribunal first considered the threshold to be considered when

applying the prejudice test and concluded that 'would or would be likely' indicates prejudice being more probable than not.

25. The Tribunal also found that the OGC was reasonable in concluding that there would be a weighty chance of harm, because the underlying way that Gateway Reviews are undertaken would need some change to current practice if it were to be demonstrated under FOIA that there could be no guarantee that reviews would be kept from disclosure in the future. These changes, it concluded would put the currently practised process at some risk and therefore it was reasonable for the OGC to determine that disclosure of the disputed information would be likely to prejudice the undertaking of Gateway Reviews and therefore the OGC's function.
26. The Commissioner has considered the OGC's arguments put forward in this case and the decision of the Tribunal and has decided that the OGC has demonstrated that release of the requested information would, or would be likely to, prejudice the exercise of its audit functions under section 33(1)(b). The Commissioner's decision is therefore that the exemption is engaged

### **Public Interest Test.**

27. Section 33 is a qualified exemption and is subject to the public interest test. The OGC assert that the public interest lies in maintaining the exemption and that therefore the information is exempt from disclosure.
28. In considering the arguments for maintaining the exemption the Commissioner considered the following arguments put forward by the OGC in this case and in the Tribunal decision:
  - There is a public interest in successful delivery of the programme for two reasons: the potential impact in improving a significant proportion of people's lives and the effective use of public money. To ensure these are met it is important that the programme is subject to effective and prompt peer review based on candid interviews. Maintaining confidentiality in order to promote openness, honesty and candid exchange of information is fundamental to this process.
  - Disclosure of the information would make interviewees become more guarded and cautious in their communications.
  - The public interest is already met in the increasing amount of information about the programme already in the public domain combined with the parliamentary scrutiny being afforded the programme.
  - Disclosure of the RAG status would put pressure on reviewers to 'soften' the status from red to amber which would enable the RAG status a less useful tool.
  - Current stakeholders involved in the review process such as interviewees, reviewers, SRO's and members of the private sector would become unwilling to be involved.
  - The process would become lengthened as more consideration would be given to the potential further disclosure of the information contained within the review. Additionally the content of the review would become more bland and issues of sensitivity could be omitted.

29. The following arguments from the complainant and the Tribunal were considered in favour of disclosure:
- There is a public interest in understanding the programme and ensuring its successful delivery and value for money.
  - There are general public interest arguments in transparency and scrutiny of the project, and in this case there is specific public interest in disclosure as relates to the ID cards scheme and the OGC's reports and Gateway reviews.
  - The current means of public scrutiny available through the National Audit Office and Public Accounts Committee involve largely historical and retrospective views and are not related to current projects. Gateway Reviews would provide a level of public scrutiny of current projects.
30. In reaching a decision as to where the balance on the public interest lies the Commissioner has considered the Tribunal's conclusions. The Tribunal pointed out that the arguments put forward by the OGC were based on the fact that the review system could only be successful if disclosure is not a realistic possibility. The Tribunal also highlighted that since the publication of the Commissioner's notices and therefore the risk that the information could be disclosed, those involved in Gateway reviews were still able to undertake them successfully.
31. The Commissioner also considers that the main constraint on frankness from interviewees is not the prospect of publicity but that they may upset colleagues at a more senior level. Comments in the Gateway review are non-attributable to individuals and that this will be completely unaffected by any prospect of disclosure. Whilst the Commissioner acknowledges that there is still a risk that it will be possible to ascertain who was the source of particular comments, that this risk is not limited to disclosure under FOI, this is also a risk from insiders who see the report and will be most familiar with the position of interviewees. It would be unrealistic to imagine that people would not take part in the system because of the possibility of disclosure, not least because, in accordance with the Civil Service Code, civil servants must fulfil their duties and obligations responsibly.
32. The OGC have argued that disclosure could lengthen the process as consideration would need to be given to the potential disclosure under FOI of any review. However, the current ground rules regarding timescales for review are clear, and if the OGC make it clear that these ground rules will still be applied then these concerns will be dissipated.
33. The Commissioner has considered all the circumstances of the case and finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

### **Section 35 – formulation of government policy**

34. The OGC also argued that the requested information was exempt from disclosure by virtue of section 35 of the Act. Section 35 exempts information held by a

government department from disclosure if it relates to the formulation or development of government policy.

35. The OGC have argued that the ID card programme, which is the only current ongoing gateway review covered by the scope of the complainant's request, is in a state of ongoing policy development. It has argued that the Gateway review process is a key part of this policy development as it informs the Home Office of areas for future development and therefore helps ensure that development of policy is also on track. The OGC assert that disclosure of the RAG status would prevent policy formulation or development from taking place in the self-contained space needed to ensure that it is done well. They also argue that disclosure would make policy development less effective by focusing departments' attention on obtaining a 'green' status rather than on effective formulation and development of policy.
36. It is arguable whether the exemption at 35(1)(a) is engaged in respect of the requested information. There is a strong argument that the information contained in the reports in fact relates to the implementation of the ID Card project, rather than to the formulation or development of government policy on ID cards. It is also worth noting that the information requested is for the RAG status and not the information contained in the reports and it is debatable whether this information alone engages the exemption. The original ID Card Bill was announced in the Queen's Speech of November 2004. The Act of 2006 has now received royal assent and is on the statute book. Therefore it is arguable whether Government policy on identity cards was still being formulated or developed when this information was requested. However, the Commissioner is willing to accept that the information does relate to the development of government policy. Disclosing the RAG status alone could relate to the development of government policy as revealing that a project has a RED status could affect decisions ministers make about its future development, and is therefore willing to accept that section 35 is engaged.

### **Public Interest Test**

37. Section 35 is a qualified exemption and is subject to the public interest test. The OGC assert that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. The complaint has put forward what he considers to be strong public interest arguments in favour of the release of the requested information. These are:
- There is a public interest that Minister's statements can be assessed for their completeness- and release of the red, amber or green status would affect that.
  - It is in the public interest that when Ministers state the ID Card Programme has had a clear bill of health they confirm the project's status.
  - If the status of the ID Card Project is red, or has been red it is in the public interest that the information is disclosed.
  - In any case where there are recommendations to be carried out either under an amber or green status it is in the public interest to distinguish this.



39. The OGC put forward the following public interest arguments for maintaining the exemption:
- The public interest in successful delivery of the programme must take account of two factors: the potential impact in improving a significant proportion of the public's lives and the effective use of a large amount of public money. To ensure these interests are met, it is important that the programme is subject to effective and prompt peer review, based on candid interviews.
  - An increasing amount of information about the programme has been put in the public domain. Combined with the parliamentary scrutiny being afforded the programme, it goes some way to meeting the public interest in increased scrutiny.
  - Disclosure would (or would be likely to) inhibit candour among future interviewees on this and other programmes. Any resulting lack of candour would cause Gateway reviews to be less useful.
  - In particular, if there were an expectation that RAG status would become public, reviewers might feel pressure to change the status e.g. from red to amber, which would render the RAG status a less useful indicator and would not be in the public interest.
40. The Commissioner has decided that section 35 of the Act is engaged. In order to decide whether the public authority has dealt with the complainants request for information in accordance with the requirements of Part 1 of the Act the Commissioner must assess whether in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In coming to his decision the Commissioner has taken the following factors into account.
41. The Commissioner is aware of the importance the Government attaches to the Gateway Review process. He recognises that there is a balance to be struck between the competing societal objectives of public accountability and transparency and the importance of maintaining public confidence in the robustness and effectiveness of the Gateway Review process. The Commissioner has taken these competing objectives into account in reaching his decision and has taken full account of the approach adopted by the Tribunal in EA/2006/0068 and 0080 *'Office of Government Commerce and Information Commissioner'*
42. The subject of these reports will have a significant impact on the lives of individuals and their relationship with the state. The Commissioner considers that this in itself presents a very strong argument in favour of disclosure. The public should therefore be kept informed as far as possible as to how the programme is progressing and what impact identity cards will have on them. Disclosure is likely to enhance public debate of issues such as the programme's feasibility and how it is being managed. It will also allow the identification of project risks and practical concerns. It could also go some way towards educating the public by allowing it to develop a better understanding of the issues surrounding the development of identity cards. In the Commissioner's view the nature of the identity card project and its implication for citizens is in itself a highly significant factor in deciding in favour of disclosure.

43. The Commissioner is mindful of the OGC's view that because the programme is of such great public importance, there is strong public interest in the programme being successful. The OGC argues that it is therefore essential that the integrity of the Gateway Process is maintained and not damaged in any way. The Commissioner has taken this into account but still considers that allowing the public a better understanding of the development of the ID card programme outweighs the public interest arguments put forward by the OGC. In any event, the Commissioner is not persuaded that disclosure of the information requested will damage the Gateway Process in the way the OGC has suggested it will.
44. The Commissioner is mindful of the OGC view that the release of the information showing the ID card scheme's traffic light status would make future prospective interviewees less willing to participate in the Gateway Process, or that they may be less candid or frank with their comments. However, in this case he is not persuaded by this argument.
45. In the Commissioner's opinion the reports do not contain any information which would cause participants to be less willing to contribute openly and fully to future Gateway Reviews. Gateway reports do not attribute comments to any particular person, although the Commissioner recognises that in some cases the nature of the information is such that it may be possible to attribute the comment to a particular individual. However, even if it is possible to do this, the Commissioner is still not convinced that disclosure of the requested information would, or would be likely to, lead to contributors being less candid in future reports. Should there be evidence of this, the organisations involved must take the necessary measures to ensure their staff continue to deliver the quality of advice that they are expected to do.
46. In any event in this case the complainant has only asked for the status of the Gateway Review. In the Commissioner's opinion disclosing the status will not reveal details of the concerns or recommendations that may have been raised by participants. He is therefore unable to accept that interviewees will be less frank with their comments if the traffic light status is disclosed.
47. The Commissioner's assessment is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

## The Decision

---

The Commissioner's decision is that the OGC has demonstrated that release of the requested information would, or would be likely to, prejudice the exercise of its audit functions under section 33(1)(b) of the Act. The Commissioner's decision is therefore that the exemption is engaged. The Commissioner also finds that the exemption at section 35(1)(a) is engaged in respect of the requested information as the public authority has demonstrated how the requested information relates to the formulation of government policy. However, in relation to both exemptions, he finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

49. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

### **Steps Required**

---

50. The Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires the OGC to disclose the information requested to the complainant within 35 calendar days of the date of this Notice.

### **Failure to comply**

---

51. 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

---

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

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 13th day of June 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## **Legal Annex**

### **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.”

### **Effect of Exemptions**

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

### **Audit functions.**

**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 33(3)** provides that –

“The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) 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).”

## 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.