

Freedom of Information Act 2000 (Section 50)

Decision Notice

20 January 2009

Public Authority: Home Office
Address: Seacole Building
2 Marsham St
London
SW1P 4DF

Summary

The complainant requested any recorded information held on the decision to ban members of the police force from membership of the British National Party. The public authority refused the request, citing the exemptions provided by sections 35(1)(a) (formulation and development of government policy), 36(2)(b)(i) & (ii) (effective conduct of public affairs), 41(1) (information provided in confidence) and 42(1) (legal professional privilege). The conclusion of the Commissioner is that sections 35(1)(a) and 36(2)(b)(i) were applied correctly. As this conclusion relates to the entirety of the information withheld, it has not been necessary to also consider whether sections 41(1) and 42(1) were applied correctly. However, the Commissioner also finds that the public authority failed to provide a valid refusal notice within 20 working days of receipt and, therefore, failed to comply with section 17(1) and that the refusal notice was inadequate for the purposes of sections 17(1)(a), (b) & (c) and 17(3)(b).

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 information request was made on 25 January 2006 and was worded as follows:

"Please provide copies of correspondence and any other recorded information held by the Home Office in relation to the decision to ban British National Party members from the police force."

3. The initial response to this was dated 20 February 2006. This stated that it would not be possible to provide a full response within 20 working days of the date of the request as it would be necessary to consider the balance of the public interest in connection with sections 35 (formulation and development of government policy) and 42 (legal professional privilege). The complainant was advised that the public authority intended to provide a full response by 22 March 2006.
4. The refusal notice sent to the complainant was dated only as April 2006. The public authority later confirmed to the Commissioner that this was sent on 24 April 2006. The following information was disclosed to the complainant:
 - ACPO's (the Association of Chief Police Officers) policy
 - Correspondence between ACPO and the public authority covering the period 6 July to 3 August 2004.
 - ACPO's press release of 7 November 2003
 - A letter from the public authority to Chief Police Officers dated 21 December 2004.
 - A transcript of an interview with the then Home Secretary on the Today programme on 4 November 2003.
 - Written advice to ministers dated 26 November 2004.
5. The public authority went on to confirm that it held additional information falling within the scope of the request that would not be disclosed. This information was withheld under sections 35 (formulation and development of government policy), 36 (effective conduct of public affairs), 41 (information provided in confidence) and 42 (legal professional privilege). The public authority gave a brief explanation for each exemption cited.
6. The complainant subsequently requested an internal review of the handling of his information request. The public authority responded with the outcome to the review on 20 July 2006, which upheld the earlier refusal.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 21 July 2006. The complainant specified the refusal to disclose the information requested as the grounds for his complaint.

Chronology

8. The Commissioner contacted the public authority initially on 27 March 2008. The basis for the complaint was set out and the public authority was asked to respond clarifying its stance. Specifically in connection with section 35(1)(a), the public authority was asked to be clear as to how the withheld information relates to the formulation and development of government policy and why the public interest

was believed to favour the maintenance of the exemption.

9. In connection with section 36, the public authority was asked to confirm whom had acted as qualified person (“QP”), the date on which the opinion was given and what was taken into account when forming this opinion. The public authority was also asked why and how in the reasonable opinion of the QP inhibition would result through disclosure, including confirmation of whether the QP believed that inhibition would result, or would be likely to result and why the public interest was believed to favour the maintenance of this exemption.
10. It was noted that the internal review response had stated that section 41 was considered to apply in relation to information supplied to the public authority by ACPO. The public authority was asked to state why this information was considered to carry the requisite quality of confidence, such as if this had arisen as a result of a specific guarantee of confidence given at the time that the information was provided to the public authority by ACPO. Alternatively, this quality of confidence may have arisen through less formal means, such as if the nature of the information in question meant that it would be subject to an expectation of confidence even where no specific guarantee of this had been made.
11. In connection with the citing of section 42, the public authority was asked to state whether the privilege claimed was advice privilege or litigation privilege and to confirm whether the information in question records advice given by a qualified legal professional acting as legal advisor to the public authority. The public authority was also asked to state why the public interest was believed to favour the maintenance of the exemption.
12. The public authority was also asked to provide to the Commissioner a copy of the withheld information in order to assist in the considerations of whether the exemptions cited had been applied correctly.
13. The public authority responded on 16 May 2008. In connection with section 35(1)(a) the public authority stated that a full explanation would be given in later correspondence. The public authority advised that it now wished to introduce section 35(1)(c) and neither confirm nor deny whether it held information falling within the class described in that subsection.
14. In connection with section 36, the public authority specified subsections 36(2)(b)(i) & (ii). It was confirmed that Tony McNulty MP, described as “*Duty Minister at the time*” had acted as QP. The opinion had been given on 30 March 2006 and, whilst the QP did not view the withheld information at that stage, a submission had been provided to the QP in order to assist in the formulation of his opinion and this had included “*a detailed and extensive summary*” of this information. At the internal review stage, the QP had been provided with a further submission which had included the withheld information and had reaffirmed his previous opinion.
15. The public authority went on to confirm that the opinion of the QP had been that prejudice would result through disclosure, rather than that it would be likely to

- result. The public authority further stated that the opinion of the QP had been that the discussions detailed in the withheld information were relatively recent and that this meant that disclosure of the details of these would prejudice the free and frank provision of advice. It was also specified that this exemption had been cited specifically in connection with information that post dated the ban on police membership of the British National Party (the "BNP") which the public authority recognised would not be subject to section 35(1)(a) and that further explanation for the citing of this exemption would be given in subsequent correspondence.
16. On section 41, the public authority stated that this had been cited in relation to legal advice received by various police forces and ACPO and subsequently shared with the public authority. The public authority referred to one item as an example, a letter from the Chief Constable of Leicestershire Constabulary to the public authority, and stated that the contents of this were sensitive and stressed that this had been marked as *'in confidence'*.
17. In connection with section 42, the public authority clarified that the privilege claimed is advice privilege. On the issue of public interest, the public authority stated that it is necessary for it to seek and receive legal advice in confidence and that disclosure would have an adverse affect on *'the freedom with which legal advice is sought'*.
18. A copy of the information withheld from the complainant was provided to the Commissioner. The information withheld was provided in five bundles. These bundles consisted of the following:
- Bundle 1: Submissions to the Permanent Secretary of the public authority on the issue of the police BNP membership ban dated 28 February and 11 March 2005. Withheld under section 36(2)(b)(i) & (ii).
- Bundle 2: Submissions to ministers within the public authority on the issue of the police BNP membership ban dated between 17 November 2003 and 7 December 2004. Withheld under section 35(1)(a) and in part under section 42.
- Bundle 3: Correspondence between Hampshire and Leicestershire Constabularies on the issue of the BNP membership ban dated 16 July 2004 and 23 September 2004, including legal advice taken on this issue by these constabularies. Withheld under sections 35(1)(a), 41 and 42.
- Bundle 4: Postal and e mail correspondence between the public authority and the Police Federation of England and Wales, Police Superintendents' Association, Police Advisory Board, the DTI and several police forces on the BNP ban, dated October and November 2004. Withheld under section 35(1)(a).
- Bundle 5: E mail exchange internal to the public authority between legal advisor and officials on the BNP membership ban, dated September, October and November 2004. Withheld under sections 35(1)(a) and 42.
19. The public authority responded with its further arguments on section 35(1)(a) and section 36(2)(b)(i) & (ii) arguments on 9 June 2008. In connection with section

35(1)(a), the public authority referred to the following Information Tribunal judgements:

“the approach of the DfES is broadly correct, mainly because this is a class of information enjoying a qualified, not an absolute exemption. That fact, of itself, enables, indeed requires a public authority to adopt a commonsense approach to the disclosure of information, which will cause no or no significant damage to the public interest. For that reason alone, we conclude that “relates to” and “formulation and development of policy” can safely be given a reasonably broad interpretation...” (paragraph 53 DfES vs the Commissioner & Evening Standard (EA/2006/0006; 19/02/07))

“When asking the question, whether the minutes of a particular meeting or part of one, a memorandum to a superior or a minister or a note of advice fall within s35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s.35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable.” (paragraph 58 DfES vs the Commissioner & Evening Standard (EA/2006/0006; 19/02/07))

20. The public authority referred to the information withheld under this exemption as ministerial submissions and communications within the public authority and with external organisations including the Police Federation about the regulations banning police membership of the BNP. The withheld information also covers the drafting of the content of the regulations. The position of the public authority was that this process relates to the formulation and development of government policy on challenging racism.
21. The public authority recognised a public interest argument in favour of disclosure where this would allow an informed public debate about the ban. It was also recognised that the public interest favoured the disclosure of information that would demonstrate that the public authority undertakes a thorough process when formulating and developing policy.
22. The public authority gave background to the development of the policy towards BNP membership within the police. It was stressed that the issue of alleged racism within the police force is extremely sensitive and was ongoing at the time of the request. This policy was developed in the context of the Stephen Lawrence Inquiry Report (February 1999) that had related to issues of racial discrimination within the police force and the BBC documentary ‘*The Secret Policeman*’, originally broadcast in October 2003.
23. This documentary in particular had appeared to affirm suspicions of racist elements within the police and had required an urgent reaction by the police and the public authority to address this issue. This resulted in what the public authority described as *“a frenetic period of policy development, and this necessitated detailed and clear dialogue with ACPO and with ministers.”*
24. The public authority referred to the chronology of events, stating that a ban on

BNP membership for police *officers* had come into effect in January 2005. Discussion on extending this ban to all police staff continued into 2005. The public authority stressed that it believed that the process of formulation and development of policy did not cease at the point that the ban on BNP membership for police officers was introduced in January 2005.

25. The public authority went on to refer to the content of the information withheld under this exemption, stating that these deal with the rationale for the policy and include frank exchanges of views on this issue. It was also stressed that these discussions were recent and disclosure would have a particularly strong prejudicial effect on future exchanges as a result. The public authority further believed that disclosure would damage its relationship with those stakeholders with which these issues were discussed and undermine future policy development carried out in collaboration with external stakeholders. Overall, the public authority stressed that the policy in question here and wider issues of racial discrimination within the police were at the time of the request and remain sensitive, current and volatile. The public authority also believed that the public interest had been served in so far as the substantial media coverage of this issue had enabled an informed public debate.
26. The public authority referred again to the aforementioned Information Tribunal decision:
- “We fully accept the DfES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike...”* (paragraph 75 DfES vs the Commissioner & Evening Standard (EA/2006/0006; 19/02/07))
- “...difficult to see how release of this information would actually inform public debate on the basis that there is a clear distinction between the information which simply added to the sum of human knowledge, and information that actually furthered a clear public interest.”* (paragraph 44 DfES vs the Commissioner & Evening Standard (EA/2006/0006; 19/02/07))
27. On section 36(2)(b)(i) & (ii), the public authority referred to the reasoning given in the internal review response. The internal review response referred to the need for officials to undertake rigorous and candid assessments of the options on offer and to be able to put forward frank advice. The public authority believed that these processes would be inhibited through disclosure. Whilst the internal review response referred to these as public interest arguments, it appears these are more likely to have been the basis for the QP's opinion that this exemption was engaged.
28. In its response of 9 June 2008, the public authority further stated that the reasoning for citing section 36 and for why it was believed that the public interest favoured the maintenance of this exemption were closely related to those given in connection with section 35(1)(a), particularly the need to discuss the options

available freely and frankly and to offer free and frank advice. In this case these processes took place within a highly pressurised environment, the aforementioned *“frenetic period of policy development”*, and that the public interest in maintenance of this exemption was strengthened owing to the withheld information recording discussions which took place relatively recently.

29. The public authority also clarified that this exemption was believed to apply to parts of the withheld information that post dated the ban on police BNP membership and had not been applied to the same information considered exempt by virtue of section 35(1)(a).
30. The Commissioner contacted the public authority again on 10 June 2008. It was noted that the public authority had previously referred to the QP having been provided with submissions to assist in the formation of an opinion in connection with section 36(2)(b)(i) & (ii) both at the time of the initial request and at the internal review stage. The public authority was asked to provide to the Commissioner a copy of these submissions. The public authority responded on 25 June 2008 with a copy of the submissions provided to the QP. These consist of:
 31. First submission dated 30 March 2006 to the Home Secretary and copied to various other officials within the public authority. This sets out the background, advising that the request has been made, the identity of the complainant and the information requested. The public authority redacted from the version of this document supplied to the Commissioner content that it stated did not relate to the citing of section 36. Included within this submission is a paragraph in which it is advised that section 36 is thought to be applicable as the *“freedom with which officials could provide such advice would be undermined if disclosure were anticipated...”*.
 32. Second submission dated July 2006 to Mr Tony McNulty MP, who acted as QP, and copied to various officials within the public authority. The information withheld under section 36 was provided to the QP with this submission. This recommended that the QP maintain his opinion that section 36 is engaged as *“disclosure of these deliberations would very likely inhibit free and frank exchanges between officials in the future”*. This submission went to state why the public interest was believed to favour maintenance of the exemption, referring mainly to any inhibition to frank advice being counter to the public interest and stating that the public interest arguments against disclosure were strengthened as a result of the withheld information recording exchanges that were relatively recent.
33. The Commissioner contacted the public authority on 2 July 2008 and asked that it clarify whether the ban on police BNP membership is a policy of ACPO's in interpretation of statute which ACPO had discussed and agreed with the government, or whether it is government policy enshrined in statute. The public authority confirmed that this ban is government policy enshrined in statute within the Police (Amendment) Regulations 2004. This includes the following provision:

“1(1)(2) A member of a police force shall in particular-

*(a) not take any active part in politics;
(b) not belong to any organisation specified or described in a determination of the Secretary of State.”*

34. The public authority also confirmed that the following determination had been made by the Secretary of State and that this had effect from 1 January 2005:

“No member of a police force may be a member of any of the following organisations-

- a) the British National Party;
b) Combat 18;
c) the National Front.”*

Findings of fact

35. The ban on police membership of the BNP came into force on 1 January 2005 and is enshrined in statute in a determination made by the Secretary of State under the Police (Amendment) Regulations 2004.
36. Mr Tony McNulty MP acted as QP for the purposes of section 36 in this case. The website of the public authority records that Mr McNulty was Home Office Minister with responsibility for Immigration, Nationality and Citizenship at the time of the information request.

Analysis

Procedural matters

Section 17

37. The request was made on 25 January 2006. The response to this was dated 24 April 2006. Whilst section 17(3)(b) allows that the time within which a response detailing the balance of the public interest should be provided may be extended beyond 20 working days, there is no extension beyond 20 working days from receipt of the request to the time within which a response must be provided setting out, in accordance with section 17(1), why the exemptions cited are believed to be engaged. Whilst the public authority did reply to the request initially within 20 working days of receipt, on 20 February 2006, this response did not confirm that the exemptions ultimately relied upon were engaged or the reasons why these exemptions were believed to be engaged. In failing to provide a valid refusal notice within 20 working days of receipt of the request, the public authority breached section 17(1).
38. As noted above, section 17(3)(b) allows an extension to the time within which a response detailing the public authority's considerations of the public interest must be provided. Section 17(3) allows that the time limit can be extended to such time

as is reasonable according to the circumstances of the request. The policy of the Commissioner on this issue is that a full response, covering the balance of the public interest, should be provided within 20 working days of receipt. Where a delay is unavoidable, the Commissioner believes that the maximum time extension reasonable in any circumstance would be to 40 working days from receipt of the request. In this case the public authority failed to provide its full response within 40 working days of receipt of the request and in so doing breached section 17(3)(b).

39. As noted above, when corresponding with the Commissioner about this case, the public authority sought to introduce section 35(1)(c), which had not been cited at any time during the correspondence between the public authority and the complainant about this request. Whilst the Commissioner will generally allow a public authority to introduce additional exemptions after a complaint has reached his office, provided the public authority makes clear to the Commissioner its wish to introduce additional exemptions at the earliest possible opportunity, the fact remains that the complainant was not advised that this exemption was considered to apply. In not informing the complainant that section 35(1)(c) was believed to be engaged, the public authority failed to comply with section 17(1)(a), (b) and (c).

Exemption

Section 35

40. The public authority has cited section 35(1)(a). This provides that information that relates to the formulation or development of government policy is exempt. The task in considering whether this exemption is engaged is to consider whether the information in question can be accurately characterised as relating to the formulation or development of government policy. This exemption is qualified by the public interest. This means that, however clear it is that the exemption is engaged, the information should be disclosed if the public interest favours this.
41. When considering whether this exemption is engaged, it is firstly necessary to establish whether the public authority is amongst those to which this exemption is available. This exemption is only available to those public authorities that have a role in the formulation or development of government policy. As the public authority in this case is a central government department, it is clear that it does have such a role and, therefore, that this exemption is available to it.
42. Turning to whether the information can be accurately characterised as relating to the formulation or development of government policy, the Commissioner's view is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. As the public authority itself noted, at paragraph 58 of *DfES vs the Commissioner & Evening Standard* (EA/2006/0006; 19/02/07), the Information Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of that information, rather than on a line by line dissection. The Commissioner's decision here is based on whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a

minute dissection of the content of this information.

43. Prior to considering whether the information relates sufficiently closely to the formulation and development of the policy of banning police membership of the BNP, the Commissioner has considered firstly whether this ban constitutes government policy. Had the ban been, for example, an ACPO policy that, whilst supported by the government, was not enshrined in statute, this would not constitute a government policy. In this case, as noted above at paragraph 34, the BNP membership ban was enshrined in statute on 1 January 2005. The Commissioner therefore accepts that the process of formulating and developing this ban would constitute the formulation and development of government policy.
44. Turning to whether the content of the withheld information supports the characterisation of relating to the formulation or development of government policy, this information can be separated into two broad categories; (i) exchanges within the public authority and (ii) discussions between the public authority and third parties. All of the information in connection with which section 35(1)(a) has been cited pre dates the 1 January 2005 BNP membership ban.
45. In relation to the information falling within the former category, that is exchanges within the public authority, the content of this consists of exchanges between officials and ministers on the issue of the BNP membership ban. This includes addressing how to give effect to this policy and whether this policy would be capable of surviving a challenge to its legality. Having accepted that the BNP membership ban is a government policy, the Commissioner accepts that the process recorded in this information constitutes the formulation and development of government policy and, therefore, falls within the class of information specified in the exemption.
46. Turning to the information in the second category, relating to discussions between the public authority and third party organisations, the Commissioner has borne in mind here that whilst some of these third party organisations are public authorities and thus are covered by the Act, this exemption would not be available to these organisations as they do not have powers to formulate or develop government policy. Information relating to these third party organisations can be broken down into two further sub-categories: (i) correspondence between the third party organisations and the public authority and (ii) correspondence between two or more third party organisations that has not involved the public authority.
47. In relation to the first sub category above, the Commissioner concludes that this information can be accurately characterised as relating to the formulation or development of government policy. It is not the case that the only information that could accurately be characterised as relating to the formulation or development of government policy would be a record of internal discussions within a central government public authority. In this case, the public authority has consulted with various police forces and other police related organisations about the BNP membership ban. This process contributed to the formulation and development of this policy and would, therefore, fall within the class specified in the exemption.
48. In relation to the second sub category above, this information was provided to the

public authority by ACPO as enclosures with a letter. Whilst this information does not record exchanges which involved the public authority, the argument of the public authority is that these fed into the process of formulating and developing government policy. The Commissioner accepts that this information can be accurately characterised as relating to the formulation and development of government policy, despite not recording exchanges with or internal to the public authority. This is on the basis that the contents of this information discuss the issue of the BNP membership ban and that they were provided as enclosures with a letter provided by ACPO to the public authority which concerned that overall issue.

49. The conclusion of the Commissioner is that the exemption provided by section 35(1)(a) is engaged in respect to the information withheld here. This is on the basis that the police BNP membership ban is a government policy and that the contents of the withheld information record the process of the formulation and development of this ban.

The public interest

50. Having concluded that the exemption is engaged, it is necessary to go on to consider whether the public interest favours the maintenance of the exemption. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006; 19/02/07) the Information Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner's considerations of each of these principles is set out here.

The information itself

51. *"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"* (paragraph 75)

This comment from the DfES case was commended as a statement of principle by Mr Justice Mitting in the High Court decision *Export Credits Guarantee Department v Friends of the Earth*.

52. The content of the information here concerns an issue of clear public interest; the avoidance of racism within the police force. To the extent that disclosure here would contribute to public knowledge and debate on this issue, the public interest would favour disclosure.
53. However, the nature of this information can also be employed as an argument in favour of maintenance of the exemption. Given the sensitive and controversial nature of the subject discussed within the withheld information, this may suggest that in order for all policy options in this area to be discussed thoroughly and robustly, it is necessary for this to take place in a private space away from the possibility of disclosure. If the government is unable to carry out effective policy

formulation and development as a result of the possibility of disclosure, this would be counter to the public interest.

'Status' of information not relevant

54. *"No information within Section 35(1)(a) is exempt from the duty of disclosure simply on account of its status or its classification as minutes or advice to a minister, nor because of the seniority of those whose actions are recorded. To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1)(a) class of absolutely exempt information"* (paragraph 69)

55. The Information Tribunal commented further on the suggestion that there is a particular importance attached to exempting from disclosure information that falls within the class specified in section 35(1)(a) in the case *DWP v the Information Commissioner* (EA/2006/0040; 05/03/07). In that case the DWP argued that:

"[section 35(1)(a)] was an exemption of particular importance...[and that] greater weight should be attached to the public interests in favour of maintaining the exemption in order to protect Government space for deliberation on policy". (paragraph 60)

The Tribunal rejected this argument.

56. The High Court has also considered this issue and endorsed the above approach in the case *OGC v The Information Commissioner*. It commented at paragraph 79 that:

*"I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to 'the public interest in maintaining the exemption', which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms, and interpreted literally it covers information that cannot possibly be confidential. For example, a report of the Law Commission being considered by the Government with a view to deciding whether to implement its proposals would be or include information relating to 'the formulation or development of government policy', yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to Parliament an intention to create a presumption of a public interest against disclosure. I therefore agree with the view expressed by the Information Tribunal in *The Department for Education and Skills v the Information Commissioner and the Evening Standard* "*

57. The information in question here includes that discussed at the very highest level within the public authority in the form of submissions between senior officials and ministers. That this information records discussions that took place at senior levels within the public authority does not, however, indicate that the public interest in favour of maintenance of the exemption is stronger than in comparison to a record of discussions undertaken at less senior levels. To the extent that the senior levels of this discussion may indicate that this information is of a sensitive nature, this would be a factor covered under the previous heading. Neither does

the conclusion above that the information falls within the class described in section 35(1)(a) suggest that the starting point when considering the balance of the public interest is that the public interest favours maintenance of the exemption.

Protection for civil servants not politicians

58. That disclosure may expose the decision making of politicians to criticism, fair or otherwise, is not a valid argument in favour of maintenance of the exemption. In this case the public authority has advanced no argument that the public interest favours maintenance of the exemption on the basis that politicians should be protected from the results of disclosure.
59. However, whilst it is not unfair to politicians to release information that allow their policy decisions to be challenged after the event, there is a public interest in preserving the convention of collective Cabinet responsibility. This would be in order to allow the Cabinet to discuss issues in a free and frank manner in order to improve the decision making process. Disclosure of information showing that ministers had voiced individual disagreement for policies at the discussion stage may discourage thorough Cabinet discussion and may lead to time being spent justifying individual ministerial views that were never government policy.
60. Having reviewed the information in question here, the Commissioner does not believe that this includes any content the disclosure of which would be likely to threaten the preservation of the convention of collective Cabinet responsibility. Neither has the public authority advanced any arguments connected to this point and this is not, therefore, a factor that carries weight here.

Timing

61. Whilst policy is in the process of formulation or development at the time of the request it is less likely that the public interest would favour disclosure unless the arguments in favour of this were particularly compelling such as, for example, if disclosure would expose wrongdoing in government. The timing of a request is of importance. In this case the formulation and development of the policy appears to have been completed with the determination of the Secretary of State on 1 January 2005. Whilst the public authority has suggested that the policy making process in this area is ongoing, the information supplied to the Commissioner by the public authority as that withheld from the complainant and subject to this exemption relates to a policy making process that was completed on 1 January 2005. The request was made on 25 January 2006. The formulation and development of the policy in question here would not, therefore, have been impacted upon through disclosure and so no argument can be made that on this basis the public interest favours maintenance of the exemption.

Completion of policy formulation or development

62. As noted above, policy formulation and development to the extent that it led to the determination of the Secretary of State was complete by the time of the request. The public authority has argued that further discussions about this policy

continued after the date of this determination and this point is returned to below.

63. That the process leading to the determination was complete by the time of the request does not, however, indicate that there would no longer be any sensitivity to this information. The issue of racism in the police is of considerable sensitivity. If disclosure would disrupt a policy designed to reduce racism within the police, this would be counter to the public interest and the Commissioner recognises that this factor carries some weight in favour of maintenance of the exemption.

Information in the public domain

64. The decision to ban police membership of the BNP was the subject of a considerable volume of media coverage. Although there is no suggestion that the information in question here has been disclosed into the public domain through this coverage, this coverage can be relevant to the balance of the public interest in other ways.
65. Firstly, if the media coverage had been sufficiently informative that disclosure of the information in question would provide little further illumination about the issues at stake, it could be argued that the public interest in disclosure would be reduced. However, the Commissioner does not believe that is the case here for two reasons, the first of these being that, regardless of how voluminous and informative the media coverage, there will always be an argument in favour of disclosure in order to provide the full picture of the background to an issue. The second of these is that, having reviewed the contents of the information in question here, the Commissioner believes that disclosure would add somewhat to the public knowledge and understanding already provided through the media coverage.
66. Secondly, the impact of information already in the public domain in terms of the harm or benefits produced through the availability of this information can be taken as an indication of what impact disclosure of the information in question would have. The Commissioner believes that the widespread awareness of the ban on members of the police force holding BNP membership is a benefit that has resulted from the media coverage in that it has helped to demonstrate that action has been taken in the area of racial discrimination within the police force. The Commissioner also believes that disclosure of the information in question here would further improve awareness of the police BNP membership ban and more generally that steps have been taken against racial discrimination within the police force. This is a valid argument in favour of disclosure.

The robustness of officials

67. This argument is relevant only to the contents of the withheld information that include contributions from civil servants. Referring again to the categories within the information identified above, this would cover the exchanges within the public authority and the exchanges between the public authority and third party organisations. This argument would not be relevant to that information that has been provided to the public authority but which records exchanges between third party organisations in which the public authority has not participated. The

suggestion made through this argument is that officials may be tempted to shy away from providing honest, frank and candid advice. Whilst this may be the case, dependant on the circumstances and sensitivity of the subject of the advice, the Information Tribunal in the DfES case mentioned above stated:

"...we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service" (paragraph 75)

68. The tribunal went on to describe civil servants as:

"...highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions." (paragraph 75)

In short they should not easily be discouraged from doing their job properly.

69. However, in the case *Export Credits Guarantee Department v Friends of the Earth*, the High Court made clear that arguments about loss of frankness and candour are central to the considerations of the public interest in section 35(1)(a). To the extent that the frankness and candour of officials when making policy in sensitive and controversial areas would in future be compromised as a result of disclosure here, this is a valid public interest factor in favour of maintenance of the exemption.

70. The information shows the BNP membership ban being discussed between officials with what the Commissioner accepts is frankness and candour and it is clear that the subject of these exchanges is one of sensitivity and controversy. The public authority has suggested that the frankness and candour of exchanges between officials and ministers and of the advice provided by officials to ministers covering similarly sensitive and controversial areas may be prejudiced if officials were concerned about the potential for future disclosure of their contributions.

71. In addition to the general 'chilling effect' argument advanced by the public authority, it is also appropriate to consider if policy formulation and development in this specific area is likely in future and whether disclosure in this case could lead to compromise in the frankness and candour of officials' contributions to this process. The Commissioner notes here that the public authority has stated that the process of policy making in this area did not cease with the order of 1 January 2005 and that the Police (Amendment) Regulations 2004 allow that future orders may be made specifying organisations that police officers cannot hold membership of.

72. Given this, the Commissioner accepts that there is a possibility of further policy making in this area in future, albeit he has no information as to actual likelihood of this. That disclosure here could compromise the frankness and candour of officials' contributions to the policy making process in the area of preventing racism within the police in future is a valid public interest argument in favour of maintenance of the exemption.

Junior officials

73. The public authority has not argued for maintenance of the exemption on the grounds that contributions attributable to junior officials should not be disclosed. This is not a factor to which the Commissioner has given weight when considering the public interest.

Relationship between officials and politicians

74. In a previous Information Tribunal case, the public authority in that case had expressed concern that officials who were identified with particular policies may find themselves discriminated against when there was a change of government or a change in ministers. However, the Tribunal's view was that we are entitled to expect our politicians to act fairly and not to remove a senior official simply because they have been identified with a policy that was no longer in favour. This has not been an argument advanced by the public authority in this case in any event and is not a factor to which the Commissioner has given any weight.

How the public will use the information

75. This factor was originally identified by the Information Tribunal in response to concern that the contents of information may reflect adversely on individual officials if they were to become associated with an unpopular policy. The concern of the Tribunal here appears to have been that the public may not understand that part of the role of the civil service is to consider all policy options thoroughly, including those that may be unpopular.
76. The public authority has not advanced any argument relevant to this factor and neither is there any obvious content within the withheld information that would suggest that particular officials could be identified as supporting specific policy options. This is not, therefore, a factor that carries weight here.

Names of civil servants

77. In order for officials' names to be redacted from an otherwise disclosable document, there must be specific reasons for this and these reasons must be relevant to section 35(1)(a) if they are to be taken into account when weighing the public interest in connection to that exemption. Any argument that stated, for instance, that names of officials should not be disclosed as this would be unfair to those officials would be relevant to section 40(2) rather than to section 35(1)(a). In this case the public authority has not argued specifically that names of officials should not be disclosed and this is not, therefore, a factor that carries any weight here.

Weighing the public interest arguments

78. In considering the above factors, the Commissioner has recognised valid public interest arguments in favour of disclosure on the grounds of the subject discussed within the information and that any disclosure that would improve public awareness about steps taken to improve the police force in the area of racial discrimination and inform public understanding and debate on this issue would be

in the public interest. Further to the arguments related to the above 11 factors, the complainant has made the valid point that banning police officers from membership of the BNP, a legitimate political party albeit that many would consider its policies unpalatable, appears an unusual and extreme step and there is a public interest in understanding the reasoning for this. The public authority recognised a further public interest in disclosure where this demonstrates that the process of policy formulation and development is conducted with appropriate thoroughness.

79. Turning to those factors that favour maintenance of the exemption, as noted above, the nature of the content of the information withheld can be employed on both sides of the argument in that in a case where, as here, policy has been formulated and developed in connection with an issue of sensitivity and controversy, ensuring a space within which the policy making process can be conducted away from the possibility of disclosure is of particular importance. Enabling the government to conduct an effective policy making process is in the public interest.
80. The argument about compromising the frankness and candour with which officials carry out the policy making process is two fold. Firstly, there is the general 'chilling effect' argument that frankness and candour will be compromised in any future case where policy is made in an area of sensitivity and controversy. Secondly, any future policy making in a similar area to that covered in the withheld information here would be compromised by a loss of frankness and candour. The Commissioner accepts both as valid arguments that the public interest favours maintenance of the exemption.

Conclusion

81. Whilst the Commissioner has recognised arguments in favour of disclosure, of those factors on both sides of the argument that have been recognised as valid the argument that carries most weight is that which suggests that disclosure could prejudice the future formulation and development of government policy as the frankness and candour of the participants in this process may be compromised. The public interest in the government having the capability to conduct an effective policy formulation and development process outweighs the public interest arguments that the Commissioner has recognised as valid in favour of disclosure.
82. The conclusion of the Commissioner is, therefore, that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. As this conclusion and the conclusion below on section 36(2)(b)(i) relates to the entirety of the information falling within the scope of the request, it has not been necessary to also consider section 35(1)(c).

Section 36

83. The role of the Commissioner when considering whether section 36 is engaged is to consider whether the opinion of the QP that the inhibition described in the exemption would or would be likely to occur is objectively reasonable. Where the conclusion is that this opinion is objectively reasonable, the exemption is

engaged. Having established that section 36 is engaged, it is necessary to then go on to consider whether the balance of the public interest favours the maintenance of the exemption. The effect of section 36 being subject to the public interest is that where the balance of the public interest favours disclosure of the information over maintenance of the exemption, the information should be disclosed regardless of how clear it is that the opinion of the QP is objectively reasonable.

Opinion of the qualified person

84. Sections 36(2)(b)(i) and (ii) are engaged where in the reasonable opinion of the QP, disclosure would or would be likely to lead to inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. When considering whether sections 36(2)(b)(i) and (ii) are engaged, the Commissioner will take into account:
- whether an opinion was given;
 - whether the person who gave that opinion is the QP for the public authority in question;
 - when the opinion was given;
 - whether the opinion is reasonable.
85. The public authority has stated that the opinion that inhibition would result was given by Mr Tony McNulty, who, as noted above, was Home Office Minister with responsibility for Immigration, Nationality and Citizenship at the time of the request, on 30 March 2006. Section 36(5)(a) provides that the QP for a government department will be any Minister of the Crown. It has been established, therefore, that an opinion was given, that this opinion was given by the QP for the public authority and that this opinion was given on 30 March 2006.
86. The next step is to consider whether the opinion is reasonable. The Commissioner will generally take into account two main factors here; what the QP took into account when forming their opinion and the content of the withheld information itself.
87. As noted above at paragraph 31, the QP was provided with a submission at the time that the initial response to the complainant's request was being formulated. The QP was also provided with a further submission at the internal review stage. The Commissioner believes that providing to the QP a submission detailing the issues surrounding the request is appropriate where section 36 has been identified as potentially relevant. The Commissioner would particularly commend the public authority in this case for reverting to the QP with a further submission at the internal stage and asking that he reaffirm his earlier opinion. This is a thorough approach to conducting an internal review where section 36 has been cited.
88. Turning back to the submission provided to the QP at the time of the request, whilst the Commissioner approves the approach taken by the public authority here, he notes that the content of this submission where it relates to section 36 is not of a high quality with the arguments for citing this exemption not covered in

any depth. It is also notable that the QP was not provided with a copy of the withheld information with this initial submission; the opinion of a QP will generally carry greater weight where this has been based to at least some extent on consideration of the information to be withheld. Whilst the public authority stated that the submission included “*a detailed and extensive summary*” of the withheld information, the Commissioner notes that nothing within the content of the submission supplied to his office justifies this description. The QP was, however, supplied with a copy of the withheld information at the internal review stage and the Commissioner assumes that this was central to his decision to reaffirm his earlier opinion.

89. On the content of the withheld information itself, as described above this consists of submissions to the permanent secretary of the public authority about issues related to the BNP membership ban. In the submissions provided to the QP and in its correspondence with the complainant, the public authority referred to inhibition resulting to the free and frank provision of advice and to the free and frank exchange of views for the purposes of deliberation interchangeably. It has also specified both subsections 36(2)(b)(i) and (ii) and consideration has therefore been given to whether the content of the information withheld supports the argument that these processes would be inhibited.
90. Taking subsection 36(2)(b)(i) firstly, it is clear that the withheld information could be fairly characterised as the provision of advice. It gives the background to the BNP membership ban and, as such, is for the purpose of advising the reader about this issue. As to whether this would be characterised as the free and frank provision of advice, the Commissioner notes firstly the highly controversial subject matter. Given the nature of this subject, it is likely that the majority of advice on this subject would fall into the definition of free and frank intended by the drafters of section 36. Secondly, some of the content of this advice covers areas of this subject and is worded in such a way that the Commissioner considers that it could be fairly characterised as free and frank.
91. Having established that this advice can be fairly characterised as free and frank, it is necessary to go on to consider whether it is reasonable to hold the opinion that disclosure of this would inhibit the provision of similarly free and frank advice in future. As already noted, the area covered by this advice is one of high sensitivity. Given this, the Commissioner believes that it would be reasonable to conclude that an official with the responsibility of giving advice on a similarly sensitive issue in future would be inhibited if they believed that the content of this advice may be disclosed via the Act.
92. Turning to subsection 36(2)(b)(ii), the content of the withheld information contains nothing that can be characterised as an exchange of views, free and frank or otherwise. It is a briefing prepared by an official within the public authority; there is no commentary on the content of the briefing.
93. The task for the Commissioner here is to conclude whether the opinion held by the QP is objectively reasonable. Whilst the Commissioner, or any other person, may hold a different opinion, if the facts support the objective reasonableness of the QP's opinion, the exemption will be engaged. Whilst the Commissioner finds

that the QP's opinion that subsection 36(2)(b)(ii) was engaged was not objectively reasonable as the withheld information shows that there was no exchange of views, he does conclude the opinion in respect to section 36(2)(b)(i) was reasonable. This is on the basis of the process undertaken in forming this opinion and on the content of the withheld information supporting the notion that disclosure would inhibit the future provision of free and frank advice.

The public interest

94. Having concluded that this exemption is engaged, the Commissioner has considered whether the public interest in maintaining this exemption outweighs the public interest in disclosure. It was the opinion of the QP that disclosure in this case would inhibit the free and frank provision of advice. In accepting that the opinion of the QP is reasonable, the Commissioner has accepted that disclosure here would inhibit the provision of free and frank advice in future. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs these concerns.
95. In the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013; 08/01/07), the Information Tribunal acknowledged that the application of the public interest test to the s36 exemption, "*involved a particular conundrum*", noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (para 88).
96. In the Tribunal's view, the reasonable opinion is limited to the *degree of likelihood* that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, "does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant" (para 91).
97. This means that whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.
98. On the issue of the severity and extent of the inhibition resulting from disclosure here, the Commissioner accepts the importance of ministers receiving free and frank advice from officials to the ability of the public authority to function effectively. Having accepted the QP's opinion that the free and frank provision of advice would be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the provision of advice to the functioning of the public authority.
99. It could be argued that the severity of the inhibition would be reduced as a result of the ban of police membership coming into force on 1 January 2005, prior to the date of the request. Any disclosure at the time of the request would not, therefore, have resulted in any impact on the discussions leading up to the decision to enshrine this ban in statute. However, the public authority has stated that work on

- this issue continued after this ban initially came into force, including on the issue of extending the ban to all police staff rather than solely police officers. That the withheld information itself post dates January 2005 also demonstrates that the BNP membership ban remained a 'live' issue beyond January 2005. The Commissioner notes that any disruption caused as a result of disclosure at the time of the request would have been lesser than had a request been made for information covering this area prior to January 2005, but finds that the argument that this reduces the severity of the inhibition is weakened by the evidence that this was an ongoing issue within the public authority post January 2005.
100. As to the frequency of inhibition, having accepted that the provision of advice from officials to ministers plays an important role in the functioning of the public authority, it follows that such advice is provided frequently. The opinion of the QP here was not that disclosure would inhibit the free and frank provision of advice on the specific issue of the BNP membership ban, but that inhibition would result to the process of officials providing advice to ministers. The Commissioner would not, however, accept that the frequency of the inhibition here would be as high as in every case where advice is provided by officials to ministers. Instead, this inhibition would occur only as frequently as where issues of similarly high sensitivity as tackling racism in the police are discussed.
 101. Having accepted the opinion of the QP as reasonable, the Commissioner recognises that this inhibition would result with some frequency; potentially in any situation where an official provides advice to a minister on an issue of similarly high sensitivity as that which is the subject of the information in question here.
 102. It is in the public interest for the public authority to be capable of functioning effectively. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to the ability of the public authority to conduct itself effectively, this contributes to the argument that maintaining the exemption is in the public interest.
 103. Turning to public interest arguments in favour of disclosure, civil service officials are under a duty to provide appropriate advice to ministers. This duty extends to ensuring that it is as free and frank as necessary. Whilst the Commissioner accepts that, notwithstanding this duty, inhibition is made more likely as a result of disclosure than in a case where there is no possibility of disclosure, the argument in favour of maintenance of the exemption due to the severity of the inhibition is reduced as a result of the existence of this duty.
 104. The subject of the withheld information is highly relevant to where the balance of the public interest lies here. The issue of the police force acting equitably towards all groups within society is a matter of significant and legitimate public interest. That disclosure of the information in question here would aid transparency in connection to and add to public understanding about steps taken by the public authority towards ensuring that the police force is free from real or perceived racial prejudice contributes to the argument that the public interest here favours disclosure.
 105. Further to this point is that the ban on police membership of the BNP has been a

matter of public debate. At the time of making his complaint to the Commissioner the complainant stated:

“The decision to stop members of a political party (however distasteful their views) from joining a public service is a matter of clear public interest. It is a decision which calls into question some of the most important principles of democracy, the rights of freedom of expression and the right to be a member of a legitimate political party without being discriminated against as a result.”

106. To the extent that disclosure here would contribute to this debate, this would be in the public interest. Disclosure would also be in the public interest where this would help to explain the decision to institute the BNP membership ban and where any suspicion of ‘spin’ exists surrounding the explanations for this ban given previously.
107. The decision to introduce this ban was the subject of considerable media coverage. Through this coverage, a significant amount of information was disclosed into the public domain. Whilst there is no suggestion that the specific information in connection with which section 36(2)(b)(i) has been cited has been disclosed through this coverage, this media coverage is of significance to the balance of the public interest here in a similar way to covered above at paragraphs 64 – 66.

Conclusion

108. The Commissioner has recognised valid arguments here that the public interest would favour disclosure of this information. Amongst these, the argument that carries most weight is that related to the contents of the withheld information here. The issue of racial discrimination within the police force is clearly of substantial public interest.
109. However, the Commissioner, having accepted that the opinion of the QP that disclosure would inhibit the free and frank provision of advice is objectively reasonable, has also recognised that, given the central role that the provision of advice from officials to ministers has to the work of the public authority, this inhibition would be extensive and of some frequency. For the public interest to favour disclosure where this would result in extensive and somewhat frequent harm to the ability of the public authority to function effectively, it would be necessary for the arguments favouring this to be appropriately compelling.
110. The Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Whilst the Commissioner has recognised valid public interest arguments in favour of disclosure, the arguments in favour of maintenance of the exemption are compelling given the extent and frequency of the inhibitory impact on the public authority. The arguments in favour of disclosure, whilst valid, are not sufficient to outweigh this factor in favour of maintenance of the exemption.

Section 41 & Section 42

111. As the conclusions on sections 35(1)(a) and 36(2)(b)(i) relate to the entirety of the information held by the public authority that falls within the scope of the complaint, it has not been necessary to consider sections 41(1) or 42(1), which were also cited by the public authority.

The Decision

112. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that the exemptions provided by sections 35(1)(a) and 36(2)(b)(i) were applied correctly and also finds that the public interest favours the maintenance of these exemptions. However, the Commissioner also finds that the public authority failed to comply with sections 17(1)(a), (b) & (c) and 17(3)(b) in its handling of the request.

Steps Required

113. The Commissioner requires no steps to be taken.

Other matters

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

On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test (PIT). This recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. Whilst he recognises that the consideration of the public interest test in this case took place before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 60 working days for the authority to communicate the outcome to the complainant.

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

116. 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 20th day of January 2009

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17

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(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 35

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.”

Section 36

Section 36(2) provides that –

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

(a) would, or would be likely to, prejudice-

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

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

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

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

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

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

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

Section 41

Section 41(1) provides that –

“Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 42

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”