

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 24 August 2009**

**Public Authority:** British Transport Police Authority  
**Address:** The Forum  
5th Floor North  
74-80 Camden Street  
London NW1 0EG

### Summary

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The complainant made a request to the British Transport Police Authority (BTPA) for an electronic copy of an economic model used in the calculation of the cost of the services provided by British Transport Police, together with all the underlying data used to populate the model. The BTPA refused the request on the basis that the model was not information held for the purposes of the Act. During the course of the Commissioner's investigation, the BTPA accepted that it holds information for the purposes of the Act, releasing some information to the complainant but withholding the remainder under section 43(2). The Commissioner does not find this exemption engaged and requires that the information be disclosed to the complainant. He also finds breaches of sections 1(1)(b), 10(1), 17(1)(b) and (c) and 17(7).

### The Commissioner's Role

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

### Background

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2. British Transport Police is the specialist national police force for the railways. Within the jurisdiction of British Transport Police there are in excess of 30 operators of services from the railway community, including passenger services operators, infrastructure owners and freight companies.
3. Each of these holds a Police Service Agreement (PSA) on the basis of which they pay police charges. PSAs are agreements which the British Transport Police

Authority (BTPA) enters into with customers to whom it provides the services of the British Transport Police.

4. The BTPA is under a statutory duty to ensure that the contributions made to policing costs from PSA holders approximately reflect the nature and extent of services provided to that operator by the British Transport Police in the financial year.
5. On 24 October 2006, the BTPA made the decision to adopt a new charging methodology for calculating how the costs of the British Transport Police are defrayed to franchise operators under their PSAs. The new methodology consists of the use of a computer model, sometimes referred to as the Matrix model or the economic model.

### **The economic model**

6. In describing the model, the BTPA has said:

*'In effect, the charging model is an operating system which relies on various calculations within a number of spreadsheets to produce the output of time and ultimately cost.'*

7. With regard to the way the model operates, the BTPA has explained:

*'All the inputs are made into the model which then produces the output of the charges for each individual train operator. It is not possible to isolate the data just for one particular operator because the whole of the system is totally interlinked and interrelated.'*

### **The Request**

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8. Whilst acknowledging that a request for information under the Act should take no account of the specific applicant or purpose of the request, the Commissioner notes that the request for information was made against a background of arbitration proceedings.
9. Further to earlier correspondence between the parties regarding the economic model, the complainant's agent wrote to the BTPA on 16 April 2007 requesting *'full access to the electronic model, including all relevant source files that are used to populate the model'*. It further clarified this by adding *'we require electronic access to all source data files that have been used to populate the model'*. Further on in the same correspondence, in respect of the requested information, it stipulated:

- 'Please provide this in an electronic auditable format along with supporting explanation and commentary that will enable our client to understand how and where in the model this data has been applied, such data provided should obviously tally to that which is used in the model. Our client wishes to receive from BTPA an electronic copy of the model that can be 'run', including such links to source data files'.*
10. The Commissioner understands this to be the 2007/2008 model.
  11. The BTPA responded on 23 April 2007 stating that:

*'[The complainant] has not been supplied with a copy of the new model which it can 'run' electronically: [The complainant] has no entitlement under FOIA to a copy of the new model which it can run electronically. To provide a copy of the model which [the complainant] could run would be to do more than provide information. The request for information is in this respect satisfied by the fact of the supply to [the complainant] of the copy of the economic model it now has.'*
  12. Regarding the data used to populate the model, BTPA advised:

*'Data has not been used to prepare an increased charging methodology. A new charging method has been adopted. [The complainant's] annual charge for 2007/2008 has been calculated by reference to the new charging method. [The complainant] has received from BTPA data used by BTPA to calculate its annual charge for 2007/2008 by reference to the new charging method. This has been done on an amicable basis, and information has been supplied in more than one tranche'.*
  13. The complainant's agent responded on 8 May 2007, disagreeing with the BTPA's view that a copy of the model which can be run electronically does not constitute 'information' under the Act. It reminded the BTPA of its responsibility to provide advice and assistance under section 16 of the Act, *'for example by providing an outline of what information could be provided which would meet the terms of our request'*. The complainant's agent also expressed dissatisfaction regarding the response about the data and attached a copy of a *'detailed schedule setting out the information which is still required in order to verify the Matrix model'*.
  14. The complainant's agent wrote to the BTPA on 13 July 2007 saying that the BTPA *'appears to be taking the position that our information request can be considered in the context of the arbitration, rather than under the Act'*.
  15. In the same correspondence, it also repeated its request for *'the full electronic version of the model that can be run by our client, containing all of the relevant source data used to populate the model, together with supporting explanations to enable our client to be able to run and manipulate the model'*.
  16. The BTPA responded on 16 July 2007 re-stating its position that *'to provide a copy of the model which [the complainant] could run would be to do more than provide information'*.

## The Investigation

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### Scope

17. On 11 September 2007 the complainant's agent contacted the Commissioner to complain about the way its client's request for information had been handled. The Commissioner was specifically asked to consider the following points:
  - a. whether or not the information requested is 'information' that is subject to the Act;
  - b. whether or not the BTPA is correct to withhold the information requested; and
  - c. the timeliness with which the BTPA handled the request
18. Following the Commissioner's intervention, the complainant clarified that it was its request of 16 April 2007 that it wished the Commissioner to investigate. This clarification established a common understanding of the information requested, there having been considerable correspondence between the two parties concerning, amongst other things, the scope of the request.
19. The BTPA has explained to the Commissioner that it has taken the view that:

*'the charging model itself is not information, but is a tool by which one set of information is used to produce another set of information ie the outputs which show the amount of time and therefore charge to each train operator. The model itself and its working underlying principles and calculations are not data and are not information but are merely a means by which an outcome is derived.'*
20. Section 84 of the Act describes information as '*information recorded in any form*'. Having seen a demonstration of the model, the Commissioner advised the BTPA that, in his view, all of the information within the scope of the request, including the databases underlying the model and the formulae within it, constitutes recorded information which the BTPA holds for the purposes of the Act.
21. During the course of the investigation, the BTPA accepted the Commissioner's view that it holds recorded information. Accordingly, it released some information to the complainant, citing the exemptions at section 40 (Personal information) and section 43 (Commercial interests) as its reason for withholding the remainder. Following further correspondence between the BTPA and the Commissioner, BTPA accepted that it was not appropriate to cite section 40 and released the information previously withheld under this exemption. It continued to withhold the remainder of the information, relying on section 43 as the basis for non-disclosure. The BTPA advised the complainant of the nature of the information being withheld.
22. Throughout the investigation, the complainant's agent has made submissions in relation to the complainant's interest in the withheld information being disclosed. While the Commissioner understands the complainant's reasons for wanting access to the withheld information, the Commissioner has taken into account the

fact that the identity of the applicant and the purpose of the request is irrelevant to consideration of a freedom of information request and that therefore he must consider whether or not it is appropriate for the information to be released to the general public.

23. The BTPA asserts that it has disclosed information to the complainant under regimes other than the Act. In this respect, the Commissioner notes that, prior to his involvement, the complainant had received a copy of the model albeit not a version that can be run electronically. He also notes that during the course of his investigation, BTPA made a further disclosure to the complainant, releasing '*an electronic copy of the model which has formulae contained to calculate [the complainant's] charges*'.
24. However, disclosure under other regimes is not disclosure to the public at large and does not constitute a valid response under the Freedom of Information Act.
25. The fact that information may have been disclosed by the BTPA via some other route, such as arbitration, does not preclude the BTPA from responding to the request in accordance with the Act. The focus of the Commissioner's investigation therefore is on whether or not the BTPA handled the complainant's request as required by the Act.

## Chronology

26. The Commissioner has set out the key correspondence between his office, the complainant and the BTPA below.
27. After initial contact by telephone, the Commissioner wrote to the BTPA on 3 November 2008 asking it to send him an executable ('runnable') copy of the model as held at the time of the request, together with a copy of the model as provided to the complainant. He also requested a detailed explanation of the model and of the differences between the executable model and the version supplied to the complainant.
28. In accordance with the interpretations at section 84 of the Act, the Commissioner reminded the BTPA that the Act provides a right to '*information recorded in any form*'. He explained that a key issue was to understand what recorded information, if any, is available in the 'runnable' version that is not within the version provided to the complainant.
29. On 6 November 2008, the BTPA telephoned the Commissioner's office. During the course of the conversation, BTPA provided an explanation of the model and offered to demonstrate to the Commissioner how the model worked.
30. On 12 November 2008, the Commissioner wrote to the BTPA asking for an explanation of a number of matters in respect of the model. In particular the Commissioner asked for further information regarding the functionality of the model and the data elements and formulae required to run it.

31. The BTPA responded on 17 November 2008 providing the Commissioner with an overview of how the model works and confirming the Authority's position with regard to its view that *'the model itself and its working underlying principles and calculations are not data and are not information but are merely a means by which an outcome is derived'*.
32. Having seen the model demonstrated, the Commissioner advised the BTPA that, in his view, all of the information within the scope of the request constitutes recorded information for the purposes of the Act. He therefore wrote to the BTPA on 23 December 2008 asking it to explain the basis on which it was withholding the requested information and to provide its reasoned arguments in relation to any exemptions it was claiming. He also referred the BTPA to his guidance in relation to the use of exemptions.
33. The BTPA responded on 19 January 2009, citing sections 40 and 43 in relation to the information it was withholding.
34. In response, the Commissioner wrote to the BTPA on 2 February 2009, asking for further information about its decision to apply the exemptions.
35. On 6 February 2009, BTPA wrote to the Commissioner advising him that it no longer considered it relevant to cite section 40. Consequently, it was releasing, under the Act, the information previously withheld under this section. However, it confirmed that it still wished to rely on section 43 for the remainder of the withheld information.
36. The BTPA explained its position in relation to citing the exemption and also advised the Commissioner that, although it was claiming *'that if access was granted to [the complainant] (or any other party) under the Act there would be prejudice to the current commercial entities and future ventures'*, it had not written to Police Service Agreement (PSA) holders specifically about the request. In this respect, it sought advice and guidance from the Commissioner.
37. On 5 March 2009, the BTPA released a disc of information to the complainant, citing section 43 in relation to the withheld information and providing the complainant with an outline of what had been withheld.
38. The complainant's agent contacted the Commissioner's office on 26 March 2009 advising that the wrong version of the model has been disclosed. The Commissioner understands that there are several versions of the model, relating to different financial years. Although the model requested was the 2007/08 model, this was not the one which was disclosed. The Commissioner accepts it was clear from the request which model was being sought.
39. The BTPA released the correct version of the model to the complainant on 8 April 2009.
40. On 11 May 2009, the complainant's agent wrote to the Commissioner arguing that, having had the opportunity to study the model, it did not accept that the withheld information was exempt from disclosure and asking the Commissioner to



continue with his investigation. In particular, the complainant's agent reminded the Commissioner that the request was for a fully executable version of the model together with all of the underlying data.

## Analysis

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41. 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.'*

42. In this case, the BTPA has claimed that specific worksheets within the requested information are exempt from the right of access provided by section 1(1)(b) of the Act by virtue of section 43 of the Act.

### **Exemption - section 43 – commercial interests**

43. Although the BTPA has not specified which sub-section of the exemption it is claiming, the Commissioner understands it to be section 43(2).

44. Section 43(2) provides that:

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

#### *Applicable interests*

45. In this case, the BTPA has argued that the withheld information *'constitutes commercial and financial interests of third parties to whom BTPA charge for British Transport Police services. Therefore we are claiming exemption based on protection of the third parties' financial and market sensitivities [sic]'*.

46. The Commissioner understands these third parties to be Police Service Agreement (PSA) holders, ie train operators, Network Rail and others who are involved in running the railway.

47. The Commissioner notes that at no stage has the BTPA indicated that its own commercial interests would, or would be likely to, be prejudiced by disclosure.

*Does the information relate to, or could it impact on, a commercial activity?*

48. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his Awareness Guidance on the application of section 43. This comments that:

*'...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services'*

49. The Commissioner has also referred, when considering this case, to guidance issued by the Scottish Information Commissioner in relation to commercial interests and section 33(1)(b) of the FOI (Scotland) Act 2002. This guidance states that:

*'commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment'*

50. As the withheld information relates to payments and charges for goods and services relevant to the environment in which rail operators compete, (for example to win rail franchises), the Commissioner is satisfied that the withheld information is commercial in nature and therefore falls within the scope of the exemption contained in section 43(2).

#### *Nature of the prejudice*

51. The Information Tribunal in *Hogan* (EA/2005/2006 and EA/2005/0030) commented:

*'An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thornton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col. 827))'*

52. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.

53. In support of its reason for withholding the information under section 43, the BTPA has argued:

*'one of the government's intentions behind the privatisation of the rail network was to introduce competition. This can only be achieved if (amongst other things) the entities seeking to enter that market can do so within this context of commercial confidentiality'*

54. The Commissioner is satisfied that, with respect to detriment to the principle of introducing competition, there are commercial interests that are capable of being prejudiced. He has therefore gone on to consider whether the disclosure of the information in question in this case would cause such a prejudice.



*Likelihood of prejudice*

55. Section 43(2) provides that:

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

56. In this case, BTPA has argued that prejudice would, rather than would be likely to, occur as a result of the disclosure of the withheld information.

*Evidence of prejudice – would prejudice*

57. Importantly, when considering prejudice to a third party's commercial interests the Commissioner's view is that the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect – the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself. This approach has been confirmed by the Information Tribunal in the case of *Derry City Council v ICO* (EA/2006/0014).

58. While he accepts that, due to time constraints for responding to requests, it may be that arguments are formulated by a public authority based on its prior knowledge of the third party's concerns, the Commissioner's view is that prejudice and the public interest are normally to be assessed at the time of the request, or, at the latest, at the time the refusal notice should have been issued.

59. In this case, the Commissioner is mindful of the fact that the BTPA did not cite the exemption until after his investigation had commenced. Nevertheless, he asked the BTPA to provide evidence in support of its claim that disclosure would prejudice third party interests.

60. In response, the BTPA initially indicated to the Commissioner that its decision not to release information was *'based on comments and requests from [third parties] made in meetings and discussions during the initial development of the model and subsequent revision and in other unrelated discussions on budget issues'*. The BTPA did not provide the Commissioner with any evidence to support this claim. Furthermore, it confirmed that it had not written specifically to the third parties at the time the request was made about the implications of the complainant's request and sought his guidance in this respect.

61. Subsequently, during the course of his investigation, BTPA advised the Commissioner that, having contacted 13 companies, these either being the owning groups for Police Service Agreement (PSA) holders or individual train operating companies, it had received responses from six of them. Of these, four objected to the release of information. The BTPA provided the Commissioner with copies of each of the responses. In the absence of any evidence to the contrary,

the Commissioner concludes that no response was received from the other companies contacted by the BTPA.

62. Examples of the responses the BTPA received, and which it provided to the Commissioner, are:
- *'I've no objection to the data being released as I can't see much of an argument re commercial sensitivity'.*
  - *'I do not consider the information that we have provided to you on Long Term Charges and Network Access Charges, which are regulated, to be particularly commercially sensitive, and would probably be available from Network Rail under the Freedom of Information Act'.*
  - *'With regard to a recent request from a third party for some information, it is unclear exactly what information is required and indeed unclear as to whom the request is from. As such, I wish to decline the release of such information on the grounds of commercial interest'.*
  - *'Please note that, on the grounds of commercial interest, [third party] objects to the release (to any 3<sup>rd</sup> party) of information previously provided by [third party] to the Authority'.*
  - *I am happy for publicly available information to be released. Any other information I consider to be commercially sensitive and therefore would not like it to be released'.*
63. The Commissioner has considered the reasons put forward by the third parties who objected to the disclosure together with any arguments they provided in support of their objection.
64. The BTPA also belatedly advised the Commissioner that, in November 2006, it had written to PSA holders about the work that was being done in connection with the remodelling of charges for 2005/06. It explained that the letter advised the PSA holders it had been approached requesting access to data and sought their written consent to allowing access. The BTPA advised the Commissioner that *'None of the PSA holders to whom I wrote gave their written consent'.*
65. The Commissioner notes that this reference to the BTPA consulting PSA holders in November 2006 was prior to the request which is the subject of this Decision Notice and was also in relation to the remodelling of charges for 2005/06 whereas the year in question in this case is 2007/08. As a result, he has weighted these arguments accordingly when making his determination with regard to prejudice.
66. The BTPA has provided no further arguments other than those outlined above.
67. The Commissioner is aware that there is industry-published data in the public domain about the majority of the withheld information (eg train kilometres, number of stations), that would be relevant for the model. However, the complainant has advised the Commissioner that as the publicly available information spans various years and the BTPA has not revealed which year's data they have used within the requested information, the fact that it is publicly available is, in its view, of no assistance in this case.

68. The complainant's agent has brought to the Commissioner's attention a recent letter from the Office of Rail Regulation which has been sent to all train operating companies (among others), which confirms that information relating to the withheld information will be published going forward.
69. When making his assessment with regard to the question of prejudice at the time of the request in this case, the Commissioner has taken account of the fact that although the withheld information was not routinely published at the time of the request, elements of the withheld information will be publicly available in the future. It is reasonable to take this into account as the prospective publication does give an indication of the sensitivity of the information of the information at the time of the request, as there is no evidence to suggest commercial or market conditions have changed between then and now.
70. The Commissioner has considered the BTPA's arguments in relation to the 'would prejudice' test but does not find them compelling. He has noted the very limited nature of the evidence in relation to third party responses and the fact that information relevant to the request will be published in the future. However, the section 43(2) prejudice test is not restricted to 'would prejudice'. It provides an alternative limb of 'would be likely to prejudice'.
71. Clearly this second limb of the test places a lesser evidential burden on the public authority to discharge and the Commissioner has therefore gone on to consider whether, in this case, the lower threshold is met.

*Evidence of prejudice – would be likely to prejudice*

72. Where the issue is that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *'the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk'*.
73. In assessing whether there was a real and significant risk, the Commissioner considers that those contracting with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of the Act, companies contracting with public authorities can reasonably expect that their commercial dealings will be subject to a high level of public scrutiny.
74. As he recorded in his Decision Notice FS50063478, which dealt with another case in which the section 43 exemption had been asserted:  
  
*'The Commissioner is of the view that those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force'*.

75. As the BTPA has not put forward discrete arguments specifically in relation to the test of 'would be likely to prejudice' the Commissioner has applied its arguments in relation to the 'would prejudice' test (described above) when determining whether or not the lower prejudice threshold is met.
76. Having considered the arguments against the lower threshold, and taking into account the timing of the claiming of the exemption, the third party responses and the future availability of relevant information, he does not find a real and significant risk of prejudice being suffered as a result of disclosure in this case.
77. Taking into account the paucity of the arguments put forward by the BTPA with regard to the prejudice test and the limited response from the third parties whose commercial interests are alleged to be at issue in this case, the overall conclusion of the Commissioner is that the public authority has demonstrated no real or significant likelihood of prejudice resulting to the commercial interests of any person (including the public authority holding it), through the disclosure of the information in question. Therefore, the Commissioner finds the exemption provided by section 43(2) is not engaged.
78. As the Commissioner has concluded that the exemption is not engaged, he has not gone on to consider the public interest test in this case.

## **Procedural Requirements**

### *Section 1 – General right of access*

79. Section 1(1) states:

*'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.*

80. Following the Commissioner's intervention, the BTPA accepted that it holds information within the scope of the requested information. However, the Commissioner considers that this information should have been supplied at the time of the initial request and therefore the BTPA has breached section 1(1)(b) of the Act in that it failed to provide disclosable information by the time of the completion of the internal review.

### *Section 10 – Time for compliance*

81. Section 10(1) of the Act 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'.*

82. The Commissioner has provided guidance on this issue in his *'Good Practice Guidance No 4'*. A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.
83. Accordingly, the Commissioner finds that, BTPA breached section 10(1) by failing to provide the information within 20 working days.

#### *Section 17 – Refusal of request*

84. Section 17(1) of the Act states:

*'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'.*

85. In this case, the BTPA failed to specify in its refusal notice dated 23 April 2007 which exemption, including the relevant sub-section where appropriate, applied to each element of the requested information and why it did so. The Commissioner has therefore concluded that the BTPA was in breach of section 17(1)(b) and (c) of the Act in failing to supply a notice compliant with the requirements of that section within 20 working days.

86. Section 17(7) of the Act states that a refusal notice must:

*'(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and*

*(b) contain particulars of the right conferred by section 50'.*

87. Refusal notices must therefore include either details of the public authority's complaints procedure or a statement that it does not have one. In this case the refusal notice issued by the BTPA did not contain details of its internal review procedures or the contact details of the Commissioner which was therefore a breach of section 17(7).

## The Decision

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

- It breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review
- It breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request
- It breached section 17(1) by failing to issue the refusal notice within the statutory time limit, section 17(1)(b) by failing to specify the subsections of the exemptions claimed and section 17(1)(c) by failing to give an explanation of why the exemption applies.
- It breached section 17(7) by failing to provide details of its complaints handling process and particulars of the right of the complainant conferred by section 50 of the Act.

## Steps Required

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89. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

disclose an electronic, 'runnable', copy of the economic model used in relation to the charges for 2007/08, including all relevant source files used to populate it, along with supporting explanation and commentary that will enable the recipient to understand how and where in the model this data has been applied.

90. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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

## Other matters

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





## Right of Appeal

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97. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 24<sup>th</sup> day of August 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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

## Legal annex

### **S.1 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.'*

### **S.10 Time for Compliance**

**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.'*

### **S.17 Refusal of Request**

**Section 17(1)** provides that -

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -*

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.'*

**Section 17(2)** states –

*'Where–*

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-*
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or*

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

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

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

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

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

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

*(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'*

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

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

**Section 17(5)** provides that –

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

**Section 17(6)** provides that –

*'Subsection (5) does not apply where—*

*(a) the public authority is relying on a claim that section 14 applies,*

*(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and*

*(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.'*

**Section 17(7)** provides that –

*'A notice under subsection (1), (3) or (5) must—*

*(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and*

*(b) contain particulars of the right conferred by section 50.'*

### **S.43 Commercial interests**

**Section 43(1)** provides that –

*'Information is exempt information if it constitutes a trade secret.'*

**Section 43(2)** provides that –

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

**Section 43(3)** provides that –

*'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).'*