

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2009

Public Authority: Department for Culture Media and Sport
Address: 2- 4 Cockspur Street
London
SW1Y 5 DH

Summary

The complainant requested from the Department for Culture, Media and Sport (DCMS) a copy of the report prepared by DCMS for the Culture Secretary on a potential bid for the 2012 Olympics. DCMS refused to disclose a copy of the report under section 35(1) (a) 'formulation or development of government policy'. The Commissioner has investigated and found that section 35(1) (a) is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. However, the Commissioner also found that DCMS breached the requirements of section 17(1) and 17(3) of the Act as the refusal notice was issued outside of twenty working days

The Commissioner's Role

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

The Request

2. The complainant made the following request for information to the Department for Culture, Media and Sport (DCMS) on 4 April 2007:

"Please let me have a copy of the report prepared by DCMS for the Culture Secretary in or around August 2002 on a potential London 2012 Olympic bid, and any documents associated with the report. (The report is referred to in a book written by Mike Lee "The Race for the 2012 Olympics" on page 9)"

3. DCMS responded on 20 June 2007 informing the complainant that it considered that the information is exempt under section 35(1) (a) of the Act as it relates to the formulation and development of government policy. DCMS explained that section 35 is a qualified exemption and as such is subject to the public interest test. DCMS stated that it required further time to consider the public interest test and said it expected to be able to reply in full by 11 July 2007.
4. On 20 September 2007 DCMS provided a response to the complainant explaining that it had now carried out a public interest test and concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.
5. The complainant requested an internal review of this decision on 20 September 2007 asking DCMS to reconsider its application of the public interest test.
6. DCMS completed its internal review on 18 October 2007 and communicated the findings to the complainant. The internal review upheld the decision to withhold the information under section 35(1)(a) of the Act.

The Investigation

Scope of the case

7. On 2 November 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

8. The Commissioner began his investigation by writing to DCMS on 15 July 2008 to request further explanation regarding the application of the exemption and the public interest test, and a copy of the withheld information.
9. DCMS responded on 29 September 2008, providing the Commissioner with a detailed submission regarding its application of section 35(1) (a) and a copy of the withheld information.

Findings of fact

10. The government's decision to back a bid for London 2012 was announced to Parliament by Tessa Jowell, the Secretary of State for Culture, Media and Sport on 15 May 2003. On 6 July 2005 London was announced as the host city for the 2012 Olympics.

Analysis

Procedural matters

11. 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.'

12. A response may take the form of the supply of the requested information, confirmation that the information is not held, a refusal to confirm or deny whether the requested information is held, a refusal to disclose the information or an indication that additional time is required to consider the public interest in relation to specific exemptions. In respect of this final circumstance, section 17(2) provides for an extension of time provided that certain measures are taken. However, a notice must be issued within twenty working days of the request which:

'must indicate that no decision...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'.

13. If an extension has been applied, and the final decision is to withhold the requested information, a second notice must be issued providing the reasons for the decision regarding the public interest. Under the terms of section 17(3) of the Act, this second notice should be issued *'within such time as is reasonable in the circumstances'*.

14. In this case the complainant's request was made on 4 April 2007. DCMS issued notice of the public interest test extension on 20 June 2007, and stated that it required until 11 July 2007, a further 15 working days. It did not provide a substantive decision until 20 September 2007, 121 working days after the request had been made.

15. As he has explained in his *'Good Practice Guidance 4'*, the Commissioner takes the view that public authorities should aim to respond fully to all requests within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken to deal with the public interest test should in no case exceed 40 working days. The Commissioner considers that the 121 working days which DCMS took to issue its final refusal notice was not a reasonable timescale, and that it constitutes a breach of section 17(3) of the Act.

16. Further the Commissioner notes that the notice issued under 17(2) (b) to extend the time required to consider the public interest test on 20 June 2007 was itself issued outside of the 20 working days required by 17(1) and was therefore issued in breach of 17(1).

Exemption: Section 35 'Formulation and development of government policy'

17. Section 35(1) (a) provides that information held by a government department is exempt information if it relates to the formulation or development of government policy.
18. DCMS state that section 35(1) (a) applies to the information withheld because the information relates to the formulation or development of government policy, specifically the government's decision on whether to back London's bid for the 2012 Olympic and Paralympic Games. "*The decision to back the bid for the 2012 Games required policy agreement across government and represents a collective decision of government.*" (DCMS response to the ICO 29 September 2008)
19. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, the Commissioner considers 35(1)(a) to encompass information pertaining to the development of options and priorities for Ministers, who determine which options should be translated into Government policy. It is unlikely to be about purely operational or administrative matters, or to a policy which has already been agreed or implemented.
20. The information being withheld is a DCMS submission to Richard Caborn who was then the Minister for Sport on a proposed bid for London to host the 2012 Olympics. It outlines the potential benefits and possible risks associated with the bid and makes a recommendation regarding government support for a bid. The Commissioner has viewed the withheld information and is satisfied that it relates to the formulation of government policy in relation to a proposed bid. The Commissioner therefore finds that section 35(1) (a) is engaged.

Public Interest Test

21. Section 35(1) (a) is a qualified exemption and is therefore subject to the public interest test. Section 2(2) (b) states that the information must nevertheless be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
22. DCMS state that it is not aware of any specific public interest factors in favour of disclosure of the information. However DCMS did identify a number of general factors in favour of disclosure. DCMS stated that these factors are qualified by the factors in favour of maintaining the exemption:
 - (i) Encouraging Good Practice. DCMS state that it could be argued that the possibility of disclosure of the information relating to the development of policy could improve the quality of contributions to policy debates and the debates themselves. However DCMS pointed

out that this generic argument was rejected in the Tribunal Case *The Department for Culture, Media and Sport v The Information Commissioner (DCMS vs ICO) (EA/2007/0090)*:

“In the absence of specific matters requiring disclosure, reliance on the transparency at such a high level of generality [would lead] to the conclusion that this category of information would always have to be disclosed; that there was in effect an absolute obligation of disclosure.”

DCMS dispute that disclosure would have the effect of improving the quality of contributions to the policy development process as there is no suggestion that the policy process was not robust or in accordance with good practice. The Commissioner notes however, that even a robust process can still be improved.

- (ii) Promoting accountability and public understanding. DCMS state that it might be argued that disclosing the information would increase public accountability in respect of, and public understanding of, the process leading up to the Government's decision to back the bid for the 2012 Games. DCMS dispute however that this would be the case as there is already a great deal of information in the public domain regarding the decision and the Secretary of State's statement to Parliament of 15 May 2003 sets out the factors considered in deciding to bid for the 2012 Games.
- (iii) Encouraging public debate. DCMS stated that disclosure of the information could encourage debate on the merits of the decision to back the bid. However, there has already been and continues to be extensive public debate and DCMS disputes that disclosure would encourage further debate.
- (iv) The age of the information. DCMS state that it may be argued that because the information was almost four years old (at the time of the request) there is a greater public interest in disclosure. However, DCMS state that it agrees with the Tribunal in *DCMS vs ICO* that:

“the passage of time generally has a greater impact in potentially diminishing the public interest in maintaining confidentiality than it does in increasing public interest in disclosure..”

DCMS also stated that the passage of time in this case has not increased the public interest in the information but instead because of the information which has since been made publicly available the passage of time has lessened the public interest in disclosure.

23. In favour of maintaining the exemption DCMS put forward the following arguments:

- (i) Issues identified in the information remain live – a number of the issues that are identified in the information remain the subject of further policy development, ongoing operational management or both. DCMS state that it is clear that the passage of time has not diminished the public interest arguments in favour of maintaining the exemption but that, to the contrary, it would not be in the public interest to disclose advice to Ministers on topics which remain the subject of policy development.
- (ii) Re-opening a long settled debate – given its date and purpose the document highlights a number of potential risks that could arise from a London Games and discusses them in frank terms. DCMS state that it is possible that disclosure of the information now, after extensive debates on the merits of London's bid have ended, could lead to the re-opening of past arguments. This could require the government to divert resources away from planning and preparing for the Games to addressing what is now a settled matter. Since London is now contractually obliged to deliver the Olympics it is difficult to see how debate would be in the public interest.
- (iii) Maintenance of DCMS's relationship with sports bodies – as DCMS is the department responsible for government sports policy it is its responsibility to form views on the skills and capacity of sports bodies and to provide advice to Ministers on those matters when necessary. Key to that function is the maintenance of healthy relationships between DCMS and sports bodies and officials. DCMS state that the information contains frank advice about sporting bodies and officials drafted in a forthright tone which whilst appropriate for the document's purpose would not have been appropriate if it was intended to be made public. DCMS believe that there is a risk that if the advice to the Minister were publicly disclosed its relationship with sporting bodies and individuals would be undermined.
- (iv) Maintenance of the relationship between officials and Ministers – DCMS stated that there is a public interest in protecting the confidentiality of advice within government departments. DCMS referred to the findings in *DCMS vs ICO*:

“the need to maintain trust and confidence between Ministers and civil servants enables the latter to do the job that the public expects of them and. .. the issue therefore (goes) to the heart of maintaining good government.”

DCMS assert that disclosure of the information in this case would undermine the trust and confidence that exists between Ministers and officials and, in that respect, is not in the public interest. DCMS cite the following finding from *DCMS vs ICO*:

“the harm to the public interest would result, not from any single disclosure, but from the erosion of confidence that would be the

consequence of a failure to recognise the importance of the benefits that accrue from the confidential relationship that exists.”

24. In order to reach a decision on the balance of the public interest the Commissioner has considered each of the arguments presented by DCMS in turn.
25. DCMS acknowledged that it was in the public interest to encourage public debate but did not accept that disclosure would have this effect as it stated that there has already been and continues to be extensive public debate around the 2012 Games. The Commissioner does not accept that, in general terms, past debate on an issue negates the need for further debate, including where a policy issue has been settled by Government. In this case, the Commissioner considers that disclosure of the information in this case would encourage further debate as the withheld information highlights, in more detail than has previously been disclosed, the benefits and risks officials informed Ministers of in relation to a potential bid. The Commissioner considers that there is considerable public interest in public debate in relation to the decision to bid for the games as well as ongoing debates regarding 2012. He considers that this further debate would, to some extent, serve the public interest.
25. DCMS also acknowledged that disclosure might promote accountability and public understanding. However, due to the information already in the public domain, specifically the announcement in May 2003 regarding the decision to bid for the 2012 Games, neither accountability nor public understanding would be furthered by disclosure. However, the Commissioner does not accept that the public interest in promoting accountability and public understanding is cancelled out by information already made public. The statement made by the Secretary of State for Culture, Media and Sport in May 2003 regarding the decision to bid for the 2012 Games is comparatively brief. Whilst it sets out the tests considered prior to reaching a decision it does not provide a detailed analysis and is a very positive statement in terms of the benefits without detailing the possible disadvantages. In contrast the withheld information is a 24 page report and outlines the pros and cons of a potential bid with a frank and detailed analysis of all factors considered. The Commissioner also notes the findings in *The Scotland Office vs Information Commissioner EA/2007/0128 (Scotland Office vs ICO)*:

“There is in our opinion, considerable public interest in disclosing information about decisions that have already been made. Such information is capable of, inter alia, encouraging participation in and debate about future decisions, informing people of which considerations were taken seriously, which were, and may routinely be, ignored, the weight that is, or appears to be, given to particular factors; which “tactics” are successful and which are not; revealing more about the role of the civil servant and the “negotiations” that take place; and confirmation that the democratic process is working properly”

26. The Commissioner also notes that there is a public interest in providing the public with the full picture on a particular issue.. The High Court in *ECDG vs FOE* commented that where release of the particular information in question further

informs the public, then the fact that there is already other information on the same subject in the public domain is not relevant, because there is a public interest in all information being made available to give the public the fullest possible picture

27. The Commissioner considers that disclosure of the information would have this positive effect. The decision to bid for the 2012 Olympics was announced on 15 May 2003 and there remains considerable public interest in the process by which the decision was reached, the factors considered and the weight given to those factors.
28. DCMS argued that the reliance on general arguments such as increasing transparency, promoting good practice, etc was in effect creating an absolute obligation of disclosure and that the emphasis should be on the effect of disclosure of the specific information. In this DCMS point out that, as considerable information is publicly available and the policy process was robust, disclosure would not have the general effect outlined in favour of disclosure. In *Scotland Office v ICO* the Scotland Office criticised the ICO for applying general and “formulaic” public interest considerations. However the Tribunal countered that:

“It is inevitable that the Commissioner will apply the same considerations in many cases but the effect of that is not to weaken their importance in any way. The factors for disclosure will almost always be wide, unlike those for maintaining the exemption.”

29. In *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and the BBC EA/2006/0011 and 13* the Tribunal also commented:

“While the public interest consideration in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.”

30. DCMS further argued that disclosure would not improve the quality of contributions as the process is already robust. However, the Commissioner notes that findings in *Baker v the information Commissioner and the Department for Communities and Local Government EA/2006/0043* in which witnesses for the public authority conceded in cross-examination that following FOI training local authority employees

“had become more rigorous and disciplined in recognition of the fact that what they wrote might become the subject of public scrutiny – they were more aware of the need ... to get it right” .

31. The Commissioner considers that the quality of contributions to any live Olympic issues would improve with the knowledge that they might be

revealed because contributors will be more aware of the need to provide high quality contributions.

32. DCMS argue that the issues discussed in the withheld information remain live and that it is clear that the passage of time has not diminished the public interest in favour of maintaining the exemption in this case. In this respect DCMS relied on the High Court's analysis in *OGC v Information Commissioner & Anor* as referred to in *DCMS vs ICO*:

“there is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected to ultimately result in a ministerial decision.”

33. The Commissioner accepts that the withheld information discusses and offers a frank assessment on a number of issues which remain live, most notably the budget and financing of the Olympics, the legacy in relation to regeneration and economic development and the burden on the transport infrastructure. However, the Commissioner notes that the decision to support the bid for the Games was made back in 2003. In addition, as the Games had, by the time of the request been awarded to London, the disclosure of the information could not impact on the success of the Government's bid. However, a number of issues remain live and are continuing to evolve such as costs overruns, sustainability, regeneration and transport infrastructure. The Commissioner considers that although disclosure of the information would enable the public to engage more fully in new debates on the delivery of the Olympics, the opportunity to influence the decision whether to bid for the Games, which was the subject of the report, has passed. He notes that the budget and financing of the 2012 Olympics remains a matter of controversy and continues to be under considerable public scrutiny. Disclosure of the withheld information would enable the public to better understand the issues regarding budgets put to Ministers before they considered whether to support the bid to host the Games.
34. DCMS also argue that disclosure would re-open a debate which has already been settled and that doing so would divert resources away from planning and preparing for the Games. DCMS pointed out that the UK has agreed to host the Games and there is no going back; it therefore cannot see how re-opening public debate can be in the public interest. The Commissioner agrees with DCMS that the debate over whether to bid for the Games has already been settled. However, as DCMS have pointed out, there are a number of issues which remain 'live' as outlined above issues such as and budget, the legacy of the Games and the impact on the regeneration of East London. These issues continue to be part of the public debate on the delivery of the 2012 Games. The 2012 Games and their legacy are intended to be of benefit to the public in terms of ensuring a lasting positive impact, not only in sporting terms but also in relation to the long term benefits to the regeneration of East London. As the long term impact of the Games will have a significant impact on the public the Commissioner considers that the public should be actively involved in debates on the delivery of the Games.

35. Nevertheless, the question for the Commissioner in this case is whether it is in the public interest to disclose the internal DCMS report to the Minister which helped to inform the Government's decision on backing the bid to host the Games. The potential impact on the delivery of the Games is a relevant factor to be weighed in the balance in this case. The Commissioner considers there is some strength in the argument that disclosure at this stage, when the focus is on the successful delivery of the 2012 Games, would not serve the public interest as it would potentially reopen a debate which is now closed. In many ways that would be a redundant exercise at this stage. A balanced report would include arguments for and against the hosting of the Games. The disclosure now of the arguments advanced would do little to serve the public interest in ensuring the successful delivery of the Games in 2012. There would, in the Commissioner's view, be a much stronger case for disclosure after the Games have been held and if then there was a debate or a review of the whole issue of the UK hosting the 2012 Games, from the inception of the bid through to the delivery of the Games themselves and the wider impact. To that extent the Commissioner agrees with the DCMS that reopening the debate on the process by which the Government took the decision to support the bid is a factor which currently weighs, as it did at the time of the request, against disclosure rather than in favour of disclosure.
36. DCMS stated that disclosure would harm its relationship with sport bodies as the withheld information contains frank advice about sporting bodies and officials which was never intended to be made public. The Commissioner accepts this argument to the extent that any harm to the relationship would affect policy making and the Government's future engagement with sporting bodies in that context. He does not consider this to be a decisive factor in this case, but it is one which carries some weight.
37. DCMS also argued that the relationship between officials and Ministers would be harmed by release as the purpose of maintaining the exemption is to protect the process of providing effective advice and assistance. The Commissioner does not consider that disclosure would affect the relationship in such a way. Ministers expect the advice given to them from their officials to be robust, frank and balanced. Further the Commissioner notes the following from *Scotland Office v ICO*:

"We believe that senior civil servants have sufficient courage and independence to continue to give the robust and independent advice they have given in the past, even in the face of potential scrutiny."

This document was written by a senior civil servant, whose name is included within the document. However, the Commissioner considers that given the position of the individual it would be expected that they would have been involved with the submission, that any advice would be free and frank and they would have expected some level of public scrutiny.

38. The Commissioner considers that any public interest in maintaining the confidentiality of the advice does not itself outweigh, in this case, the public interest in disclosing the requested information.

39. However, on balance, the Commissioner considers that the public interest arguments in favour of maintaining the exemption in the circumstances of this case outweigh the public interest in disclosing the requested information. He considers the public interest arguments on both sides to be strong, but his decision is that they are not so finely balanced that they are evenly weighted. Had that been the case, the proper decision under the Act would be to order disclosure.

The Decision

40. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

:

(i) The application of section 35(1) (a) to the withheld information.

41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

(i) breached the requirements of section 17(1) as the refusal notice was issued outside of twenty working days;

(ii) breached the requirements of section 17(3) as the time taken to consider the public interest test was not reasonable;

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. 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.
Website: www.informationtribunal.gov.uk

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

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

Dated the 16th day of March 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

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

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

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

Section 1(4) provides that –

“The information –

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

(b) which is to be communicated under subsection (1)(b),

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

Section 1(5) provides that –

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

Section 1(6) provides that –

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

Time for Compliance

Section 10(1) provides that –

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

Section 10(2) provides that –

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

Section 10(3) provides that –

“If, and to the extent that –

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

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

Section 10(4) provides that –

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

Section 10(5) provides that –

“Regulations under subsection (4) may –

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

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

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

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

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.”

Formulation of Government Policy

Section 35(1) provides that –

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

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

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.”