

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 November 2009

Public Authority: Foreign & Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Summary

The complainant made a series of freedom of information requests to the Foreign & Commonwealth Office regarding a share sale in Zambia to which he was a party. The public authority disclosed a quantity of information to the complainant but withheld additional information under section 35(1)(a) (Formulation or development of government policy) and section 42(1) (Legal professional privilege). The Commissioner has now reviewed this information and is satisfied that it is the personal data of the complainant and that therefore the correct approach would have been for the public authority to refuse to confirm or deny if the information was held under section 40(5)(a) (Personal information) of the Act. However the Commissioner found that one specific request submitted by the complainant did not constitute his personal data. This was a request for details of corruption cases identified by the British High Commission in Kenya and passed to the Kenyan government. This request was refused under section 27(1)(a) (International relations) and the Commissioner has decided that this exemption was correctly applied. The Commissioner also found that in its handling of the complainant's requests the public authority breached section 17(1) and section 17(1)(b) (Refusal of request) of the Act but requires no steps to be taken.

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. On 22 June 2005 the complainant wrote to the public authority to request correspondence between the public authority and the British High Commission in Lusaka, Zambia regarding the legality of a share sale in Zambia in the 1980's to which he was a party. The complainant emphasised that he required any internal briefing notes and inter-departmental notes relevant to this. The complainant had previously been in correspondence with the public authority regarding this issue over a number of years.
3. The complainant went on to explain that both he and his MP had previously sought assistance from the public authority in corresponding with the Anti Corruption Commission in Zambia. He now requested all inter-departmental briefing/discussion notes and meeting notes/meeting minutes relating to why his requests for assistance had been refused.
4. The public authority responded to the complainant's request on 18 July 2005 when it explained that it held information relevant to the request. However the public authority said that a qualified exemption applied to the information and it needed to extend the time for responding in order to consider the public interest test. It explained that the exemption which it was considering was section 27(1)(a) (International relations) and that it aimed to provide a substantive response by 18 August 2005.
5. On 18 August 2005 the public authority contacted the complainant and disclosed a quantity of information falling within the scope of the request. It now said that some information was being withheld under section 35(1)(a) (formulation of government policy) and section 42(1) (legal professional privilege). It concluded that the public interest in maintaining each exemption outweighed the public interest in disclosure.
6. On 23 September 2005 the complainant wrote to the public authority to ask it to carry out an internal review of its handling of his request. In particular the complainant highlighted the fact that the public authority had initially said that it was considering the application of section 27(1)(a) to the requested information but subsequently said that it considered that section 35(1)(a) and section 42(1) were the appropriate exemptions. The complainant also raised concerns that the public authority had failed to identify all of the information falling within the scope of the request.
7. The internal review had not been completed by 26 October 2005 and so the complainant wrote to the public authority on this date to ask when it would be ready to present its findings.
8. On 13 December 2005 the complainant wrote to the public authority again to ask why he had still not received the findings of the internal review.
9. The public authority finally presented the findings of the internal review on 11 January 2006. First of all it concluded that a reasonable search of all files relevant

- to the request had been undertaken. It now confirmed that 27(1)(a) was not being applied to any information and the decision to refuse the request was based solely on the exemptions in section 35(1)(a) and section 42(1) of the Act. It went on to explain why the exemptions applied and why it considered the public interest in maintaining the exemptions outweighed the public interest in disclosure.
10. The complainant wrote back to the public authority on 20 January 2006 and said that having reviewed the information which was disclosed to him he had further enquiries to make. The complainant went on to discuss the history of his involvement with the public authority regarding his case but also made a series of new requests for information.
 11. The complainant said that an email which was disclosed suggested that the Zambian Anti Corruption Commission had been in contact with the British High Commission in Zambia regarding the share sale. The complainant now made a new request for all exchanges of documents from the public authority and the British High Commission in Zambia with the Zambian Anti Corruption Commission regarding this matter. He clarified that he also required copies of notes of any telephone conversations or meetings.
 12. The complainant also requested copies of any correspondence, emails, internal memos, meeting notes and telephone conversation notes between the public authority and the Department for International Development (DFID) regarding the share sale.
 13. The complainant noted that of the documents that had been disclosed to him redactions had been made with felt-tip. The complainant now asked the public authority to clarify which exemption(s) it was relying on in making these redactions.
 14. The complainant went on to say that the British High Commission had up until December 1998 given him considerable assistance in the matter of the share sale. However, he said that since then both the public authority and the British High Commission had refused to become involved in his case, describing it as a private legal dispute. The complainant now asked for any emails, internal memos, discussion documents and meeting notes as to why the public authority was refusing to help.
 15. In previous correspondence with the public authority the complainant had said that a [name redacted] had issued an affidavit regarding the legality of the share sale. The complainant now said that he believed that this [name redacted] was in receipt of a salary supplement paid for by the Overseas Development Agency (ODA) and that it was his understanding that the ODA monitored the performance of individual expatriates who are in receipt of salary supplements through performance reports issued by the Zambian Government. The complainant now asked for a copy of any reports of this kind issued in respect of [name redacted] and any reports or complaints made by individuals or companies regarding the performance of [name redacted].

16. The complainant also brought to the attention of the public authority an article in the Daily Telegraph newspaper regarding alleged corruption in Kenya. The article alleged that the British High Commission in Kenya had unearthed '20 dodgy deals' which warranted investigation. The complainant now asked to be provided with brief details of the 20 deals.
17. Finally, the complainant explained that he had previously been advised to contact the Zambian Ministry of Home Affairs regarding his case but he had been unable to get a response from this body. The complainant now asked the public authority to confirm who it was that advised the British High Commission that the Zambian ministry of Home Affairs was the appropriate body to contact.
18. On 27 February 2006 the public authority contacted the complainant to acknowledge receipt of the complainant's new requests which it said were received on 23 February 2006.
19. On 23 March 2006 the public authority informed the complainant that it held information falling within the scope of the request but that it needed further time to respond in order to consider the public interest test. It said that the exemptions which it believed applied to the requested information were section 27(International relations); section 31 (Law enforcement) and section 41 (Information provided in confidence). It said that it aimed to have reached a decision on where the balance of the public interest lay by 7 April 2006.
20. The public authority contacted the complainant on 7 April 2006. In response to the request for information relating to communications between the public authority and the British High Commission, and the Zambian Anti-Corruption Commission, the public authority said that all of the information which it was able to disclose was released on 18 August 2005 in response to his earlier request. It clarified that it held no correspondence between itself and the Department for International Development.
21. It confirmed that it held no information relating to why it was refusing to help the complainant (regarding the matter of the share sale).
22. It confirmed that it held no information relating to the performance of a [name redacted].
23. As regards the '20 dodgy deals' it said that the information it held was exempt under, as quoted by the public authority, section 27(1) and section 31(c). It subsequently confirmed to the Commissioner that the exemptions it was seeking to rely on were section 27(1)(a) and section 31(1)(c). It explained that section 27(1)(a) applied because the information was passed in confidence to the Government of Kenya and to reveal it publicly would prejudice the United Kingdom's relations with that state. It said that the public interest in disclosure did not outweigh the damage that would be done to its ability to effectively conduct international relations.
24. For section 31(1)(c), the public authority did not explicitly state why the exemption applied but did say that it believed the public interest in disclosure did not

- outweigh the harm that would be done by potentially prejudicing the detection of crime and the apprehension and prosecution of offenders.
25. Finally, it confirmed that felt tip deletions had been made to the disclosed information in order to redact the names of officials. It said that names were redacted as they were not relevant to the request.
 26. On 26 April 2006 the complainant contacted the public authority again. He pointed out that in his request of 20 January 2006 he had also asked who had advised the British High Commission that his case should be dealt with by the Zambian Ministry of Home Affairs and asked for a response.
 27. As regards the public authority's decision to redact the names of officials, the complainant observed that there was some inconsistency in this approach because in the information already disclosed to him names of officials had not been redacted in some cases. The complainant now asked the public authority to disclose the names of all officials who featured in the correspondence.
 28. On 30 May 2006 the public authority confirmed that, in relation to the information the complainant requested again on 26 April 2006, it had disclosed all of the information it held except that which was exempt from disclosure under section 35(1)(a) and section 42. As regards the complainant's second query, the public authority reiterated that the names of officials were withheld as they were not relevant to the request but if names had been disclosed that was because they were considered to be of relevance to the request.
 29. On 9 July 2006 the complainant formally requested that the public authority conduct an internal review of its handling of his request of 20 January 2006.
 30. The public authority presented the findings of its internal review on 11 September 2006. It concluded that a reasonable search had been conducted of all information relevant to the request and all information not exempt under section 35(1)(a) and section 42 had been disclosed. The public authority explained why it considered these exemptions applied and further outlined its reasons for concluding that the public interest in maintaining the exemptions outweighed the public interest in disclosure. The public authority did not review its handling of the request for details of the "20 dodgy deals".

The Investigation

Scope of the case

31. The complainant originally submitted his complaint to the Commissioner on 12 September 2007, via his MP. At this point the Commissioner explained that under section 50 of the Act a complaint may be deemed ineligible for investigation if there has been an undue delay in making the application to his office. He went on to say that he normally expected complaints to be submitted within two months of a refusal of a request or outcome of an internal review and given the time that

had elapsed since the last internal review was completed it seemed unlikely that the complaint would at this stage be eligible for investigation.

32. On 19 November 2007 the complainant contacted the Commissioner setting out his reasons why he had had to delay submitting his complaint and why he believed that there were extenuating circumstances meaning his complaint should be accepted for investigation.
33. The complainant now explained that he wished to complain about the public authority's decision to refuse to disclose the information it continued to withhold. The complainant provided the Commissioner with a separate presentation document setting out the history of his dealings with the public authority and why he believed that it had refused to release all of the information he requested.
34. On 28 November 2007 the Commissioner informed the complainant that his complaint had been accepted for investigation.

Chronology

35. On 31 July 2008 the Commissioner wrote to the public authority with details of the complaint. The Commissioner now asked the public authority to provide him with copies of all of the withheld information, clearly marked to show where any exemption was being applied. The Commissioner then went on to ask the public authority a series of questions regarding its application of the various exemptions.
36. In respect of the first requests, dated 22 June 2005, the Commissioner asked the public authority to explain why section 35(1)(a) applied to the withheld information and specifically why the information related to the formulation and development of government policy. The Commissioner also asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.
37. As regards the public authority's application of section 42(1), the Commissioner asked a series of questions in order to establish whether the information withheld under this exemption constituted legal advice to which a claim for legal professional privilege could be maintained in legal proceedings. Again the Commissioner asked the public authority to further explain why it considered that the public interest in maintaining the exemption outweighed the public interest in disclosure.
38. In respect of the request dated 20 January 2006, for details of the '20 dodgy deals' referred to in the Telegraph newspaper, the Commissioner asked the public authority to explain why it had applied the exemptions in sections 27 and 31 of the Act and why it had concluded that the public interest in maintaining each exemption outweighed the public interest in disclosure.
39. Finally, the Commissioner noted that the complainant had asked the public authority to explain why it had removed the names of officials from the documents supplied to him and that it had responded by saying that the names had been redacted because it did not consider such information to be relevant to the

- request. Given that the complainant had specifically raised this issue the Commissioner now asked the public authority to explain, with reference to the Act, why this information had been redacted from the documents disclosed to the complainant.
40. The public authority responded to the Commissioner on 20 August 2008 and provided a brief chronology of its handling of the complainant's request. It explained that these details had been ascertained from its monitoring database and that whilst it was able to confirm that it had received the complainant's requests and that they had been refused under the exemptions cited by the Commissioner, it held no further details regarding its handling of the requests. It said that this was because the case files had all been destroyed in line with its file retention policy which requires that such files be retained for only two years. Therefore, the public authority said that it was not able to give any further information about its rationale behind its decision to refuse the complainant's requests and that in the circumstances it suggested that the complainant should submit a new request which it would consider anew.
 41. The Commissioner wrote back to the public authority on 4 September 2008 acknowledging that this was a difficult and somewhat unique situation which was clearly a result of his decision, given the extenuating circumstances, to accept the complaint even though it was submitted quite some time after the public authority concluded its involvement with the case. However, the Commissioner said that having now accepted the complaint he was obliged, under section 50 of the Act, to make a decision on whether or not the complainant's requests had been dealt with in accordance with the Act. The Commissioner said that he did not think that it was appropriate in the circumstances to expect the complainant to re-submit a request which he had made so long ago. Instead, he suggested that a possible way forward was for the public authority to retrieve the requested information and if it was still minded to withhold any of the information then it should provide the Commissioner with representations on why the information is exempt. The Commissioner provided the public authority with copies of the refusal notices and other relevant correspondence in order to allow it to revisit its handling of the case.
 42. On 10 November 2008 the public authority wrote to the Commissioner to say that it had taken some time to identify the chronology of the complainant's request but that it had now retrieved the relevant files from its archive. It explained that it was currently working on providing a full response to the Commissioner.
 43. The Commissioner subsequently spoke with the public authority on the telephone to discuss the progress of the public authority's response. The Commissioner now set a deadline of 27 February 2009 for the public authority to respond to him.
 44. The Commissioner did not receive a response from the public authority by this deadline and now said that he would issue an information notice in accordance with section 51 of the Act if a response was not received by 20 March 2009.
 45. On 20 March 2009 the public authority wrote to the Commissioner with its response to the complaint. The public authority identified the complainant's

requests as follows. The Commissioner considers that this accurately reflects the scope of his requests and for ease of reference will follow this numbering throughout the rest of this decision notice:

1. Any correspondence between the British High Commission (BHC) in Lusaka, DFID and FCO relating to [the complainant's] 1982 share sale.
 2. Any correspondence, including internal briefing, involving Julie Kirkbride MP on [the complainant's] case.
 3. All correspondence and records of conversations between the Zambian Anti-Corruption Commission (ACC) and BHC Lusaka.
 4. All internal correspondence, records, etc. about why the FCO was refusing to help (after its earlier attempts to do so).
 5. All reports on the performance of [name redacted] submitted by the Zambian Government to the Overseas Development Administration; also copies of any complaints made by individuals/companies about [name redacted].
 6. Brief details of the "20 dodgy deals" dossier provided by the British High Commissioner in Kenya to the Kenyan Government.
 7. Information on who advised BHC Lusaka the matter was for the Zambian Ministry of Home Affairs and not the ACC.
 8. Documents where officials' names had previously been felt tip deleted with names now included.
46. The public authority now outlined the steps it took to search for the requested information and confirmed that it held no information in respect of requests 5 and 7. As regards, request 6 the public authority confirmed that the information was being withheld under the exemptions in section 27(1)(a) (International relations) and section 31(1)(c) (Law enforcement). The public authority presented its reasons for applying and maintaining these exemptions.
47. The public authority confirmed that it held information falling within the scope of the complainant's other requests and provided the Commissioner with a copy of the information that it considered was suitable for disclosure. However, information was redacted under section 40(2) (Personal information) and section 42(1) (Legal professional privilege) and the public authority explained the reasoning behind its decision to apply both of these exemptions.
48. Whilst the public authority disclosed redacted copies of the information falling within requests 1 to 4 it did not provide the Commissioner with the remaining information which it considered to be wholly exempt nor did it provide the Commissioner with copies of the information falling within the scope of the 6th request.

49. On 9 April 2009 the Commissioner wrote to the public authority expressing his disappointment at its previous response. The Commissioner now asked the public authority to provide him with full un-redacted copies of the information falling within the scope of the complainant's request, clearly marked to show where an exemption applied. The Commissioner also asked the public authority to expand on some of its previous answers where he thought that it had not provided a sufficient explanation for applying an exemption.
50. On 5 May 2009 the public authority responded to the Commissioner. With the exception of part 6 of the request, the public authority provided the Commissioner with a full set of un-redacted papers relevant to the complainant's requests. As regards the 6th request the public authority explained that the 20 case corruption dossier was held in hard copy only at the British High Commission in Nairobi but that it would forward the Commissioner a copy of the dossier as soon as possible.
51. The Commissioner finally received the corruption dossier (request 6) on, or around, 7 August 2009.

Findings of fact

52. On 11 August 2005 the Daily Telegraph newspaper published an article in which it was alleged that the British High Commission in Nairobi had unearthed 20 "dodgy deals" involving corruption.¹

Analysis

53. A full text of the relevant statutory provisions referred to in this section is included within the legal annex.

Substantive Procedural Matters

54. The public authority has explained that it carried out a search of all relevant files both in the UK and in the British High Commission in Lusaka, Zambia and that no information was found for requests 5 and 7. The complainant has not specifically complained about this aspect of his request. However, the Commission wishes to stress, for the avoidance of doubt, that having seen no evidence to the contrary, and on the balance of probabilities he is satisfied that the public authority did not hold this information when the complainant made his request.

Exemptions

Section 40(1) – (Personal information)

55. The public authority responded to the complainant's request under the Act and disclosed a quantity of information falling within the scope of requests 1 to 4

¹ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/1495984/Kenya-losing-battle-against-corruption.html>

although some information, at the time, was withheld under section 35(1)(a) and section 42(1).

56. However, the Commissioner has now reviewed the information which the public authority withheld from the complainant which has led him to conclude that this information is in fact the personal data of the complainant.
57. Section 40(1) of the Act provides that information is exempt from disclosure if it constitutes personal data of which the person making the request is the data subject. Personal data is defined in the Data Protection Act 1998 ("DPA 1998") as data which relate to a living individual who can be identified from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. In this case the public authority is the data controller.
58. The Commissioner's understanding of the nature of personal data is informed by the discussions of the Article 29 Working Party (a European advisory body on data protection and privacy).
59. Following these discussions the Commissioner reissued his guidance in August 2007. This guidance is designed to assist organisations and individuals to determine whether information may be classified as personal data. In order to do this the guidance asks a series of questions which organisations should consider in order to establish if they hold personal data.
60. The Commissioner's Guidance can be viewed in full at the following link:
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
61. The Commissioner has reviewed all of the information falling within the scope of the request and has found that the complainant, a living individual, could be identified from that information. Having considered the content of the information alongside the questions asked in his guidance he is satisfied that all of the information falling within the scope of requests 1 to 4 constitutes the personal data of the complainant. Request 8 is not a request for new information but is instead a request for un-redacted copies of the information falling within the scope of requests 1 to 4. Having satisfied himself that the information covered by requests 1 to 4 is the personal data of the complainant, the Commissioner does not intend to undertake any further analysis as regards request 8.

Section 40(5)(a) – (Exclusion from the duty to confirm or deny)

62. Section 40(5)(a) provides that the duty to confirm or deny under section 1(1)(a) does not arise in relation to information which is (or, if it were held, would be) exempt under section 40(1) of the Act. Therefore the public authority was not obliged to respond to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(a).

63. The Commissioner acknowledges that the correct approach would have been to refuse to confirm or deny if it held the requested information and then deal with the request as a subject access request under section 7 of the DPA 1998.
64. The Commissioner will not proactively seek to identify or consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA 1998, are closely linked to Article 8 of the European Convention on Human Rights. The Commissioner may be in breach of his obligations under the Human Rights Act 1998 if he ordered public authorities to confirm or deny whether information was held under section 1(1)(a), or disclose information under section 1(1)(b) without considering these rights, even if the public authority has not cited the exemption. This is because disclosure under FOI is considered to be disclosure into the public domain. The Information Tribunal has supported this approach when it stated that:

“If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider the data protection issue because if this information is to be revealed, it may be a breach of the data protection rights of data subjects...Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects.”²

65. In view of the above, the Commissioner takes the view that it is appropriate for public authorities to identify information within a request which is subject to section 40(1) or (5) when it is received. Having done so, it should then consider access to that information under the DPA 1998 subject to the applicant providing any identification that may be required to prove that they are the data subject. For the avoidance of doubt, the Commissioner considers it unnecessary for applicants to submit a separate request under the DPA 1998. Public authorities should then go on to consider any of the outstanding elements of a request under the Act.

Section 27(1)(a) – (International relations)

66. It now remains for the Commissioner to consider the public authority's response to request 6, for details of the 20 cases of corruption which the Daily Telegraph had claimed had been identified by the British High Commission in Nairobi. The public authority is seeking to withhold this information in reliance on sections 27(1)(a) and 31(1)(c).
67. Section 27(1)(a) provides that information is exempt if its disclosure would, or would be likely to, prejudice the international relations between the United Kingdom and any other State.
68. The public authority has argued that section 27(1)(a) is engaged because the information was passed in confidence to the Government of Kenya and to reveal

² Bowbrick v The Information Commissioner [EA/2005/0006], para. 51.

it publicly would or would be likely to prejudice the United Kingdom's relations with that state.

69. The public authority has not explicitly said whether disclosure would OR would be likely to prejudice relations with Kenya. In light of this the Commissioner feels that in assessing the level of prejudice at which the exemption has been engaged it is appropriate to employ the lesser test, that is to say that the exemption will be engaged where disclosure would be likely to prejudice international relations. The decision of the Information Tribunal in *McIntyre v Information Commissioner & MoD* supports this approach.

70. The Commissioner is of the view that for the exemption to apply the possibility of prejudice being caused must be real. This follows a decision of the Information Tribunal in *John Connor Press Associates v Information Commissioner* in which it stated that:

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”³

71. This interpretation in turn follows the judgment of Mr Justice Munby in the High Court in which the view was expressed that:

“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”⁴

72. As regards the nature of prejudice which this exemption is designed to protect, the Commissioner is guided by the following comments of the Information Tribunal:

“...we would make clear that in our judgement prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary.”⁵

73. In this case the Commissioner has reviewed the withheld information and makes the following observations:

- The content of the information is clearly sensitive.
- The information contains details that would be likely to be used in any future investigation or prosecution.
- The information is not otherwise in the public domain.

³ *John Connor Press Associates v Information Commissioner* [EA/2005/005], para. 15.

⁴ *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 Admin

⁵ *Campaign Against Arms Trade v Information Commissioner and MOD* [EA/2006/0040], para. 81.

74. As far as the Commissioner is aware the public authority has not contacted the Kenyan Government to see whether or not it would object to disclosure of this information. Therefore the Commissioner is not formally aware of the opinion of the Kenyan Government as regards this information. However, the Commissioner believes that the information is particularly sensitive and notes that it has been shared with the Kenyan Government only. Were the information disclosed it could alert the parties named in the document to the fact that their activities have brought them to the attention of the Kenyan Government and this may serve to prejudice any action the Kenyan authorities may wish to take. The Commissioner considers that this would be likely to lead to an adverse reaction from the Kenyan Government which in turn would be likely to hamper relations with the UK. Given the findings of the Information Tribunal in the Campaign Against the Arms Trade case, the Commissioner is satisfied that this would amount to causing a prejudice to the international relations of the UK. Consequently, the Commissioner has concluded that the information falling within part 6 of the complainant's request is exempt under section 27(1) of the Act.

Public Interest Test

75. Section 27(1)(a) is a qualified exemption and is therefore subject to the public interest test. Section 2(2)(b) of the Act provides that such an exemption will only justify non-disclosure if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

76. The public authority has acknowledged that disclosure would serve the public interest through providing greater transparency and accountability in the work of government. The Commissioner agrees with this but would go further and add that disclosure would aid public confidence in the public authority as it would help to demonstrate whether it is doing its job properly by bringing cases of suspected corruption to the attention of foreign governments, where relevant.

Public interest arguments in favour of maintaining the exemption

77. Whilst the Commissioner accepts that there is a public interest in disclosure there are other factors which favour maintaining the exemption. The public authority has argued that the effective conduct of international relations depends upon maintaining confidence and trust between governments which allows for the free and frank exchange of information on the understanding that it will be treated in confidence. Were this relationship of trust undermined this would, the public authority argues, prejudice its ability to protect and promote the UK's interests through international relations. This is because in this case the Kenyan Government may be more reluctant to share sensitive information with the UK in future or may prove less willing to respect the confidentiality of information provided to it by the UK Government.
78. There is also a more general concern that if the UK Government were seen not to respect the confidentiality of information shared with international partners this

could call into question the discretion of the UK government which may have a wider effect on the willingness of foreign governments, generally, to share information with the UK.

Balance of the public interest arguments

79. The Commissioner accepts that, given the sensitivity of the information in this case, disclosure would be likely to undermine any efforts the Kenyan authorities may take to address these specific matters which would be likely to lead to a negative reaction from the Kenyan Government. The Commissioner accepts, as suggested by the public authority, that this could lead to the Kenyan Government being reluctant to share information with the UK in future. The Commissioner considers that this would not be in the public interest and therefore has given this factor due weight when balancing the public interest considerations.
80. As regards the public interest in disclosure, the Commissioner has noted that the public interest would be served to a certain extent through greater transparency and accountability in the workings of the public authority. However the Commissioner believes that the public interest in transparency and accountability has largely been met by knowing that the public authority has brought allegations of corruption to the attention of the Kenyan authorities. Disclosing the information would reveal further details about the specific allegations but would not lead to greater accountability or transparency in the work of the public authority.
81. The Commissioner has also considered whether factors such as increasing public understanding and participation regarding the issue of Kenyan corruption should be taken into account. In this case, it is the Commissioner's view that such factors carry little weight. As he has said, the Commissioner considers that the UK public interest is served by knowing that the public authority has brought information it has regarding corruption to the attention of the Kenyan authorities. This fact is now in the public domain and the Commissioner is of the view that any public interest in knowing further details about the individual cases is outweighed by the public interest in maintaining the exemption.
82. For these reasons the Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
83. As the Commissioner has decided that this information is exempt from disclosure under section 27(1) and the public interest favours maintaining the exemption, he has not gone on to consider the application of section 31(1)(c).

Procedural Requirements

84. The complainant made his first requests on 22 June 2005 and the public authority responded on 18 July 2005. At this point it explained that the exemption in section 27(1) of the Act applied to the requested information and it needed further time in order to balance the public interest in disclosure against the public interest in maintaining the exemption. The public authority replied substantively on 18 August 2005 when it explained that section 27(1) was no longer being applied to

the requested information but that it was now applying section 35(1)(a) and section 42(1) to the information it continued to withhold. By failing to cite these exemptions within 20 working days of receiving the request the public authority breached section 17(1) of the Act.

85. In response to the second series of requests dated 20 January 2006 the public authority explained that the exemptions in section '31(c)' and 'section 27(1)' were believed to apply to the requested information. It later confirmed to the Commissioner that it was actually seeking to rely on sections 31(1)(c) and 27(1)(a). Therefore, the public authority failed to properly cite the exemptions being applied down to the relevant sub-section and paragraph which is a breach of section 17(1)(b) of the Act.

The Decision

86. In respect of requests 1 – 4 the Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) on the basis of the exemption at section 40(5)(a) of the Act.
87. For request 6 the Commissioner's decision is that the public authority dealt with the request in accordance with the Act by correctly withholding the information under the exemption in section 27(1)(a).
88. The public authority breached section 17(1) of the Act by failing to cite its reliance on section 35(1)(a) and section 42(1) within 20 working days of receiving the first requests of 22 June 2005.
89. The public authority breached section 17(1)(b) of the Act by failing to properly cite the exemptions it was relying on in response to the requests submitted on 20 January 2006.

Steps Required

90. The Commissioner requires no steps to be taken.

Other matters

91. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- The Commissioner would encourage all public authorities to deal with requests for information in accordance with the appropriate legislation and to always initially consider the possibility of the application of section 40(5)(a) when considering its response to requests of this kind. This will ensure that

public authorities focus on their responsibilities under the DPA 1998 as well as the Act.

- In this case the public authority should, under the Act, have refused to confirm or deny if it held the information in requests 1 – 4. However, given that the information constitutes the personal data of the complainant, he is entitled to request this information under section 7 of the DPA 1998. The Commissioner intends to carry out a separate assessment under section 42 of the DPA 1998. This is a separate legal process from the consideration of a complaint under section 50 of the Act and so does not form part of this decision notice. The Commissioner will contact the complainant separately to inform him of the outcome of this investigation.

- Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*⁶, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out internal reviews of his first series of requests on 23 September 2005 and second series of requests on 9 July 2006. However, the internal reviews were not completed until 11 January 2006 and 11 September 2006 respectively. Whilst he recognises that in this case the delays occurred before the publication of his guidance, the Commissioner is concerned that the public authority took over 3 months to complete the first review and over 2 months to complete the second review.

⁶http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

Right of Appeal

92. 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 November 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

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 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) 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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”