

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 September 2009

Public Authority: The Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested a copy of the business case provided by the Department of Health (the "DoH") to HM Treasury in 2002 in regard to the new contract for NHS consultants, together with HM Treasury's response to the business case. The DoH directed the complainant to some information which was in the public domain, but refused to disclose other information under sections 35(1)(a) and (b). During the course of the Commissioner's investigation the DoH disclosed the withheld information relating to the first part of the request, although it continued to withhold the information relating to the second part. After investigating the case the Commissioner decided that although sections 35(1)(a) and (b) applied to the remaining information, the public interest in maintaining the exemptions did not outweigh the public interest in disclosure. Therefore the remaining withheld information should be disclosed. The Commissioner also found that the DoH did not comply with section 1(1)(b) and section 10(1).

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 9 January 2008 the complainant wrote to the DoH and requested the following:
 - (a) The business case that the DoH provided to HM Treasury in 2002 on the new contract for consultants, and

(b) HM Treasury's response to the business case.

These will be referred to as requests (a) and (b) throughout the rest of this Notice.

3. The DoH responded in an email dated 7 February 2008. In regard request (a) the DoH informed the complainant that elements of the business case had been referred to by the National Audit Office (the "NAO") in its report, *Pay Modernisation: A New Contract for NHS Consultants in England*.¹ However, it went on to state that the rest of the information it held which fell under the scope of request (a) was exempt from disclosure under section 35(1)(a) of the Act. In relation to request (b) the DoH confirmed that it held information, but withheld it under section 35(1)(b). It also provided further submissions as to why it believed that the public interest in maintaining both of these exemptions outweighed the public interest in disclosure. Finally, the DoH informed the complainant of her right to request an internal review, and her right to complain to the Commissioner.
4. On the same day the complainant requested an internal review of this decision.
5. The DoH carried out its internal review and responded in an email dated 26 February 2008. It informed the complainant that it believed that the information in question was exempt under sections 35(1)(a) and 35(1)(b). It also informed the complainant of her right to complain to the Commissioner.

The Investigation

Scope of the case

6. On 5 March 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DoH was correct to withhold the information in question under sections 35(1)(a) and (b).
7. During the course of the investigation the DoH disclosed the information it had previously withheld in relation to request (a). Following an exchange of correspondence with the complainant (see paragraph 20 below) the Commissioner focused the investigation on the information withheld in relation to request (b).

Chronology

8. The Commissioner wrote to the DoH on 15 January 2009 and requested a copy of the withheld information. He also asked it to provide further submissions to support its use of sections 35(1)(a) and (b). Finally, he asked the DoH to provide further submissions as to why it believed that the public interest in maintaining these exemptions outweighed the public interest in disclosure.

¹ http://www.nao.org.uk/publications/0607/pay_modernisation_a_new_contr.aspx

9. The DoH provided a substantive response in a letter dated 27 February 2009. It explained that the information relating to request (a) formed part of a larger paper from the DoH to HM Treasury regarding NHS pay reform. It informed the Commissioner that after reconsidering the withheld information it was now prepared to disclose it to the complainant (i.e. the parts of the larger paper that fell under the scope of request (a)). It went on to state that it still believed that the information that fell under request (b) was exempt from disclosure under section 35(1)(b), and provided further arguments to support its use of this exemption. It also made reference to section 35(1)(a), although it was not clear whether it was also seeking to rely upon this exemption to withhold the information in relation to request (b).
10. The Commissioner wrote to the DoH on 17 March 2009 and asked it to confirm whether it had yet disclosed the information relating to request (a), and if it had not, whether it still intended to disclose it. He also asked the DoH to clarify whether it intended to disclose all the information it held in relation to request (a). In relation to request (b) he stated that he was proceeding on the basis that it was seeking to rely upon section 35(1)(b) to withhold this information.
11. On 1 April 2009 the DoH informed the Commissioner that it had disclosed the information that it believed fell under the scope of request (a). It also provided the Commissioner with a copy of the disclosed information. The disclosed information had been redacted to remove the information which the DoH considered fell outside the scope of request (a).
12. Following a telephone conversation, the Commissioner emailed the DoH on 15 April 2009 and queried some of the redactions it had made in this disclosure. In addition to this, he asked the DoH to confirm that it had provided him with a copy of all the information it held that fell under the scope of both of the requests. Finally he asked the DoH to clarify whether it was relying upon sections 35(1)(a) and (b) to withhold the information relating to request (b), or whether it only sought to rely upon section 35(1)(a).
13. In a letter dated 30 April 2009 the DoH informed the Commissioner that it was seeking to rely upon sections 35(1)(a) and (b) to withhold the information relating to request (b).
14. On 8 May 2009 the Commissioner wrote to the DoH and noted that he had not received a substantive response to all of the questions listed in his letter of 15 April 2009 (apart from it confirming that it was relying upon sections 35(1)(a) and (b)). He asked for a response by no later than 26 May 2009. He also drew the DoH's attention to his power to issue an information notice under section 51 of the Act.
15. The DoH wrote to the Commissioner in a letter dated 22 May 2009. In relation to the Commissioner's query about the redactions it had made in the disclosure of 1 April 2009 it acknowledged that some of the redacted information related generally to discussions about the NHS pay modernisation programme, but argued that this fell outside the scope of request (a). It also noted that there was a limited amount of the redacted information which did fall under the scope of

- request (a). It continued to withhold this as it believed that it was so inextricably entwined with information that did not fall under the scope of the request, that disclosure would not be practical, or would mislead or confuse the reader.
16. On 28 May 2009 the Commissioner contacted the complainant. He set out the DoH's position in regard to the redacted information which related more generally to discussions about the NHS pay modernisation programme, and which it believed fell outside the scope of request (a). He informed the complainant that he found this argument persuasive, but stated that he was seeking her views before making a final decision on this. Therefore he asked her to confirm whether she felt that this information would fall under the scope of her request. Unless she stated otherwise he would proceed on the basis that she was not seeking access to this information. The Commissioner also noted that there was a small amount of the redacted information which he believed clearly fell within the scope of request (a). He informed the complainant that he would be contacting the DoH about this additional information.
 17. The complainant contacted the Commissioner by email on 15 June 2009 and informed him that he had interpreted her request correctly. Therefore, apart from the small amount of the redacted information which he believed clearly fell within the scope of request (a), the Commissioner focused his investigation solely on the information withheld in relation to request (b).
 18. The Commissioner wrote to the DoH on 24 June 2009 in relation to the information it had redacted from the disclosed bundle which it had acknowledged fell under request (a), but that it considered to be 'inextricably entwined' with information that fell outside the scope of the request. He pointed out that this information still fell within the scope of request (a) and asked the DoH to confirm whether it was prepared to disclose this information.
 19. In a letter dated 8 July 2009 the DoH confirmed that it was prepared to disclose this additional information. The Commissioner emailed the DoH on 10 July 2009 and asked it to confirm when this additional disclosure had been made.
 20. The DoH emailed the Commissioner on 17 July 2009 and informed him that it had disclosed this additional information to the complainant.

Findings of fact

21. In April 2002 the DoH submitted a business case on NHS pay modernisation to HM Treasury – which included proposals on the new consultant contract – this is the information that was the subject of request (a).
22. Negotiations on the new consultant contract did not reach a conclusion until October 2003. In that month the British Medical Association announced 60.7% of consultants in England had voted in favour of the new contract.² Although the

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http://www.dh.gov.uk/en/Managingyourorganisation/Humanresourcesandtraining/Modernisingpay/Consultantcontract/DH_4051508

new contract was optional, the DoH expected NHS Trusts to implement it for as many consultants as possible by April 2004.³

23. The NAO published a report on the new consultant contract in April 2007 entitled, *Pay Modernisation: A New Contract for NHS Consultants in England* (the “NAO Report”). The Executive Summary of this report stated that given the importance of pay modernisation to the NHS reform agenda, the NAO had examined the development and implementation of the new consultant contract to determine its costs and realisable benefits.
24. The conclusions of the NAO Report were mixed, and raised several concerns. In particular the NAO found that:
 - By the end of March 2006, the DoH had spent £715 million on the new consultant contract (27 per cent more than the original estimate of £565 million).
 - At the time of the publication of the report, the contract was not yet delivering the full value for money to the NHS and patients that was expected from it – although the report noted that the DoH believed that it was too early to judge this.
 - There was little evidence that ways of working had changed as a result of the new consultant contract and, although most consultants now had job plans, few NHS Trusts had used job planning as a lever for improving participation or productivity.
 - Consultants, in general, were not yet working in a sufficiently different way and some of the benefits that the DoH had envisaged in its national strategy had yet to be achieved. Initially, this was due to the short timeframe in which NHS Trusts had to implement the contract and their lack of attention or indeed awareness, as to the aims of the contract. The NAO stated that its survey of NHS Trusts had highlighted that many still lacked clarity as to what the intended benefits were.

The full summary of the NAO Report’s conclusions can be found on its website at http://www.nao.org.uk/publications/0607/pay_modernisation_a_new_contr.aspx

Analysis

25. As stated above, following the disclosure of the previously withheld information relating to request (a), this investigation has focused solely on request (b).

Exemptions

26. During the course of the investigation the DoH confirmed that it was relying upon sections 35(1)(a) and (b) to withhold the information subject to request (b).

³ http://www.nao.org.uk/publications/0607/pay_modernisation_a_new_contr.aspx#fana_back

Section 35

27. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to ministerial communications.
28. The full text of section 35 can be found in the Legal Annex at the end of the Notice.
29. Section 35 is a class based exemption; this means that there is no need to consider the 'prejudice' test in relation to the requested information. Therefore in order to engage section 35(1)(a) the information in question must relate to the formulation or development of government policy. In order to engage section 35(1)(b) the information in question must fall within the definition of ministerial communications.
30. The withheld information in this case is a letter between a Minister at HM Treasury and the Secretary of State for Health, in regard to the DoH's proposals for a new contract for NHS consultants.
31. 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.
32. In this case the Commissioner accepts that the new contract for NHS consultants was government policy. Given the nature of request (b), and having examined the withheld information, the Commissioner believes that it is clear that this information relates to the formulation of this policy. As such, he is satisfied that section 35(1)(a) is engaged in respect of the withheld information.
33. In addition to this, as the withheld information in this case consists of a letter between a Minister at HM Treasury and the Secretary of State for Health the Commissioner believes that it also falls under the definition of a ministerial communication. Therefore he is satisfied that section 35(1)(b) is engaged in respect of the withheld information.
34. Section 35 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider where the balance of public interest lies and decide if the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information.
35. Given the circumstances of this case, the Commissioner has considered the application of the public interest test to both sections 35(1)(a) and (b) at the same time. In reaching this decision he has taken into account the fact that the withheld information is a ministerial communication discussing the formulation of

government policy. Therefore the public interest factors are considered together below.

Public interest arguments in favour of disclosing the information

36. The DoH has stated that it believes that the public interest factors in favour of disclosure are:
- Disclosure could result in the public being better informed about the new consultant contract and thus better placed to engage in debate on any associated issues.
 - There is a general public interest in the transparency of the processes leading up to a decision being made. Finance and public spending are key areas of government action and are, therefore, of public interest.
 - There is a general public interest in being able to understand better the way in which government works and how or why decisions are reached.
37. In addition to this the Commissioner believes that there is a general public interest in increasing the accountability for and the transparency of government decisions. He believes that this public interest is particularly strong when those decisions concern the spending of public money.
38. The Commissioner has noted that the request was made only a few months after the publication of the NAO Report. As noted at paragraph 24 above, the NAO Report raised significant concerns in regard to several fundamental issues about the formulation and implementation of the new consultant contract. In particular the NAO Report had noted concerns about the cost of the new consultant contract and how, by March 2006, this had exceeded estimated costs by approximately £150 million. In addition to this, the NAO Report had also raised concerns that the new contract had not yet delivered the full value for money to the NHS and patients that was expected from it.
39. Given the conclusions of the NAO Report, the fundamental role the NHS plays in the health of the nation, and the fact that the implementation of the new consultant contract had had an apparently unexpected additional financial impact, the Commissioner believes that there was a significant public interest in increasing the public understanding in relation to the formulation and development of the new consultant contract. He also believes that this issue was a matter of significant public debate.
40. The Commissioner believes that the disclosure of the withheld information would increase the public understanding of the issues that were considered during the formulation and development of the new consultant contract. This, he believes, would also lead to increased participation in the public debate about the formulation, development and implementation of this contract.
41. In relation to the withheld information, the Commissioner notes that this is HM Treasury's response to the DoH business case for the new consultant contract. Whilst some of the information contained in the business case has already been put into the public domain (initially by way of the NAO Report, and latterly by the

disclosure of the information requested at request (a) during the investigation of this case), the Commissioner is not aware of any detailed information of HM Treasury's role in approving the business case. Given the impact the implementation of the new contract had on the public purse and the concerns raised by the NAO, the Commissioner believes that there is a significant public interest in increasing the public's understanding of HM Treasury's role in the formulation of the new consultant contract. The Commissioner believes that the disclosure of the withheld information would increase the public understanding of this.

Public interest arguments in favour of maintaining the exemption

42. At internal review, and in its letter to the Commissioner dated 27 February 2009, the DoH stated that it believed that the public interest factors in favour of maintaining the exemption were:
- Premature disclosure of information protected under section 35 could prejudice good working relationships and, ultimately, the quality of government.
 - Disclosure would inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.
 - Ministers and government officials need to be able to engage in free and frank discussion of all the policy options, to expose their merits and demerits and their possible implication as appropriate. Their candour in doing so will be adversely affected by their assessment of whether the content of such discussion will be disclosed in the near future.
 - Ministers must be able to make decisions in an environment which is as free as possible from public controversy on issues about which opinions may be strongly held. Should Ministers feel inhibited from open and straightforward discussion with one another because of the risk of subsequent disclosure, the quality of deliberation behind collective decisions would be diminished.
 - It is in the public interest that the government is able to plan and deliver its spending priorities efficiently and effectively. This requires scrutiny of public spending by HM Treasury to ensure departments are discharging their functions in an efficient and effective way and are not over-spending against pre-determined cash limits. The prospect of such a communication being disclosed would constrain and undermine similar communications in the future, making this inter-departmental cooperation less rigorous and productive. This would materially damage the effectiveness of HM Treasury's role in controlling public spending.
 - Disclosure might deter the keeping of detailed records.
 - Disclosure may have a chilling effect on the candid exchange of views between Ministers, "...it is critical for...Ministers to be able to have frank communication and deliberation on Spending Review priorities free from the worry that such communications may be placed in the public domain. If Treasury Ministers believed such Settlement Letters were to be published, this would influence the way they are written, and make it more difficult to include controversial or tough messages."

- "...Spending Review and related discussions between the [DoH] and HM Treasury fall within the collective responsibility of Ministers of the Crown. Critically, they are an integral part of the process of central governance and effective management of public expenditure which could be undermined through public exposure that would make Departmental officials less likely to spell out the "worst case" consequences of tight funding settlements, and make HM Treasury less able to ensure that Departments keep within agreed spending totals."
43. The Commissioner believes that the factors identified by the DoH which favour maintaining sections 35(1)(a) and (b) can loosely be grouped under four headings. These are that disclosure would:
- undermine the convention that Ministers are collectively responsible for policy and its delivery (and therefore require a 'safe space' to formulate, develop, make decisions and defend it),
 - inhibit the free and frank discussion of all policy options, and damage the quality and candour of communication between Ministers (i.e. the so-called 'chilling effect' argument),
 - undermine HM Treasury's ability to scrutinise public spending, and
 - deter effective record keeping.
44. In relation to the argument about collective responsibility of Ministers the Commissioner believes that this can be expanded somewhat. In particular he believes that the public interest in maintaining the convention of collective responsibility covers two separate, though related, public interest arguments.
45. Firstly, there is a public interest in protecting the safe space required by Ministers to engage in frank and candid debate and reach a collective position in relation to a particular issue – this argument is akin to the 'safe space' argument already advanced by the DoH in this case.
46. Secondly, there is a public interest in allowing Ministers to promote and defend an agreed position without revealing divergent views. Not allowing this could potentially result in valuable government time being spent publicly debating (and defending) views that have only ever been individual views, rather than government positions, and in commenting on the significance of, and implications of, a divided Cabinet. In essence, it is not in the public interest that disclosures of information under the Act would undermine confidence so much that it is unable to devote sufficient attention to the process and business of governing.

Balance of the public interest arguments

47. The Commissioner recognises that the DoH's main argument for maintaining the exemptions is that disclosure could undermine the convention of collective Cabinet responsibility.
48. The convention of collective responsibility allows government to be able to engage in free and frank debate in order to reach a collective position and to

present a united front after a decision is made. The Tribunal in *Scotland Office v ICO* [EA/2007/0070] provided the following description,

“...the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed.”⁴

49. The Commissioner believes that the convention of collective responsibility can extend beyond immediate members of the Cabinet to all Ministers. In this case the withheld information is a letter from a Minister at HM Treasury to the Secretary of State for Health. The Commissioner is satisfied that the information represents a substantive and significant communication in relation to government policy, and he therefore believes that it is relevant in considering the public interest test in relation to the withheld information in this case to consider the convention of collective responsibility.

50. In reaching a view on this public interest argument the Commissioner is mindful of the factors identified by the Tribunal in *Scotland Office v ICO* [EA/2007/0070], which stated that,

“Where Ministerial communication does engage the convention of collective responsibility, it is necessary, in particular, to assess whether and to what extent, the collective responsibility of Ministers would be undermined by disclosure. Factors such as the context of the information, whether it deals with issues that are still “live”, the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest balance.”⁵

51. Therefore, how much weight the public interest in maintaining the convention of collective responsibility will carry in any individual case, will vary depending on the specific circumstances of the case and the public interest in disclosure.

52. In this case the withheld information does not deal with live issues, in so far as the letter dates from 2002, when the new consultant contract was still being formulated. By the time of the request in January 2008 the new consultant contract had been implemented across the NHS (see paragraph 22 above).

⁴ EA/2007/0070, para 82.

⁵ EA/2007/0070, para 87.

53. However, the Commissioner believes that at the time of the request in January 2008 there was a significant public interest and level of debate in the new consultant contract and, in particular, in its effectiveness.
54. In reaching this view the Commissioner notes the concerns of the NAO, and, in particular, its concerns about the effectiveness of the new contract, whether it was achieving value for money, and the costs of the contract – which were significantly higher than the original estimates. According to the DoH website, the aim of the new consultant contract was to properly reward consultants so that more NHS patients benefit from their time and skills.⁶ Given this stated aim and the central role of the NHS in the health of the nation, the Commissioner believes that the concerns raised by the NAO Report in regard to the new consultant contract (especially in regard to budgeting) created a significant public interest in increasing public understanding of the formulation and development of the new consultant contract.
55. Having considered the withheld information, the Commissioner accepts that at the time of the request both Ministers were still active in politics, and that both are identifiable. He also notes that the specific views of one of the ministers are detailed in the withheld information.
56. In reaching a view on the DoH's arguments in relation to collective cabinet responsibility, and how they affect the balance of public interest in this case the Commissioner has also been mindful of the findings of the Tribunal in relation to the notion of collective responsibility in *Friends of the Earth v ICO & The Export Credit Guarantee Department* [EA/2006/0073]. In considering the public interest the Tribunal found that:

“There is not and can be no immutable rule in terms of reliance upon the collective ministerial responsibility and / or the individual accountability of ministers to Parliament. The Tribunal refutes any suggestion that those notions, either singly or together represent some form of trump card in favour of maintaining the particular exemption.”⁷

Whilst the Tribunal decision in this case related to regulation 12(4)(e) under the Environmental Information Regulations to all intents and purposes the consideration of the public interest in that case were equally applicable to section 35(1)(b).

57. In this case the Commissioner notes that the DoH has not provided specific arguments as to how the release of this withheld information would either undermine collective responsibility, nor how it would cause Ministers to be less frank or candid when debating issues in future. Instead, the DoH's arguments in relation to the withheld information have been on a more general level, i.e. about how the release of this kind of information could have this kind of effect in the future.

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<http://www.dh.gov.uk/en/Managingyourorganisation/Humanresourcesandtraining/Modernisingpay/Consultantcontract/index.htm>

⁷ EA/2006/0073, para 56.

58. Taking all the above factors into account, the Commissioner does not find the DoH's arguments here particularly convincing. Consequently, whilst he acknowledges that the principle of protecting collective cabinet responsibility is a strong one, in the circumstances of this case he does not believe that this is an overwhelming factor in favour of maintaining the exemptions.
59. The DoH has also advanced a number of arguments as to how the disclosure of the withheld information would inhibit the free and frank discussion of all policy options, and damage the quality and candour of communications, between Ministers. This would lead to poorer quality advice and less well informed policy and decision making. This, the DoH has argued, would not be in the public interest. The Commissioner considers this to be a 'chilling effect' argument.
60. As the request in this case was made following the implementation of the new consultant contract, the Commissioner believes that the DoH's arguments are specifically that although the information does not relate to a "live" issue, disclosure would affect the frankness and candour with which Ministers debate other live issues in the future.
61. In reaching a view on this argument the Commissioner has been mindful of the findings of the Tribunal in *Department for Education and Skills v ICO & the Evening Standard* [EA/2006/0006], which stated that in relation to the chilling effect argument,
- "The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."⁸
62. He has also considered the views of the Tribunal in *Cabinet Office v ICO & Dr Christopher Lamb* [EA/2008/0024 & EA/2008/0029] which discussed the potential for a chilling effect on Ministers. The Tribunal stated that,
- "When considering how to behave in future Cabinet Ministers will be aware that, as a result of the decision to make this type of information the subject of a qualified, not an absolute exemption, the risk of disclosure in appropriate circumstances has existed since January 2005. Their attitude will no doubt also be affected by the frequency with which disclosure is made and the reasons given for ordering it. Early disclosure as a matter of routine will clearly have greater impact than if it is seen that disclosure is ordered only in cases that merit it and then only after a reasonable passage of time."⁹
63. As noted above in this case the Commissioner considers the DoH's arguments are somewhat generic, and he believes that it has not provided specific

⁸ EA/2006/0006, para 75.

⁹ EA/2008/0024 & 0029, para 74.

arguments as to how the disclosure of the withheld information would have such an effect. He also notes that the withheld information did not relate to a live issue at the time of the request, as the new consultant contract had been implemented several years before the request. Bearing in mind the contents of the withheld information, the age of the information and the fact that it does not relate to a live issue, the Commissioner does not find the DoH's arguments here convincing. Consequently the Commissioner is satisfied that in this case the weight that can properly be given to the 'chilling effect' of disclosure is slight.

64. The DoH has also argued that the disclosure of the withheld information would have a detrimental affect on HM Treasury's ability to scrutinise public spending – which would not be in the public interest. In its letter to the Commissioner dated 27 February 2009 the DoH stated that,

“...the prospect of disclosure of such communications in the future would undermine the robust and unprejudiced examination of spending priorities because:

- Officials (and in turn, Ministers) might be less willing to make clear the costs and implications of funding if their candid statements were to be released to the public.
- Lobby groups, the media and Select Committees could use the published information to suggest that “under or over funding” had resulted in adverse outcomes which were actually foreseen by officials and Ministers at the time.”

The Commissioner has noted that the first bullet point in the DoH's argument is very similar to the 'chilling effect' argument discussed at paragraphs 59 to 63 above. The DoH has argued that the prospect of such a chilling effect would make this inter-departmental cooperation less rigorous and productive, and would materially damage the effectiveness of HM Treasury's role in controlling public spending.

65. The DoH has stressed the importance of HM Treasury's role in overseeing public spending. The Commissioner does not underestimate this, and he agrees that it would not be in the public interest for the effectiveness of this role to be prejudiced by disclosures made under the Act. However, bearing in mind the comments of the Tribunal as quoted at paragraphs 63 and 64 above, he has to consider the weight of this argument in relation to the circumstances of this case – and in particular whether the disclosure of the withheld information in this case would be likely to cause the prejudicial effects argued by the DoH.
66. As noted above, the Commissioner does not find the DoH's 'chilling effect' arguments particularly persuasive in this case. In reaching this view he has taken into account the age of the information, the fact that it does not relate to a live issue, the somewhat generic nature of the DoH's arguments, and the contents of the withheld information.
67. Whilst the Commissioner acknowledges that HM Treasury officials or Ministers might, at times, have to discuss potential adverse outcomes as part of their role in overseeing public spending, he has to consider this argument in relation to the

merits of this case. In particular he has to consider the nature and contents of the withheld information. Having done so, he is satisfied that in this case the weight that can be given to this public interest argument is slight.

68. The Commissioner is also mindful of the concerns raised by the NAO Report in regard to the new consultant contract – as detailed at paragraph 24 above. Given the nature of the concerns raised by the NAO the Commissioner believes that the public interest in increasing the public understanding in HM Treasury's role in the formulation of the new contract is a significant and weighty one.
69. In relation to effective record keeping, the Commissioner notes the views of the Tribunal in *Department for Education and Skills v ICO & the Evening Standard* [EA/2006/0006], where it declared that,

“As to record – keeping...we do not consider that we should be deflected from ordering disclosure by the possibility that minutes will become still less informative...Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency.”¹⁰

The Commissioner agrees that public officials should have a suitably robust approach. There may be some occasions where disclosure would generate legitimate concerns for public officials responsible for record keeping, and in those circumstances the balance of the public interest might fall in favour of maintaining the exemption in order to protect the integrity of the record keeping process. However, the Commissioner agrees with the Tribunal that the possibility of disclosure of information should not generally have the effect of deterring officials from recording their discussions. In relation to the withheld information in this case, he does not believe that the DoH has provided any specific reasons as to why the disclosure of this letter would deter officials from effective record keeping in the future. Therefore he does not find this argument persuasive.

70. Whilst the Commissioner has recognised that there are significant arguments in favour of maintenance of the exemption, when weighing factors on both sides of the balancing exercise the argument that carries most weight is that relating to the nature of the information.
71. In relation to section 35(1)(a) the Commissioner considers that the DoH's fundamental arguments are that the disclosure of the withheld information would have a 'chilling effect' by limiting the free and frank discussion of policy options, and affecting the quality and candour of communications. The DoH has also argued that disclosure could lead to poorer record keeping.
72. In reaching a view on the balance of public interest in relation to section 35(1)(a) the Commissioner is mindful of the conclusions he has reached above in relation to the DoH's arguments in favour of maintaining the exemption, and the weight he has attached to those arguments. In particular he has noted his comments at paragraphs 63 to 69.

¹⁰ EA/2006/0006, para 83.

73. He has also been mindful of the points he has made at paragraphs 36 to 41 above in relation to the public interest factors in favour of disclosing the information. In particular he believes that following the publication of the NAO Report and the criticisms of the new consultant contract therein, there was a significant public interest in increasing the public understanding in relation to the formulation of the contract, and in increasing the public's understanding of HM Treasury's role in it.
74. Given these factors, the conclusion of the Commissioner is that the public interest in maintaining section 35(1)(a) does not outweigh the public interest in disclosing the information.
75. In relation to section 35(1)(b) the Commissioner considers that the DoH's fundamental argument is that the disclosure of the withheld information could undermine the convention of collective Cabinet responsibility. Whilst the Commissioner recognises the strength in the argument of protecting the convention of collective Cabinet responsibility, he has to consider this argument in relation to the circumstances of the case, and, in particular, the nature of the withheld information.
76. In reaching a view on the balance of public interest in relation to section 35(1)(b) the Commissioner is mindful of the conclusions he has reached above in relation to the DoH's arguments in favour of maintaining the exemption, and the weight he has attached to those arguments. In particular he has noted his comments at paragraphs 50 to 58 into the weight he has attached to these public interest arguments in this case.
77. However, he has again been mindful of the points he has made at paragraphs 36 to 41 above in relation to the public interest factors in favour of disclosing the information. In particular he believes that following the publication of the NAO Report there was a significant public interest in increasing the public understanding in relation to the formulation of the contract.
78. Given these factors, the conclusion of the Commissioner is that the public interest in maintaining section 35(1)(b) does not outweigh the public interest in disclosing the information.

Procedural Requirements

79. Section 1(1) of the Act states 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.”

80. Section 10(1) of the Act states 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.”

81. As the Commissioner has decided that the information covered by request (b) is not exempt from disclosure on the basis of sections 35(1)(a) or (b) the Commissioner believes that this information should have been provided in line with the duty at section 1(1)(b). The DoH's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the DoH also breached section 10(1).
82. Further to this, the Commissioner believes that the DoH also breached section 10(1) in relation to the information covered by request (a) – in that this information was not provided to the complainant within 20 working days of the request.

The Decision

83. The Commissioner's decision is that sections 35(1)(a) and (b) do not provide a basis to withhold the information requested by the complainant in request (b) and therefore this information must be provided to the complainant. By failing to provide this information in response to the request the Commissioner has found that the DoH breached sections 1(1)(b) and 10(1) of the Act. The Commissioner also believes that the DoH did not meet the requirements of section 10(1) in relation to the information requested by the complainant in request (a).

Steps Required

84. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:
 - disclose the information covered by request (b), i.e. the letter between a Minister at HM Treasury and the Secretary of State for Health provided to the Commissioner on 24 February 2009.
85. The DoH must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

87. 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 7th day of September 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Section 35

- (1) 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.
- (2) 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.
- (3) 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).
- (4) 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.
- (5) 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.