

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 30 April 2009

Public Authority: Department of Health
Address: Skipton House
80 London Road
London
SE1 6LH

Summary

1. The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Department of Health ("DoH") for information concerning how the DoH reached its most recent decision to recommend that pregnant women and those trying to conceive should avoid alcohol. The DoH refused the complainant's request as it stated that the information was exempt from disclosure by virtue of section 35(1)(a) of the Act which relates to the formulation or development of government policy. The Commissioner has reviewed the withheld information and considers that whilst section 35(1)(a) was engaged the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner also found that in failing to make available the withheld information available to the complainant the DoH breached section 1(1)(b) and section 10(1) of the Act.

The Commissioner's Role

2. 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

3. The complainant made a request to the DoH on 28 June 2007 for, "information concerning how the DoH reached its recent decision to recommend that pregnant women and those trying to conceive should avoid alcohol."

4. On 23 July 2007 the DoH responded to the complainant's request for information. It provided him with information on the policy making process and provided details of where he could obtain the principal pieces of publicly available scientific research material. The DoH discussed the issue in some detail as well as the basis for the Government advice. It explained to the complainant that it required a further 10 working days to consider where the balance of public interest lay in relation to the exemptions contained at section 35 and 28 of the Act. The Commissioner was not made aware of this response until the investigation into this case had commenced.
5. On 13 August 2007 the DoH provided a further response to the complainant's request for information. It refused the request as it stated that the information was exempt from disclosure by virtue of section 35 of the Act (Formulation of Government Policy). When assessing the public interest test, the DoH conceded that there was a public interest in the availability of information about alcohol in pregnancy. However it also took into account the public interest in preserving the ability of officials to engage in discussion of policy options without apprehension that suggested courses of action may be held up to public or media scrutiny before they had been fully developed or evaluated. Furthermore the DoH stated that the papers explored different options for the wording of the message on alcohol and pregnancy, therefore it was possible that if media coverage gave prominence to alternative messages it could lead to confusion about what the new wording was and thus undermine public health. It concluded that a full explanation of the decision-making process and the factual information used had already been provided and that the additional papers were unlikely to add much to this. It determined that the balance of public interest favoured withholding the information.
6. On 13 August 2007 the complainant asked the DoH to carry out an internal review of its decision.
7. On 4 April 2008 the DoH wrote to the complainant with the result of the internal review it had carried out. It clarified that the request had been refused as the information was exempt from disclosure under section 35(1)(a) of the Act. The DoH upheld its decision.

The Investigation

Scope of the case

8. On 4 April 2008 the complainant made a formal complaint to the Information Commissioner's Office as he was dissatisfied with the result of the internal review. The complainant specifically asked the Commissioner to investigate whether or not the section 35(1)(a) exemption had been correctly applied in this case. The Commissioner

has also considered whether the DoH breached section 10 of the Act in its handling of this request.

9. The Commissioner has not considered the DoH's application of section 28 any further as it did not rely on this exemption upon consideration of the information at internal review. The Commissioner therefore considers that the DoH decided that the section 28 exemption was not applicable in this case at the time of internal review.
10. The Commissioner notes that a private email address of one of the officials involved in the formulation and development of the government policy is included within the withheld information. The complainant has confirmed to the Commissioner that he does not require private email addresses and therefore this information falls outside the scope of his request. In view of this clarification the Commissioner has not included this information within the scope of his investigation.

Chronology

11. The Commissioner contacted the DoH on 15 January 2009 in order to discuss its handling of the complainant's request and to establish whether or not the section 35(1)(a) exemption had been correctly applied in this case.
12. The Commissioner asked the DoH to provide further information as to how the withheld information related to the formulation or development of Government policy, which policy this was, and whether the formulation or development process of this policy had been completed by the time the request was made. Furthermore the Commissioner asked the DoH to provide further information regarding its carrying out of the public interest test in this case, and the considerations as to how the public interest in maintaining the exemption outweighed the public interest in disclosure at the time of the refusal.
13. On 23 February 2009 the DoH responded to the Commissioner. The DoH confirmed that it wished to continue to withhold the information under section 35(1)(a) of the Act. It confirmed that the information requested directly related to the formulation or development of Government policy. It explained that disclosure may discourage full and open discussion in the future as the information described discussions between officials within the DoH, the Devolved Administrations, other government departments and, other expert stakeholders, including health professionals and industry representatives. It clarified that the policy area in question is the development of official UK Government guidance on the consumption of alcohol during pregnancy and for those planning to conceive. It confirmed that the process of policy formulation in this area was completed when the Government announced its guidance on 25 May 2007, which was a month prior to the original request for information.

14. The DoH provided the Commissioner with a copy of the withheld information.
15. The DoH confirmed that an initial response was sent to the complainant on 23 July 2007 which provided him information on the policy making process and provided details of where he could obtain the principal pieces of publicly available scientific research material. As the Commissioner did not have this response the DoH provided a copy of this correspondence. The DoH response discussed the issue in some detail as well as the basis for the Government advice. It explained to the complainant that it required a further 10 working days to consider where the balance of public interest lay in relation to the exemptions contained at section 35 and 28 of the Act. A further response was sent to the complainant on 13 August 2007, which provided the reasons why the DoH refused further disclosure under Section 35(1)(a) of the Act. It did not consider the application of the exemption contained at section 28 of the Act any further.
16. The DoH looked at the public interest considerations in coming to its decision to apply the section 35(1)(a) exemption. It explained that releasing the details of discussions between officials, and other experts and stakeholders, which took place during the course of the formulation of the policy advice could interfere with robust policy development across all public health and Chief Medical Officer (CMO) health advice development. If officials, experts and stakeholders were to understand that the background discussion of options and messages could be disclosed it could discourage open and honest discourse required to explore the pros and cons of various courses of action, which is needed to ensure clear, comprehensive and non-ambiguous public policy advice. It stated that this is especially important in public health areas. In this case it stated that this was particularly true of the discussions between officials in the four CMO offices and Devolved Administrations where preliminary discussions were, by their very nature, not framed in a way that would meet public communication standards.
17. It stated that it considered that the public interest was best served through the information that had already been provided to the complainant, which explained the basis on which the Government reached its decision. It explained that it was mindful of the need to protect the disclosure of the information in this particular case and drew the Commissioner's attention to the ECGD High Court decision¹ (para 38) in which the Hon Mr Justice Mitting noted that:

"...there is a legitimate public interest in maintaining the confidentiality of advice within and between government"

¹ Export Credit Guarantees Dept v Friends of the Earth (2008) EWHC 638 (Admin) 17 March 2008.

departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case.... I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."

18. Alternatively, the DoH stated that if its arguments relating to section 35(1)(a) were not sustained it would contend that the information should still be withheld under Section 36 of the Act. It explained that it believed that any further disclosure would inhibit officials within the DoH, those in the Devolved Administrations and expert stakeholders from engaging in discussion and providing free and frank advice or exchange of views for the purposes of policy formation. It explained that this was especially true where the views of the Devolved Administrations have varied from those of Whitehall based Departments or where unofficial records had been kept of informal discussions with stakeholders to explore policy options.
19. In addition, it explained that it should also be recognised that it is taking some time for this guidance to impact upon public understanding and become embedded in practice. Despite a voluntary agreement with industry in May 2007 to include an alcohol in pregnancy message on the labels of alcoholic drinks a survey of industry implementation carried out in March 2008 revealed a disappointing level of implementation of the pregnancy message with around only 15% of labels carrying an acceptable version of the pregnancy message.
20. The DoH summarised that for the reasons described above it believed that it was in the public interest to withhold further disclosure of internal discussions. It conceded that although there remained general public interest in alcohol consumption during pregnancy, it believed that the level of confidence in and understanding of the Government's advice is such that the disclosure of this information could dilute comprehension of the Government's message and put public health at risk through an erosion of confidence in public health advice. It stated that there is already a lack of understanding of the message among the public and the media, which the DoH is continuing to try to address, and the publication of discussions that took place during the consideration of options for Government advice was likely to exacerbate this.

Analysis

Procedural

Section 1(1)

21. Section 1(1) of the Act 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.”

22. The Commissioner has considered whether the DoH has complied with section 1(1) (a) and (b) of the Act.

23. The DoH provided the complainant with a response on 23 July 2007 however it stated that it required further time to consider the public interest attached to the section 35 exemption which it wished to apply. The DoH provided a full response on 13 August 2007 which considered the public interest factors for and against disclosure. The DoH determined that the public interest in disclosure outweighed the public interest in withholding the information. The DoH therefore did not release the requested information to the complainant. The internal review dated 4 April 2008 upheld this decision.

24. The Commissioner does not consider that the DoH breached section 1(1)(a) of the Act as it provided an initial response to the complainant on 23 July 2007 which was within 20 working days of the date of the request. The DoH's response confirmed to the complainant that the information was held. It estimated that it required a further 10 working days to consider the public interest attached to the section 35 exemption. The DoH then responded again to the complainant on 13 August 2007 and explained the consideration it had given to the public interest in its application of the section 35(1)(a) exemption.

25. However for the reasons which will be explained below the Commissioner considers that the information withheld from the complainant should be released to him. Therefore the DoH has breached section 1(1)(b) of the Act by failing to communicate the information to the complainant in response to his request.

Section 10(1)

26. Section 10(1) of the Act provides that:-

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

27. The Commissioner has considered whether or not the DoH complied with section 10(1) of the Act.

28. As the DoH complied with section 1(1)(a) the Commissioner does not consider that it breached section 10(1) in relation to its compliance with section 1(1)(a).
29. However for the reasons which will be explained below as the DoH did not provide the requested information to the complainant within the statutory time for compliance because it incorrectly applied the section 35(1)(a) exemption, the Commissioner therefore considers that it breached section 10(1) of the Act in relation to its obligation under section 1(1)(b).

Exemption

Section 35(1)(a)

30. Section 35(1)(a) of the Act provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test. The full text of section 35 is detailed in the attached Legal Annex.
31. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy. The Commissioner notes that the DoH explained that the policy area the withheld information related to was the development of official UK Government guidance on the consumption of alcohol during pregnancy and for those planning to conceive. It explained to the Commissioner that the process of policy formulation in this area was completed when the Government announced its guidance on 25 May 2007. This guidance can be accessed at the following link:-
- http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_074920
32. The Commissioner has also considered the case of *DfES v The Information Commissioner & Evening Standard* (EA/2006/0006) in which the Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of the information rather than on a line by line dissection. The Commissioner has therefore looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a minute dissection of the content of the information. This is the approach the Commissioner took in a previous decision notice reference FS50129487. When considering whether the exemption is engaged he has also applied a broad interpretation of the term 'relates to' bearing in mind the Tribunal's comments in the aforementioned decision (paragraphs 50 to 59).

33. The information includes exchanges within the DoH as well as exchanges between the public authority and third parties. The content of these exchanges relates to the issue of alcohol consumption during pregnancy and addresses how to formulate and develop the Government policy on this issue.
34. Upon consideration of the above the Commissioner considers that the withheld information relates to the formulation or development of Government policy and therefore falls within the exemption contained at section 35(1)(a) of the Act.

Public Interest Test

35. As noted above section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DfES v The Information Commissioner and the Evening Standard (EA/2006/0006)* the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case. In particular he has borne in mind the principle that any arguments presented should be considered in the context of the case and with reference back to the actual information in question. He also wishes to highlight that the arguments put forward by the DoH in favour of maintaining the exemption in section 35(1)(a) have not been linked specifically to the contents of the withheld information that is at issue in this case.

Public Interest in Maintaining the Exemption

36. The Commissioner notes that the policy in this case is the UK Government's position and advice on the consumption of alcohol during pregnancy and for those planning to conceive. The Commissioner considers that the policy formulation and development was complete at the time of the request as it culminated in the guidance which was published on 25 May 2007. The complainant made his request for information on 28 June 2007, a month after the guidance had been published. Therefore the safe space to formulate and debate the proposed policy away from external comment and pressure was no longer required. The Commissioner does not consider this to be a relevant argument in relation to the policy in question in this case and therefore has not attributed any weight to it.
37. The DoH has argued that if officials, experts and stakeholders were to think that the background discussion of options could be disclosed it would discourage open and honest discourse which is required to explore the pros and cons of various courses of action. It argued that

open and honest discourse is needed to ensure clear, comprehensive and non-ambiguous public policy advice is produced.

38. The DoH has therefore argued that whilst the policy guidance had already been published in relation to the issue in this case, disclosure would cause officials across departments and Devolved Administrations to lose frankness and candour in future debate or in giving future advice which would lead to poorer quality advice and less well formulated policy. As the formulation and development was complete at the time of the request the DoH were not arguing that this particular policy would suffer because of a loss of frankness in debate they were therefore arguing that there would be a wider chilling effect.
39. When considering the DoH's arguments about the chilling effect the Commissioner has taken into account Tribunal and High Court decisions in previous cases. In the case of *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* the Tribunal considered the extent to which the disclosure of particular information requested under the Act could be said to create a 'chilling effect'. It referred to its earlier decision of *HM Treasury v Information Commissioner (EA/2007/0001)* and stated that "it was the passing into the law of the FOIA that generated any chilling effect [rather than the potential disclosure of any particular piece of information], no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity."
40. In the case of *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department*² Mr Justice Mitting stated that chilling effect arguments, "are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between (paragraph 38)".

² *Export Credit Guarantees Dept v Friends of the Earth (2008) EWHC 638 (Admin) 17 March 2008.*

41. Finally in the case of Cabinet Office v Information Commissioner and Lamb v Information Commissioner (EA/2008/0024 & 0029) the Tribunal stated that “early disclosure as a matter of routine will clearly have a 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.”
42. In this case the Commissioner does not consider that releasing the requested information would constitute a routine disclosure. As explained in the section below that addresses the arguments in favour of releasing the information, he considers that there is a significant public interest in the information being made public in this case. Disclosure would enable people to better understand how the policy was developed and the different options explored.
43. The Commissioner has considered the content of the information and the timing of the request and how they affect the weight of the chilling effect argument. At the time of the request, the DoH had issued guidance clearly publicising the message relating to alcohol consumption during pregnancy that it had decided to adopt. Therefore the policy was clearly within the public domain at the time of the request. However disclosing the withheld material would reveal information that was not published such as policy options that were discarded. Moreover the Commissioner does not consider that one month constitutes a significant passage of time. In view of the proximity of the request to the policy formulation being completed and the content of the disputed material he considers that this argument is of some significance in this instance. In particular he notes that the individuals involved in formulating the policy were likely to have been in the same position when the request was made and to be involved in other health policy development in the future.
44. Whilst the Commissioner has attributed some significance to the chilling effect argument primarily in view of the timing of the request, he notes that the DoH's submissions did not include specific evidence linked to the circumstances of this case to further support this argument. Nor has the DoH engaged with the specific information and identified those parts which are particularly free and frank and more likely to result in a loss of candour. If such evidence had been provided it may have added weight to this argument.
45. As mentioned above the DoH has also argued that stakeholders including expert health professionals and industry representatives would be discouraged from providing open and honest advice and input in the future if the requested information was disclosed. The Commissioner considers that as experts in their field who are contributing to policy debate the same courage and independence should be expected of them as of the civil servants mentioned by the Tribunal in the Foreign and Commonwealth Office case cited above (EA/2007/0047). In relation to industry representatives the Commissioner does not consider that they would be easily discouraged

from providing input given that they seek to shape and influence policy to meet their own aims and interests. In this case he also notes that whilst organisations may be named comments do not appear to be attributed to individuals representing industry, nor are they named. Notwithstanding these comments, the Commissioner has given this argument some significance as he accepts that the likelihood of discouraging free and frank input is greater given the proximity of the request to the completion of the policy formulation.

Public Interest in Disclosure

46. In this case the DoH suggested that there was a general public interest in understanding the extent of safe alcohol consumption during pregnancy however it failed to provide any specific examples. It did not clarify specifically how it considered disclosure of the information would further the public's understanding.

47. The Commissioner considers that the following public interest factors in favour of disclosure are relevant in this case.

48. Disclosing the requested information would further understanding of and participation in the public debate of the issue of alcohol consumption during pregnancy. It would allow the public to engage in a more informed debate of this issue. The Commissioner believes that when the guidance on alcohol consumption during pregnancy was released on 25 May 2007 it attracted a substantial amount of media interest which reflected the wider public concern about the issue. The proximity of the request to completion of the policy formulation cuts both ways. Whilst the Commissioner has accepted that it can be seen to add some weight to the chilling effect argument above, he also considers that it adds weight to the argument that disclosure would enable the public to participate in debate from a more informed position. Given the timing of the request the debate surrounding this issue was very much live. Therefore the public could have fed into debate about the conclusions reached with a more informed understanding of all of the options that were considered prior to the policy's publication.

49. Disclosure would promote the accountability and transparency of the DoH for the decisions it has taken in respect of the guidance. Placing an obligation on the DoH and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration. In this case the Commissioner considers that there is a significant public interest in releasing the requested information as it would help to explain the reasons behind the re-wording of guidance about alcohol consumption during pregnancy. He notes that previously the message given in Scotland differed from other parts of the UK. He considers that there is a considerable public interest in informing the public about how one piece of consistent UK wide guidance was developed.

50. Disclosure would bring to light information affecting public health. The prompt disclosure of the requested information may not only contribute to improved health during pregnancy but may also increase public confidence in official scientific advice. This would be achieved as it would provide the public with a full picture as to how and why the decision was reached to produce the published guidance. If an individual has all of the information available, they can make an informed decision about their own health based on the evidence and a clear understanding of the reasons behind the decision to publish the finalised guidance. Given the significance of the advice and the number of people affected the Commissioner's view is that this argument has considerable weight.

Public interest conclusion

51. As explained above the Commissioner considers that that civil servants must be expected to provide full and candid advice as part of their professional duties. Therefore he does not accept that they will be easily discouraged from contributing fully during the policy formulation process if the requested information is released. Moreover, given the interests that other stakeholders have in shaping policy to meet with their own interests he does not believe that they would readily be less candid or refuse to contribute to future policy in the event of the material being disclosed. However, he is also mindful of the proximity of the timing of the request to the completion of the guidance and the content of the disputed information, some of which is particularly free and frank. In view of this he has attributed some significance to the chilling effect argument.
52. In contrast, on the basis of the information provided by the DoH, the Commissioner does not consider that the argument about safe space has any weight in this case.
53. The Commissioner has balanced the arguments for maintaining section 35(1)(a) against the arguments in favour of disclosure. He considers that each of the arguments for releasing the requested material have significant weight. Therefore, whilst he has attributed weight to the chilling effect this is not sufficient in this particular case to favour maintaining the exemption.
54. Having reviewed the withheld information it appears that some of the content may be factual. Section 35(4) states that when making a decision about where the public interest balance lies regard should be had to the particular public interest in the disclosure of factual information which has been used or is intended to be used to inform decision taking. As the Commissioner has reached the above conclusion in relation to the entirety of the information falling within the scope of the request it has not been necessary to go on to consider the

public interest in the factual information separately in accordance with section 35(4).

55. The exemptions in section 35 and 36 are mutually exclusive. In a previous decision notice, reference FS50086299, it was stated that "Since section 36 does not apply to information which is exempt by virtue of section 35, and the Commissioner has decided that section 35 does in fact apply to all the information in this case, the information therefore cannot be exempt by virtue of section 36. This remains the case even though the Commissioner has concluded that, by virtue of the section 2 public interest test, the duty to disclose remains." Following this approach it has not been necessary to consider section 36 in this case.

The Decision

56. The Commissioner's decision is that the DoH was incorrect to withhold the requested information on the basis of section 35(1)(a) because although section 35(1)(a) was engaged, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
57. The Commissioner also considers that the DoH breached section 1(1)(b) of the Act as it failed to provide the requested information to the complainant .
58. The Commissioner also considers that the DoH breached section 10(1) of the Act as the DoH failed to comply with its obligations under section 1(1)(b) of the Act within the statutory time for compliance.

Steps Required

59. The Commissioner requires the DoH to provide the complainant with the requested information, having redacted the email address he has identified in the letter sent with this decision notice wherever it appears within the withheld information, within 35 calendar days of the date of this notice.

Failure to comply

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

Other Matters

61. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
62. In February 2007, the Commissioner issued guidance on the [time limits for considering the public interest test](#). The guidance recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. The Commissioner notes that in this case it took 31 working days for the authority to communicate the outcome of the public interest test to the complainant. In his opinion, the content of the refusal notice issued to the complainant on the 13 August 2007 does not suggest that the public interest considerations were exceptionally complex and he is therefore not persuaded that the additional time needed was reasonable.
63. The Commissioner is particularly concerned to note that the authority took 161 working days to complete an internal review. In his opinion the time taken does not conform to recommendations of part VI of the section 45 Code of Practice or to the expectations set out in his ['Good Practice Guidance No 5'](#). In this guidance, the Commissioner explains 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.
64. The outcome of the internal review itself (as communicated to the complainant) was limited in scope and does not suggest that a fresh decision on the reconsideration of all factors relevant to the request has been made. In the Commissioner's opinion, this approach does not conform to part VI (paragraph 39) of the [section 45 Code of Practice](#).
65. Finally the Commissioner notes that the DoH argued that it is taking some time for the guidance on alcohol consumption during pregnancy to impact upon public understanding and become embedded in practice. It stated that disclosure of the information could dilute comprehension of the Government's message and put public health at risk through the erosion of confidence in public health advice. It suggested that this gave weight to its application of the section 35(1)(a) exemption. The Commissioner considers that this argument should have been considered in the context of the exemption contained at section 38 of the Act, given that the harm identified if the message was diluted was to public health and not to policy formulation or development. Section 38 relates to health and safety but was not cited

by the DoH. The Commissioner did not specifically raise section 38 with the DoH. When determining that it was not necessary to do so he had regard to his obligations as a responsible regulator and under the Human Rights Act 1998. Having reviewed the content of the information and the submissions put forward by the public authority he is not satisfied that he would have been persuaded that section 38 was engaged in this case. In view of this he concluded that it was not necessary to contact the DoH further about this point.

66. Notwithstanding the comments above, the Commissioner wishes to take this opportunity to highlight the importance of citing the correct exemptions in relation to arguments raised when responding to a request for information.

Right of Appeal

67. 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.

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 30th day of April 2009

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

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

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

Section 1(2) provides that -

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

Section 1(3) provides that –

“Where a public authority –

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

(b) has informed the applicant of that requirement,

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

Section 1(4) provides that –

“The information –

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

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

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

Section 1(5) provides that –

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

Section 1(6) provides that –

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

Time for Compliance

Section 10(1) provides that –

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

Section 10(2) provides that –

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

Section 10(3) provides that –

“If, and to the extent that –

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

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

Section 10(4) provides that –

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

Section 10(5) provides that –

“Regulations under subsection (4) may –

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

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

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

Formulation of Government Policy

Section 35(1) provides that –

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

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

Section 35(2) provides that –

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

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

Section 35(3) provides that –

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

Section 35(4) provides that –

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

Section 35(5) provides that –

“In this section-

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

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

"Ministerial communications" means any communications-

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

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

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