

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 December 2010

Public Authority: The Governing Body of the University of London
Address: In relation to the London Deanery
Stewart House
32 Russell Square
London
WC1B 5DN

Summary

The complainant requested the detailed marking system (or scoring scale) used to score each question in the application process for the Plastic Surgery course Specialty Training 3rd Year. The public authority refused the request citing section 36(2)(c) of the Act. However, at internal review it withdrew its reliance on section 36(2)(c) and stated it did not hold the requested information.

The Commissioner has found that the public authority did hold relevant recorded information in this case, that the information engages the exemption found in section 36(2)(c) and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

He has found procedural breaches of section 1(1)(a), 17(1)(a), 17(1)(b), 17(1)(c) and 17(3). However, he requires no remedial steps to be taken.

The Commissioner's Role

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

Background

2. London Deanery ("the public authority") is responsible for postgraduate medical and dental training in London. The Deanery entered into a Memorandum of Understanding with the University of London in 2004.
3. The Commissioner is satisfied that it is a public authority for the purposes of the Act by virtue of paragraph 53(1)(b) of Schedule 1 of the Act. This is because for the purposes of the Act he has concluded that the Deanery is an institution of the University of London and the public authority has confirmed that it views itself in the same way. He has made this decision by carefully checking the relevant constitutional documents and through assessing how the Deanery functions.
4. The complainant participated in a recruitment exercise for the Plastic Surgery course Specialty Training 3rd Year ('ST3 in Plastic Surgery'). This was a national recruitment process that was organised by the London Deanery who makes the final decision about who is recruited. There are two rounds of recruitment every year. The candidates are shortlisted on the basis of their application forms and those who have the highest score are invited for interview. Those who succeed in the interview are offered 5 year training programmes in Plastic Surgery. The complainant has requested the marking scheme used to assess the application forms to understand how the short listing process was undertaken.

The Request

5. On 22 October 2009 the complainant requested a number of pieces of recorded information in accordance with section 1(1) of the Act, including:
 - Re: STM 3: In Plastic Surgery*
 1. *The detailed marking system (scoring system) used to score each question'.*
6. On 12 November 2009 the public authority issued a response. It explained that the recruiters were provided with guidance and a scoring framework to score the forms. It explained that it believed that this information fell within the exemption found in section 36(2)(c) [prejudice to the effective conduct of public affairs] and that in its view

it was not in the public interest to release the information as to do so would prejudice the fairness of future recruitment.

7. On 18 November 2009 the complainant requested an internal review. He explained that he did not think that section 36(2)(c) could be correctly applied because:

(1) The decision must be made by a 'Qualified Person' and in this case no such person had provided the appropriate input;

(2) The release of the scoring system would be likely to boost the fairness as it would:

a. Remove any advantage of those individual trainees who have close contact with consultants involved in the selection process.

b. It is of crucial interest for trainees to enable them to build up their training portfolio in a way that increases their opportunity in obtaining a training position. It enables the trainees to choose appropriate jobs, courses and activities to improve their chances.

c. The withholding of the information means that some parties may be able to receive unwarranted financial gains. This is reflected in the market for one to one training courses which enable some trainees to improve their chances by telling them what is desired. He explained that he therefore believes that there exists a black market in communicating the information contained within the scoring criteria.

8. On 8 December 2009 the complainant reiterated his request for an internal review.

9. On 17 December 2009 the public authority communicated the result of its internal review. It provided the complainant with a copy of the scoring sheet and explained that its revised view was that this was all the relevant recorded information that it held. The scoring sheet contained the criteria that were to be considered, but not how the scorers were to apply the criteria. The public authority said that it was no longer applying section 36(2)(c) and that it upheld the complaint. It provided the Commissioner's details.

10. On 30 December 2009 the complainant expressed dissatisfaction at the public authority's new position. He explained that he was interested only in the criteria that were used to mark the answers. He said that it

was clear such a document was held from the previous correspondence and that it was necessary to hold this information to be able to ensure a fair system. He explained that his request was for the detailed marking system and criteria used to score each answer. This includes, but not limited to, the guidelines and scoring frameworks provided to shortlisters to guide them in their marking of the application forms. He wanted to make sure that it was clear what had been requested before referring the case to the Information Commissioner.

The Investigation

Scope of the case

11. On 23 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - That the public authority needed to hold the information as otherwise there would be nothing to guide the shortlisters in marking the questions;
 - That the public authority acknowledged that it held this information in its refusal notice dated 12 November 2009;
 - This was particularly important as the process required the careful assessment of personal qualities, understanding and experience and without a system the best candidates may be overlooked;
 - That the Commissioner should carefully consider his arguments of 18 November 2009; and
 - That the Commissioner also considers the public authority's compliance with its own publication scheme (in particular the Freedom of Information policy and complaints policies).
12. On 27 May 2010 the public authority confirmed that it would remedy the problems with its publication scheme that were identified by the complainant. The Commissioner regards this matter as informally resolved and will not consider it further in this Notice.

Chronology

13. Between the 15 March 2010 and 29 April 2010 the Commissioner communicated with the public authority regarding its handling of the request, setting out his position and asking for further arguments.
14. 14 May 2010: The Commissioner received a copy of the 'disputed information'.
15. 21 May 2010: The Commissioner received a full response to the outstanding enquiries.

Analysis

Substantive Procedural Matters

Was relevant recorded information held at the date of the request?

16. When the Commissioner was originally contacted about this complaint, the public authority had concluded that it held no further relevant recorded information that had not been provided.
17. The complainant disputed that this was the case. He explained that it was highly improbable that the public authority did not hold the relevant recorded information that was caught by his request.
18. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the time of the request for information. This is the only information that a public authority is obliged to provide. The time of the request is 22 October 2009 in this case.
19. When investigating cases involving a disagreement as to whether or not further information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.
20. The public authority, after the Commissioner wrote to it, found that it did hold an item of information called *'Plastic Surgery Shortlisting –*

Panel Guidance'. Having considered this information the Commissioner finds that this information falls within the scope of the request.

21. For failing to confirm that it held this recorded information at the time of its internal review the public authority breached section 1(1)(a). While it provided some information, it failed to confirm that it held further information when it did so.
22. Having identified the information that it held, the public authority applied the exemption at section 36(2)(c) to it. The remainder of this Notice will consider the public authority's application of section 36 to this information.

Exemption

Section 36(2)(c) – prejudice to the effective conduct of public affairs

23. Section 36(2)(c) provides that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to prejudice the effective conduct of public affairs.
24. The public authority has now confirmed that it is applying section 36(2)(c) to the withheld information namely the document entitled "Plastic Surgery Shortlisting - Panel Guidance".

The late application of the exemption

25. This case is unusual as the position at the time of the internal review was that the public authority did not believe that it held relevant recorded information. It did not therefore apply any relevant exemptions at that time.
26. Where, as in this case, a public authority claims an exemption to information located during the course of his investigation, the Information Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* [EA/2008/0087] confirmed that the Commissioner has discretion as to whether or not to consider the exemption.
27. The Commissioner has noted that the public authority has expressed consistent concerns that the disclosure of the information would have prejudiced the effective conduct of public affairs as it would adversely affect the integrity of its recruitment process. The Commissioner notes that the Tribunal in *MacIntrye v Ministry of Defence* [EA/2007/0068] considered a similar type of information that related to the promotion

criteria of senior staff. The Tribunal explained that it believed that public service would be more effectively delivered and its objectives more efficiently met if the right people are chosen. It was therefore important that the process ensures, so far as possible, that only those with the required competencies and the best available candidates are appointed. A recruitment system that achieves the goal would have a clear impact on the effective conduct of public affairs, while a system that does not would instead have an adverse effect on them¹.

28. He also notes that the public authority as soon as it realised that it held relevant recorded information within the scope of the request, it took steps to apply section 36(2)(c) to it, including obtaining the qualified person's opinion. In light of this, the Commissioner has determined that he is prepared to consider the public authority's arguments relating to the application of section 36(2)(c) to the withheld information.

Is the exemption engaged?

29. In section 36(2)(c) cases, the Commissioner is required to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there were two possible limbs on which the reasonable opinion could have been sought: where disclosure "would be likely to prejudice" and where disclosure "would prejudice".
30. The first limb places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005]. The tribunal stated that:
- "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".*
31. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
32. The public authority has argued that the disclosure of this information 'would prejudice' the effective conduct of public affairs and the reasonable opinion was provided on that basis. The Commissioner is

¹ Paragraphs 24-26 of the Decision. The Decision can be found at the following link: http://www.informationtribunal.gov.uk/Documents/decisions/McIntyreDecision04_11_02_08.pdf

only able to consider the higher threshold as this was the threshold that was the basis on which the opinion was given.

33. When establishing whether disclosure 'would prejudice', it is important to note that information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would lead to the prejudice to the effective conduct of public affairs. In order to establish that the exemption has been engaged the Commissioner must:
- Ascertain who the qualified person is;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was objectively reasonable and reasonable arrived at.
34. The Commissioner will consider each in turn. Firstly, the Commissioner must ascertain who the qualified person is. The public authority is unusual in that it has a formal relationship with both the University of London (the University) and the London Strategic Health Authority (the SHA). It is a department of the University and the SHA has a full interest in ensuring the vitality and smooth operation of its Specialty Training. The issue had not been considered previously and at the time of its refusal notice the public authority believed wrongly that the Deanery's Director of Corporate Services was the correct individual to act as the qualified person.
35. The Commissioner, however, is satisfied that the Memorandum of Agreement with the University of London operates so that the public authority's qualified person was the Vice Chancellor of the University of London, Sir Graeme Davies. He has noted that the Information Tribunal in *University of Central Lancashire v the Information Commissioner & David Colquhoun* [EA/2009/0034] explained in paragraph 53 that it was important that a public authority provides adequate evidence that that the individual concerned has the authority to act as a qualified person. The Commissioner has considered the Memorandum of Agreement and his view is that for the London Deanery, the Vice Chancellor of the University of London is the qualified person.
36. The Commissioner is satisfied that the appropriate opinion was given. He has received detailed records of what was provided to the decision maker. The decision maker was asked to consider the withheld information in its context along with appropriate arguments. The Commissioner has been satisfied that the individual provided his

opinion in May 2010 and that the matters considered were also relevant at the date of the request.

37. In the case of *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0011 and 0013], the Information Tribunal stated that “in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at.” (paragraph 64). In relation to the issue of reasonable in substance, the Tribunal indicated that “the opinion must be objectively reasonable” (paragraph 60). In determining whether an opinion had been reasonably arrived at, it suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
38. In relation to whether the qualified person’s opinion was reasonably arrived at, the public authority provided the Commissioner with a copy of the qualified person’s opinion and the evidence he considered prior to giving his opinion. This evidence consisted of a memorandum setting out in detail the issues related to the request. Attached to the memorandum was a copy of the withheld information (and other examples of similar information for different recruitment processes), a similar request for information considered by the Department of Health, details of communications between the ICO and the public authority about its Data Protection obligations and also the information that is already available to applicants in the recruitment process. The qualified person’s opinion refers to his consideration of the factors identified in the memorandum. From these documents, the Commissioner is satisfied that the opinion was reasonably arrived at.
39. The Commissioner has gone on to consider whether the opinion was objectively reasonable. The public authority has detailed the reasons why it believes that the disclosure of the withheld information would cause prejudice to the effective conduct of public affairs. The ones that the Commissioner feels are relevant are:
 - (i) *It would reveal the shortlisting panel’s internal decision-making processes. This could militate against the recruitment of the best candidates, which in turn could compromise patient safety;*
 - (ii) *In the course of the public authority’s considerations, the views of the Speciality Training Committee Chairs were canvassed. Their collective view was that as the*

documentation remained substantially similar from one year to another; disclosure could jeopardise the effectiveness of the process in discerning between candidates and hence the effective conduct of the recruitment and selection process in the future;

- (iii) It is often impracticable for consultants to meet together to shortlist (without detriment to the provision of service within the NHS) and such confidential briefings are invaluable in ensuring a consistency of approach in the recruitment and selection process; and*
- (iv) It could narrow the range of candidates' responses, in terms of quality, if they were able to prepare with knowledge of the required detail in advance. It could distort the process from finding the best candidates to those who are best prepared for the process.*

40. After considering the arguments above, the Commissioner is also satisfied that it was objectively reasonable for the qualified person to conclude that the disclosure of the Shortlisting Panel guidance would give candidates detailed information about what was expected in the application process, and would be likely to make it easier for many candidates to gain higher marks, which would undermine the basis of the Shortlisting process. In addition it is right that the public authority takes into account the potential prejudice to meet its wider objectives while ensuring that the best applicants are appointed. Consequently the Commissioner is satisfied that there is evidence that the disclosure of the information would prejudice the effective conduct of public affairs and that the opinion of the qualified person appears to be both reasonable in substance and reasonably arrived and therefore accepts that section 36(2)(c) is engaged.

41. The public authority also asked the Commissioner to consider whether the disclosure would also result in difficulty in maintaining public safety. The Commissioner decided that this potential effect was too remote and did not accept these arguments.

The Public Interest Test

42. Section 36(2)(c) is a qualified exemption. Therefore, once the exemption is engaged, the withholding of the information is subject to the public interest test. The test involves balancing factors for and against disclosure to decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

43. The public explained that in favour of disclosure there is a public interest in transparency in decision making by a public authority.
44. The Commissioner notes it is important to promote accountability and transparency in the successful use of public funds to recruit the best trainee plastic surgeons. The information in question may enable the public to gain a greater understanding of the basis of the public authority's approach and enable wider public debate about what would make a good trainee surgeon. In addition, as competition is fierce and success and/or failure may be due to only a couple of marks, it is important that there is full confidence in the application process.
45. The complainant has also provided his arguments about why he believes that the information should be disclosed to the public. His arguments are that the information would provide important accountability that would improve the fairness of the recruitment process because it would:
 - (1) *Remove any advantage of those individual trainees who have close contact with consultants involved in the selection process;*
 - (2) *Enable trainees to build up their training portfolio in a way that increases their opportunity in obtaining a training position. They can then choose appropriate jobs, courses and activities to improve their chances; and*
 - (3) *Prevent third parties from being able to receive unwarranted financial gains. He explained that his concern relates to the market for one to one training courses which enable some trainees to improve their chances by telling them what is desired.*
46. The Commissioner accepts that the disclosure of the withheld information would be beneficial for applicants. It would enable them to know the objective criteria that are used and how they are applied. The consequences would be to enable productive preparation and may improve the applicant pool from which the public authority selects. He believes that these benefits in transparency increase the weight of the public interest arguments in favour of disclosure. In addition, the information, if released, would be available to all potential applicants and thus would potentially ensure a level playing field.

47. The Commissioner has also carefully considered the transparency of the current process. He notes that applicants when they receive feedback do receive the headings of the criteria that are used in a score sheet. These also explain what is being looked for in general terms from the application form. The Commissioner believes that individuals are relatively well informed about what is required on receiving their feedback and what evidence has been considered by the Shortlisting panel. The Commissioner does not accept that the public interest in transparency and accountability can be fully addressed via the release of other related information. He notes the Information Tribunal's view in *Cabinet Office v Lamb and the Information Commissioner* [EA/2008/0024 & 0029] that "Disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny, for example, by providing a flow of information which a free press could use."
48. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in disclosing the information:
- The potential improvement in accountability;
 - The improvement to transparency of the public authority's and its panellists' actions; and
 - The positive effects that disclosure would have for potential applicants in choosing relevant work experience.

Public interest arguments in favour of maintaining the exemption

49. The public authority has provided detailed submissions about why it believes that the public interest favours the maintenance of the exemption. It is important to note that only factors that relate to the prejudice of effective conduct of public affairs can be considered in this analysis.
50. When making a judgment about the weight of the public authority's public interest arguments, the Commissioner will also consider the severity, extent and frequency of prejudice or inhibition to the effective conduct of public affairs.
51. The first factor the public authority asked the Commissioner to consider was that the disclosure of the information would be likely to substantially prejudice the effectiveness of its recruitment process both in the current year and subsequent years. It explained that it was important that its recruitment process was and remained a level playing field and that it was allowed to use objective criteria in order to

identify the most suitable candidates to undertake training in plastic surgery. The Commissioner has carefully considered the criteria themselves. He has determined:

- (1) That they have been calibrated with real care and that the requirements are generally objective;
 - (2) That the content of the shortlisting criteria is relatively easy to apply by the respective members of staff;
 - (3) That the provision of the criteria would provide the candidates with detailed knowledge about what to include in their application form and what to omit. In the Commissioner's view an analogy would be provision of an exam marking scheme, before sitting an exam;
 - (4) That there are a number of categories that constitute requirements for applicants and the Commissioner regards it as being unlikely that every word in an application form can be verified later in the process;
 - (5) That the provision of the criteria would provide incentive for individuals to potentially fabricate their experiences in order to get through the shortlisting process (particularly as one or two points extra would make all the difference);
 - (6) That the application form does have an important purpose to provide a layer of screening to allow limited administrative resources to be focussed on those candidates who are best suited; and
 - (7) Any potential distortion between the knowledge between applicants is likely to lead to the process not being fair to the less informed applicants.
52. The public authority explained that it believed that the undermining of the recruitment process would be multifaceted. Firstly, there would be distortion in knowledge between those applicants who are aware of the criteria and those who are not. The Commissioner notes that disclosure of the guidelines under the Act, would make them theoretically available to the whole public and could therefore create an equal playing field. However, this presupposes that all other candidates are aware that the guidance has been released into the public domain. The Commissioner is not satisfied that this will be the case and any candidate who lacked the guidance would be at an unfair disadvantage.
53. Secondly, the public authority explained that it believed that the applications that it would receive would be skewed which may disable

scorers to exercise even judgment as applied across the full range of criteria. It commented that it believed that this would defeat to a great extent the purpose of using an application form to differentiate between applicants. The public authority explained that the maintenance of the integrity of its recruitment process ought to be a compelling public interest factor that favours the maintenance of the exemption. The Commissioner has noted that the disclosure would theoretically be made to the whole world. However, given his comments in paragraph 51 above, he does believe that the utility of the shortlisting process would be considerably undermined through its disclosure. The Commissioner has been satisfied that the nature of the information shows that the prejudice would be likely to be severe and of a serious extent.

54. In addition it asked the Commissioner to consider the potential consequences of its recruitment process being undermined by the disclosure of the information.
55. The first option would be for it to carry on using the same recruitment criteria. The result of doing so could compromise the integrity of its recruitment process and lead to the undermining of its core purposes. In particular, applications could be amended in a manner that intensifies the risks of failings of competence not being discovered. The Commissioner agrees that this could be the effect and provides further evidence that the prejudice would be severe and of a serious extent.
56. The public authority expanded on this argument and explained that it believed that the result would be totally unacceptable as it would lead to additional avoidable risks to patients. The Commissioner believes that these arguments can be addressed to a certain extent through the remainder of the application process and the subsequent training programme and has not put much weight on these arguments around patient safety.
57. The second option would be for it to develop a new set of recruitment criteria for each and every recruitment process. While, the Commissioner is only considering a particular piece of guidance, it is likely given the advantage that is gained that the revised guidance would also be requested by applicants wanting to enhance their opportunities. The public authority explained that this would be the likely result of the disclosure of the disputed information as it would have to move to ensure the integrity of the process. However, it explained that the imposed obligation to counter the disclosure would lead to the expenditure of its sparse administrative resources and public money. It explained that in its view it was not in the public interest for it to be forced to change its policy on how to weight the

criteria annually in order to enable it to conduct its public duties appropriately. The necessity to develop new criteria would mean that the prejudice would have real frequency.

58. In addition it explained that there were considerable similarities between how these criteria were weighted and those of a number of other courses whose recruitment it supervises. It explained that it had discussed the issue with all the Chairs of Speciality Training Committees who explained that the criteria remain substantially similar from one year to another. The adverse effect would therefore be intensified and the expenditure to change the process every year would not just be for one round of recruitment but for all of its recruitment processes. The Commissioner has considered a sample of such scoring criteria and believes that this argument is appropriate in this case. He notes that the similarity may lead to past applicants having an advantage over first time applicants, but accepts that the lack of knowledge of how the requirements are weighted means that individuals are presently in an equal position. This is because both past applicants and first time applicants know the general criteria, but do not know how the answers to those criteria are weighted. The Commissioner has been satisfied that the frequency of prejudice extends through all the courses of recruitment it supervises.
59. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in withholding the information:
- the likelihood and severity of harm arising from disclosure to the effectiveness of the recruitment process;
 - the potential consequences of that harm to the public – that has not been given much weight on the facts of this case; and
 - the potential consequences of that harm to the public authority.

Balance of the public interest arguments

60. The Commissioner is aware that disclosure of the weighting criteria into the public domain would lead to increased debate about the process of recruiting people on plastic surgery training, but is of the view that this would not necessarily serve the public interest. The adequacy of the applications process is not for the Commissioner to comment on; his decision must relate solely to where the balance of the public interest lies. The Commissioner has therefore to consider the likely impact of disclosure on the public authority's application system, and decide whether it would cause sufficient harm for that balance to lie in maintaining the exemption.

61. However, the Commissioner also accepts that candidates are interested in the weighting applied in the shortlisting process. Given that training positions at the public authority are limited, candidates will want to ensure that they have an opportunity to prepare both to undertake supplementary training and to fill in the application form so as to maximise their chance of success. The Commissioner notes that the public authority does currently provide candidates with feedback on their score and what was measured.
62. The Commissioner is mindful that there is a presumption of openness running through the Act, and if the public interest test is evenly balanced, the public interest favours disclosure. However, the Commissioner is of the view that the argument for maintaining the exemption in this case is stronger than the opposing arguments for disclosure of the information requested. This is because disclosure would prejudice the effective conduct of public affairs to a significant effect, and such prejudice would be severe and frequent. Although it is important for training institutions to be accountable and transparent with regard to their application processes, it is clear that these processes must be effective. The Commissioner is satisfied that disclosure of the weightings applied in the shortlisting process would undermine the value of the application process, and given that the application process is the public authority's chosen selection method, disclosure would significantly harm the effectiveness of the public authority in selecting suitable candidates.
63. In light of the above, the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. He is satisfied that the information was withheld correctly.

Procedural Requirements

Section 17(1)(a), (b) and (c)

64. Section 17(1)(a) requires that where a public authority specifies that information it holds is exempt it says so explicitly in its refusal notice. The Commissioner believes that because the refusal notice was revised at the time of the internal review, the public authority breached section 17(1)(a).
65. Section 17(1)(b) requires that where a public authority specifies that information it holds is exempt it specifies the exemption in its refusal notice. As it failed to do so, it breached section 17(1)(b).
66. Section 17(1)(c) requires that where a public authority specifies that information it holds is exempt, it specifies why it was relying on the

exemption where it was not obvious. The Commissioner believes that the refusal notice inadequately explained why an exemption was being relied upon in this case and that this was a breach of section 17(1)(c).

Section 17(3)

67. Section 17(3) requires that where a public authority applies a qualified exemption that it specifies its public interest test and why it believes that the public interest in maintaining the exemption outweighs that of disclosure. The public authority failed to detail its public interest test by the time of its internal review and breached section 17(3).

The Decision

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

- *It correctly withheld the disputed information by virtue of section 36(2)(c)*

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

- *It wrongly denied at the time of its internal review that it held relevant recorded information and so breached section 1(1)(a).*
- *It also breached sections 17(1)(a), 17(1)(b), 17(1)(c) and 17(3).*

Steps Required

70. The Commissioner requires no steps to be taken.

Other matters

71. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. As has been noted above, it is important that if the public authority is applying section 36 in the future, it obtains the consent of the qualified

person before applying the exemption in its refusal notice. The failure to do this is poor practice and may result in the public authority being unable to rely on that exemption.

72. The Commissioner was also concerned about the public authority's publication scheme. Some of the links on it were not accessible to the public. The Commissioner highlighted this problem to the public authority and is satisfied that it has been rectified.

Right of Appeal

73. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 6th day of December 2010

Signed

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

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

(1) 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.

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

(3) 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 17 - Refusal of request

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

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

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

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

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

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

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

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

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

(6) Subsection (5) does not apply where—

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

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

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

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

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

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

Section 36 - Prejudice to the effective conduct of public affairs

(1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.