



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2006/0040

Freedom of Information Act 2000 (FOIA)

**Heard at Procession House, London
on 8th, 9th and 16th January 2007**

**Decision Promulgated
5th March 2007**

BEFORE

INFORMATION TRIBUNAL CHAIRMAN

John Angel

And

LAY MEMBERS

Suzanne Cosgrave and Roger Creedon

Between

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant

And

INFORMATION COMMISSIONER

Respondent

Representation:

**For the Appellant: Mr James Eadie
For the Respondent: Mr Timothy Pitt-Payne**

Decision

The Tribunal upholds the decision notice dated 5th June 2006 and dismisses the appeal. This means that the Appellant must send the disputed information, the subject of the request under section 1(1) FOIA, redacted as set out in paragraph 112 of the reasons for this decision, to the complainant within 30 days of the date of promulgation of the decision.

Reasons for Decision

The request for information

1. On 18th November 2004 Mr Mark Oaten MP (Mr Oaten) by Parliamentary Question (PQ) asked for the following information from the Secretary of State for Work and Pensions (DWP):
“The timescale and anticipated publication date for the feasibility study being undertaken by this Department [DWP] to establish the full impact, costs and benefits of the introduction of identity cards.”
(Letters in square brackets inserted by us.)
2. The DWP admitted that “an initial feasibility study on the impact Identity Cards will have on DWP business.....had already been completed and forwarded to the Home Office”, but refused to publish the results. On 2nd December 2004 Mr Oaten requested a review of the decision but amended his request to ask for “*a copy of the feasibility study with all sensitive information removed*” (the Request).
3. Eventually on 27th June 2005 James Plaskitt (Mr Plaskitt) MP Parliamentary under Secretary of State at the DWP wrote to Mr Oaten refusing to provide the information requested, having first accepted the Request under FOIA, but claiming that the information requested fell within the exemptions under sections 35(1)(a) FOIA (formulation and development of government policy) and 43(2) FOIA (commercial interests) and “that there is no overarching public interest argument in favour of releasing this information” (the Refusal Notice).
4. Although Mr Plaskitt provided no factors that had been considered by the DWP in favour of disclosure in the Refusal Notice when applying the public interest test, he gave a number of reasons for maintaining the exemption under section 35(1)(a) which can be summarised as follows:

- a. Good government depends on good decision making and therefore needs space in which to formulate policies based on the best advice available with full consideration of all options;
 - b. Ministers and officials must be able to conduct rigorous and candid assessment of their policies and programmes including consideration of the pro and cons without there being premature disclosure which might close off discussion and the development of better options; and
 - c. Premature disclosure of the work undertaken could put the unrestrained and unprejudiced assessment of the programme at risk. It may limit discussions, discourage frank reporting of progress and undermine the identification of risks of delivery. This would put at risk the successful delivery of government policy and would be to the detriment of the effective conduct of public affairs.
5. He also gave a number of other factors which principally related to the section 43(2) exemption but as this exemption has now been abandoned we do not intend to set out these factors here.

The complaint to the Information Commissioner

6. On 11th July 2005 Mr Oaten complained to the Information Commissioner (the Commissioner) about the way the Request had been handled. The Commissioner accepted that the Request could be handled under FOIA.
7. On 5th June 2006 the Commissioner issued a decision notice (the Decision Notice) requiring that the disputed information be disclosed. Although the Commissioner found that the section 35(1)(a) exemption was engaged and that the public interest balance favoured disclosure, he did not find that the section 43 exemption was engaged.
8. The Commissioner considered the public interest factors in favour of maintaining the exemption set out in the Refusal Notice and at paragraph 4 above. He also considered factors in favour of disclosure when considering the application of the public interest test which can be summarised as follows:

- a. The scale, expense and constitutional implications of the identification card scheme (ID card scheme);
 - b. Understanding any benefits derived from savings by government departments, such as the DWP, as the ID card scheme would incur costs running into several billions of pounds;
 - c. The ID card scheme would fundamentally alter the way in which people accessed public services;
 - d. The ID card scheme would have considerable financial implications for every adult citizen.
 - e. The ID scheme would have long lasting effect.
9. The Commissioner found that the public interest in favour of disclosure outweighed the public interest in maintaining the exemption and ordered disclosure of the disputed information.

The Appeal to the Tribunal

10. The DWP appealed to the Tribunal on 3rd July 2006. The Department accepted that the Request should be considered under FOIA and that section 43 was not engaged. However, although the DWP agreed that section 35(1)(a) was engaged it disagreed with the Commissioner's findings in relation to section 35(4) (factual information) and the Commissioner's finding in relation to the application of the public interest test.
11. The fact that the parties maintain that an exemption is engaged means that the Tribunal has conducted the proceedings in this appeal so that the disputed information is kept confidential in accordance with our Practice Direction of March 2006. In this light the reasons for this decision have been drafted in such a way that they do not intentionally disclose the details of the disputed information in order to continue to provide confidentiality until this decision is complied with or successfully appealed against.

Validity of the Request

12. The DWP accepted the Request as a valid request under FOIA. As both parties to this appeal and Mr Oaten wish us to consider the Request under FOIA we are happy to do so. This is a sensible approach by the parties because otherwise Mr Oaten could have made another request at any time on or after 1st January 2005 on the same or similar terms which would have been a valid request under FOIA. Therefore we are prepared to accept that we can deal with the Request under section 1(1) FOIA.

13. The only issue is the date of the Request, particularly for the purposes of considering the public interest test under section 35. It was agreed by Mr Pitt-Payne on behalf of the Commissioner and Mr Eadie on behalf of the DWP that the date should be January 2005. There is no need to specify an actual date as although a request will be made on a specific date, it will be received by the public authority on a subsequent date and in any case the authority will have 20 days in which to reply and where it considers that an exemption is engaged a further reasonable period to issue a refusal notice, if it so chooses. Therefore we are prepared to accept that “January 2005” is the relevant date for the purposes of the Act.

Evidence before the Tribunal

14. Mr Eadie invited us to consider the evidence of several witnesses given to a differently constituted panel of this Tribunal in *Department for Education and Skills v The Information Commissioner* (DFES case). These witnesses are Andrew Lord Turnbull (Lord Turnbull) who was Secretary of the Cabinet and Head of the Home Civil Service between 2002 and 2005 and Paul Britton (Mr Britton) who is the Director General, Domestic Policy Group in the Cabinet Office. Their evidence was provided by way of written statements provided in the DFES case and the transcripts of their evidence at that hearing. We agreed to accept their evidence in this case which is very ably summarised by the learned Chairman, David Farrer QC, of the Tribunal in that case, at paragraphs 27 to 36.

15. Mr Eadie called four witnesses. Sir David Normington (Sir David) who is a Permanent Secretary of the Home Office and Leigh Lewis (Mr Lewis) the Permanent Secretary of the DWP. Both largely endorsed the views expressed by Lord Turnbull and Mr Britton. He also called two other witnesses, Stephen Harrison and David Barr, to whom we will refer to later. The Commissioner did not call any witnesses.

The Tribunal's powers

16. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act. They are in wide terms. Section 58 provides as follows.

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The question whether the exemption in section 35(1)(a) applies is a question of law or alternatively of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision as to whether the exemption applies, and may substitute its own view if it considers that the Commissioner's decision was erroneous. The Tribunal is not required to adopt the more

limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority.

Relevant statutory provisions

17. The relevant part of section 35(1) in relation to this case reads as follows.

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

...

18. The exemption created by section 35(1) is not absolute (it is not included in the exclusive list of absolute exemptions in section 2(3) of the Act). Hence this is a qualified exemption. It excludes the duty to disclose (which arises under section 1(1)(b)) if, and only if, in all the circumstances the public interest in maintaining the exemption outweighs the public interest in disclosing the information: see section 2(2). In carrying out that assessment, section 35(4) must be considered. It reads:

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.

19. Section 35(2) has also been considered in this appeal:

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 purpose of subsection (1)(a), as relating to the formulation or development of government policy.

20. There is no definition of statistical information in FOIA. The DCA guide on section 35 provides some helpful guidance on what is statistical information:

Statistical information used to provide an informed background to government policy and decisionwill usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, etc. to be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being i) derived from some recorded or repeatable methodology, and ii) qualified by some explicit or implied measures of quality, integrity, and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the limitations of the methodology, and the relevant measures of quality, etc., allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy.

Proper approach to the public interest test

21. In the DWP's letter of 27th June 2006 providing the outcome of the internal review, it described the public interest test that it applied in this case in terms that there needed to be an "overarching public interest argument in favour of releasing this information." This interpretation of the test is clearly wrong. This has now been accepted by the DWP. On one side of the "balance" introduced by section 2 is the public interest in *maintaining the exemption*: it is not the public interest in non disclosure.
22. The application of the public interest test by the Commissioner is a question of law, alternatively of mixed law and fact; and the Tribunal may substitute its own view for that of the Commissioner as to where the balance should be drawn.

23. The exemption in section 35(1)(a) is a “class” exemption rather than a prejudice-based exemption. That is to say, in order for the exemption to be engaged the public authority does not need to demonstrate that any specific prejudice or harm would flow from the disclosure of the information in question.
24. Nevertheless, because this is a qualified exemption it is necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information sought. In carrying out this exercise it is relevant to consider what specific harm would follow from the disclosure of the particular information in question. The public authority’s assessment of the public interest in maintaining the exemption should focus on the public interest factors specifically associated with that particular exemption, rather than on a more general consideration of the public interest in withholding the information: see the decision of the Tribunal in *Hogan and Oxford City Council v Information Commissioner* at paragraph 59. This exercise requires the public authority to stand back and abnegate its own interests except and insofar as those interests are properly viewed as part of the public interest.
25. A question that sometimes arises is whether, and in what sense, the Act gives rise to any presumption in favour of disclosure. In one sense the scheme of the Act as a whole involves a presumption in favour of disclosure. The duty to confirm or deny (section 1(1)(a)) and the duty to disclose information (section 1(1)(b)) are both expressed in general terms. Unless there is any relevant exemption under the Act then those duties will operate. The “default setting” in the Act is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.
26. What is the position, however, where a qualified exemption is engaged (i.e. the particular information requested comes within the language of the exemption) and the balance of public interest falls to be assessed?
27. In order for a qualified exemption to operate so as to exclude the duty to disclose in section 1(1)(b) FOIA, the public interest in maintaining the exemption must outweigh the public interest in disclosing the information: see

section 2(2)(b) of the Act. Hence if the public interest on both sides is equally balanced then the exemption will not exclude the duty to disclose, and where there is no other relevant exemption the information must be disclosed. In this sense there is a presumption in favour of disclosure in cases where the qualified exemptions are engaged. It is, however, a presumption that will only operate in cases where the respective public interests are equally balanced.

28. There is no provision in FOIA comparable to regulation 12(2) of the Environmental Information Regulations 2004, which expressly requires public authorities to apply a presumption in favour of disclosure when considering the exceptions to the general duty to disclose environmental information under those Regulations.

29. It can be said, however, that there is an *assumption* built into FOIA, that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered “in all the circumstances of the case”.

30. As we have said in other cases (e.g. *DTI v Information Commissioner* at paragraphs 44 and 46) the competing public interests should be assessed by reference to the time when the request was made and not by reference to the time when the Commissioner made his decision or the time when the Tribunal hears this appeal.

31. In Philip Coppel’s book *Information Rights* he makes the following propositions about the application of the public interest test in relation to section 35(1)(a). First, there is nothing in the description of the sub-section itself that urges non-disclosure, or at least, not without some rejection of the underlying premise of FOIA. This is further evidenced by the limited range of public authorities to

which the exemption applies: if there is a public interest served by exempting information relating to the formulation or development of policy, it is not immediately obvious why that public interest stops with government departments and does not include the formulation or development of policy of, say, a local authority. Secondly and largely because of the first, a public authority's self-interest in non-disclosure of this class of information is apt to be presented or even perceived as the public interest in maintaining the exemption, with the public authority effectively determining its own case. The exemption therefore requires government departments to steel themselves, and where required find that the public interest in maintaining the exemption is outweighed by the public interest in disclosure.

32. This Tribunal accepts these propositions, as to do otherwise would effectively promote the exemption into an absolute exemption.

33. We note that the Tribunal in the DFES case (at paragraphs 60 to 66) found similarly.

The background to identity cards

34. In the aftermath of the terrorist atrocities on 11th September 2001 a serious debate as to the introduction of identity cards commenced in the UK. Stephen Harrison (Mr Harrison), who worked at the Home Office at the time, gave evidence to the Tribunal that he was asked to become involved in considerations relating to identity cards as early as October 2001.

35. The Government announced its intention to consult on an identity cards scheme (ID cards scheme) in February 2002 in the Immigration White Paper '*Secure Borders, Safe Haven*' (CM 5387). This was given effect in '*Entitlement Cards and Identity Fraud – A Consultation Paper*' (CM 5557) which was published in July 2002 and was followed by a consultation period which ran for six months. Following the consultation the Government announced its intention in principle to introduce an ID cards scheme in '*Identity Cards: The Next Steps*' (CM 6020)

which was published in November 2003. It made clear the scheme would be introduced incrementally and that a move to a fully compulsory scheme would depend on the successful implementation of earlier incremental steps such as the establishment of a National Identity Register as well as an assessment of the implications of a move to full compulsion.

36. Further consultation followed the publication of a draft Identity Cards Bill in April 2004. Then an Identity Cards Bill was introduced to Parliament in November 2004 (2004 Bill). This Bill did not complete its Parliamentary stages before the General Election in May 2005. As a result a second Identity Cards Bill was introduced in May 2005. It received the Royal Assent as the Identity Cards Act in March 2006 (2006 Act).

37. The legislative framework used by both Bills for the introduction of ID cards for public services, such as those provided by the DWP, was by way of enabling legislation which deliberately left detailed decisions to a later stage of public and Parliamentary scrutiny. With the 2004 Bill that secondary legislation would be subject to the negative resolution procedure which meant that it would not require Parliamentary debate before coming into effect. Only later in the Parliamentary process did this change and an affirmative resolution procedure was adopted requiring Parliamentary debate and approval. This latter approach was adopted by the 2006 Act.

38. It would appear from the evidence of Mr Harrison that at the time of the Request the version of the 2004 Bill before Parliament only required a negative resolution procedure and that the level of scrutiny at that time under 2004 Bill was less than now required under the 2006 Act.

39. Mr Harrison, who later became the DWP's Director of Policy, Identity and Passport Service at the Home Office, in his written statement explained the position of the 2004 Bill in relation to the DWP as follows:

“The Bill which was before Parliament in 2004 reflected the Government’s approach on the relationship of the ID cards scheme to DWP services which was:

- (i) there was an intention to link the ID cards scheme to DWP’s services e.g. social security payments;
- (ii) there was no specific commitment on any further detail e.g. what social security benefits might be linked to the scheme and by when;
- (iii) there would be a safeguard on linking requirements to produce ID cards for social security payments (and other free public services) to the compulsory requirement to register and be issued with an ID card.”

40. In cross-examination Mr Harrison clarified the timing of the intention in (i) to the previous paragraph by confirming that the Government in 2004 was

“committed to ensuring that there was a legislative vehicle which would allow it to implement links between DWP services and the ID card scheme once the ID card scheme was in place....but as to having a very specific understanding of what types of DWP services would definitely be linked to the scheme, it certainly did not have that understanding at that time because it could not draft the legislation in that way.”

41. Mr Harrison explained in his witness statement that while working on identity card policy at the Home Office that:

“the Government’s approach was at the macro level, i.e. that there should in principle be a link between the ID cards scheme and DWP services with a safeguard related to compulsion. Decisions on the timing and nature of the relationship between the scheme and specific social security benefits and other DWP services would be made

separately at a later time with Parliamentary scrutiny and public consultation.”

42. Whereas the 2004 Bill did not originally envisage ID cards becoming compulsory without a superaffirmative process (passage through both Houses where amendments could be made), the 2006 Act requires further primary legislation.
43. With all bills a regulatory impact assessment (RIA) is published which is meant to provide an analysis of the likely impacts of a policy change and the range of options for implementing it together with a cost benefit section. We were informed that the RIA does not normally contain a detailed cost benefit analysis but in evidence we were told that because of the level of public interest in ID cards, the RIA for the 2004 Bill took a rather different approach and contained more information providing estimates of costs and areas of benefits, for example reduced fraud, but without identifying actual estimated savings.
44. Throughout the legislative process business cases are prepared. In the case of the 2004 Bill the Home Office, who were responsible for the 2004 Bill, appeared to have prepared several versions of an outline business case by the time it was laid before Parliament. In evidence we heard from Mr Harrison

“that the purpose of a business case was to provide the information necessary to make informed decisions as to whether to devote resources to deliver the proposed changes, and as to the nature of the scheme or schemes that might be implemented. The business case describes the potential costs of a scheme, how it will be managed and what it will achieve i.e. the benefits gained from the investment required. It is a working document and which develops incrementally as matters relevant to the policy or the detail change – for example, different options as to the structure of the scheme might need to be incorporated and tested, more detailed and precise information might become available, new ideas as to the shape of the scheme might be

brought forward, new judgements on issues previously considered might be arrived at.”

45. In early 2004 the DWP set up a working team to help prepare for the introduction of an ID card scheme. David Barr (Mr Barr) who was Head of the Fraud and Error Strategy Division which is part of the DWP’s Work Welfare and Equality Group, explained in cross-examination:

“I think it would be true to say that we were starting from a standing start in relation to providing any sort of level of detail. Between January 2004 and September 2004 it would really very much have been the case of DWP internally setting up the appropriate teams to prepare to deal with whatever came from the Home Office, and to start thinking about what DWP’s interest in the ID card scheme might be.”

46. The Home Office, who was the department responsible for steering through the 2004 Bill, developed a number of assumptions about how an ID card scheme might work for the purpose of developing the business case in the latter part of 2004. According to Mr Harrison:

“these were not assumptions cleared either by Home Office ministers or collectively by government ministers as the agreed government position for how they wanted the scheme to materialise.”

The major Whitehall departments including the DWP were part of a Principal Users Group involved in the development of these assumptions, which were proposed by the Home Office but were not challenged in any substantive way by departments during the Principal User Group discussions. According to Mr Harrison:

“they were accepted as a reasonable basis on which to develop this outline business case.”

47. It would appear from the evidence that this was one of the first projects with which the DWP ID card project team seems to have been involved. The developed assumptions were given by the Home Office to the DWP in September 2004 and the two departments conferred through work shop style meetings as to which services the DWP might best use the cards for to identify costed benefits for the purposes of updating the business case. Other departments were asked to do a similar exercise. The DWP provided this information in spreadsheet type form in October 2004 and this is the disputed information in this case. It would perhaps be going too far to describe it as a feasibility study but it clearly identified assessments of the costs and benefits of the use of ID cards by the DWP. The Home Office was in control of the whole process and collated the information when it was returned from departments. .
48. The Home Office updated the business case in and around the time the 2004 Bill was laid before Parliament. This business case appears from the evidence to have been related, inter alia, to the overall cost/benefit analysis of the introduction of an ID card scheme at the time. There is no evidence that this case was published except that elements appear to have been used in the RIA published on 29th November 2004 alongside the 2004 Bill. We note that this RIA has ministerial sign-off by Desmond Browne, Ministry of State at the Home office who states “I am satisfied that the benefits [of introducing the ID scheme] justify the costs.” In our view the business case being prepared by the Home Office at this time would almost certainly have helped him form this view and provided input to Parliamentary debate following the introduction of the 2004 Bill.
49. Mr Harrison in cross examination also explained that the disputed information was used to start to build a view across departments of the demand for particular services in, say, terms of transaction volumes in order to inform a subsequent procurement exercise for, say, a card reader for use across departments to ensure it had sufficient capacity to meet the customer requirement.

50. Mr Harrison also explained that at the time of the Request in January 2005 the Parliamentary debate was around general issues associated with issuing ID cards, rather than necessarily any particular uses or scenarios.

51. Mr Barr's view was that the disputed information was provided for Home Office purposes. In response to a question by Mr Pitt-Payne about whether the DWP prepared the figures in the disputed information knowing they would be used by the Home Office to inform their business case he responded:

“Indeed, but also knowing that the Home Office would fully understand the context in which the figures had been produced so that they would ensure that they used them appropriately in developing their business case.”

52. The disputed information considers several possible areas of DWP business for savings estimation purposes. According to Mr Barr these were not chosen after considerable policy debate, but as an exercise to help the Home Office with the development of the business case. Mr Barr in cross examination said:

“I think those were the three most obvious areas that sort of jumped up as being of clear advantage to the DWP from the introduction of an ID card scheme.” However “thinking through what those [services] might be, identifying those areas of the business where those benefits might be derived, had certainly not taken place.”

Also Mr Barr confirmed in evidence that the disputed information was provided to assist the Home Office.

53. We note with interest that in response to a question from the Tribunal Mr Barr said that until the Strategic Action Plan was published in 2006 “the scope that has been identified to use DWP information systems in support of a cross-government identity management strategy” was not available for the DWP to develop detailed policies for which secondary legislation would be required. He went on to say that work came to an “abrupt halt in March 2006 for the simple

reason it was clear to us that we had no informed basis on which to continue to take work forward. It was clear then that the Home Office were reviewing their thinking on the way forward and so that work on the strategic outline business case did not really progress very far because it was clear that we had to wait for further clarity from the Home Office, and that is still the position.”

Conclusions in relation to the evidence

54. From this evidence we conclude that there were clearly two policy decision stages to the introduction of an ID card scheme. The first was the decision to introduce a scheme. This policy was at a macro level. At the time of the Request we find that this policy had already been formulated and that the policy had been developed to such a stage that a bill had been presented to Parliament for debate and approval. In our view this was a late stage in the policy formulation and development of the decision to introduce an ID card scheme.
55. The second policy decision stage related to the detailed implementation of the scheme at departmental level which would require secondary legislation. We find that the policy decisions related to this micro process had not been taken and that it was a very early stage in the formulation and development of these policies. This seems to be confirmed by Mr Pond on behalf of the Secretary of State for Pensions in response to a PQ on 21st December 2004 when he confirmed that the DWP had not conducted a specific assessment that would allow the department to make an estimate of the savings in benefit fraud. We consider our view is supported by responses to PQ's at around the time of the Request.
56. It is interesting for us to note that the Tribunal in the DFES case (at paragraph 63) found that the wording of section 35(2) seemed to envisage policy formulation as a series of decisions rather than a continuing process of evolution. We agree with this interpretation and go on to find that in this case the two stage decision and policy formulation process can be considered separately at each stage rather than as a continuum.

57. In relation to the disputed information we find that it was provided by the DWP to the Home Office as part of the development of the macro policy: decision to introduce an ID card scheme. Although the disputed information could have contributed to secondary micro policy decisions, that was not its purpose in January 2005. Its purpose was to help develop the higher level policy and by that time a decision had already been taken by Government to introduce an ID cards scheme. Government policy had moved from the formulation stage well into development. We therefore need to consider the questions for the Tribunal with this finding in mind.

Questions for the Tribunal.

58. There are four principal questions for the Tribunal in this case:

- a. Firstly, does the disputed information come within the scope of the section 35(1)(a) FOIA exemption? If the exemption is engaged then:
- b. Secondly, do we find that there is any factual information to which we should have regard to a particular public interest?
- c. Thirdly, is there any statistical information which was used to provide background information which should be disclosed?
- d. Finally, in all the circumstances of this case does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

59. Before considering these questions Mr Eadie asks us to consider several matters, which he describes, as of principle.

The Appellant's matters of principle

60. Firstly he contends that the section 35(1)(a) exemption is of particular importance and when applying the public interest test under section 2(2)(b) greater weight should be attached to the public interests in favour of maintaining the exemption in order to protect Government space for deliberation on policy. He argues that it is perfectly permissible for us to make a judgment about the weight of the exemption and thus on the weight needed on the other side of the scales to outweigh it. The particular protected interest in any qualified exemption or the weight to be attached to the particular protected interest in any of the qualified exemptions may vary depending upon the particular qualified exemption that is being dealt with. He then provides an example of another exemption where he would expect greater weight to be afforded, namely legal profession privilege (LPP). He continues there is a need to allow for a protected space around legal advice, and it will require something very weighty to outweigh LPP.
61. Mr Pitt-Payne argues that the section 35 exemption is very different from the LPP exemption for three reasons. Firstly the range of types of information that fall within section 35 is much wider than the range of types of information that fall within LPP. Section 35 explicitly recognises this through the special provisions relating to statistical and factual background information. Therefore there is a wider range of possibilities when assessing the public interest in maintaining the exemption.
62. Secondly he argues with LPP it comes down to maintenance of the rule of law. If people are deterred from taking legal advice on the basis of full and frank disclosure to their own lawyers, then they are likely to be deterred from obtaining advice about their legal obligations and in effect deterred from obeying the law, which could potentially undermine the rule of law, particularly where the parties concerned are public authorities.
63. Finally he argues the public interest factors in favour of disclosure are very different. There is a limit to the extent to which the merits or demerits of a public authority's legal advice can itself either be the subject of informed public debate or can sensibly inform the public debate.

64. Although we take note of Mr Eadie's submission on the weight of the exemption we agree with Mr Pitt-Payne that LPP is not a comparable exemption.
65. His second contention of principle is that there are very serious risks that flow from making disclosures of information falling within the section 35(1)(a) exemption. He points us to the weight of evidence from the eminent civil servants who have given evidence in this and the DFES case. These are the "secondary signals" which are dealt with below.
66. Mr Eadie's third matter of principle is that ideas being considered as part of the formulation and development process are considered in a "political environment." This means that there are inevitable and real difficulties with information being put into the public domain from this protected space needed for decision making. He continues there will be the opportunity for debate on policy proposals and this goes to limit or negate any disclosure of information before this point.
67. Mr Pitt-Payne has some sympathy with the need to maintain a space for policy formulation and deliberations so that public debate does not swamp the Government policy-making process. However he contends that there is a danger of treating the policy making process and the process of public debate in a very artificial way, as if they were hermetically sealed from one another and as if they alternated. In practice, he maintains, they tend to take place side-by side. It needs to be recognised, he argues, that the public debate itself may inform the policy making process. He continues the public interest in having an informed public debate is not just about issues of constitutional principle, democratic legitimacy, public participation and reducing alienation from the political system and so forth. It is also about getting the decision right.
68. We have taken these arguments into account when considering the questions for the Tribunal to decide in this case. We now turn to the questions set out in paragraph 58 above.

Scope of exemption

69. Both the parties accept that the disputed information comes within the scope of section 35(1)(a). We agree with that position and therefore find we do not have to undertake the exercise undertaken by the Tribunal in the DFES case to consider the scope of the exemption and whether the disputed information fell within it. However we note the Tribunal's finding in that case on this point with approval.
70. However Mr Eadie asks us to determine how close the disputed information is to what he describes as the "heart" of the exemption because he argues the closer it is to the heart, the weightier the exemption and its effect when applying the public interest test.

Factual information

71. The disputed information is a set of assumptions which the DWP has applied to three of their services in short reports so as to help identify some savings and costs over time. Mr Pitt-Payne argues that some of the assumptions are based on factual information and therefore should be treated as such for the purposes of applying section 35(4). Mr Harrison in cross examination did not accept this argument and maintained that the disputed information was purely a set of assumptions upon which certain calculations or predictions were to be based.
72. It is an important consideration because if we find that the disputed information contains factual information, then section 35(4) obliges us to have regard to the particular public interest in the disclosure of the information which is used to provide an informed background to decision-taking when applying the public interest test under section 2(1)(b). This requires an identification of what is and what is not "factual information.."
73. Mr Eadie contends that there is no factual information because of the reasons given by Mr Harrison and other witnesses who concluded that the disputed

information is a combination of assumptions, judgements, predictions, opinions and views. He suggested, based on evidence given by Mr Lewis, that information can be characterised within a spectrum where pure advice was at one end of the spectrum and straightforward factual information at the other end of the spectrum. He submitted that the disputed information was somewhere in between these ends and therefore was not caught by section 35(4).

74. We tend to agree with Mr Eadie. We have had difficulty finding any factual information in the disputed information despite Mr Pitt-Payne's valiant efforts to show otherwise and his acceptance that it is a difficult exercise. Even if we are wrong and there is such information, where the information is firstly, so inextricably connected to the deliberative material that it is difficult to distinguish and secondly, where the vast weight of material is non factual information, we consider Parliament did not intend the sub-section to apply. We make these findings in this case.

Statistical information

75. Mr Eadie urged us to apply a narrow construction to "statistical information", although he was unable to provide us with a definition of the term. His basis for this contention was because otherwise section 35(2) might have a thoroughly damaging effect.

76. We do not accept his argument. The sub-section only comes into play "once a decision as to government policy has taken place." Also it only applies to "statistical information used to provide an informed background to the taking of the decision." The sub-section should be construed as set out by Parliament.

77. The only matter which is in doubt is the meaning of statistical information. We are happy to adopt the definition in paragraph 20 above which comes from the DCA's own guidance on section 35 FOIA. This requires '*mathematical operations performed on a sample of observations or some other factual information*' Mr Pitt-Payne helpfully contends that statistical information is

information that is put forward with a high degree of confidence by those putting it forward that it accurately describes the state of things.

78. In view of our finding that the disputed information does not contain factual information for the purposes of section 35(4) we find that the disputed information is not statistical information in this case. Also we accept that the disputed information was used to help the Home Office inform an iteration of its high level business plan in January 2005 and that its aim was not to accurately provide details of benefits.

79. If we had found that it was statistical information, then because of our earlier finding that a decision to introduce an ID card scheme had been made taken by the Government by the time of the Request, then we would have proceeded to consider whether the disputed information had been used to provide an informed background to the taking of the policy decision. However there is no need to do so as we have found that section 35(2) does not apply in this case.

The public interest test

80. We have set out above what is the proper approach to the test under section 2(2)(b). We have already ruled that the disputed information is caught by the section 35(1)(a) exemption. We now seek to apply that test in this case.

Factors in favour of maintaining the exemption

81. Mr Eadie argues that a class exemption itself assumes that the information will be harmful and repeats a similar argument made in the DFES case. Mr Pitt-Payne disagrees. He argues that it is necessary to consider in the circumstances of each individual case as to whether the disclosure of the information will be harmful. It is not to be considered in a vacuum, he contends, and the five factors enunciated by the senior civil servants in the DFES case and by Mr Lewis in this case (referred to in paragraph 88 below) are a useful checklist of considerations to bear in mind in any particular case. What he does not accept is that for every

section 35 case they are all engaged and at the same level of cogency or weight, irrespective of the nature of the information.

82. This Tribunal agrees with Mr Pitt-Payne that section 35 does not automatically deem or assume that disclosure of the information will be harmful. That depends on all the circumstances of the case.

83. Mr Eadie moreover contends that section 35 creates a very important exemption and that there is a very strong public interest against disclosure of the deliberations of civil servants and ministers when developing and formulating policy. He continues that at a time when ideas are being raised, tested, rejected, accepted and then as part of that process opinions, views and judgments are being sought and offered both within departments and between departments and between civil servants and ministers and back again, that it is very important that the space to do this is protected. He therefore submits because of the inherent weight of the exemption itself that the public interest factors in favour of disclosure need to be particularly weighty for the balance to be determined in favour of disclosure.

84. Mr Eadie then reiterates the public interest factors in favour of maintaining the exemption as expounded by Lord Turnbull and Mr Britton in the DFES case and endorsed by Sir David and Mr Lewis in this case. These relate to the intrinsic value of the information, wider signals sent by disclosure and the damage caused by disclosure. We will briefly summarise Mr Eadie's arguments, which are largely similar to those put forward in the DFES case.

85. Where the intrinsic value of the information is greater, then the weightier the public interest in maintaining the exemption. As Mr Lewis put it in evidence section 35 covers a broad spectrum of information with varying degrees of importance as to the harm that might flow from its disclosure depending on where on the spectrum the information lies. At one extreme might be minutes of a meeting in which civil servants are critical of announced government policies whereas at the other end of the scale might be essential factual papers that have assisted in developing policy.

86. Mr Pitt-Payne found the spectrum analysis helpful but had a rather different conception of how the spectrum might be calibrated. In his view the further towards the policy formulation/policy debate/policy analysis end of the spectrum the more likely it is that the five factors referred to in paragraph 88 below will come into play. He also argues that the intrinsic importance of ID cards does not mean that only the public interest factors in favour of maintaining the exemption should be given particular weight. The significance, for example, of opportunities for public consultation on the future may be just as important in the public interest.

87. Mr Eadie then contends that it is extremely important to preserve the confidentiality of policy discussions in the interests of good government and the perceived threat to candour and boldness in the giving of advice, and the consideration of options and the exchange of views within a 'safe space' Without this safe space disclosure would send two sets of signals to civil servants, the first being those relating to the particular information and its publication. The second, involves a major perceived threat to the role and integrity of the Civil Service which would significantly alter the way in which the executive conducted its business (the 'secondary signals') (DFES case at paragraphs 31 and 32)

88. The 'secondary signals' (DFES case at paragraph 41), are a series of grave adverse effects which Mr Eadie argues would inexorably result from disclosure of such information:

- loss of frankness and candour ;
- the danger of government by cabal ;
- the damaging effect of disclosure on difficult policy decisions ;
- the impact on record – keeping ;
- damage to relations between civil servants and ministers and to the role of civil servants in the formation of policy.

89. Mr Pitt-Payne considers these factors, which were formulated in general terms by the witnesses referred to paragraph 14 above, are essentially a checklist of considerations to bear in mind in any particular case as with any other factors considered. They are not necessarily exhaustive. However he does not accept that they automatically apply with the same level of weight or cogency whenever a section 35 exemption is engaged, irrespective of the nature of the information or other circumstances of the case.
90. Mr Pitt-Payne argues that rather than second signal effects there could be another way that civil servants might react, particularly because civil servants would have been aware of the possible effects of FOIA for some time by January 2005. He suggested that the new law would have concentrated the mind of civil servants in a beneficial way to ensure a more rigorous approach to any analysis or predictions. He suggests a way of testing the second signal argument is to ask a question: how credible is it to think that those civil servants who produced the disputed information would have acted differently if they had known the information was to be disclosed in due course under FOIA? Would they have put forward lower figures in order not to change their position later or would they have put up higher figures to bolster the benefits for this key Government policy. He submits that the safest thing for the prudent civil servant, faced with the prospect of disclosure, is to make sure that he/she does the best job and puts forward figures that can be defended, not just to the Home Office, but, if necessary, in the course of public debate. So, he says again, the prospect of public disclosure is actually capable of importing a greater degree of rigour into the process.
91. Mr Eadie argued that the damaging effects of disclosure could also:
- a. result in premature disclosure which might close off discussion and the development of better options;
 - b. put at risk the unrestrained and unprejudiced assessment of the ID card scheme programme;
 - c. give the false impression that the scheme was only about making savings in public expenditure;

- d. undermine frank reporting on progress and the identification of risks to delivery;
- e. be a serious distraction from the efficient process of decision making if the disputed information was presented inaccurately by the media;
- f. have an adverse affect on any civil servant named whose role of simply collating data from colleagues and signing off the return to the Home Office might not be understood by the wider public.

92. Mr Eadie was particularly concerned about the public debate which could follow disclosure. He maintained that any caveats or riders attached to released information were likely to be ignored in any presentation by the press. The information could be misunderstood or misinterpreted and later if the policy eventually formulated was different be used to assert there had been a government retreat. Tentative and incomplete information could misinform or hamper the public debate rather than assist it. Finally he argued that the earlier in the policy making process the less tested the ideas and the greater the risk of ill informed debate. The more mature the policy the greater the weight in favour of disclosure.

93. In relation to the naming of officials Mr Eadie reminded us that Mr Harrison said in evidence that there could be no conceivable public interest in the release of the name of the particular civil servant who signed off the disputed information in this case. In his view it could not possibly inform the public debate or to advance any legitimate public interest to release the name. Mr Pitt-Payne was sympathetic with this argument and recognised that relatively junior civil servants, who were more in a position of co-ordinating a team effort in relation to information rather than being personally responsible for its accuracy, may deserve some protection.

94. We note that in paragraph 75(xi) of the DFES case the Tribunal did not accept a blanket policy of refusing to disclose the names of civil servants wherever they appear in departmental records. The Tribunal found that it “cannot be justified because, in many cases disclosure will do no harm to anyone, even if it does little good.” However the Tribunal did accept that there will “plainly be

instances where an individual has advanced particularly sensitive or controversial advice which for whatever reason should not be attributed. It might be appropriate to disclose the advice with the name redacted. Again, each decision will depend on the facts of the case. There must, however, be a specific reason for omitting the name of the official where the document is otherwise disclosable. That reason may not need to be utterly compelling where, as will often be the case, there is little or no public interest in learning the name.” We agree with this finding.

Factors in favour of disclosure of the information

95. A number of public interest factors in favour of disclosure were identified in this case. We will try to summarise them.

96. Firstly, the importance of the decision to introduce an ID card scheme. Mr Oaten in his letter to Chris Pond MP of 2nd December 2004 puts it succinctly:

“The identity card scheme is a public sector project of unprecedented scale and complexity, and will incur costs running into several billions of pounds. It will fundamentally alter the way in which people access public services, and will have considerable financial implications for every adult citizen.”

This is a significant public interest raised by a Member of Parliament whose job it is, particularly in opposition, to raise such matters.

97. Secondly, the need for informed public debate of such an important decision. From Mr Harrison’s evidence it was clear that as a matter of government policy the decision to introduce ID cards had been taken in November 2003. This was confirmed in the RIA at paragraph 27. In order for the decision to be carried into effect, the 2004 Bill was introduced in November of that year. It needed to be passed and the passage of the Bill in January 2005 was an obvious point for there to be Parliamentary and public debate about the question of principle as to whether there should be a scheme at all. There was already information in the

public domain about the costs of the proposed scheme, particularly in the RIA, but little information about the benefits. The disputed information would have contributed significantly to that debate.

98. Mr Eadie accepted that informed public debate was in the public interest. However he argued ID cards were a controversial subject and that the greater the controversy generated by a policy the greater the need for the protection of the decision-making process.

99. As we have already pointed out there is a statement at the end of the RIA, which is a ministerial sign-off as follows: "I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs." This is a position the Government is taking as it seeks Parliamentary support and necessarily also public support, as with any elected Government, for its legislative programme, for introducing a Bill which paves the way for ID cards to come into effect. There is a public interest in knowing how robust that judgment is that the benefits justify the costs. There is therefore a public interest in knowing what the benefits are.

100. Mr Eadie argues that this was a very early stage in policy formulation because none of the detailed implementation by departments had been undertaken and in any case this was to be carried through by secondary legislation which process could not even start until the primary legislation was in place. The introduction of an ID card scheme required a continuum of policies and decisions that had not yet been made in relation to the policies of individual departments. We have already found that we do not accept that there was such a continuum argument in this case and that the disputed information related to the decision to introduce an ID card scheme at a high level which was well formulated and developed by the time of the Request.

101. Thirdly, it would allow the public to better judge the Government's performance. For example in relation to the Government giving due consideration to the financial implications of the scheme or its presentation of the scheme corresponding with advice it has been given. The disputed

information would allow the public to better understand how the DWP was protecting the public purse by its prevention of benefit fraud. In any case disclosure of information is an aspect of good government.

102. Fourthly, the disputed information was mature information. In the RIA at paragraph 27 it states that “the Government was satisfied that the benefits of the identity cards scheme justified the costs” when it announced the decision to proceed to introduce ID cards in November 2003. The evidence before us is that the disputed information was taken into account when preparing the RIA and was therefore presumably mature enough for that exercise. Also the information was robust enough to withstand public scrutiny. It had been signed off by a DWP official “as a realistic appraisal, given the assumptions, and dependencies outlined.” The information was not incomplete or tentative which is evidenced by the fact that we were provided with figures that show that the projections have remained largely the same over time. The information was provided to inform the Home Office’s business case which was already into a number of iterations by January 2005.

The Tribunal’s analysis and findings

103. The Tribunal has already found that the section 35(1)(a) exemption is engaged in this case and that neither sub-sections 35(2) and (4) apply. Therefore for us to uphold the exemption we must find, under section 2(2)(b), that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.” This test is the same for this exemption as for other qualified exemptions.

104. We have found a number of important facts. The Government decided to introduce an ID card scheme in late 2003 and by that time had formulated its high level policy in relation to ID cards. By the time of the Request in January 2005 a bill had been presented to Parliament and was going through the parliamentary process. The 2004 Bill envisaged a two stage policy decision approach. At a high level the adoption of a scheme which would ultimately

result in ID cards becoming compulsory for the vast majority of people. At a lower level the adoption of various policies to implement the scheme in detail, which would involve departments like the DWP. These lower level policies would be adopted through mainly secondary legislation or other processes subsequent to the 2004 Bill receiving the Royal Assent.

105. The disputed information was produced by the DWP as part of a Home Office exercise to update the business case for the high level policy already decided upon and in the process of further development as the 2004 Bill passed through Parliament. A similar exercise was carried out by most other Government departments. This information not only updated the business case but was used to help prepare the RIA to the 2004 Bill.

106. The disputed information would have been of assistance in the formulation process for the lower level policies but that was not its prime purpose. We find it was produced to assist the Home Office at a late stage in the formulation and development of an ID card scheme, after the decision had been taken by Government to introduce an ID card scheme. At the time of the Request a bill for its approval had been presented to Parliament and was being debated in Parliament. In our view this was an advanced stage in the policy formulation and development of an ID card scheme.

107. If Mr Oaten had requested the disputed information from the Home Office this position would have been more easily understood. Because it was requested from the DWP its primary purpose has become somewhat confused. Mr Oaten assumed it was a feasibility study to establish the full impact, costs and benefits of the introduction of ID cards by the DWP. As we now know from the evidence it was not such a study and did not have the significance, in terms of the DWP's future operations, which Mr Oaten assumed it had.

108. Therefore we come to two main conclusions. Firstly as to where the disputed information might lie in Mr Lewis' spectrum of materials considered during the course of policy formulation and development. We consider the information was towards the bottom of the scale and therefore of less importance as regards to

the harm that might flow from its disclosure. The second conclusion is that it would have been very relevant to assist the public (which would include MPs) in understanding Government thinking on the introduction of an ID card scheme in January 2005, particularly in relation to the benefits which could derive from such a scheme.

109. With these conclusions in mind we have considered the public interest factors in favour of maintaining the exemption and in favour of disclosure as set out above. At this point we would observe that the DWP made no real attempt in the Refusal Notice to consider factors in favour of disclosure in order to undertake the balancing exercise required under section 2(2)(b). Even in the evidence before this Tribunal the DWP appears to have made no serious attempt to rectify this position and Mr Eadie in his final submissions only seemed to recognise one public interest in favour of disclosure, namely informed public debate. Instead the DWP has concentrated on putting forward factors in favour of maintaining the exemption. These factors have been largely put forward at a general level as they might apply to any claim for a section 35(1)(a) exemption, and have not necessarily been applied to all the circumstances of this case.

110. In relation to these factors we are mindful of the principles established by the Tribunal in the DFES case at paragraph 75, which we endorse and apply so far as they are relevant to this case.

111. We find that in all the circumstances of this case that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the disputed information. In other words that the disputed information should be disclosed by the DWP to Mr Oaten.

Conclusion

112. This finding means that we uphold the Commissioner's Decision Notice and dismiss the appeal. However we are mindful of the public interest argument in not naming junior civil servants acting largely on behalf of others referred to in

paragraph 94 above and the fact Mr. Oaten in his revised request was happy for sensitive information to be removed. We have decided therefore that there is no need to disclose the name of the “strategic benefit owner” and the “signature, name and job title” of the person at the end of each of the three profiles in the disputed information and that the disputed information be redacted to this extent only before being disclosed.

113. We order that the information requested in the form of 3 schedules plus supporting information, without the redacted information mentioned in the previous paragraph, be disclosed to Mr Oaten within 30 days of the date this decision is promulgated.

Signed

John Angel
Chairman of The Tribunal

Dated this 5th March 2007