



# Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0062**  
**Information Commissioner's Ref: FS50174491**

**Heard at Field House, London, EC4**  
**On 3<sup>rd</sup> and 4<sup>th</sup> November 2008**

**Decision Promulgated**  
**20 November 2008**

**BEFORE**

**Chairman**

**JOHN ANGEL**

**And**

**Lay Members**

**MICHAEL HAKE and DAVE SIVERS**

**Between**

**HOME OFFICE**

**And**

**First Appellant**

**MINISTRY OF JUSTICE**

**Second Appellant**

**And**

**INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:**

**FOIA: s.36(2) exemptions (b) inhibit free and frank advice or exchange of views and (c) prejudice effective conduct of public affairs.**

**FOIA: ss. 10 & 17 late claiming of exemptions.**

**Cases: McIntyre v IC & MOD EA/2007/0068; Guardian Newspapers Ltd & Brooke v IC EA/2006/0011 & 13; Archer v IC EA/2007/0037; DTI v IC EA/2006/0007; Foreign Office v IC & Friends of the Earth EA/20006/0065; Department of Business and Regulatory Reform v IC & CBI EA/2007/0072.**

**Representation:**

For the First and Second Appellants: Mr Gerry Facenna  
For the Respondent: Ms Anya Proops

**Decision**

The Tribunal finds on a preliminary matter that the IC was correct in finding that the public interest in maintaining the exemption in s.36 FOIA did not outweigh the public interest in disclosure of the information requested in respect of what is described as the 'meta-request' in this case, except in respect of the documents set out in the confidential annex to this decision where the Tribunal finds that it did not have sufficient evidence to make a decision at the preliminary hearing.

The Tribunal also finds that it is not prepared to allow the late claiming of other exemptions in this case, except where s.40(2) FOIA has been claimed by the Appellants.

To this extent the appeal is dismissed but in relation to the outstanding s.36(2) and s.40(2) exemptions the case will need to proceed to a full hearing unless the parties agree otherwise. The parties to notify the Tribunal within 21 days of the date of this decision as to whether they wish the case to proceed to a full hearing on these outstanding matters or some of them and, if so, to provide agreed proposed directions for the further case management of the proceedings for the Tribunal to consider.

## Reasons for Decision

### The request for information

1. On 4 January 2007, Matthew Davis of John Connor Press Associates Ltd (“the company”) requested disclosure of any documents relating to *‘internal communication within Government and Government departments relating to the use of the Freedom of Information Act by Matthew Davis or John Connor Press Associates Ltd’*. In a later email of 17 January 2007 Mr Davis sought to clarify his request in the following terms *“I am after any material that relates to my company John Connor Press Associates but NOT that information that I have already received ie. Any answers or correspondence that has already been sent to me. What I imagine might fall within the scope of this request is any internal communication about my company’s requests and any communication on the way they should be handled. However, this is not an exclusive list and as stated I would like to see all communication that mentions my company’s name but which has not been communicated to me.”* The reason behind the request is explained by Mr Davis in a later email of 17 April 2007 *“is that requests from my company are deliberately handled differently to other members of the public, which is a clear abuse of the act on your part as you should be ‘applicant blind’ when dealing with requests.”*
2. On 1 March 2007, the First Appellant (“HO”) confirmed to Mr Davis that it held information falling within the ambit of the request. At some stage the HO established that in the period between January 2005 and 4 January 2007 they had received 48 requests for information under FOIA from Mr Davis or his company. Some of this information was disclosed to Mr Davis on the basis that it comprised his personal data. The remainder of the information (“the disputed information”) was withheld on the basis that it was exempt under sections 36(2)(b)(i) and (ii) and 36(2)(c) FOIA (“refusal notice”).
3. Mr Davis asked for an internal review of the refusal notice. The review decision, which upheld the refusal notice, was notified to Mr Davis by letter of 23 May 2007.

The complaint to the Information Commissioner (“IC”)

4. Mr Davis complained about the decision to refuse his request to the IC. The IC investigated his complaint, having seen the disputed information following the service of Information Notices on the Appellants. The IC decided that the HO had erred in its conclusion that the disputed information was exempt under section 36. In summary he concluded in the decision notice dated 30 June 2008 (“decision notice”):

- (1) Section 36 was engaged on all the evidence because:
  - (a) the HO had sought and obtained an opinion from a qualified person that disclosure would risk the relevant prejudice for the purposes of sections 36(2)(b) and 36(2)(c); and
  - (b) that opinion was both reasonable in substance and reasonably arrived at (§17-22).
- (2) However, on an application of the public interest test, the public interest weighed in favour of disclosure because:
  - (a) disclosure would improve openness, transparency and, hence, accountability in the FOIA decision-making process and, further, would increase the public’s understanding of the reasoning behind FOIA decisions (§24);
  - (b) it was not accepted that disclosure would in fact result in a lack of frankness and robustness in the handling of FOIA requests (§26);
  - (c) on the facts of the case, the request did not circumvent formal complaints procedures because, with respect to the FOIA requests with which the disputed information was concerned, Mr Davis was either happy with the response he had received or he

had exhausted the public authority's internal complaints procedure (§28);

- (d) disclosure would have the effect of increasing public confidence in the robustness of the HO's internal procedures for handling information requests (§28).

- 5. The IC ordered that the disputed information be disclosed to Mr Davis, except for some information which was not clearly defined in the decision notice, but which we have come to understand relates to names of officials and other persons mentioned in the disputed information.

### The appeal to the Tribunal

- 6. The HO appealed to the Tribunal against the decision of the IC. On 8 May 2007 some of the disputed information had been transferred to the Second Appellant ("MoJ") following a reorganisation. The Tribunal agreed to join the MoJ as an appellant to the appeal.
- 7. In the notice of appeal dated 29 July 2008 the HO stated that the request in this case was a 'meta-request' by which the department meant that the request was for information about another request under FOIA. The HO considered that requests for 'meta information' were a problem across government, hence the appeal on two principal grounds which can be summarised as follows:
  - (1) the IC erred when he weighed the public interest as, having regard to the salient facts, he should have concluded that the public interest weighed in favour of the exemption being maintained in respect of the disputed information;
  - (2) further or alternatively, the IC erred because he ordered all of the disputed information to be disclosed, despite the fact that some of the information 'appear to fall within other substantive exemptions in the

2000 Act' and the IC could not reasonably have intended that such information should be disclosed.

8. In relation to the second ground this was the first time that the HO had sought to rely on exemptions other than s.36. In other words the HO is seeking to raise further exemptions for the first time before the Tribunal. The following exemptions were raised in the notice of appeal: sections 23 (information supplied by or relating to bodies dealing with security matters); 24 (national security); 31 (law enforcement); 35 (formulation of government policy); 38 (health and safety); 40 (personal information); 41 (information provided in confidence); and 43 (commercial interests). These exemptions were not positively asserted, but rather speculated subject to "the process of further examining and cataloguing the substantial number of documents within the case".
9. In the directions dated 4 September 2008 it was agreed that there would be a preliminary hearing to decide two preliminary issues which are set out below. Depending on the Tribunal's findings on these issues it was envisaged there might be a need for a full hearing and if that was the case then directions for the full hearing would be provided with the preliminary decision.

#### The questions for the Tribunal

10. In this case the Tribunal needs to decide the following questions:
  - (1) Whether the IC erred in finding that the exemption was engaged (although the parties agree that it was) and the public interest in maintaining the exemption in s.36 FOIA did not outweigh the public interest in disclosure of the information requested;
  - (2) If not, whether the Appellants can rely on any other exemptions under FOIA at this late stage of the proceedings;

- (3) If so, whether under any of these other exemptions the information requested may be withheld.
11. This decision is only concerned with the first two questions which have been dealt with as preliminary issues.
12. It was agreed by the parties at the Directions Hearing on 4 September 2008 that if the first preliminary issue was decided in the IC's favour but the Tribunal decided that the Appellants could rely on any other exemptions as set out in their further and better particulars dated 22 October 2008, there would be a further oral hearing and that directions would be provided for that further hearing. If the Tribunal found in favour of the IC on both preliminary issues, the appeal would be dismissed. If the Tribunal decided the first preliminary issue in the Appellants' favour, the appeal would be allowed.
13. In order for the Tribunal to be able to consider the second issue the Appellants were directed to provide further and better particulars setting out the application of any further exemptions upon which they would intend to rely in the event that the first preliminary issue was decided in the IC's favour. This they did by way of a closed submission dated 22 October 2008 which sought to apply s.40(2), s.35(1)(a), s.42, s.31(1) and S.43(2).

#### The statutory provisions

14. The first question for the Tribunal involves the s.36 exemption. S.36(2) provides for an exemption in respect of information the disclosure of which, *'in the reasonable opinion of a qualified person'*:

*'...*

*(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 be likely otherwise to prejudice, the effective conduct of public affairs.'*

15. The exemption afforded under section 36 is a qualified exemption and, accordingly, where it is engaged, calls for the application of the public interest test (section 2 FOIA).
16. The second question involves the Tribunal deciding whether the Appellants can rely on other exemptions set out in the further particulars referred to in paragraph 13 above.

### Evidence

17. We were provided with two signed witness statements by the Appellants. The first was provided by Oliver Lendrum a Senior Executive Officer within the Information Management Service of the HO. His evidence related to the late claiming of exemptions so that we could be assisted in the case management of this appeal. His evidence was largely not relevant to the preliminary issues before the Tribunal. The other witness was Jane Sigley who is also a civil servant Grade 7 and currently the Information Rights Manager at the HO. It was her staff who dealt with the request and the internal review and she personally reviewed the internal review.
18. She informed us that in her experience of the first three years of the operation of the Act *"the vast majority of requesters use the Act in a reasonable and responsible way. Whether or not information is ultimately disclosed, most requests may be said to be in accordance with the intention of the legislation to provide access to information consistent with the public interest and the overall interests of good governance."*
19. However she then went to say that *"in my view, "meta-requests" such as the one in this case are a good example of an arguably permissible, but irresponsible, use of the Act. The interests such requests serve are, generally, exclusively private interests, relating to an individual's desire to*

*know the details of how his or her own requests have been handled. Rather than seeking an internal review or appealing to the Commissioner, a meta-request may be made in an attempt to obtain disclosure of the details of internal discussions about information that has been withheld ..... such requests can lead to a considerable amount of additional work for public authorities. Although I am aware that in each case it will be a matter for the judgment of the qualified person, in my view requests for meta-information are generally prejudicial to the effective conduct of public affairs, for a number of reasons, particularly where – as in the present case – such requests encompass information relating to a very large number of previous information requests. Dealing with meta-requests causes disruption to the work of public authorities and a disproportionate diversion of resources (including away from dealing with other requests for information under FOIA). As is apparent from the information in this case, much of the information created by a public authority in dealing with a request for information is not actually sensitive, and there may be no real prejudice caused by disclosure of the information. The prejudice is caused, however, by the impact of such requests on the public authorities' workload and resources, and the operation of the FOIA regime overall.”*

20. She then went on to suggest that the IC had not considered that its decision would result in information being disclosed that had been withheld under the original requests. Ms Sigley then explains the real problem underlying meta-requests such as in this case, namely that *“Although it is possible for a public authority to re-apply any individual exemptions to those parts of the meta-information that warrant it, that can be an extremely burdensome task, particularly – as in this case – where a large number of previous information requests are covered. However, to avoid the use of ‘catch-all super requests’ as a backdoor method of obtaining further details of information that has previously been withheld, a public authority would have no choice but to undertake the time-consuming task of collating and auditing all the internal information that has been created, to ensure that any reference to the details of previously withheld information is identified.”*

21. She then identified a number of other issues with such requests including the fact that it is difficult to apply s.12 FOIA as most of the time would involve consideration and identification of exemptions, which is not covered by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("2004 Regulations"). It was apparent from Mr Lendrum's evidence that this exercise was not actually carried out in relation to the request in this case until after these proceedings commenced.
22. Ms Sigley told us that meta-requests were not uncommon. When asked how many she was aware of she could not give an exact answer but said that it was less than 100 within the HO and that to her knowledge all of these requests had been refused. She said "*I believe that the department would have received significantly more requests of this type had we not adopted the position of generally refusing such requests on the basis that they are prejudicial to the effective conduct of public affairs*".
23. She then expressed the view "*I do not think it is in the public interest for public resources to be diverted to dealing with an individual's requests about his own previous information requests, where there is already an established complaints and appeal procedure designed to deal with concerns that an individual may have about the way previous requests under the Act have been handled.*" Her view was that there were other means for a dissatisfied requester to get the information they wanted through the FOIA complaints and appeals mechanism. Otherwise "*use of meta-requests as an alternative option to the use of the established complaints mechanisms put in place by the FOI Act places a very significant additional burden on public authorities unnecessarily, because of the nature (and sometimes amount) of the information likely to be covered by the request.*"
24. Her position was that there was no evidence in this case that Mr Davis' requests had received special treatment. He was advised of this following the internal review. As the HO followed published procedures this went a significant way to addressing the public interest in seeing how requests are handled. She concluded that "*releasing information about the handling of a*

*specific case or cases would add little more to the public understanding of this issue”.*

25. Ms Sigley finally explained that in her view the release of meta-data would have a likely impact on the free and frank exchange of views by officials handling FOI requests. She put it these terms *“I can certainly confirm that, particularly where high profile or sensitive information is concerned, there may be a robust internal discussion about the application of particular exemptions in the Act to requested information to ensure that any decision complies with the law. In my experience, it is important that such discussions should take place within public authorities, that they should be frank, and that they should be properly and fully recorded for future reference. It is, in my view, in the public interest that such discussions should generally be protected from disclosure, so that officials may feel free to express and record views on the application of the Act openly and without fear of adverse consequences should such discussions be disclosed to the person making the request, particularly where there has been a decision to withhold information that has not itself been challenged or appealed.”*
26. In cross-examination Ms Sigley accepted a number of relevant matters:
- (1) there is a public interest in favour of transparency and openness but it is a question of the weight to be attributed to the interest;
  - (2) the ss.9, 12 and 14 exemptions were not appropriate in this case. It should be noted that the HO does not levy fees under s.9;
  - (3) the request in this case was not irresponsible;
  - (4) although the Act is motive-blind, the motive if known could affect the consideration of the public interests in relation to a request;
  - (5) that this request did not just serve the private interests of the requester;
  - (6) if dissatisfied with the way a request was handled a requester should follow the correct complaints procedure by which she meant an internal

review followed by a complaint to the IC and ultimately an appeal to the Information Tribunal;

- (7) there is a public interest in seeing that public authorities are applying the Act properly and fairly to everyone who makes a request but this can be achieved by a requester following the complaints procedure. In addition the HO's published procedures go some way to showing that there are robust processes in place for dealing with FOI requests;
- (8) the requester in this case was not trying to circumvent the Act. Ms Sigley was aware of only one case where this had been an issue;
- (9) meta-requesters have a right to access information under the Act subject to the application of exemptions;
- (10) Ms Sigley had been aware of less than 100 meta-requests within the HO since FOIA came into force and understood the HO had refused them all;
- (11) in respect of the public interest that disclosure would or would be likely to inhibit the free and frank exchange of views and provision of advice Ms Sigley said *"I am not saying I won't do my job, but I am saying that I think it is quite naive to suggest that disclosure of information in general doesn't affect the way people write things and the way people work. We are all professional and we will all do our job, and I am certainly not giving evidence to the effect that we won't do our job, but it will affect possibly the way things are phrased, the way things are written, definitely.....I would always do my job fully and professionally and give the appropriate advice, yes, but it would affect the way that we work"*;
- (12) the request Mr Davis claimed had been dealt with differently from an identical or similar request by another (which was one of the reasons why he had regarded himself as discriminated against) could be explained by the fact that the two requests had been dealt with by two different departments and their approaches had been different, although eventually amounting to the same response.

Whether the s.36 exemption is engaged and the application of the public interest test

27. In relation to the first preliminary issue the IC accepted that the s.36 exemption was engaged on the basis of the HO maintaining that a reasonable opinion of a qualified person had been obtained both at the refusal notice and internal review stages. The IC did not require to see submissions to ministers or the ministers' responses but still came to this conclusion. We have had the opportunity of seeing the submissions and are satisfied that the exemption is engaged. However we would observe, as the Tribunal did in **McIntyre v IC & MOD** EA/2007/0068, that the IC is unsafe to come to such a conclusion without seeing the submissions to ministers as otherwise the test established in **Guardian Newspapers Ltd & Brooke v IC** EA/2006/0011 & 13 that the opinion should be reasonable in substance and reasonably arrived at, will be difficult to consider. Also in this case there was no evidence as to which limb of prejudice the opinion had found i.e. would or would be likely to inhibit/prejudice. We accept the finding in **McIntyre** that where there is no such indication, in the absence of other clear evidence, the lower threshold of prejudice should be applied. We do not find such other clear evidence in this case and therefore consider the lower threshold applies. This is important because where the higher threshold applies we would expect the IC to give greater weight to the inherent public interest in the exemption being claimed.
28. Therefore the only matter which we have to consider in relation to the first preliminary issue is whether the IC erred in his application of the public interest test under s.2(2)(b) FOIA.
29. Mr. Facenna for the Appellants makes a distinction between meta-requests and substantive requests by which he means original requests, rather than requests about requests. He impresses upon us that he is not seeking to argue that information within the scope of meta-requests has 'automatically exempt status' under FOIA. He says the Appellants accept that, as with all types of FOI requests, meta-requests must be dealt with on a case-by-case basis and that the Appellants are not seeking to establish an absolute, class-based exemption for meta-requests under FOIA. Ms Proops for the IC brings

to our attention that although Mr Facenna is maintaining this position, she contends, this is not apparent from the Appellants' approach to the case or on the evidence. The Appellants heavily rely on high level general public interests in favour of maintaining the exemption rather than specific interests related to the facts of this case. Mr Facenna invites the Tribunal to provide general policy rules. He says that it would be wrong to focus on this case alone without acknowledging that it is an example of a wider trend. Furthermore the MoJ and HO hope to obtain guidance from the Tribunal in relation to the handling of such requests. Also the evidence of Ms Sigley is that she considers meta-requests largely in a separate category which she describes as "*arguably permissible, but irresponsible, use of the Act*". Also elsewhere in her evidence she maintains this theme, for example she says "*in my view requests for meta-information are generally prejudicial to the effective conduct of public affairs*" and gives a number of reasons for this which are not specific to this case. Finally Ms Sigley informed us that to her knowledge all meta-requests to the HO have been refused.

30. Moreover, Ms Proops contends, the Appellants have chosen to take the s.36 exemption approach to all the disputed information rather than an individual examination of 48 files to which appropriate exemptions could be claimed, as was later undertaken before the Tribunal.
31. Ms Proops argues that there is no provision in FOIA which permits requests to be refused on the basis they constitute requests for the disclosure of information as to how a public authority internally handles a particular information request or meta-requests as described by the Appellants. She contends that such a term ('meta-requests') is potentially misleading and inapt because requests of this nature do not differ in status or importance from any other type of request made under FOIA.
32. Ms Proops reminds us of the process by which all requests should be considered under s.1(1) FOIA. Where a person makes a request for information to a public authority, he/she is entitled to be informed in writing whether the requested information is held by the authority (s.1(1)(a)) and, if it is held, to have that information communicated to him/her (s.1(1)(b)). S.1(1)

accordingly embraces a wide general duty to make information available to members of the public on request.

33. The general duty provided for under s.1 is not, however, unlimited. In particular, it will not be engaged where:

- (1) the requested information is exempt from disclosure under one of the exempting provisions contained in Part II FOIA (s.2 FOIA);
- (2) where an applicant has failed to pay fees to the authority following receipt of a relevant fees notice (s.9 FOIA);
- (3) where, on a reasonable estimate, the costs of responding to the request would exceed the statutory costs limit (s.12 FOIA); and, further,
- (4) where a request is either:
  - (a) vexatious (s.14(1) FOIA); or
  - (b) is an identical or substantially similar request for the purposes of s. 14(2) FOIA.

34. With respect to the costs limit applicable under s.12, this limit is £600 for government departments and other public authorities listed in Part 1 of Schedule 1 to FOIA. It is £450 for all other public authorities - regulation 3 of the 2004 Regulations.

35. The concept of a 'vexatious request' has been analysed by the Tribunal in a number of cases. It is clear from these decisions<sup>1</sup> that considerations which are relevant to the question whether a particular request is vexatious include whether:

- (1) it would impose a significant burden on the public authority in terms of expense or distraction;

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<sup>1</sup> See *Ahilathirunayagam v IC & London Metropolitan University* [2007] UKIT EA/2006/0070; *Mr David Gowers v IC & London Borough of Camden* EA/2007/0114; *Robert Andrew Brown v IC & the National Archives* EA/2006/0088; *Hossack v ICO* EA/2007/0024; *Coggins v ICO* EA/2007/0013; *Welsh v ICO* EA/20070088; *Betts v ICO* EA/2007/0190; and *Gowers v ICO and Camden LBC* EA/2007/0014,

- (2) it clearly does not have any serious purpose or value;
  - (3) it is designed to cause disruption or annoyance;
  - (4) it has the effect of harassing the public authority; and
  - (5) it can otherwise fairly be characterised as obsessive or manifestly unreasonable.
36. Most of these considerations are set out in the IC's Awareness Guide No 22 dated July 2007 which relates directly to the use of s.14 exemption and the ICO charter for responsible freedom of information requests which indirectly relates to the exemption. In the former the term 'meta-requests' is defined and covers requests beyond the meaning being given to the term in this case. Moreover the IC makes clear that s.14 can only be used in relation to the considerations set out in the previous paragraph. Mr Facenna argues that the Awareness Guide recognises meta-requests as a special category of requests and this is reflected in the MoJ's Meta-Request Toolkit which has now been withdrawn. Ms Proops does not accept this and that the reference to the term is only used in the context of explaining how s.14 works.
37. Also Ms Proops contended that where a request is estimated to exceed the cost limit then the public authority should seek to advise and assist the requester under s.16 FOIA to give the requester an opportunity to narrow the request so that it could come within the limit before s.12 is claimed (see **Archer v IC EA/2007/0037**).
38. Ms Proops finally submitted that there is no legal basis for concluding that public authorities can automatically refuse meta-requests under FOIA simply because they are meta-requests. We agree with Ms Proops.
39. In this case the Appellants have chosen to exempt the request under s.36. Therefore it remains for us to consider the IC's application of the public interest test.

40. Before doing this it should be explained that Mr Facenna asked us not only to consider the application of s.36 to the request as a whole but also to some parts of the request to which he argues s.36 applies specifically.

#### Public interest factors

41. The IC relied on the following public interest factors in favour of disclosure in the decision notice:
- (a) openness and transparency in the FOI decision making process are in the public interest because of the increased accountability they bring to it (§24);
  - (b) disclosure would allow the public to see that decisions taken in relation to FOI requests were taken promptly and only after full consideration of all the relevant issues (§24);
  - (c) disclosure would enable the public to understand better the reasoning behind these FOIA decisions (§24);
  - (d) disclosure would have the positive effect of increasing the public's confidence in the robustness of the public authority's internal procedures for handling information requests (§28).
42. Ms Proops expanded on these public interest factors in favour of disclosure. It is important in the context of general accountability and transparency that the public are able to scrutinise whether FOIA is being complied with in practice. In this case to show whether the HO is upholding its own procedures so that the public has confidence in the way the HO is complying with the Act. This involves understanding how the HO handles particular requests, how they negotiate with other departments and decide how to respond. Where, as in this case, the requester makes multiple requests in relation to his media role and is concerned that he is being discriminated against, particularly where there is some prima facie evidence as to this

concern, it enables the public to test whether the public authority is operating effectively and lawfully.

43. Mr Facenna largely accepted these general interests in favour of disclosure. However he did argue that as the Appellants publish their procedures for dealing with FOIA requests including internal reviews and these procedures were transparent then there was no need to have access to any other information. Also where the internal review confirmed the procedures had been followed there was no justification or public interest in seeing the information. Ms Proops regarded this proposition as absurd. The public must be able to test that a public authority is complying with its own procedures. It cannot do this on the say so of the public authority itself. Publishing the processes does not bring alive how these processes operate in practice. Again we agree with Ms Proops.
44. Mr Faccena identified 4 public interests in favour of maintaining the exemption: namely:
  - (1) there would be a chilling effect on the future conduct of those responsible for handling FOI requests;
  - (2) there was a resources issue;
  - (3) meta-requests circumvented other processes provided for under FOIA for dealing with such matters; and
  - (4) the information contains little or no material of value.

We consider each of these in turn.

#### Chilling effect

45. Mr Faccena maintains that if meta-information was disclosed that it would inhibit officials' ability to discuss issues relating to FOIA requests and to provide advice in a free and frank manner, without fear of premature disclosure and thereby put at risk the integrity of the internal decision-making

processes. This was part of Ms Sigley's evidence. This risk is often described as the 'chilling effect'.

46. Ms Proops points us to a number of decisions of the Information Tribunal which places some scepticism on the risk of such a chilling effect on future conduct of officials (see **Guardian Newspapers** and **DfES v IC & Evening Standard** EA/2006/0006). Following these cases she argues that there is an expectation that civil servants will continue to do their job properly and where necessary use more appropriate language. This is reflected in the Civil Service Code. By the time of the request in this case civil servants should have come to terms with the freedom of information regime and should be well practised at coping. Although there could be a chilling effect in particular cases this argument could not be maintained at a general level as in this case where much of the evidence was on the basis of dealing with meta-requests generally. We note Ms Sigley's evidence that it "*is apparent from the information in this case, much of the information created by a public authority in dealing with a request for information is not actually sensitive*". To be fair to Mr Facenna, in his closing submissions he did not seem to want to press this public interest too strongly particularly because of the anodyne nature of much of the disputed information. We consider that this is the correct approach particularly in view of the Information Tribunal's jurisprudence on this matter.

### Resources

47. The next public interest in favour of maintaining the exemption was that there would be a disproportionate diversion of valuable resources to deal with meta-requests which would have an impact on resources to deal with substantive FOI requests i.e. original requests. The implication is that if public authorities are tied up with dealing with meta-requests then they will not have sufficient resources to deal with other requests which should, in effect, have priority.
48. Ms Proops contends that as there was no reliable evidence before the Tribunal as to the number of meta-requests to public authorities generally or

the HO/MoJ in particular it is difficult to place much weight on this public interest. Ms Sigley gave evidence that there had been less than 100 meta-requests to the HO in the last 3 years and there was no evidence of a dramatic increase in this type of request. She said it had not stopped her department dealing with other (substantive) requests and there was very little evidence that FOIA was being used other than responsibly. In any case Ms Proops points to a submission by Mr Facenna as to why the costs limit under s.12 FOIA was not being applied for meta-requests. He said that the information relevant to meta-requests will often be relatively easily available and that most meta-requests cannot be ruled out on grounds of costs. He clarified this point in final submissions by explaining that under the 2004 Regulations the time taken to identify exemptions and deal with any redactions could not be taken into account under these Regulations. However that did not mean that the public authority complying with the meta-request would not exceed the appropriate time limit but the activities involved could not be taken into account under the s.12 exemption. This was one of the reasons, he maintained, for why the Appellants had taken the s.36 route in this case. We would note from the evidence before us that a request relating to as many as 48 previous requests is probably unusual and that most meta-requests are likely to relate to far fewer original requests where s.12 would not come into play.

### Circumvention

49. The third public interest in favour of maintaining the exemption is that the diversion of resources is particularly unjustified in circumstances where there is a robust, well publicised and transparent appeals process – internal review, complaint to the IC and ultimately an appeal to the Information Tribunal. That scheme can address any complaints about the handling of previous requests and that meta-requests may circumvent that process particularly where the requests are outstanding at the time of the meta-request which was the position for 6 of the 48 requests the subject of the meta-request in this case. (Mr Facenna accepted this would not have been apparent to the IC at the time the decision notice was issued.) In addition, as

well as s.50 FOIA, there are other routes open to the IC to deal with such matters under his powers on ss.47, 48 and 49 which includes his duty to promote good practice by public authorities and to promote observance of FOIA. Mr Facenna cites in support of this contention the Tribunal's decision in **DTI v IC** EA/2006/0007. Ms Proops argues this decision can be distinguished because Parliament entrusted a specific responsibility to the DTI in that case which is not relevant in this appeal.

50. Ms Proops contends that this so called public interest is fundamentally misconceived. FOIA provides for information to be disclosed in response to requests unless exempted under ss.2, 9, 12 and 14. Circumvention is not an exemption under FOIA. In any case Ms Proops contends it is wrong to suggest a complaints procedure provides an adequate substitute for a number of reasons including:

- (a) The use of such a procedure is unlikely to result in the disclosure of the raw information relating to the underlying process of handling a request and at best would be a summary in say an internal review letter or decision notice;
- (b) The use of such a complaints procedure would be costly, cumbersome and take longer than the timescales set out under ss.10 and 17. In any case it would be likely to be transferring the costs to other authorities, namely the IC and the Information Tribunal which would not necessarily be in the public interest;
- (c) There are limits to the complaints procedure under s.50. It is aimed at processes which might have gone wrong and where this can be specified. One of FOIA's purposes is to open up government processes to public scrutiny not only to be able to show where it has gone wrong but also to be able to show that it is working properly. S.50 does not cover the latter;
- (d) Parliament has placed the burden on public authorities under FOIA to deal with requests for information, not the IC which principally has regulatory duties;

- (e) The public needs confidence that the internal review process is not self serving. If the public wants to test this then it is important that there can be access to the raw material. The complaints procedure is not apt to deal with the concern of Mr Davis in this case as to whether there is a pattern of conduct emerging with a large number of requests. The s.50 procedure is designed to deal with individual requests.
- (f) The other powers of the IC are not specifically designed to replace s.1 rights nor should they be. The public interest is better served if meta-requests are used to request such information particularly because such requests, as with other requests, are motive blind.

51. Again we find ourselves agreeing with Ms Proops and find that this is a weak public interest in favour of maintaining the exemption.

#### Little or no value

52. The fourth public interest in favour of the exemption is that the information contains little or no material that would serve the public interest. Much of it is 'day to day' exchanges, emails etc and completely innocuous or anodyne. Mr Facenna draws our attention to the Tribunal's decision in **Foreign Office v IC & Friends of the Earth** EA/20006/0065 at para. 44 which notes that there is a clear distinction between information that simply adds to the sum of human knowledge and information that actually furthers a clear public interest. He argues that the disputed information falls into the former category and would not inform any public debate.
53. Ms Proops does not agree because although much of the information may be anodyne it is an important public interest that such information shows the processes are working well or otherwise. However in this case the very fact that the Appellants have sought to apply other, albeit late, exemptions for some of the information demonstrates that the Appellants consider that some of the disputed information in this case has value.

54. Ms Proops submits that the Appellants have given evidence that amounts to two more public interests in favour of maintaining the exemption, namely it is generally irresponsible to make meta-requests and they tend to serve private interests, and they are a backdoor method of trying to obtain disclosure of exempt information.

#### Irresponsible/private interests

55. Ms Sigley in her evidence says that *“in my view, meta-requests such as the one in this case are an arguably permissible, but irresponsible, use of the Act. The interests such requests serve are, generally, exclusively private interests relating to an individual’s desire to know the details of how his or her requests have been handled”*. On cross-examination she conceded that she was only aware of one case of irresponsible use.
56. Ms Proops argued the proper way to deal with such use is as vexatious requests under s.14 FOIA and that the concept of irresponsible use has no place outside s.14. As the Appellants have not chosen to use s.14 Ms Sigley’s evidence is misconceived in this case. She further argues that as there was no general evidence provided in this case that meta-requests served private interests this was not something we should take into account. Ms Proops maintained that, as this case shows, it is likely that most requesters will have private as well as public interests in information but as the Act is motive blind the Tribunal should not be concerned with private interests except in exceptional cases where for example s.14 might apply.
57. We find that Parliament has particularly provided an exemption to deal with irresponsible requests, namely that set out in s.14 FOIA. It is therefore difficult for us to give much weight to the public interest, in effect, set out by Ms Sigley in her evidence, where s.14 has not been considered appropriate in this case.

#### Backdoor access

58. In Ms Sigley’s evidence she considers that meta-requests can be used as a backdoor method of obtaining information previously withheld. In such situations she says the *“public authority would have no choice but to*

*undertake the time consuming task of collating and auditing all the internal information that has been created, to ensure that any reference to the details of previously withheld information is identified”.*

59. Ms Proops argues that meta-requests are legal under FOIA. She accepts, however, that it can be time consuming to consider such requests for the reasons stated by Ms Sigley. However, the public authority should always have an eye to s.12 and the 2004 Regulations. The fact that the time involved with the application of exemptions to the information had been considered by Parliament (for inclusion in the 2004 Regulations) in proposals in 2006 but abandoned by Parliament in 2007 meant that public authorities had to accept this burden and that the time spent had no relevance or was of limited weight. Furthermore even the DCA’s own 2005 Meta-Request Toolkit acknowledges that costs alone cannot be a reason for refusing such requests. Moreover Ms Proops maintains that the Appellants have provided no evidence that meta-requests have been used to gain backdoor access and there is certainly no such evidence in this case. Anyway withheld information can always be redacted and if it amounts to a repeated request s.14 can be claimed.
60. For the reasons argued by Ms Proops we attribute limited weight to this public interest.

### Conclusions

61. We have considered all the evidence and arguments in relation to the first preliminary issue before us in this case. The Appellants chose solely to claim the s.36(2) exemption to the disputed information up until the appeal to the Tribunal. Although we accept that the Appellants are not asking us to treat s.36 as if it can be applied as an absolute exemption in the context of meta-requests, we do find that the Appellants’ approach is to invite us to treat meta-requests as a special category of requests. We agree with Ms Proops that there is no basis under FOIA for us to do that and that there is no separate class of request, which has been called the ‘meta-request’ in this case. We consider that Parliament intended that meta-requests should be

dealt with in the same way as any other requests otherwise Parliament would have provided for this, which in our view they have not done so.

62. We accept the IC's finding that the exemption was engaged although we are critical about the extent of the investigation carried out by the IC to establish that the opinion was reasonable. We would again draw the IC's attention to our observations in **McIntyre** and would hope that guidelines might now be provided. Therefore we need to consider whether the IC applied the public interest test under s.2 correctly. S.2(2)(b) which applies to this appeal states that in relation to the exemption engaged in this case it is necessary to consider "all the circumstances of the case". In other words to consider the request before us, not a special category of request which is not recognised by the Act.
63. The Appellants have put to us a number of public interest factors in favour of maintaining the exemption which are largely at a high generalised level. There is considerable jurisprudence of the Information Tribunal<sup>2</sup> which concludes that such factors should focus on the particular public interest which the exemption is inherently designed to protect, i.e. that a narrow approach should be taken. If a wide approach is generally allowed then this would undermine the basis of FOIA which, in effect, promotes disclosure of information unless specific exemptions apply. It is not an Act designed to encourage ways of avoiding openness otherwise it would defeat the object of having freedom of information legislation. Therefore where generalised public interests are put forward in favour of maintaining an exemption, which do not necessarily go to the very heart of the exemption being claimed, then we will not usually give as much weight to these public interests as we would to inherent public interests. This is largely the position in this case.
64. In contrast we can give more weight to generalised public interests in favour of disclosure because inevitably the factors in favour of disclosure will be of

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<sup>2</sup> The leading decision is DfES *ibid*.

this nature, inter alia, because there is an assumption or even presumption in favour of disclosure under FOIA.<sup>3</sup>

65. We have considered all the public interest factors in the circumstances of the way the s.36 exemption has been applied in this case and find that the IC has not erred in deciding that the public interest in maintaining the exemption in s.36 does not outweigh the public interest in disclosure of the information requested as a whole. We have given strong weight to the public interest in knowing that public authorities deal with FOI requests properly and lawfully and do not discriminate against requesters or between requesters. This is the particular public interest raised by Mr Davis himself. It is vital to show and to be seen to show that the fundamental compliance processes of the Act are being observed.
66. However when we come to examine in detail some of the particular documents of the disputed information, to which we have been invited to consider s.36 more specifically, we find ourselves unable to deal with some of these in this preliminary hearing because of a lack of evidence before us. We therefore have no alternative but to consider these documents at a full hearing. We have set out the information we are referring in the confidential annex to this decision. We provide at the commencement of this decision the directions for dealing with this information.
67. We would observe that the Tribunal can appreciate the particular concerns that some meta-requests could pose for public authorities. However as Ms Proops indicates FOIA provides a number of mechanisms for dealing with such concerns should they arise which are set out at paragraphs 33 to 35 above. Public authorities need to appreciate that if the exemptions under ss.9, 12 and 14 cannot be claimed then it will be necessary to review the request in detail to decide whether any Part II exemptions can be claimed. This was the exercise which, in effect, was carried out in this case at a very late stage in the proceedings before the Tribunal. We turn next to consider whether such exemptions can be claimed.

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<sup>3</sup> See Secretary of State for Work and Pensions v IC EA/2006/0040 and OGC v IC [2008] EWHC 737.

### Whether late exemptions can be claimed

68. As referred to in paragraph 8 above the Appellants raised for the first time in the notice of appeal their wish possibly to claim other exemptions subject to “the process of further examining and cataloguing the substantial number of documents within the case.” By way of directions dated 4<sup>th</sup> September 2008 the Tribunal gave the Appellants the opportunity to provide further particulars by 22<sup>nd</sup> October 2008 and which were served on the other party and the Tribunal on 27<sup>th</sup> October 2008 with the agreement of the Tribunal to the extension of time. These particulars were submitted as closed submissions because they dealt in some detail with some parts of the disputed information. Of the 48 requests forming the disputed information only additional exemptions were claimed in relation to 9 requests and only in relation to parts of those requests. The exemptions claimed other than s.36(2) were s.40(2), s.35(1)(a), s.42, s.31(1) and s.43(2) which were not exactly the same as those proffered in the notice of appeal.
69. Mr Facenna argues that we should allow his clients to rely on these exemptions even at this late stage as this is not prohibited under FOIA. The exemptions under FOIA, he maintains, represent an expression of a wider public interest (i.e. of the general good) that certain information warrants protection from disclosure. In any event, he says, the facts of each case dictate that the Appellants should be permitted to raise the exemptions, which relate, inter alia, to important matters such as policy formulation, legally privileged material, commercial interests of third parties and prison security/criminal justice. He contends there is no prejudice to the IC by claiming such late exemptions.
70. Mr Faccena further argues that the Tribunal’s jurisprudence supports his contentions.
71. Ms Proops disagrees. She argues that the whole scheme of FOIA tips the scales in favour of early claiming of exemptions. Ss. 10 and 17 do not envisage exemptions being claimed so late even though they do not prohibit

it. In any case the Tribunal's jurisprudence does not support Mr Faccena's contentions. However she was prepared to accept that names of junior officials and other individuals did not have to be disclosed and was, in effect, agreeing that s.40(2) could be claimed for such information.

### Conclusions and remedy

72. The Tribunal has considerable jurisprudence on the claiming of late exemptions. This was summarised by the Tribunal in **Department of Business and Regulatory Reform v IC & CBI** EA/2007/0072 at paragraph 42:

*The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases<sup>4</sup> and there is now considerable jurisprudence on the matter. In summary the Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss. 10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA.*

73. We endorse this finding even more so where exemptions are claimed for the first time before the Tribunal. We do not accept Mr Faccena's contention that we are obliged to accept the claiming of late exemptions under FOIA.

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<sup>4</sup> *Bowbrick v Information Commissioner & Nottingham City Council* EA/2005/006, *England & London Borough of Bexley v Information Commissioner* EA/2006/0060&66, *Benford v Information Commissioner* EA/2007/0009 *Archer v Information Commissioner & Salisbury County Council* EA/2006/0037 and *Oftcom v Information Commissioner & TMobile* EA/2006/0078.

74. In relation to this case the actual exemptions were claimed very late in the appeal proceedings. The Appellants were able to locate the information relating to this request without difficulty at the time of the request. Although being aware that much of the information was anodyne they chose to withhold the information claiming the s.36 exemption. It has emerged from the evidence that the Appellants did not review the disputed information in any detail, other than to provide Mr Davis with personal data to which he was entitled under the DPA, until after these proceedings were commenced; rather they relied on one exemption for all the information. For whatever reason, although we can surmise that it may have been because the Appellants were no longer completely confident in the chosen s.36 route, they decided to embark on a detailed evaluation of the information only after instituting this appeal. Only very few documents in 9 of the 48 requests were identified as being subject to exemptions of which a number of these were where s.36 was still being claimed. We accept, on the facts of this case, that although the latter have been referred to as late exemptions, they were in effect part of the original s.36 claim and can be considered as such.
75. We find that in the circumstances of this particular case, having taken into consideration the arguments of the parties, that there is no reasonable justification for allowing the late claiming of exemptions, except in relation to s.40(2). We find that because of the IC's jurisdiction under both FOIA and DPA that unless we allow this exemption to be claimed in relation to names of some individuals in the disputed material then any order we might eventually make could breach the data protection rights of data subjects. This is an exceptional matter. In relation to this exemption the parties are agreed, and the Tribunal concurs, that the following information should be redacted:
- (1) The names and contact details of junior officials (not senior officials);
  - (2) The names of criminals referred to in the disputed information including the personal data referred to in the confidential annex;

- (3) The names of others, not covered by (1) and (2), who are referred to in the disputed information;

76. Our decision is unanimous.

Signed

John Angel

Chairman

Date 20<sup>th</sup> November 2008