

Freedom of Information Act 2000 (Section 50)

Decision Notice

13 February 2007

Public Authority: Department of Trade and Industry
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant, on 4 January 2005, requested information from the Department of Trade and Industry ("the Department") in relation to the assessment by the Department of the application for grant aid made in relation to the complainant's wave energy conversion system. The Department withheld the information on the basis that it is exempt under sections 36, 41 and 43 of the Freedom of Information Act 2000 ("the Act"). The Commissioner is satisfied that none of the withheld information falls within the terms of the exemptions under sections 41 or 43 of the Act. The Commissioner is satisfied that some of the information is exempt under section 40 (1) of the Act in that the information constitutes personal data of which the complainant is the data subject. He is also satisfied that other information is exempt under section 40 (2) of the Act in that it constitutes personal data about third parties and that disclosure would be unfair.

Although the Commissioner is satisfied that the remaining information falls within the exemption set out at section 36 of the Act, he considers that the public interest in maintaining that exemption in the circumstances of this case does not outweigh the public interest in disclosure of that information.

Accordingly, the Commissioner finds that the Department has not dealt with the complainant's request in accordance with Part 1 of the Act. The Commissioner requires the Department to disclose to the complainant that information which is identified in correspondence to the Department served upon it with this Notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision in respect of the complainant's request dated 3 May 2005.

The Request

2. On 4 January 2005 the complainant wrote in e-mail to the Department to request information in respect of the assessment by the Department of the application for grant aid made by Wavebob Technology Limited in relation to the complainant's wave energy invention as follows:
 - "1. Full copies of the Independent Assessors reports for the Full Proposal TP/2/RT/6/I/10189*
 - 2. Was there a consensus meeting (as with the EC Framework Programmes) where the assessors' reports are discussed? Is this the same as the Panel? If so please send us copies of the relevant extracts from the records of such a meeting.*
 - 3. [Name] and I met with [Name] and [Name] at DTI's offices on December 17th 2003 following the various SEI/DTI liaison meetings in Dublin. Was a record made of that meeting? If so, we request a copy.*
 - 4. Following agreements between DTI and SEI, the DTI recommend that we submit and outline proposal under call 422/65, - you will recollect that the deadline was extended. On 23rd March you advised us that the Independent Assessors invited a Full Proposal. We now request copies of the reports from the Independent Assessors on that outline proposal, and any relevant extracts from record of the meeting of the Assessors referred to in your letter.*
 - 5. We did not submit a Full Proposal under call 422/65, and for the reasons given in our letter to you dated 18th May 2004, mainly because the SEI and Carbontrust support for the Wavebob rendered the 422/65 scope of work redundant. Instead an Outline Proposal was submitted on 21st June under the DTI Technology Programme, 2nd call. We request copies of the Independent Assessors' reports and relevant extracts from the Panel meetings regarding that Outline proposal, as summarised in your letter to us dated 9th August 2004".*
3. On 31 January 2005 the Department wrote an e-mail to the complainant acknowledging his request and seeking an extension of time in which to reply. The Department stated that the request had been received on 10 January 2005. The Department advised that it was hoped that the complainant should have a response from the Department by 15 February 2005.
4. The Complainant replied to the Department on 2 February 2005. The complainant stated:

"Our email request was sent at 12.10 on January 4th ...and copied to your colleague...Both e-mails were successfully transmitted. 20 Working days

elapsed at 12.10 on February 1st. You are incorrect to maintain that the 20 days follow from January 10th."

The complainant continued:

"At the meeting with [Name] we made it clear that we are strongly of the opinion that the implementation of the DTI's evaluation process in so far as it affects the development of innovative wave energy conversion systems is seriously flawed. ...

...It was agreed with [Name] that the Wavebob Project, internationally recognised by experts as being important and innovative... carries baggage with the DTI Assessors and that consequently is unlikely ever to be recommended by them."

5. On 23 February 2005 the Department wrote to the complainant with its decision in relation to the requested information. The Department advised the complainant that the information requested was being withheld as it was considered to fall under the exemption in section 36 of the Act on the grounds that:

"in the cases you raise the disclosure of such information would, or would be likely to inhibit the free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation; or, would otherwise prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs.

In applying this exemption in this case we have had to balance the public interest in withholding the information against the public interest in disclosing the information."

In this response the Department offered the complainant the opportunity to seek an internal review. In his e-mail response dated 23 February 2005 the complainant requested such a review.

6. On 14 March 2005 the Department e-mailed the complainant and explained that the offer of an internal review was in fact *"an oversight"* and that no such review would be possible as *"this request was refused under s.36, and the decision was taken by a Minister."*
7. On 28 March 2005 the complainant contacted the Commissioner to complain about the way his request for information of 4 January 2005 had been handled by the Department.
8. On 3 August 2005, following submissions by and discussions with the Commissioner in relation to the potential application of the Environmental Information Regulations 2004 (the "Regulations") (see below), the Department wrote to the complainant setting out details of the arguments for withholding the information upon which it now sought to rely.
9. The Department advised that it considered that some of the information fell to be considered under the Regulations and that that information was exempt under

regulations 12(4)(e), 12(5)(d), 12(5)(e) and 12(5)(g) of the Regulations. The Department further stated that in relation to information concerning emissions it sought to rely on the exemption under 12(4)(e).

10. In relation to the remaining information the Department advised that it sought to rely upon the exemptions under sections 36, 41 and 43 of the Act.

The Investigation

Scope of the case

11. The Department is an important source of grant support for research and development in the field of renewable energy technology. The complainant is the inventor of a wave energy conversion system. The patent in that system is assigned to a limited company in which the complainant has substantial interests and of which the complainant is a director. An application was made by a wholly owned subsidiary of that company to the Department for grant support for research and development. Following the Department's decision not to provide support for the development of the wave energy conversion project, and in order to prepare for any subsequent proposal to the Department, the complainant sought information from the Department relating to those assessments of previous submissions.
12. In its refusal notice to the complainant the Department withheld the requested information on the grounds that it fell within the exemption under section 36 of the Act. The refusal was on the grounds that disclosure of the information would, or would be likely to inhibit the free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation; or, would otherwise prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs (36(2)(b) and 36(2)(c) of the Act respectively).
13. The Commissioner notes that the Department did not carry out an internal review. This was because the decision to withhold the requested information was taken by a minister. The Commissioner considers that the Department was correct in its view that, as the decision was taken at the highest level, by a minister, there could be no credible internal review. Accordingly, the Commissioner agrees that it is appropriate that the matter be passed directly to the Commissioner for consideration without such a review.
14. The Commissioner notes that, following referral of this matter to the Commissioner and subsequent to discussion with the Commissioner, the Department did write to the complainant on 3 August 2005 stating that "*we have now carried out an internal review of our decision.*" Whilst providing useful clarification of the Department's subsequent consideration of the request the Commissioner does not consider that this letter represents an internal review of the Minister's initial decision. As stated above any such review would not, in this instance, be credible because of the seniority of that person who originally took the decision to withhold the information.

15. In the first instance, the Commissioner considered that the requested information constituted environmental information and so was exempt under section 39 of the Act and, accordingly, was to be considered under the Environmental Information Regulations 2004. Following subsequent investigation and consideration of the requested information, the Commissioner is now satisfied that the requested information is not environmental information and is not so exempt under the Act.
16. The Commissioner in this Decision Notice will consider the response of the Department to that request for information which was made by the complainant on 4 January 2005, its adherence to the procedural requirements of the Act, its application of the exemptions under the Act and its consideration of the public interest.

Chronology

17. On 25 April 2005 the Commissioner wrote to the Department asking that the Commissioner be provided with copies of the requested information and seeking confirmation as to what consideration was made by the Department to withhold or disclose the information under the Environmental Information Regulations 2004 (the "Regulations"). The Commissioner also requested details of the Minister who took the decision to withhold the information. The identity of the Minister was subsequently confirmed by the Department who further replied that it did not consider that the Regulations would apply in this case.
18. On 5 May 2005 the Commissioner wrote to the Department setting out his considerations of the applicability of the Regulations and seeking the views of the Department.
19. On 24 May 2005 the Commissioner wrote again to the Department. The Commissioner telephoned the Department on 26 May 2005 and subsequently forwarded the previous correspondence to the Department again.
20. The Department confirmed that it would give this issue its full consideration and on 1 July 2005 wrote to the complainant to request some further time in order to consider the application of the Regulations to the complainant's request.
21. On 3 August 2005 the Department wrote to the complainant advising that it considered that some of the information fell to be considered under the Regulations and that that information was exempt under regulations 12(4)(e), 12(5)(d), 12(5)(e) and 12(5)(g) of the Regulations. The Department further stated that in relation to information concerning emissions it sought to rely on the exemption under 12(4)(e). In relation to the remaining information the Department advised that it sought to rely upon the exemptions under sections 36, 41 and 43 of the Act.
22. On 24 August 2005 the Commissioner sought further information from the Department and on 26 September 2005 the Department sent its detailed response advising, that the Department was of the view that, given its thorough

examination of the issues under the Act and the Regulations, the matter might be considered by the Commissioner without further internal review.

23. On 27 September 2005, and again on 14 October 2005, the Commissioner requested sight of copies of further of the withheld information.
24. On 18 October 2005 the Department provided to the Commissioner copies of the requested information and confirmed that that part of the requested information referred to at paragraph 2 (3) above had been provided to the complainant.
25. Following investigation and consideration of the withheld information, the Commissioner was satisfied that the requested information is not environmental information and is not exempt under the Act section 39 of the Act.
26. On 8 June 2006 the Commissioner wrote to the Department seeking detailed information on the Department's response to the request. The Commissioner noted that while the Department had stated that in relying upon the exemption under section 36 the Department had given consideration to the balance of the public interest, the Department had given no indication as to what those public interest considerations had been. Further, the Commissioner asked the Department:
 - i) For clarification as to why the Department had stated that the request was received of 10 January 2005 when it had been successfully e-mailed on 4 January 2005.
 - ii) The Department's submissions as to what exemption it sought to rely upon in relation to each particular element of the requested information.
 - iii) Details of the basis of the opinion of the qualified person including any submissions to him and the evidence upon which he based his decision.
 - iv) Details of the reason for concluding that no internal review was available to the complainant.
27. On 10 July 2006 the Department responded to the Commissioner. The Department provided some clarification of the Department's public interest arguments in favour of withholding the requested information under section 36 of the Act. The Department also advised that, as part of its abortive internal review process, it made further submissions to the Minister that the information be withheld under sections 41 and 43 of the Act. The Commissioner notes that the Department's consideration of these exemptions did not inform its initial decision to withhold the information and that no internal review was carried out.
28. Having considered the Department's response and perused the withheld information provided by it, the Commissioner contacted the complainant and sought detailed information from him on the structure of the applicant company and on the development of the wave energy project. The Commissioner subsequently contacted the Department and asked that the Department give its full consideration to the application of the exemption under section 40 of the Act and in particular to section 40(1).

29. The Department provided the Commissioner with its detailed response on 13 November 2006. The Department confirmed that in withholding comments made about the complainant it sought to rely on the exemption in section 40(1) of the FOI Act.
30. The Department went on to consider in some detail its arguments against the release of the complainant's personal data should the complainant make a subject access request for the information under the Data Protection Act 1998 (the "DPA"). The Commissioner replied to the Department and provided guidance to it on the proper application of the exemptions under the DPA.

Findings of fact

31. The withheld information, not provided to the complainant, is as follows:
 - a) Two assessment sheets/reports for proposal reference 422/65 including:
 - i) assessment
 - ii) name of assessor
 - b) Two assessment sheets/reports for proposal reference TP/2/RT/6/I/10189 including:
 - i) assessment
 - ii) name of assessor
 - c) Three assessment sheets/reports for proposal reference TP 16560 including:
 - i) assessment
 - ii) name of assessor, where recorded
 - d) Relevant extracts of minutes of meeting 2 March 2004, including:
 - i) names of those present
 - ii) discussion of the complainant's proposal
 - e) Relevant extracts of minutes of meeting dated 30 September 2004, including:
 - i) names of those present
 - ii) discussion of the complainant's proposal
 - iii) discussion of assessment forms and sample forms
32. Central to the consideration of this request is the issue of the identity of the complainant. The Commissioner is required to consider whether the complainant is the individual who made the request or whether that individual merely represents a limited company, which might then be considered to be the complainant.
33. The individual who sent the request for information to the Department is the inventor of the wave energy conversion system for which the application for grant support was made. That individual has assigned the patent in that system to parent company of that limited company making the application for support to the Department. He is the founder of that company and retains substantial interests in

it. It may be argued that he makes the request for information on behalf of the applicant limited company. However, the Commissioner, having considered the request, the individual's involvement and perceived involvement with the project at issue, and having also considered the withheld information, is of the view that the individual made the request in his own right.

34. This is relevant to the consideration of whether the Department ought to have considered that part of the requested information be released as in response to a subject access request or, in the alternative, withheld from the subject requestor under appropriate provisions under the DPA. This issue is pursued below in the context of section 40 of the Act.

Procedural matters

35. In its refusal notice to the complainant dated 23 February 2005, the Department stated that the information requested fell under the exemption in section 36 of the Freedom of Information Act on the grounds that the disclosure of such information would, or would be likely to inhibit the free and frank provision of advice; or the free and frank exchange of views for the purposes of deliberation; or, would otherwise prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs.
36. The Department went on to state that in applying this exemption it had to balance the public interest in withholding the information against the public interest in disclosing the information.
37. Section 17 of the Act provides that where a request for information is refused upon the basis of an exemption, the public authority must explain what exemption or exemptions have been relied upon. Where it would not otherwise be apparent the public authority must also explain why the exemption is being relied upon. While the Department did state to the complainant which exemption it sought to rely upon the Commissioner is of the view that it did not state why the exemption under section 36 of the Act applied.
38. The Department was required, by virtue of sections 17(3)(b) of the Act, to state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Department did not state in its refusal notice what it considered to be the public interest arguments in favour of withholding or in disclosing the requested information.

39.0 Application of the exemption under section 40

Section 40 of the Act is set out in Appendix 1 hereto.

The exemption under section 40(1)

- 39.1 The Commissioner is satisfied that the absolute exemption under section 40(1) is engaged in relation to some of the withheld information for the following reasons.

- 39.2 The Commissioner has considered whether the withheld information constitutes personal data of which the complainant is the data subject.

The Commissioner has considered whether any of the withheld information is “personal data.” “Personal data” is defined in section 40 (7) of the Act as having the same meaning as in section 1(1) of the Data Protection Act 1998 (“the DPA”). Section 1(1) of the DPA defines personal data as follows:

“ “personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

- 39.3 The Commissioner is satisfied that the majority of the information requested by the complainant is such personal data.

- 39.4 The Commissioner has considered the guidance of the court on the interpretation of this provision given in the case of *Durant v Financial Services Authority* [2003] EWCA Civ 1746. The Commissioner notes that in that case Lord Justice Auld confirms that *“mere mention of a data subject in a document held by a data controller does not necessarily amount to his personal data.”* He goes on to state that two notions may be of assistance:

“The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject’s involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised.

“The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person’s or body’s conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.”

Lord Justice Auld goes on to state:

*“A recent example is that considered by the European Court in *Criminal Proceedings against Lindquist*, Case C-101/01 (6th November 2003), in which the Court held, at para. 27, that “personal data” covered the name of a person or identification of him by some other means, for instance by giving his telephone number or information regarding his working conditions or hobbies.”*

- 39.5 In this case the Commissioner is satisfied that a large amount of the withheld information does “relate to” the complainant in that it goes beyond the mere recording of his involvement in this project but rather does effect his privacy in a business and professional capacity and in relation to his professional reputation. The information is “biographical” in a significant sense as it speaks of the complainant’s interests, views, role, abilities and business.
- 39.6 The Commissioner is satisfied that the complainant is the focus of the information. The data relates to his invention, its development and viability and that of the project focused upon it and on the professional reputation of the complainant.
- 39.7 Further, the Commissioner is satisfied that the complainant can “be identified” from the data or from those data and other data within the possession of the Department.
- 39.8 Accordingly, the Commissioner finds that a substantial portion of that information “relates to” the individual requesting the information – i.e. the complainant. That information is described at paragraph 30 a)i), b)i), c)i), d) ii) and e) ii) above. The Commissioner is therefore satisfied that this information is exempt under section 40(1) of the Act.
- 40.0 **The exemption under section 40(2)**
- 40.1 The Commissioner has considered whether any of the withheld information constitutes personal data which is not the personal data of the complainant, and whether the disclosure of any such information would contravene any of the data protection principles.
- 40.2 The Commissioner is satisfied that the exemption under section 40(2) is engaged in relation to some of the withheld information for the following reasons:
- 40.3 The Commissioner has considered the withheld information and notes that the withheld information includes the names of those individuals who have assessed the application for grant support for development of the wave energy conversion project and also the names, roles and/or institutions of those individuals who attended two meetings at which the project and its assessment were discussed.
- 40.4 The assessments were carried out by consultants engaged by and acting on behalf of the Department. In attendance at the assessment meetings were these consultants and also employees of the Department and observers.
- 40.5 The Commissioner has considered whether any of the withheld information is “personal data.” The Commissioner has considered the definition of personal data in section 1(1) of the DPA and the assistance in interpreting this definition given by Lord Justice Auld in *Durant* (see paragraph 39 above). The Commissioner is of the view that the information is biographical because it tells one something about the individuals, their views, roles and occupations.

40.6 The Commissioner has considered section 40 (2)(a) of the Act and examined whether the disclosure of this personal data, the names, roles and institutions of the assessors and those present at the meetings, would breach the Data Protection Principles. The Commissioner has specifically considered whether the disclosure of this information would breach the first data protection principle.

40.7 The first Data Protection Principle states:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
at least of the conditions in Schedule 2 is met...”*

The Department has advised the Commissioner that it is Department practice to assure assessors that all advices given by them will be held “confidential” by the Department. Assessment advices are given by assessors in formal reports and in discussion at minuted meetings. The Department has provided the Commissioner with details of the induction given to assessors which explicitly states that their assessments are “confidential” and that proposers are not told who evaluates their proposals. The Commissioner is not of the view that the Department’s use of the term “confidential” bears its legal meaning in this context.

40.8 The Commissioner is satisfied that it would be unfair to disclose the personal data of those assessors who have received such an assurance from the Department in relation to their personal data.

The Commissioner is of the view, expressed in his decision in Corby Borough Council (case reference FS50062124) that the occupants of senior posts within public authorities, particularly those responsible for the expenditure of public funds, must expect public scrutiny to ensure their accountability. The Commissioner recognises that while the assessors have been given an assurance from the Department that their identity will not be disclosed, other persons present at the assessment meetings at issue have not received such an assurance. However, the Commissioner is of the view that the legitimate and reasonable expectations of all those present at those assessment meetings were necessarily informed by the explicit assurances given to the assessors present. The Commissioner is satisfied therefore that all those present had a legitimate expectation that their personal data would not be disclosed.

40.9 Accordingly, the Commissioner finds that it would be unfair in the circumstances of this case to disclose the personal data of any of those carrying out assessments or attending the assessment meetings and is satisfied that the exemption under section 40(2) of the Act is engaged in respect of that information set out at paragraph 30 a) ii), b)ii), c)ii, d)i) and e)i) above.

41.0 Application of the exemption under section 36

41.1 Section 36 of the Act is set out in Appendix 1 hereto.

41.2 Although the Commissioner is satisfied that a substantial amount of the requested information is exempt under section 40 of the Act, the Commissioner has also

considered whether that withheld information, not otherwise exempt under section 40(1) of the Act is in fact exempt under section 36 of the Act. Information is so exempt where, in the reasonable opinion of a qualified person disclosure would, or would be likely to, inhibit the free and frank provision of advice, or exchange of views for the purposes of deliberation or would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs.

41.3 The information at issue is limited to the relevant extracts of the minutes of those meetings of 2 March 2004 and 3 September 2004 which includes the names of those persons engaged as consultants to carry out assessment of proposals to the Department and others present at the meetings.

41.4 The Commissioner is satisfied that the decision to apply the exemption under section 36 to the information was taken by a qualified person.

The Commissioner has considered whether the opinion of the qualified person was in fact "reasonable." The Commissioner considers that a reasonable opinion is one which lies within the bounds of reasonableness or a range of reasonable opinions and can be verified by evidence. Any opinion which is outrageous, manifestly absurd or made with no evidence, or which is made on the basis of irrelevant factors or without consideration of all relevant factors will fail to satisfy such a test.

41.5 On 8 June 2005 the Commissioner asked the Department for details of the basis of the decision taken by the qualified person including details of any submissions to him and any documentation or information upon which he based his decision. The Department replied to this query advising that on 14th February it had sent a submission to the then Minister of State for Energy, the 'qualified person' in this case. The Department's submission to the Minister detailed the terms of the request and why the Department felt that section 36 of the Act applied and why the Department considered that the public interest lay in favour of withholding the information. The Minister was asked to consider the application of section 36 and the public interest arguments to the request. The Department recommended to the Minister that that the requested information should be withheld on the grounds that section 36 (specifically section 36(2)(b)) applied and that the balance of the public interest lay in withholding the information. The Department advised the Commissioner that the Minister agreed with the Department's recommendation to withhold the requested information and that the Department advised the complainant of this on 23 February 2005.

That reply of 23 February is detailed at paragraph 5 above.

41.6 In light of those considerations, the Commissioner does not consider that the decision of the Minister is manifestly absurd. The Commissioner recognises that should those giving advice or offering opinions in deliberation be aware that they will be named and their opinions published, they may indeed be inhibited in robustly expressing their views. The Commissioner further recognises that such inhibition may lead to incomplete recording of advice and discussion, to difficult choices being avoided and to the quality of decision making being undermined.

41.7 It coming to this view the Commissioner has given full consideration to those submissions made by the Department to the Minister which post date his decision to withhold the information.

41.8 Accordingly, the Commissioner finds that the exemption under section 36(2)(b) is engaged in respect of the requested information in this case.

41.9 **Consideration of the public interest**

41.9.1 The exemption under section 36(2)(b) of the Act is a qualified exemption in the case of information not relating to the House of Commons or the House of Lords. Accordingly, having concluded that the exemption is engaged the Commissioner is required by section 2(2)(b) of the Act to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

41.9.2 The Commissioner recognises the public interest in providing government, and those advising government, with free thinking space and a forum in which to honestly and robustly express opinion and air ideas. Such a free space can encourage rigorous and open discussion and, in the case of assessments such as those concerned in this case, will disinhibit advisors and permit them to give their most candid advice. The Commissioner recognises that the preservation of the anonymity of assessors affords those assessors protection from lobbying or canvassing on behalf of those assessed and enables those assessors the opportunity to give of their best and most open advice.

41.9.3 However, the Commissioner also recognises the substantial public interest in openness and accountability particularly with respect to the allocation of public funds and is of the view that such openness may well increase public confidence in government and in the decisions taken on its behalf. The Commissioner notes too the particular public interest in the maximum transparency about the effective development of alternative energy technologies and strategies.

41.9.4 Recognising the very strong public interest in accountability and the public interest in transparency in the decision making process, especially with respect to the support of emerging technologies, the Commissioner finds that in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

42.0 **Application of the exemption under section 41 –**

42.1 Section 41 of the Act is set out in Appendix 1 hereto.

42.2 Although the Commissioner is satisfied that a substantial amount of the requested information is exempt under section 40 of the Act the Commissioner has also considered whether any of that withheld information, not otherwise exempt under section 40(1), was obtained from any other person and whether the disclosure of any such information would constitute a breach of confidence actionable by that or any other person.

- 42.3 The information at issue is limited to the relevant extracts of the minutes of those meetings of 2 March 2004 and 3 September 2004 which includes the names of those persons engaged as consultants to carry out assessment of proposals to the Department and of others present at the meetings.
- 42.4 The Commissioner is satisfied that the exemption under section 41 is not engaged in relation to that part of the withheld information for the following reasons:
- 42.5 The Commissioner is satisfied that the part of the withheld information was, as is required by the Act, “obtained...from any other person.”

The Commissioner is of the view that it is possible that the name of persons engaged by a public authority to act on its behalf may be considered to be “obtained ...from any other person.” If it is accepted that the name of a consultant engaged by the Department and stated within an assessment might be construed as information obtained from another person, the Commissioner must then consider whether the disclosure of that information to the public (otherwise than under the Act), would constitute a breach of confidence ‘actionable’ by that or any other person.

However, the Commissioner has considered the remaining relevant extracts from the assessment meetings, that information other than the names of the participants. The Commissioner finds that the content of the minutes of those meetings, called, held and minuted by the Department, is not information obtained by the Department from any other person. Accordingly section 41 (1)(a) is not satisfied in respect of that part of the withheld information.

- 42.6 The Commissioner takes the view that the word “actionable” in the context of section 41 means that all the requirements for a successful claim for breach of confidence must be fulfilled. If a claim for breach of confidence was brought, would the claim succeed? A mere chance of success is not sufficient to satisfy section 41.
- 42.7 The requirements for a claim for breach of confidence are set out in the case of *Coco v Clarke (Engineers) Ltd* [1969] RPC 41. A claim for breach of confidence can be established where (1) the information has the necessary “quality of confidence”, (2) was imparted in circumstances giving rise to an obligation of confidence and (3) there has been (or would be) an unauthorised disclosure of the information. All three elements must be present for a claim to be made out. However for that claim to be ‘actionable’ within the meaning of section 41(1) (b) of the Act requires a further consideration in any case, namely, whether or not there would be a defence to such a claim.
- 42.8 The Commissioner has considered the withheld information and, notwithstanding the assurance given by the Department that the assessors identity and the assessments would remain “confidential,” the Commissioner is satisfied that the name of each of the assessors and of each of those persons present at the assessment meetings does not have the necessary quality of confidence in the context of a formal decision making process involving the expenditure of public

money.

The Commissioner notes that it is Department practice to assure assessors that all advices given by them will be held “confidential” by the Department and that, in induction, assessors are explicitly assured that that their assessments are “confidential” and that proposers are not told who evaluates their proposals. The Commissioner is not of the view that the Department’s use of the term “confidential” bears its legal meaning in this context. The Commissioner notes that assessors are made aware that details of their assessments will be made available to proposers. The Commissioner is not of the view that the assessors can have any legitimate expectation that the substance of their assessments will remain undisclosed. The Commissioner is satisfied that the mere promise of “confidentiality” is not sufficient to imbue information with the quality of confidence.

42.9 For the reason set out above the Commissioner is satisfied that the exemption under section 41 of the Act is not engaged.

43.0 **Application of the exemption under section 43(2) –**

43.1 Section 43 (2) of the Act is set out in Appendix 1 hereto.

43.2 Although the Commissioner is satisfied that a substantial amount of the requested information is exempt under section 40 (2) of the Act, the Commissioner has also considered whether the exemption under section 43(2) of the Act is applicable to that withheld information not otherwise exempt under section 40(1) of the Act. The withheld information would be exempt from disclosure under section 43(2) of the Act if disclosure of that information would or would be likely, as is claimed by the Department, to prejudice the commercial interests of the Department or of any persons or organization who might provide advice for or submit applications to the Department.

43.3 The information at issue is limited to the relevant extracts of the minutes of those meetings of 2 March 2004 and 3 September 2004 which includes the names of those persons engaged as consultants to carry out assessment of proposals to the Department and others present at the meetings.

43.4 The Commissioner is of the view that the exemption under section 43 of the Act is not engaged in relation to the withheld information for the following reasons: The Department has submitted that, should the identity of assessors be made known, their credibility and commercial and professional standing would be subject to attack by disgruntled proposers. The commercial interest of the Department, it submits, would be prejudiced by the inhibition of the assessors in the provision of their advices, in the disinclination of well qualified persons to act as assessors on the Department’s behalf and in the consequent undermining of the Department’s role in supporting industry.

43.5 The Commissioner is of the view that it is possible that rejected proposers may seek to undermine the credibility of critical assessors and that it is possible that this would inhibit assessors as described by the Department. The Commissioner

must ask whether any such an eventuality would then be “likely” to prejudice the commercial interests of the assessor or any other. The Commissioner recognises that the disclosure of the names of assessors and others present at assessment meetings, and other relevant extracts of the minutes of those meetings here considered, may have the potential to inhibit candid discourse at such meetings.

- 43.6 However, the Commissioner must consider whether such potential inhibition would be likely to prejudice the commercial interests of the Department or any other. In considering whether any such prejudice would be “likely” the Commissioner interprets the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than merely hypothetical, more than a remote possibility.
- 43.7 The Commissioner is mindful of the views of Munby J. in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), in which case the same expression fell to be construed under the Data Protection Act 1998. He said: *“I accept that “likely”...does not mean more probable than not. But on the other hand, it must connote a significantly greater degree of probability than merely ‘more than fanciful.’* He stated that in his view the word *“connotes an degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.”*
- 43.8 In this case, and on the evidence before the Commissioner, the Commissioner is satisfied that there is no such likelihood of prejudice. Accordingly, the Commissioner is satisfied that the exemption under section 43(2) of the Act is not engaged.

The Decision

44. The Commissioner’s decision is that the public authority has not dealt with the request in accordance with the Act for the following reasons:
- The Department was in error in its application of the exemption under section 36 of the Act. This is because the Department did not give sufficient consideration, in all the circumstances of the case, to whether the public interest in maintaining the exemption under section 36 of the Act outweighed the public interest in disclosing the information, in accordance with section 17 of the Act.
 - The Department was in error in its application of the exemption under section 41 of the Act.
 - The Department was in error in its application of the exemption under section 43 of the Act.
 - The Department failed to comply with the requirements of section 17 of the Act in that it did not state to the complainant the reasons for claiming that in all the circumstances of this case, the public interest in maintaining the

exemption under section 36 of the Act outweighs the public interest in disclosing the information.

- The Department was in error in its failure to apply the exemption under section 40(1) of the Act.

Steps Required

45. The Commissioner requires the Department to disclose to the complainant the information identified in correspondence served upon it with this Notice in order to ensure compliance with the Act. The Department must take the steps required by this Notice within 35 calendar days from the date of this Notice.

Other matters

46. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
47. The Commissioner recommends that the Department review its practice in relation to future requests for information where that information is, or may be, the personal data of the requestor.
48. The Commissioner recommends that the Department takes such steps as are necessary to ensure that full and timely consideration is given to the question of whether information falls within the exemption under section 40 (1) of the Act and that procedures are put in place that any such subject access requests are dealt with in accordance with the Data Protection Act 1998.
49. The Commissioner recommends that the Department review its practice in relation to future requests for information where the Department seeks to withhold information on the grounds of a qualified exemption. The Commissioner recommends that the Department takes such steps as are necessary to ensure that public interest arguments in favour of disclosure and in favour of maintaining the exemption are fully considered and are fully communicated in the refusal notice.

Right of Appeal

50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 13th day of February 2007

Signed
Richard Thomas
Information Commissioner

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

Appendix 1:

Relevant Statutory Obligations under the Act

1. **Section 1(1)** provides that –

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

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

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

2. **Section 17 (1)** provides that –

“A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or*
- on a claim that information is exempt information*

must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

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

3. **Section 2(2)(b)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

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

4. **Sections 36(2)(b) and (c)** provide that –

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

(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 purpose of deliberation, or*
- (c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”*

5. **Section 40** provides that:

- “(1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
- (2) *Any information to which a request for information relates is also exempt information if-*
 - (a) *it constitutes personal data which do not fall within subsection(1), and*
 - (b) *either the first or the second condition below is satisfied.*
- (3) *The first condition is-*
 - (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
 - (i) *any of the data protection principles, or*
 - (ii) *section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
 - (b) *in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”*
- (4) *The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”*

6. **Section 41** provides that -

- “(1) *Information is exempt information if –*
 - (a) *it was obtained by the public authority from any other person (including another public authority), and*
 - (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1) (a) would (apart from this Act) constitute an actionable breach of confidence.”

7. **Section 43 (2)** provides that -

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)”