

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 7 July 2008

Public Authority: Medical Research Council
Address: 20 Park Crescent
London
W1B 1AL

Summary

The complainant requested from the MRC copies of independent reviewers' reports and its Research Boards' assessments of applications for funding for research into ME which had been refused between 2002 -2005. The MRC refused to disclose the information on the basis of the exemptions contained in sections 36, 40 and 41 of the Act. The Commissioner determined that it had correctly applied section 41 to the reviewers' reports and the Research Boards' assessments. He decided that, to the extent that any information in the Research Boards' assessments was not exempt under section 41, it was exempt from disclosure under section 36. The MRC was not required to take any further action.

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.

The Request

2. On 14 January 2005 the complainant wrote to the Medical Research Council (the "MRC") for information about research it had funded into ME/Chronic Fatigue Syndrome and, also, details of any applications for funding which had been refused. The MRC provided him with details of applications it had funded and a summary of the general areas covered by eleven applications which had been refused since 2002.
3. On 8 March 2005 the complainant requested from the MRC the written evidence that supported the refusal to fund the eleven applications, including the reports

provided by independent experts who had reviewed the applications on behalf of the MRC.

4. On 15 April 2005 the MRC wrote to the complainant confirming that it held reviewers' reports and records of its Research Boards' assessments in relation to the applications which had been refused. However, it stated that it believed that they were exempt from disclosure under the Act, specifically section 40, as the Board's discussions would identify the grant applicants, section 41, as the applications and the reviewers' reports were provided in confidence to the MRC, and section 36(2)(b), as making the information public would result in less constructive comments about applications in future.
5. On 18 April 2005 the complainant emailed the MRC to ask it to carry out a review of its decision to withhold the information he had requested.
6. On 5 May 2005 the MRC wrote to the complainant to inform him that the result of the internal review was to uphold its original decision.

The Investigation

Scope of the case

7. On 5 May 2005 the complainant wrote to the Commissioner to complain about the MRC's decision to refuse to provide him with the reviewers' reports and Research Boards' assessments on the applications which it had refused between 2002 and 2005.
8. He queried whether the disclosure of the information he had requested would be likely to have any detrimental effect on the willingness of Boards' members and reviewers to freely express their views. He also felt that there was a significant public interest and benefit in the MRC being open and transparent in relation to the decisions it took over the spending of public money.

Chronology

9. There were a large number of communications between the Commissioner and the MRC, those of most significance are identified below.
10. On 24 January 2007 the Commissioner wrote to the MRC requesting copies of the withheld information and clarification of the basis on which it believed that the information was exempt from disclosure.
11. On 1 March 2007 the MRC telephoned the Commissioner to explain that it was having difficulty locating all the information related to the complaint due to a fire at its storage facility which had destroyed some of the relevant documents. It informed him that it was trying to locate some of the missing documents on its electronic systems.

12. On 15 May 2007 the MRC provided the Commissioner with the requested information and an explanation of the different stages of the grant application process, particularly in relation to the reviewers' reports and the considerations of the MRC's Research Boards. It explained that it was one of the main UK funding bodies through which the Government supported medical and clinical research. It funded research undertaken across the entire spectrum of medical sciences in universities, hospitals and its own units.
13. The MRC informed the Commissioner that applications for research funding were normally assessed through a two stage process. Initially applications were assessed by members of the MRC's College of Experts which was made up of over one thousand scientific advisors. Each member of the College was affiliated to one of five separate research boards according to their area of expertise. Each of the applications was sent to a number of these experts who provided a detailed assessment report and a score in respect of the contents of the application. The applications were assessed against core criteria such as the importance of the issues being addressed, scientific potential and requested resources. Copies of the reports were provided to the applicants in an anonymised form so that they were aware of the comments that had been made on their application but not which particular reviewers had made the comments.
14. The assessments by the reviewers were forwarded to the Research Board of the MRC appropriate for that area of research. In view of the large numbers of applications received by the MRC, initial decisions were taken by the Chairs and Deputy Chairs of the relevant Research Board about which applications should be considered by the full Board. Prior to their applications being considered by the Research Boards, applicants were given an opportunity to comment on any matters contained in the reviewers' reports and these comments were submitted to the Boards, along with the reports.
15. The relevant Research Boards then considered the applications and made a decision as to whether funding should be provided. They gave feedback to applicants on their decisions through an assessment form. The MRC emphasised that it had made it clear to reviewers and members of the Research Boards that any information they received in relation to applications should be treated as confidential and that any comments that they made would also be regarded as confidential.
16. The MRC explained that, whilst it made information available about successful applications, it did not routinely disclose information about unsuccessful proposals. It believed that it was on this understanding, common to other research funding organisations, that researchers submitted their applications to it. It also provided detailed arguments as to why it believed the withheld information was exempt from disclosure.
17. In addition, the MRC informed the Commissioner that an entire file for one application, and part of the file for another, had been destroyed by a fire at its storage facility in July 2006. It informed him of searches it carried out and that it had managed to locate some reviewers' reports related to the two applications.

However it could not be sure that these constituted all the reports that had been submitted in relation to those applications at the time they were considered.

18. On 29 August 2007 the Commissioner wrote to the MRC seeking further clarification of the application of the exemptions. He sought additional evidence as to why it believed there was a duty of confidence owed in relation to the reviewers' reports and Board's assessments under section 41. He also sought clarification of the application of section 36.
19. On 13 September 2007 the Commissioner held a meeting with the MRC, and other research councils, to obtain further clarification as to the operation of the review process for grant applications.
20. At the meeting it was argued by the MRC that the reviewers' reports and Research Boards' assessments contained detailed information about the proposals contained in the applications. Concerns were therefore raised about the impact that disclosure might have on the applicants for grants because of the commercial sensitivity of the information concerned and the intellectual property rights attached to it.
21. The MRC agreed to consult with the parties whose applications were covered by the request to ascertain their views about the disclosure of the information contained in the reviewers' reports and Research Boards' assessments. It confirmed that it would not only seek the views of the applicants as to disclosure at the present time but, also, what their views might have been in relation to disclosure at the time that the initial request was made.
22. On 15 October 2007 the MRC wrote to the Commissioner to provide him with additional evidence and arguments regarding the application of sections 36 and 41.
23. On 12 November 2007 the Commissioner discussed with the MRC the results of its consultation exercise with the applicants. The MRC informed the Commissioner that it had not received a response from one applicant and that two of the responses that had been received were unclear. The MRC agreed to seek further clarification from the applicants whose responses were unclear and to make a further attempt to obtain an answer from the applicant who had failed to respond. On the same day the MRC forwarded to the Commissioner details of the responses it had received to date.
24. On 5 January 2008 the MRC confirmed that it had now received responses from all of the applicants covered by the request and forwarded copies of the correspondence. The responses indicated that none of the applicants would have consented to disclosure of the requested information at the time that the request was made in January 2005. However, some of the applicants informed the MRC that, due to the passage of time, they would have no objection to the information being disclosed if a request were made for it at the present time.

Analysis

The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant points are summarised below.

Exemptions

Section 41 – Information provided in confidence

25. The MRC contended that the reviewers' reports and the Research Boards' assessments of the applications were exempt from disclosure under section 41 of the Act as it owed a duty of confidence to the applicants, the reviewers and the members of the Boards in respect of the information contained within them.

26. Section 41(1) provides that information is exemption from disclosure if:-

- (a) it was obtained by the public authority from another person and
- (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

27. The Commissioner's view is that disclosure would constitute an actionable breach of confidence if:-

- i. the information has the necessary quality of confidence;
- ii. the information was imparted in circumstances importing an obligation of confidence; and
- iii. there was an unauthorised use of the information to the detriment of the confider (although the element of detriment is not always necessary).

28. If these parts of the test were satisfied, the Commissioner believes that he should then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

29. All of the eleven applications which were the subject of the request were assessed by the external reviewers with copies of the reports being provided to the applicants in an anonymised form.

30. The applications were then considered by either the Health Services and Public Health Research Board or the Neurosciences and Mental Health Board. Of the applications covered by the request, three had been forwarded to the full Boards for discussion and for a decision to be made as to whether a grant should be awarded.

31. The Commissioner has considered whether section 41 was applicable to the Research Boards' assessments and the reviewers' reports.

(a) Was information contained in the Research Boards' assessments and reviewers' reports obtained by the MRC from another person?

32. The Commissioner initially considered whether, to the extent that the applicants, the reviewers and the members of the Research Boards provided information contained in the withheld information, they could be regarded as another person, separate from the MRC, for the purposes of section 41.

33. As regards the applicants, both the Research Boards' assessments and the reviewers' reports contained detailed information about them, their proposals and analysis of the strengths and weaknesses of the applications. To the extent that the assessments and reports contained information from the applications, the Commissioner is satisfied that this was information provided by a third party to the MRC as the applicants were clearly independent of the MRC. The MRC subsequently passed this information to the members of the Research Boards and the reviewers.

34. However the assessments and reports, in addition to containing information from the applications, also contained the reviewers' and Boards' comments on the applications. The Commissioner therefore had to consider whether the reviewers and the Boards were separate from the MRC for the purpose of section 41 when making these comments.

35. The reviewers were sent copies of an application for funding for comment after it was received by the MRC. They were provided with some guidance as to the criteria to consider when carrying out their assessment but were otherwise free to make whatever comments they felt appropriate.

36. The MRC normally received responses from a number of reviewers in relation to each individual application. The actual decisions as to whether proposals should be funded were taken by the Chairs of the Research Boards or the Boards themselves, based on the contents of the reviewers' report. The reviewers received no payment for providing their comments.

37. In light of the above the Commissioner is satisfied that the reviewers were acting independently of the MRC as peer reviewers when providing their comments on the applications in question and not on behalf of the MRC. He therefore believes that their comments on the applications were information obtained by the MRC from a third party for the purposes of section 41.

38. As regards the Boards' assessments, to the extent that the assessments contained information from the applications, the Commissioner believes this was information provided by the applicants.

39. The assessments also contained detailed comments from the Boards on the strengths and weaknesses of the applications. The Commissioner is of the view that the Research Boards functioned as an integral part of the decision making

process within the MRC when carrying out assessments of the applications for grants. Their decisions were likely to determine whether funding would be awarded to particular applicants. The Boards were therefore making a decision on behalf of the MRC.

40. The Commissioner acknowledges that there is consequently an argument that the Boards' comments on the applications did not constitute information obtained from a third party as it was information provided by a part of the MRC itself. However, after carefully examining the information in question, he believes that the Boards' comments on the applications and the content of the applications are inextricably linked and intertwined. The Boards' comments themselves provide detailed information about the content of the applications. The Commissioner is therefore of the view that those comments reflect the content of the applications and so can be regarded as information provided by the applicants. To the extent that any information fell outside this category it would be likely to be of no value when removed from the context of the surrounding information in the assessment.
41. The Commissioner also considered whether, if any of the Boards' comments were to be regarded as falling outside of section 41(1)(a), they might have been exempt from disclosure under section 36.
42. The Commissioner proceeded to consider separately whether the MRC owed the applicants for grants and the reviewers a duty of confidence in respect of information contained in the Research Boards' assessments and reviewers' reports.

Duty of confidence owed by the MRC to the applicants for grants

(b) Would the disclosure of the information constitute an actionable breach of confidence owed by the MRC to the applicants for grants?

(i) Does the information have the necessary quality of confidence to justify the imposition of an obligation of confidence?

43. The Boards' assessments and reviewers' reports contained detailed information about the content of the applicants' submissions and the Boards' and reviewers' comments on those submissions. This information was likely to have been of a commercially sensitive nature and been subject to intellectual property rights. The Commissioner is satisfied that the information contained within the assessments and reports was not information which was readily available, in the public domain or of a trivial nature. As a result he is of the view that the information concerned had the necessary quality of confidence to justify the imposition of an obligation of confidence.

(ii) Was the information communicated in circumstances that created such an obligation?

44. The MRC made clear statements to potential applicants that it would regard applications as confidential and that it would take all reasonable steps to ensure the contents of the applications were treated as such. The Commissioner is

therefore satisfied that there was an express obligation of confidence owed to applicants in respect of the information that was contained within their applications.

45. It follows from the preceding paragraph that it would have been reasonable for the applicants to have expected that the content of the reviewers' reports and Boards' assessments would be treated in a confidential manner in so far as these documents reflected information contained in their applications.
46. It would also seem reasonable for the applicants to have expected that comments made by the reviewers in their reports and the Boards in their assessments would also have been treated as confidential by the MRC as they contained detailed observations on the strengths and weaknesses of what was contained in the applications. If this information had been disclosed it would have allowed conclusions to be drawn about the content of their applications and made public frank assessments of the strengths and weaknesses of their proposals.

(iii) Would disclosure of the information have been unauthorised and have caused harm to the interests of the applicants?

47. The Commissioner is satisfied that, following the consultation exercise carried out by the MRC, that none of the applicants would have consented to the disclosure of the information contained in the Boards' assessments and reviewers' reports at the time the request was made. He understands from the MRC that some of the applicants would not object to disclosure if a request were made at the present time for this information. This might affect whether information should be withheld if a fresh request were made for it. However, the Commissioner has to consider the circumstances applicable at the time that the original request was made and determine whether, at that time, the decision taken by a public authority was correct.
48. The Commissioner also believes that the release of the reviewers' reports, to the extent to which those reports reflected the content of the applications, and the Boards' assessments into the public domain could have had a detrimental impact on the applicants' commercial and other interests given its sensitive nature.

(c) Would the MRC have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

49. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under the Act. However, under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information concerned.
50. Under the Act, the public interest test assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. Under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The public interest test in relation to the duty of confidence is therefore the reverse of that

under the Act. Disclosure would, therefore, be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

Public interest arguments in favour of the disclosure of the information

51. The Commissioner believes that there is a general public interest in disclosing information which allows individuals to gain a greater understanding of how and why decisions are taken by public authorities. Disclosure of the withheld information would have allowed the public to see the assessments which formed the basis for decisions which were taken on the funding of medical research and so ensure that the public authority was discharging its functions adequately.
52. Disclosure would also have promoted accountability and transparency by allowing the public to ascertain whether decisions related to the funding of medical research were being taken on a sound, rational basis and that public money was being appropriately spent. However the public interest in disclosure of the reviewers' reports and Boards' assessments in relation to this request is less strong as it concerned applications which were unsuccessful and therefore did not involve the spending of public money. Had the request concerned successful applications, for which grants of public money had been awarded, it is likely that there would have been a stronger public interest in disclosure of the information.
53. The release of the information would have been of particular assistance to members of the public who believed that there might have been a bias in favour of particular forms of medical research to the detriment of other approaches and were of the view that this had resulted from political pressure being brought to bear on the MRC. Disclosure of the reports would have allowed an objective assessment of the basis on which funding decisions had been taken.
54. The information would, in addition, have been of assistance to those who were considering applying for grants by allowing them to identify the strengths and weaknesses of previous applications and help to ensure that their own applications were as rigorously prepared as possible. It would also have provided them with a better understanding of how the criteria for assessment of the applications were applied in practice by the MRC.
55. In relation to this particular public interest, the Commissioner notes that the MRC provides feedback on the Boards' assessments and anonymised copies of reviewers' reports to all applicants so that they are aware of any comment that have been made about their applications. This means that any rejected applications could be resubmitted, taken into account of the views contained in the reports and assessments.
56. The release of this information would also have helped to promote the general flow of information about medical research into the public domain which would have assisted in stimulating debate about areas of research covered by the MRC and helped to identify areas which were worthy of further investigation.

Public interest arguments in favour of maintaining the duty of confidence owed to the applicants

57. The Commissioner recognises that where a duty of confidence has been created there is a strong inherent public interest in the maintenance of that duty.
58. The reviewers' reports and Boards' assessments contained considerable detail about the content of the applicants' proposals and a detailed critique of the proposed research. As both sets of documents were likely to have contained a considerable amount of information which was commercially sensitive and to which intellectual property rights attached, disclosure could have been potentially very detrimental to the applicants. There was consequently a strong public interest in protecting the rights of the applicants in relation to this information.
59. If sensitive information contained in the reports and the assessments had been disclosed by the public authority it would have been unlikely that the applicants would have applied to the MRC for grants in future as there were other organisations from which they could have sought funding. Alternatively, they might only have disclosed very limited information in their future applications which may not have been helpful to the MRC in making a determination as to whether to award a grant. In addition, any critical comment could have a detrimental impact on the reputations of applicants.
60. If other researchers had learned of the disclosure, as they may well have done, it would also probably have deterred others from applying for the same reasons as those explained in the previous paragraph. All of this could have had a detrimental impact on medical research in the United Kingdom.
61. These arguments have been supported by comments of some of the applicants contacted by the MRC as part of its consultation exercise regarding disclosure of the reviewers' reports on their applications. There were concerns expressed that disclosure would have resulted in applicants' research hypotheses and proposed methodologies being prematurely passed to competitors. Also that it could have led to future applicants not including the same levels of information in their applications. In addition, concerns were raised about the impact that the disclosure of comments might have on the reputations and credibility of applicants.
62. The MRC also indicated that, based on its own experience, it was aware that the need for confidentiality in relation to the independent review of research proposals was acknowledged by a wide range of research bodies, both within the United Kingdom and internationally.
63. The MRC also believed that if reviewers' reports and Boards' assessments were disclosed this could have resulted in reviewers and Board members being less willing to be as free and frank with regard to their comments as they might otherwise have been, particularly where those comments might be critical. The consequence of this would be anodyne reviews and discussions which would make it difficult to determine the true merits of different applications. This would be detrimental to applicants in terms of the quality of feedback they received on

their applications, the effective operation of the MRC in being able to determine which proposals to support with public money and to the exchange of ideas within the research communities on which everyone, including the reviewers and Board members, depended.

64. After considering the public interest arguments, the Commissioner has formed the view that, in this case, the public interest in disclosure did not outweigh the public interest in maintaining the duty of confidence owed to the applicants for grants. He is therefore satisfied that section 41 applied to the Research Boards' assessments and, to the extent that they reflected the content of the applications, the reviewers' reports.

Duty of confidence owed by the MRC to the reviewers in respect of their comments

The Commissioner went on to consider whether the reviewers' reports might have been exempt from disclosure under a duty of confidence owed by the MRC to the reviewers.

(b) Would the disclosure of the information constitute an actionable breach of confidence owed by the MRC to the reviewers?

(i) Does the information have the necessary quality of confidence to justify the imposition of an obligation of confidence?

65. Each of the reports submitted by the reviewers contained a very detailed discussion of the contents of the applications that had been made. To the extent that the reviewers' reports contained information reflecting the content of the applications the Commissioner is satisfied that this would have been exempt from disclosure under the duty of confidence owed to the applicants.
66. To the extent that the reports did not reflect the content of the applications, they still contained the reviewers' personal views and ideas. The Commissioner considers that such information could be regarded as of a sensitive nature and was not information which was readily available or in the public domain. The Commissioner is, therefore, satisfied that the reviewers' reports had the necessary quality of confidence to justify the imposition of an obligation of confidence.

(ii) Were the reviewers' reports communicated in circumstances that created such an obligation?

67. The MRC provided the Commissioner with a copy of its guidance issued to reviewers on reviewing research proposals which was in place between 2002 – 2005 when the reviewers prepared the reports which were the subject of the request. Under the heading of "Confidentiality", this document emphasised to the reviewers that they had an obligation to protect the ideas and plans of applicants but that confidentiality also allowed the free exchange of views amongst reviewers. This statement may have created an express duty of confidence owed by the reviewers to the MRC, and possibly the applicants, in relation to the information contained in the applications. However, the Commissioner is not

satisfied that it created an express duty of confidence owed by the MRC to the reviewers in respect of their reports. He therefore went on to consider whether a duty of confidence might have been implied from the circumstances.

68. The reviewers would have been chosen to review a particular proposal because they were perceived by the MRC to have a degree of knowledge and understanding of the area of research to which the application related. The reports contained the reviewers' personal views on the topic under consideration. This may have included ideas linked to the reviewers' own research. It seems likely that the reviewers would have expected such information to be treated as confidential.
69. In addition, the MRC has informed the Commissioner that it is the MRC's, and other research councils', standard practice to treat such reports on confidential basis, only disclosing the contents to the applicants. It seems likely that the reviewers, as experienced academics, would have been aware of such standard practice.
70. The Commissioner is therefore satisfied that the reports were communicated in circumstances where the reviewers would have had a reasonable expectation that their reports would have been treated as confidential by the MRC and that this created an obligation of confidence on the part of the MRC to the reviewers in respect of the content of those reports.

(iii) Would disclosure of the reviewers' reports have been unauthorised and have caused harm to the interests of the reviewers?

71. In the Commissioner's view, the disclosure to the world at large of reviewers' personal views and ideas in relation to this area of research could have caused them harm as it may have put into the public domain ideas which they wished to use for their own research projects in future. The reviewers may have been prepared for such information to be communicated to specific applicants but are likely to have been reluctant for it to be disclosed to a wide range of other parties outside the reviewers' control.
72. In addition to any harm that disclosure might have caused to the reviewers' possible research projects, it might also have damaged the reviewers' relationship with the MRC, with a resulting loss of confidence on the part of the reviewers in the research body. This may have affected the reviewers' willingness to participate openly and frankly in the review process.
73. Had the reviewers' reports been released this could have led to them suffering detriment because it would have placed in the public domain their comments, some which may have been quite critical, on proposals made by fellow researchers. This disclosure could have affected their relationships, not only with the applicants whose proposals they were discussing, but also other researchers, if any of those researchers had viewed the comments as in any way unfair or unwarranted.
74. In the circumstances the Commissioner is satisfied that the disclosure of the reviewers reports would have been likely to have caused a degree of harm to the reviewers' interests.

(c) Would the MRC have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

75. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under the Act. However, under the common law, a duty of confidentiality can be overridden if there is an overriding public interest in the disclosure of the information concerned.

76. Under the Act, the public interest test assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. Under the law of confidence, the public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The burden of proof under the law of confidence is therefore the reverse of that under the Act. Disclosure would, therefore, be lawful where the public interest in disclosure outweighed the public interest in maintaining the duty of confidence.

Public interest arguments in favour of the disclosure of the information

77. The Commissioner believes that there is a general public interest in disclosing information which allows individuals to gain a greater understanding of the basis on which decisions have been taken by public authorities. The disclosure of the reviewers' reports, to the extent that they did not reflect the content of the applications, would have allowed the public to see part of the evaluations which formed the basis for decisions which were taken on the funding of medical research. This would have contributed to ensuring that the MRC was discharging its functions adequately.

78. It would also helped to promote accountability and transparency by allowing the public access to information in relation to whether decisions concerning the funding of medical research were being taken on a sound, rational basis and that public money was being appropriately spent.

79. However, the Commissioner notes that the applications concerned were unsuccessful submissions and, as a consequence, did not involve the direct spending of public money. Had the request concerned applications for which grants of public money had been awarded it is likely there would have been a stronger public interest in disclosure of the information.

80. Disclosure of the requested information would also have been of assistance to those who were considering applying for grants as it would have given them an indication of some of the strengths and weaknesses of previous applications and this would then have helped them in preparing their own applications. It would also have provided them with a better understanding of how the criteria for assessment of applications were applied in practice.

81. In relation to the public interest in assisting with the future preparation of applications for grants, the Commissioner notes that the MRC provided feedback on the reviewers' assessments to all applicants so that they are aware of any

comment that have been made about their applications and, where their application had been refused, could therefore resubmit them in light of any relevant comments.

82. The release of this information would also have helped to promote the general flow of information about medical research into the public domain which would have assisted in stimulating debate about areas of research covered by the MRC and to identify areas which were worthy of further investigation.
83. However, the Commissioner notes that most of the information contained in the reviewers' reports would have been exempt from disclosure under the duty of confidence owed to the applicants. This would have left only a relatively small amount of information to be considered under the duty of confidence owed to the reviewers. The disclosure of this small amount of information would have been of very limited value in achieving the public interests identified above.

Public interest arguments in favour of maintaining the duty of confidence owed to reviewers

84. The Commissioner recognises that where a duty of confidence has been created there is a strong inherent public interest in the maintenance of that duty.
85. The Commissioner identified, in section (b)(iii) above, the detriment that might have been suffered by reviewers from the disclosure of information from their reports. This included possible harm to their own research projects and to their relationship with the MRC. As a consequence, reviewers may have become less willing to participate openly and frankly in the review process. This would have produced more anodyne reviews and discussions which would have made it difficult to determine the true merits of different applications. This would have been detrimental to future applicants in terms of the quality of feedback they received on their applications, the effective operation of the MRC in being able to determine which proposals to support with public money and to the exchange of ideas within the research communities on which everyone, including the reviewers, depended.
86. The MRC also pointed to research carried out by the UK Research Council which had provided an endorsement from the research community of the current system involving independent reviewers which it was believed had been important in ensuring a vibrant research system in the United Kingdom. The success of this research system was considered to be due, in no small part, to the quality of the existing review process that was in place.
87. It also indicated that, based on its own experience, it was aware that the need for confidentiality in relation to the independent review of research proposals was acknowledged by a wide range of research bodies, both within the United Kingdom and internationally.
88. After considering the public interest arguments, the Commissioner believes that, in this case, the public interest in disclosure did not outweigh the public interest in maintaining the duty of confidence owed by the MRC to the reviewers.

89. The Commissioner is consequently satisfied that the disclosure of the information would have constituted an actionable breach of confidence and that, therefore, the exemption in section 41 has been correctly applied by the MRC to the parts of the reviewers' report not exempt under the duty of confidence owed to the applicants.

Section 36 – Prejudice to the effective conduct of public affairs

90. The Commissioner, as explained above, was satisfied that the Research Boards' assessments were exempt from disclosure under section 41 under the duty of confidence owed to the applicants for grants. However, he thought it appropriate to consider whether, if there were any information in the Research Boards' assessments which might not be regarded as exempt under section 41, it would have been exempt under section 36.

91. The MRC argued that section 36(2)(b)(i) and (ii) were applicable to the Research Boards' assessments. The effect of these parts of section 36 is to exempt information from disclosure if, 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.

92. In order to determine whether the exemption was applicable to this information the Commissioner considered:-

- i. the opinion of the qualified person;
- ii. as the exemption is a qualified exemption, whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

(i) Opinion of the qualified person

93. The MRC confirmed to the Commissioner that an opinion was given by the qualified person, who for the purposes of this request was the Executive Director, on 12 April 2005 at a meeting of the Executive Board at which the request was considered. The Commissioner is satisfied that the Executive Director was a qualified person for the MRC for the purposes of section 36 at that time and, from the minutes of the meeting, that his opinion was given prior to the issuing of the refusal notice.

94. In the case of *Guardian & Brooke v The Information Commissioner & the BBC (EA/2006/0011 and 0013)*, the Information Tribunal stated that "in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at." (para 64). In relation to the issue of reasonable substance, the Tribunal indicated that "the opinion must be objectively reasonable" (para 60). In determining whether an opinion had been reasonably arrived at, it suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a

judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

95. In addition, the Commissioner looked at whether the qualified person had reached his opinion on the basis that he considered that disclosure would inhibit the free and frank provision of advice or exchange of views or that it would be likely to inhibit the free and frank provision of advice or exchange of views. However, from the information available to the Commissioner, it is not apparent to him which level of prejudice the qualified person intended to designate in relation to the disclosure of the Boards' assessments.

96. The Commissioner notes the Information Tribunal's comments in the case of *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)*

"...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level." (para 45)

He has therefore applied the lower level of prejudice in this case which, in line with a number of previous Tribunal decisions, has been interpreted to mean that there is a real and significant risk of prejudice to the interest in the exemption.

97. The Commissioner also notes the Tribunal's view from the *McIntyre* case, when commenting on the application of section 36(2)(c), but which he believes is equally applicable to the consideration of section 36(2)(b), that where the reasonable opinion of the qualified person is based on the higher threshold,

"...this will give greater weight to the public interest inherent ... in the... exemption in favour of maintaining the exemption than if the reasonable opinion was based on the lower threshold. That in turn will affect the public interest balance." (para 43)

He considered this further when applying the public interest test in relation to this exemption.

98. The Commissioner is satisfied that it was objectively reasonable for the qualified person to conclude that the disclosure of the withheld information would have been likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. The disclosure of this information could clearly have had an impact on the willingness of the Board members to provide detailed comment and advice in future because of the concern that if potential applicants knew that critical comments might be disclosed, they might be deterred from making an application.

99. Although the evidence as to the matters taken into account by the Executive Director in reaching his opinion are limited, the Commissioner is of the view that he appears to have taken into account relevant considerations and does not appear to have been influenced by irrelevant ones.

100. The Commissioner is of the view that section 36(2)(b)(i) and (ii) were therefore engaged in relation the Boards' assessments. He then went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure.

(ii) Public interest test

101. The Commissioner notes the comments of the Information Tribunal in the *Guardian & Brooke* case that he should give due weight to the reasonable opinion of the qualified person when considering the public interest test in relation to section 36. However, the Tribunal's view was that the qualified person's opinion was limited to the degree of likelihood that inhibition or prejudice would occur and that the opinion "does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant" (para 91).

102. The Commissioner therefore, in assessing the public interest arguments, particularly those related to withholding the information, considered the relevance of factors such as the severity, extent and frequency with which the inhibition of the provision of advice and free and frank exchange of views might occur if the information had been disclosed.

Public interest arguments in favour of disclosing the information

103. The Commissioner believes that there is a general public interest in disclosing information which allows individuals to gain a greater understanding of the basis on which decisions have been taken by public authorities. The disclosure of some of the information contained in the Boards' assessments would have allowed the public to access to some material relevant to decisions which were taken on the funding of medical research by the MRC.

104. Disclosure of the information may also have assisted in promoting accountability and transparency by providing some insight into how decisions related to the funding of medical research were being taken and whether public money was being appropriately spent.

105. However the Commissioner notes that the Boards' assessments which were requested related to applications that were unsuccessful and, as a consequence, did not involve the direct spending of public money. Had the request concerned applications for which grants of public money had been awarded it is likely there would have been a stronger public interest in disclosure of the information.

106. The information may have been of some assistance to those who were considering applying for grants by allowing them a partial view of the strengths and weaknesses of previous applications and this would then help them in preparing their own applications.

107. In relation to this particular public interest, the Commissioner notes that the MRC provided feedback to all applicants whose submissions were considered by the

Boards so that they were aware of any comment that had been made about their applications and, where their application had been refused, could resubmit, having taken into account any relevant comments.

108. In addition, the Commissioner understands that applicants whose proposals were short listed for consideration by the Boards were given an opportunity to comment on the reviewers' feedback. These comments were then considered by the relevant Board, alongside the information in the application and reviewers' reports.
109. The release of this information may have helped to promote the general flow of information about medical research into the public domain which would have assisted in stimulating debate about areas of research covered by the MRC and may have assisted in identifying areas which were worthy of further investigation.
110. However, the Commissioner notes that if he were incorrect in his view was that all of the information contained in the Boards' assessments would have been exempt from disclosure under the duty of confidence owed to the applicants, the amount of information falling outside this duty of confidence was likely to be very small. The disclosure of this small amount of information would have been of very limited value in relation to the public interests identified above.

Public interest arguments in favour of maintaining the exemption

111. The MRC is one of main funding bodies through which the UK Government supports medical and clinical research. There is therefore a strong public interest in ensuring a free flow of information between those involved in assessing applications. This helps to ensure that appropriate research is given funding and is to the benefit of applicants, the research community as a whole and the public, in terms of the benefits that are derived from the research that is undertaken and the effective spending of public money.
112. The Commissioner notes the point made earlier that, as the lower threshold of prejudice was being applied in this case, this would give lesser weight to the public interest inherent in the exemption than if the higher threshold were being applied.
113. The Commissioner agrees with the public authority that the disclosure of the withheld information would have been likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation by the Board. As he has previously identified, disclosure of this information could clearly have had an impact on the willingness of the Board members to provide detailed comment and advice in future as they may have been concerned that if potential applicants knew that critical comments might be disclosed, those applicants might have been deterred from making an application.
114. Any diminution in the free and frank provision of views by the Board members would have produced more limited reviews of the applications that were under consideration. This would have been detrimental to applicants in terms of the quality of feedback they received on their applications. It would also have made it

more difficult to determine the true merits of particular applications and so inhibit the effective operation of the MRC in being able to determine which proposals to support with public money. On a broader level, it would have restricted the exchange of ideas within the research communities on which everyone, including the applicants and Board members, depended. The Commissioner also finds that the passage of time between the conduct of the assessments and when the request was made had not significantly reduced the likely impact and severity of the effects described above.

115. Having considered the relevant public interest arguments, the Commissioner believes that the public interest in maintaining the exemption in relation to this information outweighed the public interest in disclosure. He is therefore satisfied that the MRC correctly applied section 36 to the Research Boards' assessments.

Section 40 – Personal information

116. The MRC initially claimed that the disclosure of some of the requested information would be a breach of section 40(2) as it constituted the personal data of the reviewers. However, as the Commissioner has found that this information was exempt from disclosure under section 41 he has not felt it necessary to go to consider the application of section 40(2) to the same information.

The Decision

117. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

118. The Commissioner does not require any steps to be taken by the public authority.

Other matters

119. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters:
120. Under section 1 of the Act, a public authority is under a duty to inform a person who requests information whether it holds the requested information. The MRC informed the complainant that it held information in relation to the eleven applications for grants.
121. In July 2006 there was a fire at a storage facility used by the MRC and it informed the Commissioner that a complete file related to one of the applications and part of a file relating to another application were destroyed. The MRC acknowledged

that there was a possibility that, as a result, reviewers' reports on these two applications may have been lost. It informed the Commissioner of the searches it carried out of its records to attempt to locate copies of any records that has been destroyed in the fire. The Commissioner accepts that the MRC has carried out appropriate searches to locate copies of any reports which it may still hold.

122. The Commissioner acknowledges that, at the time of the request, there was a possibility that the MRC held additional information to that which has been disclosed to him. However he is satisfied that, on the balance of probabilities, it no longer holds any reviewers' reports related to the request other than those which have been provided to him.
123. The Commissioner also notes that none of the applicants covered by the complainant's request indicated that they would have consented to the disclosure of information about their applications at the time that the request was made due to concerns about its sensitivity. However, a number of them indicated that they no longer had any objections to disclosure if a request was made at the present time. In view of this, if a request were to be made for this information now, it is likely that there would be a stronger case for the disclosure of the information related to the applications where the applicants now had no objection to its release.

Right of Appeal

124. 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

125. 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 7th day of July 2008

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

Refusal of Request

Section 17(1) provides that -

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

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides 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-

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

Personal information.

Section 40(1) provides that –

“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.”

Section 40(2) provides that –

“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.”

Information provided in confidence.

Section 41(1) provides that –

“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.”