

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 January 2008

Public Authority: Home Office
Address: 4th Floor Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant made successive requests to the public authority for information relating to the Identity Cards Bill: the memorandum (and drafts) advising on European Convention of Human Rights obligations which were submitted to the Legislative Programme Committee of the Cabinet; background briefing papers for Ministers in response to amendments tabled by opposition parties at the Committee Stage; and similar information at the Report Stage. The public authority withheld the information, citing section 35(1)(a) of the Freedom of Information Act 2000 ('the Act') for all of the requests; section 42 for the first and second requests; and section 36(2)(b)(i) for part of the second request. The Commissioner concluded that all of the information in the second request fell within section 35 so that section 36(2)(b)(i) was not engaged. He decided that the information in all three requests had been properly withheld under section 35(1)(a) because the public interest in maintaining the exemption outweighed the public interest in disclosure. Since that was the case he did not go on to consider the application of section 42.

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. The complainant contacted the Home Office on 17 December 2004 making a freedom of information request for information which had previously been refused to him under the Code of Practice on Access to Government Information. The

requested information ('the legal advice') had been identified by the Home Office on 13 December as comprising:

'1. ECHR [European Convention of Human Rights] memorandum which was submitted to the Legislative Programme Committee of the Cabinet prior to introduction of the Identity Cards Bill

2. Drafts of that memorandum'.

3. The complainant sent a further email on 26 January 2005 requesting 'formal briefing material' relating to the Committee Stage of the Identity Cards Bill:

'A copy of all formal finalised briefing materials drafted for Ministers for use in relation to the Parliamentary record in response to amendments tabled by all Opposition Parties at the Committee Stage'.

4. The Home Office replied separately to the two requests on 12 April 2005, claiming that both were exempt by virtue of sections 35 and 42 of the Act. It explained its application of the public interest test. However, it gave the complainant a summary of its reasons for considering that the Identity Cards Bill introduced in November 2004 was compatible with the European Convention on Human Rights, and referred him to various websites where he could access information about the identity cards proposal and human rights. In both of its letters of 12 April the Home Office notified the complainant of his right to request an internal review of its decision.

5. In June 2005 the complainant wrote to the Home Office asking for an internal review for both requests. He expressed his view that not all of the requested information was subject to the claimed exemptions, and that the balance of the public interest favoured disclosure.

6. The complainant sent a further request to the Home Office on 23 October 2005 for 'background briefing papers' in the Report Stage of the Identity Cards Bill:

'the background briefing papers given to Mr Burnham in relation to this amendment and to all the information prepared for civil servants in relation to this amendment which had the potential to be read into the Parliamentary record'.

7. On 8 November 2005 the Home Office informed the complainant of the result of its internal review in relation to his first two requests. It apologised for the delay in responding, which it explained was due to the requests raising complex public interest issues. It decided that the exemptions under sections 35(1)(a) and 42 had been correctly applied. It also concluded that some of the briefing material could be withheld under section 36(2)(b)(i). The Home Office provided the complainant with details of the Information Commissioner's Office.

8. On 5 January 2006 the Home Office informed the complainant that the information covered by his third request was exempt from disclosure by virtue of section 35(1)(a) and 35(3) of the Act, and it explained its application of the public interest test. It also apologised for the delay in replying. However, it provided a

copy of a section from Hansard in which a government Minister had provided clarification of the issue to the House of Lords. The Home Office informed the complainant of its internal review procedure and of his right to approach the Commissioner.

9. On 18 January 2006 the complainant requested an internal review of the decision in his third request. His reasons were that the balance of the public interest favoured disclosure, and that the section 35 exemption could not apply to information which possessed the potential to be read into the public record but which had not been solely because of a Parliamentary guillotine motion.
10. The Home Office sent its internal review decision to the complainant on 29 March 2006. It apologised for a number of matters: the delay in completing the review; the refusal notice's '*superfluous*' reference to section 35(3) of the Act, relating to the duty to confirm or deny; and for the fact that it had not been made clear in the original refusal notice that the reference to a speech in the House of Lords had been made because that speech contained essentially the information at issue in the third request. It explained that it was in the public interest test to withhold any remaining information. However, it provided a link to the Identity Cards Scheme page on the Home Office website so that the complainant could access any updates which were published. The Home Office again gave the details of the Information Commissioner.

The Investigation

Scope of the case

11. On 1 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He claimed that the public interest favoured disclosure, that the section 42 exemption could not apply to all of the requested information (for example, a contents list could be disclosed), and suggested that the review process had been delayed in order to ensure that information would not be available while the legislation was proceeding through Parliament.
12. The complainant sent the Commissioner a further complaint, received on 13 April 2006, relating to the decision in respect of his third request. He identified specific elements of the information which he claimed did not fall under the section 35(1)(a) exemption, and expressed his view that the balance of the public interest favoured disclosure.

Chronology

13. The Commissioner wrote to the complainant and the Home Office on 5 February 2007. He asked the Home Office to provide further comments on various matters and to forward the requested information which had been withheld.

14. The Home Office sent the withheld information on 26 March 2007. The Commissioner sent a reminder on 28 March that the comments were still outstanding.
15. The Home Office provided a detailed response to the Commissioner on 30 March 2007.

Findings of fact

16. The first attempt by the government to introduce identity cards, in 2004, failed with the intervention of the 2005 general election. Following the general election the decision to introduce a National Identity Scheme was announced in the Queen's Speech on 17 May 2005. The second Bill was passed in the House of Commons in June 2005, but was then amended on several occasions during the committee stages and House of Lords readings. On 30 March 2006 Royal Assent was given to the Identity Cards Act, which was enabling legislation for a national identity card.
17. The complainant's three requests were made on 17 December 2004, 26 January and 23 October 2005. The first and second requests therefore preceded the announcement of the decision to introduce a National Identity Scheme, and the third request was made after that announcement but before the Identity Cards Act received Royal Assent.

Analysis

Procedural matters

18. The complainant made his first request on 17 December 2004. This was before the Freedom of Information Act came into effect on 1 January 2005. However, the Home Office decided to accept the request and processed it after the Act had come into force, issuing its refusal notice on 12 April 2005. In the circumstances, the Commissioner has taken the view that the request was properly made.
19. The complainant indicated that the Home Office had delayed in dealing with his requests and suggested that this might have been deliberate in order to ensure that information would not be available while the Identity Cards Bill was being debated in Parliament. The complainant's first request was made on 17 December 2004 and the second on 26 January 2005. The Home Office sent refusal notices to the complainant on 12 April 2005. The time taken by the Home Office to deal with the first and second requests was therefore 76 and 51 working days respectively. The complainant's third request was made on 23 October 2005. The Home Office did not provide its refusal notice until 5 January 2006, 50 working days later. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working

day following the date of receipt.'

In this case the Home Office took significantly longer than the statutory 20 working day timescale to respond to each of the three information requests. The Commissioner therefore finds that the Home Office failed to comply with the requirements of section 10(1), which constitutes a breach of section 17(1) of the Act.

First request

20. The complainant's first request was for the final European Convention of Human Rights (ECHR) memorandum submitted to the Legislative Programme Committee of Cabinet prior to introduction of the Identity Cards Bill, and for the earlier drafts of that memorandum. The Home Office claimed that this information was exempt under sections 35(1)(a) and 42 of the Act.

First request: section 35(1)(a) exemption

21. Section 35(1) of the Act provides that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy...'

The Commissioner takes the view that the 'formulation' and 'development' of government policy encompasses the policy process from the earliest stages, where options are generated and sorted, through to piloting, monitoring, and reviewing existing policy. Policy is 'government' policy when it involves the development of options and priorities for Ministers to select from, and is likely to be a political process which requires Cabinet input, or applies across government, or represents the collective view of ministers. Accordingly, the formulation or development of government policy is unlikely to include purely operational or administrative matters, or policies which have already been agreed or implemented.

22. The Commissioner has obtained and considered the requested information in this case. The memorandum set out for the consideration of the Home Secretary any issues under the ECHR which might arise from the Identity Cards Bill. Having considered the information, the Commissioner has taken the view that it does indeed relate to the formulation and development of policy, as it addressed issues which informed the proposed identity cards legislation. He is also satisfied that the identity cards policy had the status of 'government' policy. Accordingly, he has concluded that the information involved in the complainant's first request engages section 35(1)(a).
23. Since section 35 is a qualified exemption it is subject to a public interest test under section 2(2)(b) of the Act. This favours disclosure unless,

'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'.

24. The Home Office explained that the memorandum had been prepared for the Legislative Programme Committee, one of the Cabinet Ministerial Committees. The Home Office's *'Guide to Legislative Procedure'* states that consideration of the impact of legislation on ECHR rights is an integral part of the policy-making process rather than a last-minute compliance exercise, and for this reason a memorandum setting out the Bill's compatibility with the Convention rights must be produced for the Legislative Programme Committee before a Bill can be introduced or published. For every Government Bill, a written statement is made before the Second Reading in each House of Parliament by the relevant Minister as to the Bill's compatibility with ECHR rights. The *'Guide to Legislative Procedure'* states that *'the memorandum is not disclosable and should address the weaknesses as well as the strengths in the department's position'*.
25. The Home Office accepted that there is a public interest in *'citizens knowing that proposals, which might affect civil liberties, have been properly developed with the benefit of sound legal advice'*, but it claimed that this interest was served through scrutiny of Bills by the Joint Committee on Human Rights, and by the explanation provided by the government during Parliamentary debate.
26. On the other hand, the Home Office noted a number of factors favouring maintenance of the exemption. First, it claimed that identity cards policy was still under development even after the Identity Cards Bill was granted Royal Assent in April 2006:

'There are outstanding policy questions in key areas and the position on ID cards has radically changed since the original proposals were formulated... The National Identity Scheme will be subject to secondary legislation and consultation. The formulation of policy on identity cards is an ongoing process and it is important that officials' [sic] are able to continue to give candid advice.'

The Commissioner does not accept as conclusive the argument that, because the Identity Cards Act is to a significant degree an 'enabling' measure, the process of identity card policy development would in effect continue into the future with the introduction of further legislation. He notes that this argument has been rejected by the Information Tribunal. In the case of the *Secretary of State for Work and Pensions v the Information Commissioner* (EA/2006/0040) the Tribunal considered the Bill which established the principle of introducing identity cards and paved the way for secondary legislation to establish details of an identity cards scheme. The Tribunal indicated that policy formulation should be construed *'as a series of decisions rather than a continuing process of evolution'* and that the process could therefore be split into two stages: the high-level decision to introduce identity cards, followed by policy decisions on the details of the scheme. The Tribunal decided that the information requested in that case had been created to inform the high level policy and therefore related to a policy decision that had already been taken. This reduced the public interest in maintaining the

exemption even though the information could be used to inform the more detailed policy issues that were still being considered. Having regard to that decision by the Tribunal, the Commissioner takes the view in this case that the formulation and development of the identity cards policy relevant to this case was completed when the Identity Cards Act passed into law in 2006.

27. The Home Office also referred to the *'damaging effect of disclosure on difficult policy decisions'*, and to the *'Damage to relations between Ministers and civil servants and to the role of civil servants in the formulation of policy'*. It also made various points about the importance of frankness and candour in officials' provision of advice. For example, it claimed that the *'confidential nature of Cabinet proceedings is a long standing aspect of the constitution and is a key consideration when applying the public interest test'*. It also referred to the public interest that *'officials' opinions and ideas on the Identity card Bill are not exposed to public scrutiny as this could inhibit the quality of advice provided and have a detrimental effect on future policy formulation'*. In the Commissioner's view the fact that the advice related to legal obligations was of particular significance. As the Home Office pointed out:

'The reason that the Home Office guidance says that the advice should not be disclosable is that it is intended as a full and frank account of the Bill's compatibility with the ECHR (strengths - but also weaknesses) and is prepared on the basis of legal advice for the sole purpose of consideration by the LP Cabinet Committee.'

28. The Commissioner considers that some of the Home Office's points about the need for 'private thinking space' have validity. In particular, he considers that the possibility of disclosure of the advice about ECHR rights, when that is intended to canvass the weaknesses as well as the strengths of the legislation's compliance, might have a 'chilling effect' on the provision of such advice in the future. However, he is also mindful of the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), where the Information Tribunal identified a number of principles for weighing the public interest in cases involving the section 35 exemption. Amongst other things, it rejected the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that *'we are entitled to expect of [civil servants] the courage and independence that...[is]...the hallmark of our civil service'*, since civil servants are *'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions'* and should not be easily discouraged from doing their job properly.
29. The Commissioner recognises that the possibility of disclosure could give rise to a temptation to keep inaccurate or incomplete records. The Commissioner recognises that it is important for the conduct of public affairs that appropriate records are kept of the advice given by public officials. He therefore accepts that where disclosure of information might legitimately inhibit the making and keeping of records then that would create a public interest in withholding the information. In the *Evening Standard* case mentioned above, however, the Tribunal declared that it did not consider that it:

'should be deflected from ordering disclosure by the possibility that minutes will become still less informative... Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency'.

The Commissioner agrees with the Tribunal that the possibility of disclosure of information should not in general have the effect of deterring officials from recording their discussions. However, he considers that this case can be distinguished to some degree because the record is of advice relating to the government's legal obligations and is intended to canvass weaknesses as well as strengths in the government's position. The Commissioner believes that disclosure of such information when the policy was still under development and the potential weaknesses in the government's position still active would generate difficulties for public officials charged with providing impartial advice and keeping adequate records.

30. The Commissioner also notes that the Tribunal stated in the *Evening Standard* case that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy... will normally mark the end of the process of formulation'*. In this case, the Commissioner considers that the identity cards policy-making process ended when the Identity Cards Act passed into law on 30 March 2006. Accordingly, at the time of the complainant's first request in December 2004 the policy-making process was still live.
31. The Commissioner accepts that there is a significant public interest in disclosure of the information pertaining to the complainant's first request because that would promote policy-makers' accountability to the public, facilitate a well-informed public debate on the issues, and encourage public participation in the development and formulation of government policy. The significance of those factors is increased by the fact that the nature of the information in this case is of widespread interest and concern to the general public.
32. On the other hand, he recognises that there is a significant public interest in allowing 'private thinking space' to facilitate the frank provision of advice, to reduce the temptation to keep inaccurate or incomplete records, and to encourage proper advice of the same sort in the future. Having considered all of these public interest factors, the Commissioner has decided in this case that, at the time when the request was made, the public interest in maintaining the exemption outweighed the factors in favour of disclosure. In reaching that conclusion he has had particular regard to the fact that the policy regarding identity cards was still under development at the time of the request and the requested information was therefore not 'historical'.

First request: section 42 exemption

33. The Home Office also claimed that the information in the first request was exempt by virtue of section 42. Since the Commissioner has concluded that the Home Office was justified in withholding the information by reference to section 35(1)(a) he has not gone on to assess the application of section 42.

Second request

34. On 26 January 2005 the complainant requested:

'A copy of all formal finalised briefing materials drafted for Ministers for use in relation to the Parliamentary record in response to amendments tabled by all Opposition Parties at the Committee Stage'.

The Home Office decided that this information was exempt from disclosure by virtue of sections 35 and 42 of the Act. However, it did refer the complainant to the full record of the proceedings of the Committee on the Parliament website and to published information about the identity cards proposal on the Home Office website.

Second request: section 35(1)(a) exemption

35. The complainant had requested the finalised briefing notes for Ministers relating to the opposition parties' amendments at the Committee Stage. Each note comprised an explanation of the relevant amendment together with a speaking note to assist in the Minister's response to Parliament. The complainant argued that information that had been prepared so as to be read into the public record could not engage section 35(1)(a), even if in the event it was not read, because it was information *'given to Ministers to **explain or justify** Government policy'* (original emphasis) rather than information implicated in the development itself of the policy. The Commissioner does not agree. The information relates to the formulation and development of policy because it addresses issues informing the identity cards legislation. In such circumstances, explanations or justifications of the government's position prepared at one time could, if involuntarily disclosed, be used subsequently to affect the policy development process. The Commissioner considers that it is for the Minister to decide whether such information should be released during the relevant Parliamentary debate. Accordingly, he is satisfied that the information involved in the complainant's second request engages section 35(1)(a).
36. Section 35 is subject to the public interest test. Similar considerations apply to the information in the second request as to that in the first. The Home Office accepted that release of the information:

'could further inform public debate on a key government programme that is already the subject of substantial debate in terms of civil liberties and privacy of individuals and also that it could promote accountability and

transparency on decisions relating to this programme and allow the public to improve understanding of decision(s) relating to ID cards.'

37. However, it concluded that the balance of the public interest favoured non-disclosure. It offered a number of factors which it claimed favoured maintaining the exemption, the merits of which were addressed in the section above dealing with the first request: the 'enabling' legislation point, the desirability of frankness and candour in officials' advice, and the timing of the request. As already explained, the Commissioner does not accept that the enabling nature of the legislation rendered it part of an ongoing process of policy formulation and development. However, he does agree that, while the policy was under development, there was a need for 'private thinking space' to facilitate impartial advice and to maintain the integrity of the record-keeping process, although he does not accept the suggestion that disclosure of this information would create a risk of inhibiting the candour of officials in future. Furthermore, he considers it to be particularly significant that the second request was made on 26 January 2005, whereas the identity cards policy-making process only ended when the Identity Cards Act passed into law on 30 March 2006, so that the information was not 'historical' at the time of the request. (For this reason, had the request been made after the Identity Cards Act had received Royal Assent the factors in favour of maintaining the exemption would have been weaker.)
38. The requested information was a number of briefing notes, each of which comprised an explanation of the relevant amendment together with a speaking note to assist in the Minister's response to Parliament. Regarding the explanatory element of each note, the Commissioner considers that this is not merely a 'technical' outline of the amendments being proposed to the legislation, but also includes specific policy positions to be taken by the Minister, and for that reason it engages the need for 'private thinking space'. In relation to the speaking notes, he notes the Home Office's submission that it was *'for the Minister to decide whether to use any of the briefing provided and, if so, which parts of it to use'*. In other words, the speaking notes do not necessarily reflect the statements actually made by the Minister to Parliament, and that fact diminishes the value of this information in informing public debate and increasing public confidence about the government's position regarding the various amendments.
39. The complainant made the point that the speaking notes constituted information which *'was to have been, or could have been prepared for reading into the Parliamentary record'*, and that there could therefore be no prejudice in disclosing it if it were not read in for whatever reason (for example, a lack of time or the amendment not being selected). The Commissioner does not agree with this suggestion. The speaking notes did not create an obligation on the Minister to make a particular statement on any amendment, should it be raised – the Minister retained discretion in the matter. Furthermore, it might have been the case that the Minister took steps to avoid debate regarding particular amendments precisely so that he could avoid having to make the statements proposed in his speaking notes. The fact that Ministerial speaking notes were not read into the record was therefore not a mere technicality, and the contents of the notes remained a live issue for the identity cards policy up to the point at which its development was concluded by passage of the Identity Cards Act.

40. The complainant also claimed that there would be a number of public interest benefits from making the information publicly available. For example, *'enhanced scrutiny of the legislative process'* would encourage and facilitate *'those with no direct lobbying access to Westminster to engage, via their elected representatives, in detailed consideration of issues associated with any Bill under scrutiny'*. Furthermore, disclosure would allow *'all drafting errors and unintended consequences of an amendment to be corrected'* so that there could be *'a further debate, at a later stage in the Parliamentary process, on the substantive issue in the context of a refined amendment'*. In addition, greater openness would give the public and Parliamentary representatives *'access to high quality information provided by civil servants'* so that *'Parliament would then become less reliant on information of unknown quality provided by ad-hoc pressure groups'*. It appears from these comments that the complainant is envisaging the routine disclosure of Ministerial briefing material during the passage of legislation in order to allow for greater participation of both the public and members of the Houses of Parliament in the process of determining the content of legislation.
41. The Commissioner accepts that some of the effects identified by the complainant might flow from disclosure of this information. However, he considers that disclosure of information in the way proposed by the complainant would have a significant impact on the Parliamentary process. Parliamentary democracy as it currently operates in the United Kingdom is representative rather than participatory, and the process by which government Bills are promulgated in Parliament is essentially an adversarial one. If the briefing notes for Ministers, which could contain extremely sensitive information relevant to the debate (such as assessments of the strengths and weaknesses of the government's position, or the possibilities for concession on opposition and backbench amendments), were to be compulsorily disclosed while legislation was still making its way through the Parliamentary process, then that would put the government at a distinct disadvantage during Parliamentary debates.
42. Furthermore, the Commissioner takes the view that there is in general an overriding public interest in allowing Parliament itself to control the legislative process. Indeed, there is an absolute exemption under section 34 of the Act for areas which are covered by Parliamentary privilege, which includes the freedom of each House to control its own affairs (*'exclusive cognisance'*). Although the section 34 exemption was not applied in this case, it is indicative of a recognition by Parliament when passing the Freedom of Information Act that Parliamentary privilege should be protected. In the circumstances, the Commissioner takes the view that it is for Parliament to determine how – or whether – *'drafting errors and unintended consequences of an amendment'* (as the complainant put it) should be corrected, and whether the public and/or members of the Houses of Parliament should be given more *'access to high quality information provided by civil servants'* during the passage of legislation. In relation to the complainant's suggestion that the information should be disclosed in order to improve scrutiny by the public of the legislative process and to facilitate informed lobbying of *'elected representatives in relation to particular legislation'*, the Commissioner considers that what is being proposed by the complainant is in fact public intervention in the legislative process which goes well beyond *'scrutiny'*. The

Commissioner makes no comment on whether a more participatory democracy would be a positive development; he is, however, convinced that the Freedom of Information Act's public interest test is not the appropriate mechanism to initiate any movement away from the existing form of Parliamentary democracy. While there is a public interest in scrutiny of legislative decisions, the Commissioner believes that that can be served by making information relevant to the passage of legislation available after the event, when politicians can be made answerable for their legislative decisions.

43. As with the first request, having considered all of these public interest factors the Commissioner accepts that there are significant public interest factors in favour of disclosure of the requested information which relate to accountability, public debate and public participation in the development and formulation of government policy. On the other hand, he recognises that there is a significant public interest in giving space to policy-makers and their advisers during the process of formulating and developing policy. Having considered all of these public interest factors, the Commissioner has decided in this case that, at the time when the request was made, the public interest in maintaining the exemption outweighed that favouring disclosure.

Second request: section 36(2)(b)(i) exemption

44. In its internal review decision dated 8 November 2005 the Home Office concluded that some of the briefing material could be withheld under section 36(2)(b)(i). 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 - ...

...(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice...'

The Home Office stated that the relevant qualified person was the Home Secretary, whose opinion had been sought on 1 November 2005 and was given on 7 November 2005.

45. According to the Home Office, the relevant information comprised speaking notes regarding 'contingent arguments' which might be raised during the debate. Section 36 is only applicable to information which *'is not exempt information by virtue of section 35'*. It is not clear to the Commissioner why the Home Office took the view that this information did not engage the section 35 exemption. Having considered the information himself, the Commissioner takes the view that the fact that these speaking notes were intended to deal with 'contingencies' does not distinguish them from the other speaking notes. He has decided that in fact this information relates to the formulation and development of government policy and that it therefore engages the exemption in section 35(1)(a). Since the same public interest factors apply this information too should be withheld from disclosure.

Second request: section 42 exemption

46. Since the Commissioner has concluded that the requested information should be withheld by virtue of the exemption under section 35(1)(a) he has not assessed the Home Office's application of section 42.

Third request

47. The complainant's third request was for Ministerial briefing papers and information prepared for civil servants relating to the Committee stage. In response, the Home Office withheld the briefing papers under section 35(1)(a) of the Act. However, it provided a section of Hansard recording a speech given by Baroness Scotland to the House of Lords regarding the Identity Cards Bill, which it claimed comprised '*substantially*' the same information.

Third request: section 35(1)(a) exemption

48. The Commissioner considers that the issues relating to engagement of the exemption and to the public interest test is identical for this information as for that in the second request. There is a difference in the circumstances of the two requests, in that the second request preceded the announcement of the decision to introduce a National Identity Scheme whereas the third was made afterwards. However, since the third request preceded the Act receiving Royal Assent, the Commissioner considers that the policy development process was ongoing at that time, and the information requested in the third request was also not of 'historical' status. Again, had the request been made after the Identity Cards Act received Royal Assent, the public interest in maintaining the exemption would have been weaker.

The Decision

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

Steps Required

50. The Commissioner requires no steps to be taken.

Other matters

51. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its

handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that in the context of provisions in the Act a reasonable time for completing an internal review is 20 working days from the date of the request for review. He accepts that, in exceptional circumstances, it may be reasonable to take longer, but the total time taken should not exceed 40 working days.

52. In this case the complainant's internal review request in respect of the first two requests was made in June 2005 (the exact date on which they were sent is not recorded on the document). The Home Office sent its internal review decisions to the complainant on 8 November 2005. Therefore, even if the request for internal review was made at the end of June 2005, it was still at least 91 days before the Home Office provided its decision. The complainant requested an internal review of the decision regarding his third request on 18 January 2006. The Home Office sent its internal review decision on 29 March 2006. It therefore took 49 working days to conclude the internal review procedure in relation to the third request. The Home Office explained that the delay in the first two requests was due to their raising complex public interest issues. However, the Commissioner does not consider that it has provided any evidence to justify the very significant delay that occurred in dealing with all three of the internal reviews.

Right of Appeal

19. 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 8th day of January 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

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.”

Section 1(2) provides that -

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

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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.”

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.”

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.

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”