

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 23 June 2008

Public Authority: Department for Culture, Media and Sport
Address: 2-4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant requested from the Department of Culture, Media and Sport various aspects of information relating to the declarations of interests made under the Ministerial Code by Ministers within the Department. The Department supplied the complainant with much of the information it held in relation to the request but withheld the remainder under section 41 of the Act (Information provided in confidence) and section 43 (Commercial interests).

By the time of his investigation, the Department no longer wished to rely upon section 43 to withhold the information to which that exemption was applied and had supplied this information to the complainant. However, the Commissioner is satisfied that the remaining withheld information is exempt under section 41. In its handling of the complainant's request, the Commissioner found that the Department failed to respond within the statutory time limit. In this case, the failure constituted a breach of sections 10(1) and 17(1) of the Act ('Time for compliance with request' and 'Refusal of request').

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 28 June 2005 the complainant requested the following information from the Department for Culture, Media and Sport (DCMS) in relation to the Ministerial Code:
 1. How many times have ministers in your department consulted the permanent secretary under section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since 26 November 2004;
 2. Which ministers in your department have consulted the permanent secretary in relation to section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since 26 November 2004;
 3. On what dates have ministers in your department consulted the permanent secretary in relation to section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since 26 November 2004;
 4. For what reasons did each minister consult the permanent secretary in relation to section nine (section on ministers' private interests) of the ministerial code in respect of conflicts between their public duties and their private interests (financial or otherwise) since 26 November 2004;
 5. What action was taken in each case since 26 November 2004 and in which was it necessary to consult the Prime Minister.
 6. Complete copies of the lists of interests provided by each minister to their Permanent Secretary on entering office in your department since 26 November 2004 which might be thought to give rise to a conflict.
 7. Complete copies of the documents written by each minister on entering office in your department since 26 November 2004 which records what action has been considered and taken, following their meeting with the Permanent Secretary.
 8. A schedule of documents which are relevant to this request...there should be a brief description of each relevant document including the nature of the document, the date of the document, and whether the document is being released or not....providing such a schedule would clarify what documents are being released and what is being withheld.
3. DCMS responded to the complainant on 20 September 2005, in which it supplied a table containing information requested in relation to the Ministers within the

Department: Tessa Jowell, David Lammy and James Purnell. Details were provided alongside each name under the following headings:

- How many times Ministers consulted their Permanent Secretary under Section 9 of the 2001 Ministerial Code – 26 Nov 2004 to 28 June 2005.
- On what dates consultation took place
- For what reason consultation took place
- Details
- What action was taken in each case and in which was it necessary to consult the Prime Minister

4. DCMS also sent the complainant a letter in which it made the following points (which are directly reproduced here):

5. **Information held**

- i. To the extent that the Department is required by the FOI Act to provide disclosure in relation to the relevant period, the recorded information that it holds is set out in the attached table.
- ii. There may have been informal consultations, for example, in the margins of meetings, which will not have been recorded: any information so disclosed would fall outside the scope of the FOI Act.

6. **Section 41 – Information provided in confidence**

- iii. Some of the information requested is exempt from disclosure by virtue of section 41 of the Act because it was provided to the Department in confidence. Under section 41, information is exempt if (a) it was obtained by a public authority from any other 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.
- iv. Section 41 applies to some of the information provided to this department in respect of the interests of Ministers. There is a strong public interest in protecting the confidentiality of such communications. First, the information is inherently private. It may include information which is not in the public domain, such as mortgage deals. Second, it is disclosed as a result of the obligations imposed by the Ministerial Code. Third, that Code expressly states that the information is provided in “complete confidence”.
- v. We recognise that a duty of confidence can be overridden by a higher public interest, and we accept that there is a public interest in ensuring that there is an appropriate regime for eliminating any risk of a conflict between a Minister’s private interests and his or her official duties. However, in the circumstances of this case, we consider that the public interest does not demand any greater disclosure than that set out in the attached table.

7. Section 43 – Commercial interests

- vi. Some of the information requested is exempt from disclosure by virtue of section 43(2) of the Act, because its release would be likely to prejudice certain individuals' commercial interests. In particular, relationships that are important to business dealings would be likely to be damaged by the release of such information.
 - vii. The exemption in section 43 can only be used if the public interest in withholding the information outweighs the public interest in its disclosure. In this regard we consider that there is a public interest in the disclosure of the information. Additionally, there is a public interest in transparency and openness, where information relates to public figures such as Ministers.
 - viii. However, we consider that there is a strong public interest against disclosure of the information, as disclosure would (at this point in time) be likely to damage legitimate business interests. It would not be in the public interest to disclose information which would be likely to have that effect and render the conduct of commercial transactions problematic for individuals.
 - ix. Disclosure would ultimately make it less likely that such individuals would provide the Department with commercially sensitive information in future, which would potentially undermine the ability of the Department properly to assess any potential conflict and give appropriate advice. We consider that the balance of public interest lies in favour of our withholding the information.
8. The complainant wrote to the DCMS on 7 March 2006 to request in internal review of its decision. In his letter he also made the following points (the following are direct quotes):
- i. I believe disclosure of all the requested information to be in the public interest...public confidence can only be ensured if the public can see for themselves that the system for avoiding these conflicts is being applied.
 - ii. The Parliamentary Ombudsman decided that the withheld information should be released in response to a previous request made by the complainant for the same information under the Code of Practice on Access to Government Information. Paragraph 41 of the Ombudsman's decision stated "that public interest in such matters has intensified in recent years in a climate where greater openness about conflicts between the public and private interests of ministers is increasingly seen as a desirable end in itself. This is not only for general reasons of good governance but to avoid any suspicion of improper ministerial influence".
 - iii. The government is undermining the public's confidence in the integrity of ministers by refusing to release this information in full.....(the DCMS response) merely gives credence to the view that ministers have disclosed

interests which they believe are not controversial, while keeping secret those which they believe are or might be.

- iv. I believe the public interest in disclosing this information outweighs that of protecting the confidentiality of communications between ministers and their officials.....in a democratic system, politicians are required to make public information which they may see as private. Members of Parliament are for instance required to declare their financial interests. Those interests may be private, but the public expects it to be in the public domain, not least to judge whether such interests are influencing the public behaviour of those MPs.
 - v. I believe that the government needs only to make public a level of information which would allow the public to see what has been going on, but can keep private other sensitive details. For instance, the minister could declare that he or she has a bank account, but not with a particular bank or how much is in the account.
9. The DCMS replied to the complainant on 23 March 2006, in which it refused to conduct an internal review into its handling of the complainant's request and advised him of his right to appeal to the Commissioner. It stated the following reasons for this decision:
- i. It has been almost six months from the time that decision was communicated and the request for a review. This department is of the view that in this case there has been undue delay in seeking a review of that decision.
 - ii. The Department has reasonably concluded that this case was closed and it would not now be appropriate to re-open it. In coming to this decision we note that in respect of making a complaint to the Information Commissioner, such a complaint ought to be brought before him as soon as possible and in any event within two months of the date of the public authority's decision.

The Investigation

Scope of the case

10. On 23 March 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - i. The department's decision not to conduct an internal review.
 - ii. The department's refusal to release all the information requested.

11. Section 50(2)(b) of the Act allows the Commissioner to reject a complaint to him if it appears that there has been undue delay in making the application. The Commissioner considers that normally a delay of more than two months between the outcome of the internal review and the submission of a complaint to him amounts to “undue delay”. However, although the DCMS refused to carry out an internal review, less than two months elapsed between its decision as such and the complainant referring the matter to the Commissioner. The Commissioner therefore accepted the complaint. In addition, it is of relevance that the DCMS did not inform the complainant in its original refusal notice of the time in which it would be prepared to accept a request for an internal review into its initial decision. However, the Commissioner acknowledges that there is no provision in the Act requiring this notification.
12. The Commissioner wrote to the complainant on 15 November 2006, in which he explained that his investigation would be restricted to the department’s refusal to release the information requested. The Commissioner stated his reasons for not considering the refusal to conduct an internal review as follows:
 - i. Although section 17 of the Act (Refusal of request) requires a requestor to be informed in a refusal notice of any procedure provided for dealing with internal reviews, there is no legal requirement for a public authority to actually carry one out.
 - ii. If a public authority refuses to conduct a review, the Commissioner will treat the complaint as having exhausted the internal review procedure and therefore eligible for consideration under section 50 (Application for decision by Commissioner).
 - iii. As long as the complainant is informed of their right to appeal to the Commissioner (as was the case in relation to this request), no action can be required of the public authority on this issue within this Notice.

Chronology

13. The Commissioner contacted the DCMS on 15 November 2006 to request the following information:
 - i. Full, unredacted copies of information withheld from the complainant in response to his request of 28 June 2005.
 - ii. Any additional representations DCMS wished to make on its decision in this matter.
14. The DCMS responded to the Commissioner on 26 January 2007, in which it made the following points (the following – aside from the headings - are direct quotations):

15. Information provided to the complainant

- i. The complainant was provided with information in relation to the majority of his request, namely:
 - How many times Ministers in the DCMS consulted the Permanent Secretary under section 9 of the Ministerial Code for the period 26 November 2004 to 28 June 2005;
 - Which Ministers in DCMS consulted the Permanent Secretary;
 - On what dates Ministers in DCMS consulted the Permanent Secretary;
 - For what reason the Minister consulted the Permanent Secretary in each case;
 - What action was taken in each case and in which whether the Prime Minister was consulted; and
 - Some detail of the declarations made by Ministers.

16. Information withheld from the complainant

- i. The assessment in this case was that Sections 41 and 43 of the Act applied to some of the detail of the declarations provided by Ministers of the DCMS, for the following reasons. The information is inherently private or would be likely to damage legitimate business interests. In addition, the information was disclosed by the Ministers as a result of the obligations imposed by the Ministerial Code which expressly states that the information is provided in confidence.
- ii. It is recognised that a duty of confidence and a likely prejudice to commercial interest can be overridden by a higher public interest, and accept that there is a public interest in ensuring that there is an appropriate regime for eliminating any risk of a conflict arising between a Minister's private interests and his or her official duties. However, there is also a strong public interest in protecting the confidentiality of the information provided by Ministers or where disclosure would be likely to render the conduct of commercial transactions problematic for individuals.
- iii. In the circumstances of this case, the assessment was that the public interest did not demand any greater disclosure than was provided to the complainant, where the only information that was withheld was personal or commercially sensitive information relating to the Ministers of their spouses and information related to the Ministers' finances and family homes. It is believed that disclosing the personal, financial or commercially sensitive information provided in confidence by Ministers could lead Ministers to disclose less information to their Permanent Secretaries and as a result reduce the effectiveness of and therefore public confidence in the regime for protecting conflicts of interest.
- iv. Given the confidential and personal nature of declarations made under the Ministerial Code it is the view that it would be inappropriate to disclose those declarations to any third party. In accordance with the Ministerial

Code, where it was proposed to release any detail from a Minister's declaration the Minister concerned was consulted to ensure that they were content with the release. To release any additional information would be contrary to the Ministerial Code.

- v. Some Ministers err on the side of caution and provide more information to their Permanent Secretaries than is required under the Ministerial Code. For example, some provide copies of bank and mortgage statements or spreadsheets from their financial advisers detailing transactions. Ministers provide this information to their Permanent Secretaries in confidence on the understanding that it will not be shared otherwise than in accordance with the Ministerial Code.
17. The DCMS did not provide the Commissioner with a copy of the withheld information. Rather, it stated in its letter of 26 January 2007 that "given the sensitivities surrounding the documents in question" it would like to invite the Commissioner to come to DCMS to view the documents. It further stated that "this would go some way to allay the concerns that Ministers and Permanent Secretaries have about sharing the declarations more widely than was originally intended."
18. On 31 August 2007 the Commissioner visited DCMS to view the information withheld from the complainant. Having analysed this information, the Commissioner asked the DCMS to provide clarification on a number of observations he made in relation to its application of the exemptions to the information withheld. The DCMS responded to the Commissioner's request on 1 October 2007, the details of which are referred to in the 'Analysis' section later in this Notice.

Findings of fact

19. The Commissioner has analysed the Ministerial Code and considered the following provisions (listed under 'Minister's Private Interests') relevant to his investigation:
- "5.3 On appointment to each new office, Ministers are advised to provide their Permanent Secretary with a full list in writing of all interests which might be thought to give rise to a conflict. The list should cover not only the Minister's personal interests but those of a spouse or partner, of children who are minors, of trusts of which the Minister or a spouse or partner is a trustee or beneficiary, or of closely associated persons. The list should cover all kinds of interest including financial instruments and partnerships, financial interests such as unincorporated businesses and real estate, as well as relevant non-financial private interests such as links with outside organisations, and previous relevant employment."
- "5.4 On receipt of the written list the Permanent Secretary will arrange a meeting with the Minister to discuss it and to consider what advice is necessary and from what source, and what further written information is needed. The Permanent Secretary will stand ready either to give a considered view on the issues which the Minister raises, drawing on precedent and the help of the Cabinet Office as

necessary, or to arrange for expert or professional advice also to be made available to the Minister from inside or outside government. At the end of the exercise Ministers are advised to record in writing what action has been considered and taken, and to provide the Permanent Secretary with a copy of that record.”

“5.6 The personal information which Ministers disclose to those who advise them is treated in confidence. Should the Department receive a request for this information it will take account of a range of factors including the confidentiality of the information. The relevant Minister will also be consulted and his or her views taken into account before a decision would be made on disclosure. If an allegation is made that a particular Minister has a conflict of interest it must be for that Minister to explain their position and justify what has been done. In doing so, they may wish to make public the list of their private interests (required under paragraph 5.3) and the steps taken to avoid an actual or perceived conflict. It is open to them if they wish to confirm (if it is the case) that they have consulted their Permanent Secretary in accordance with the Code. The Minister should however consult the Permanent Secretary about the content of any such statement before making it to ensure that there is agreement about the content, and any disagreement should be referred to the Prime Minister.”

20. In May 2006, the DCMS placed in the public domain a summary of certain declarations made under the Ministerial Code between June 2001 and March 2006 by the Department’s Secretary of State at the time (Tessa Jowell). A copy was also provided to the complainant in May 2006. Having studied this summary, the Commissioner notes that two interests disclosed related to a business relationship of the Secretary of State’s spouse, David Mills. These were listed as being declared in February and April 2005 but were not disclosed to the complainant in its response of 20 September 2005. However, these declarations fell within the scope of the complainant’s request. (The Commissioner did not identify any other inconsistencies between the two disclosures.)

Analysis

Procedural Matters

Section 10 – Time for compliance with request

21. Section 10 of the Act states that a public authority must comply with a request made under the Act not later than the twentieth working day following the date of receipt.
22. The Commissioner notes that the complainant made his request on 28 June 2005. However, the Department did not provide the complainant with the information it did not withhold until 20 September 2005. Therefore, this constitutes a breach of section 10.

Section 17 – Refusal of request

23. Section 17 of the Act states that if a public authority is relying on any exemption, it must, within twenty working days following the date of receipt of the request:
- i. State that fact,
 - ii. Specify the exemption(s) in question, and
 - iii. State why the exemption applies.
24. The Commissioner notes that the Department did not issue such a refusal notice to the complainant in respect of the information to which exemptions were applied until 20 September 2005. This constitutes a breach of section 17.

Exemptions

Section 43 – Commercial Interests

25. Following his viewing of the withheld information, the Commissioner requested clarification from the DCMS as to what particular information the exemption under section 43 was applied. In its response of 1 October 2007, DCMS stated that (the following is a direct quotation):
- i. In the response of September 2005 to the original request from the complainant, DCMS relied upon section 43 in relation to one aspect of information, namely information relating to a business relationship of Mr Mills, the husband of the then Secretary of State for Culture, Media and Sport, Tessa Jowell.
 - ii. We had been informed that the relationship was newly formed and that to release details of this relationship in response to an FOI request from the Department at that early stage would be detrimental to Mr Mills' future business with that individual, prejudicing Mr Mills' commercial interests.
 - iii. By the time of the subsequent schedule of Ministerial interests was disclosed in 2006, the fact of that particular business relationship was in the public domain. Reliance on section 43 was therefore removed, and this relationship was included in the 2006 schedule.
 - iv. We confirm that section 43 is no longer relied upon in relation to the information held and also confirm that no other information held at the time of the complainant's request in 2005 was withheld and then released in the updated schedule in 2006. Any further information identified in the updated schedule that did not appear in the initial schedule was not held at the time of the complainant's request or not within the scope of the request.
26. Having studied all the material withheld from the complainant in detail, the Commissioner considered this clarification sufficient to identify the information to which section 43 had solely been applied. Given the updated position of the DCMS in respect of this information, the Commissioner is satisfied that this

information was put into the public domain during 2006 and he did not therefore consider whether section 43 was correctly engaged by DCMS in response to the original request. Additionally, the Commissioner is satisfied that this information constitutes that which he identified in paragraph 20. He is therefore satisfied that this information had subsequently been provided to the complainant and did not investigate the inconsistency between the release of information in September 2005 and May 2006 any further.

Section 41 – Information Provided in Confidence

27. In its response of 1 October 2007, the DCMS stated that its view remained that section 41 applies to the information to which this exemption was engaged and that the passage of time has not diminished the necessary quality of confidence in that information.
28. When viewing the information withheld from the complainant, the Commissioner observed that the majority of the information falling within the scope of the request had been released to the complainant. He then proceeded to compare the nature of the information which had been withheld to that which had been released.
29. Section 41 of the Act provides that –
 - “(1) Information is exempt information if-
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
 - (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”
30. In order for section 41(1)(a) to apply, the information must have been obtained from a source outside the public authority. In this case, the information was provided by the Department's own ministers to their own Permanent Secretary. However, regardless of whether it has any bearing on the conduct of the ministers in their official capacity, the information itself relates to those ministers' private lives and, therefore, their private capacity. In drawing a distinction between information obtained about a minister's dealings or interests in their public capacity (which would generally fall within the scope of information obtained from *within* the Department) and private capacity (which falls within the scope of information obtained from *outside* the department), the nature of this information is such that the Commissioner is satisfied that it constitutes information which was obtained by the public authority from “another person”.
31. In order to determine whether disclosure of the withheld information would constitute an actionable breach of confidence (which would allow for section

41(1)(b) to apply) the Commissioner took the following considerations into account:

- Whether the information has the necessary quality of confidence about it;
- Whether the information was communicated in circumstances importing an obligation of confidence; and
- Whether disclosure of the information would be to the detriment of the party to whom the duty of confidence is owed.

i. Information provided to the Department from Ministers

32. Of the information withheld which constitutes declarations made to the Department by Ministers, the Commissioner considers these to consist of either commercial and financial details, confidential information relating to third parties or declarations which are not required to be made under the Ministerial Code. The Commissioner is satisfied that such information has the necessary quality of confidence.
33. As the Ministerial Code explicitly assures Ministers that any information provided under it will be provided in confidence, the Commissioner believes that the circumstances under which the information was provided means that its release without the consent of the relevant Minister would constitute an actionable breach of confidence. The Commissioner is also of the view that disclosure of the withheld information in *this* case would subject Ministers to an unwarranted intrusion into their private lives. This would be of detriment to those ministers.
34. The Commissioner considers it important that Ministers are encouraged, willing and able to provide as much information as possible about their private interests to their Permanent Secretary under the Code, even if it goes beyond the requirements of the Code. The Commissioner considers that this will assist in ensuring that the Ministerial Code is effectively applied in order to provide for Departments to identify any possible conflicts of interest. This will then enable Permanent Secretaries to provide Ministers with appropriate advice. The Commissioner is satisfied with the assurance of the DCMS that disclosure of such information would restrict the information declared by Ministers which, in the absence of a statutory requirement to provide such details, would result in less accountability.
35. The Commissioner considers that nature of the information withheld from the complainant to differ to that supplied, the latter of which the Commissioner considers to consist of summaries of the interests declared which:
 - fall within the scope of the Ministerial Code,
 - are presented in such a way as to ensure that confidence would not be breached by its disclosure, and
 - were disclosed with the consent of the relevant Ministers.
36. In contrast, the Commissioner is satisfied that there is no remaining withheld information the content of which both fall within the requirements of the Ministerial

Code and could be presented to the complainant in such a way as to ensure that confidence would not be breached by its disclosure.

ii. Information provided to Ministers from the Permanent Secretary

37. The Commissioner notes that in response to part five of the complainant's request ('What action was taken in each case since 26 November 2004 and in which was it necessary to consult the Prime Minister') DCMS informed the complainant, alongside each submission of interests, of the following:
- "Advice given. PM not consulted", or
 - "Noted. PM not consulted".
38. The Commissioner studied the letters provided to him in relation to these responses, which consisted of the written communications provided to the relevant Ministers from the Department's Permanent Secretary. It is clear that the content of the letters held in relation to part five of the request was withheld from the complainant, although the Commissioner is satisfied that the communications do consist of "advice given" or declarations "noted".
39. The contents of letters provided to Ministers from the Permanent Secretary consist of:
- declarations that Ministers provided to the Permanent Secretary in confidence, and
 - advice provided on the basis of those confidential declarations.

Furthermore, the Commissioner does not consider the advice from the Permanent Secretary to be provided on the basis of information supplied from any other source to that which was provided in confidence.

40. Therefore, the Commissioner believes that disclosure of the letters from the Permanent Secretary would have the consequence of certain withheld interests contained within declarations made to the Department from Ministers being disclosed. As such, the Commissioner is satisfied that section 41 is engaged in relation to these letters as disclosure would result in an actionable breach of confidence on the part of the Ministers to whom the advice was provided. The Commissioner's reasoning for the engagement of the exemption therefore matches that set out in his analysis of the declarations themselves to which he accepts that section 41 is engaged.

iii. Public interest override

41. As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, case law on the common law concept of confidence suggests that a duty of confidence can be overridden if there is an overriding public interest in the disclosure of the information. In this respect, the Commissioner took note of the decision in *Derry City Council v The Information Commissioner* [EA/2006/0014], in which the

Information Tribunal interpreted a Court of Appeal decision (London Regional Transport v The Mayor of London, 2001).

42. The cases referred to above were considered in the context of commercial contractual confidentiality. Nevertheless, the Commissioner does consider the decisions to be of relevance to cases where an individual person has supplied information in confidence.
43. In the London Regional Transport case the judge at first instance said an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. In the subsequent Court of Appeal hearing, this view was not expressly overturned but left the question open. Its final decision was to allow the disclosure in that case.
44. In the Derry case, the Information Tribunal interpreted the Court of Appeal decision as meaning that:
 - No exceptional case has to be made to override the duty of confidence that would otherwise exist.
 - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
45. In this case, the Commissioner therefore assessed whether this public interest override is relevant in respect of the information withheld from the complainant.
46. The Commissioner interprets the public interest test in deciding if a duty of confidence can be overridden to differ from the public interest test normally applied under the Act, in that the burden of proof is reversed:
 - The FOI public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.
 - The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
47. In light of this interpretation, the Commissioner believes that it is important to fully appreciate the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. In particular, his view is that a duty of confidence should not be overridden lightly, particularly in a case such as this, where a duty of confidence is owed to an individual.
48. The wider public interest in preserving the principle of confidentiality
The Commissioner considers the relationship of trust, protected by the duty of confidence, operates to serve the public interest. In this case, the Commissioner considers that the relationship of trust between a Minister and their Permanent Secretary in respect of declarations made under the Ministerial Code serves the public interest as it encourages the Minister to be as open as possible about their

interests which results in transparency with their departments and allows the Permanent Secretary to provide the Minister with appropriate advice on the basis of those declarations in order. This ensures that any possible conflicts of interests are both declared and acted upon.

49. The interests of the confider

The importance of the right to privacy is recognised by the Article 8 of the Human Rights Act 1998 which states that: "Everyone has a right to respect for his private and family life, his home and his correspondence." In light of this, the Commissioner considers the real consequence of disclosing private personal information is an infringement of the confider's privacy and there is a public interest in protecting the privacy of individuals.

50. Having identified the public interest in withholding this information, the Commissioner proceeded to reach a view as to whether the Department would have a public interest defence were it to disclose the withheld information. The Commissioner concluded that it could not. He based this on his assessment of the information itself, upon which he formed the following opinions, and related these to the factors set out above which support the withholding of the information:

- i. The quality of confidence of the withheld information is of a higher degree to that which was disclosed to the complainant.
- ii. The nature of the declarations are not of sufficient significance to merit disclosure to the public such as a conflict(s) of interest which, even following Departmental advice, is likely to affect a Minister's legitimate conduct in their role. Nor has the Commissioner noticed any declaration made or action taken which could be considered improper.
- iii. In respect of accountability and transparency, the public interest in disclosing the interests declared is, to a large extent, served by the information which had been disclosed to the complainant. This is because the nature of the information being withheld (especially when compared to that which has been released) is such that accountability and transparency would not be furthered by its disclosure to any notable extent.

51. Since this Notice was initially drafted, the Commissioner noted that the application of section 41 to ministerial interests was confirmed by the Information Tribunal in the case of *Ennis McBride v Information Commissioner and Ministry of Justice (Formerly the Privy Council Office)* [EA/2007/0105]. This decision was promulgated on 27 May 2008.

The Decision

52. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

- i. Application of section 41 (Information provided in confidence).
53. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Section 10 (Time for compliance with request) in relation to the time taken to supply information to the complainant.
 - ii. Section 17 (Refusal of request) in relation to the time taken to issue a refusal notice to the complainant.

Steps Required

54. The Commissioner requires no steps to be taken.

Other matters

55. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter:
56. In light of the public authority's handling of the complainant's request for an internal review in this case, the Commissioner intends to publish advice to public authorities on the issue of timescales and the eligibility of requests for review. This advice will encourage public authorities, as a matter of good practice, to state in refusal notices that requestors will be permitted to have forty working days from the date of that notice in which to request an internal review. This advice will be in line with the statutory timescale to request an internal review under the Environmental Information Regulations 2004 and the timescale for making an FOI (Section 50) complaint to the Commissioner.

Failure to comply

57. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

58. 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@tribunals.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 23rd day of June 2008

Signed

**Graham Smith
Deputy Commissioner**

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