

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 April 2008

Public Authority: Ministry of Justice ('MoJ')
Address: Selbourne House
54 Victoria Street
London
SW1E 6QW

Summary

The complainant requested copies of the responses the Ministry of Justice ('MoJ') had received in response to the Fundamental Legal Aid Review which was a policy review of legal aid provision. The complainant also requested a schedule of these responses. The MoJ refused to disclose these responses on the basis that they were exempt from disclosure under section 35(1)(a) of the Act. The MoJ also explained that in its opinion it did not hold a schedule of the responses. The Commissioner has concluded that the responses are exempt from disclosure on the basis of section 35(1)(a) and that the public interest favours withholding this information. However, the Commissioner has also concluded that the MoJ does hold a schedule of responses and that disclosure of an anonymised version of this schedule (i.e. with respondents' names removed) is in the public interest.

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 20 September 2005 the complainant requested copies of all the responses the MoJ¹ had received in response to the Fundamental Legal Aid Review

¹ Although the complainant actually submitted his request to the Department for Constitutional Affairs ('DCA'), the DCA actually ceased to exist in May 2007 and therefore this notice is served on the MoJ which took over responsibility for legal aid policy. Consequently, the notice refers to both the DCA and MoJ as the public authority responsible for this request.

- (‘FLAR’). The complainant also asked the MoJ to provide him with a schedule of these responses.
3. The MoJ contacted the complainant on 14 October 2005 and confirmed that it did hold information falling within the scope of his request. The MoJ explained that when a qualified exemption applies to the information and the public interest test is engaged, it was able to extend the time for a response by a reasonable time period. Furthermore, the MoJ explained ‘your request...raises complex public interest considerations, which must be analysed before we can come to a decision on releasing the information. Therefore, we plan to let you have a response by 1 November 2005’. (The Commissioner notes that the MoJ did not in fact cite a particular exemption in this initial correspondence with the complainant).
 4. On 1 November 2005 the MoJ informed the complainant that it was still considering the complex public interest factors surrounding this request and hoped to be in a position to inform the complainant of its decision by 15 November 2005.
 5. The MoJ contacted the complainant again on 29 November 2005 and explained that it had concluded that the information covered by the request fell within the scope of section 35(1)(a) of the Act. Furthermore, the MoJ had decided that the public interest in withholding the information outweighed the public interest in disclosure of the information.
 6. The complainant contacted the MoJ on 21 December 2005 and asked it to conduct an internal review into its handling of the request.
 7. In a letter dated 13 January 2005, but clearly intended to be dated 13 January 2006, the MoJ informed the complainant that it had completed the internal review and remained of the view that the information was exempt by virtue of section 35(1)(a) and the public interest favoured withholding the information.

The Investigation

Scope of the case

8. On 22 February 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant argued that the public interest favoured disclosure of the requested information. The complainant also noted that his original request had included a request for a schedule of the responses should the MoJ conclude that the responses themselves were exempt from disclosure, but the MoJ had failed to provide such a schedule.

Chronology

9. On 7 July 2007 the Commissioner wrote to the MoJ and asked to be provided with a copy of the withheld information. The Commissioner also asked the MoJ to provide a detailed explanation as to why it had concluded that this information was exempt from disclosure on the basis of the exemption contained at section 35(1)(a) of the Act. The Commissioner also noted that the complainant had suggested to the MoJ that if the information itself was withheld, he wished to be provided with a schedule of the documents falling within the scope of his request. Therefore the Commissioner asked the MoJ to explain whether it was prepared to disclose a copy of such a schedule or whether it also considered it exempt from disclosure on the basis of section 35(1)(a).
10. On 24 July 2007 the MoJ acknowledged receipt of the Commissioner's letter and explained that it hoped to be in a position to provide a substantive response by 9 August 2007.
11. The Commissioner did not receive a substantive response from the MoJ by the 9 August 2007 and consequently the Commissioner sent the first of a number of letters chasing a response on 14 August 2007.
12. The MoJ finally provided the Commissioner with a response to his letter of 7 July 2007 on 18 October 2007. In this response the MoJ outlined in detail the reasons why it considered the withheld information to be exempt from disclosure by virtue of section 35(1)(a). The MoJ also informed the Commissioner that:

'If it were held that the public interest under s35(1)(a) FoIA fell in favour of disclosure, then we would argue in the alternative that, for the same reasons as outlined above, the public interest balance under s36 falls in favour of non-disclosure. I can confirm that a qualified person in this case a DCA Minister has considered the application of section 36 and considers that to the extent that section 35 does not apply then in his reasonable opinion section 36 should apply'.
13. The MoJ also informed the Commissioner that it did not hold a schedule of the information requested by the complainant.
14. On 12 January 2008 the Commissioner contacted the MoJ and explained that in his opinion where a request is made for a schedule or list of documents, even if the schedule itself does not exist, if the information which would be in the schedule is also part of other held information, the schedule will be held by the public authority and therefore should be disclosed unless the contents of a schedule would also be exempt. Consequently, the Commissioner asked the MoJ to confirm whether it would be prepared to disclose such a schedule and if not, which exemptions it would seek to withhold the information.
15. Having received no response from the MoJ, the Commissioner contacted the MoJ again 29 January 2008 and explained that if he did not receive a response from the MoJ within seven days, he would assume that the MoJ's position was that the information contained in the schedule was exempt on the basis of the section 35

arguments the MoJ had previously provided in relation to the requested information itself.

16. The MoJ wrote to the Commissioner on 22 February 2008 and asked for a further period of time in which to provide arguments in relation to the request for a schedule of information. The MoJ informed the Commissioner that it would 'aim to send you a substantive reply by 6 March or sooner'.
17. The Commissioner subsequently received a further letter from the MoJ on 17 March 2008, although the MoJ appeared to have also dated this letter 22 February 2008. In this letter the MoJ explained that:

'Our position remains that a schedule does not exist and we do not think it is necessary to create new information as a result of a Freedom of Information request'.

18. However, the MoJ also explained that it had considered what other information it may hold that may be relevant to this request. It went on to explain that:

'We do hold a schedule of all external organisations and individuals that we met as part of the Fundamental Legal Aid Review (FLAR). This includes, but is not limited to, those organisations and individuals where we hold information about the views the expressed.'

Findings of fact

19. Before considering whether the MoJ's application of the section 35 exemption, the Commissioner believes that it would be useful if he provided some background information on legal aid and a brief summary of the recent changes in legal aid provision.
20. Legal aid funds the provision of legal advice and representation for people who would otherwise be denied access to justice because they could not afford to pay. The MoJ is, and its predecessor the Department for Constitutional Affairs ("DCA") was, responsible for legal aid strategy and the Legal Services Commission ('LSC') is the public body responsible for administering legal aid in England and Wales.
21. In May 2004 the government published the Draft Criminal Defence Service Bill along with a consultation paper covering proposals for restructuring the criminal legal aid scheme.
22. At the same time, the MoJ ordered a far reaching study, FLAR, into the legal aid system. The aim of FLAR was to focus on how best to provide legal help to those who need it in the longer term. FLAR aimed to specifically address:
 - How legal aid can provide services which meet the needs of society.
 - How it can be best used to help people improve their lives and prevent social exclusion.

- How legal processes and innovative ways of delivering legal services can be developed to ensure the best use of taxpayers' money.
23. FLAR was carried out within the DCA, working closely with LSC and involved discussions with the Prime Minister's Strategy Unit, other Government departments, including the Home Office and the Crown Prosecution Service, and a range of external stakeholders, including the judiciary and the legal professions.
 24. Following the conclusion of FLAR, the MoJ published 'A Fairer Deal for Legal Aid' in June 2005 which, in the MoJ's opinion, constituted a blueprint for reform of the legal aid system.
 25. In July 2005 Lord Carter of Coles was asked by the DCA to conduct a review of legal aid procurement, in light of the initial findings in FLAR, and published his findings in 'Legal Aid: A Market Based Approach to Reform' in July 2006. Lord Carter's report put forward suggestions for a competitive market based system for the procurement of legal aid services based on quality, capacity and price.
 26. The DCA and the LSC then published 'Legal Aid: A Sustainable Future' in July 2006 which was a consultation paper on Lord Carter's independent review into legal aid. In this paper the DCA outlined its programme of legal aid reform which was largely based on Lord Carter's review and invited responses from stakeholders.
 27. Following this consultation exercise the DCA published 'Legal Aid Reform: the Way Ahead' in November 2006 which outlined how the Government intended to deliver the new system of legal aid. In summary the DCA intended to replace the existing system under which hourly rates were paid to lawyers for undertaking legal aid work, to a system where payments would be on the basis of a whole case and work completed, although some particularly complex civil and family cases would continue to be paid by the hour. Such proposals were designed to pave the way to a complete market based system.
 28. In preparation for the introduction of these reforms the DCA, along with LSC, undertook a number of further consultations, as well as contractual and legislative changes throughout 2007.

Analysis

Procedural matters

29. Section 17 of the Act states that when a public authority refuses a request for information and is relying on one of the exemptions contained in part II of the Act, it must provide the applicant with a refusal notice within 20 working days of his request. This refusal notice must specify the exemption, or exemptions, upon which the public authority is relying to withhold the requested information and why it believes these exemption, or exemptions, apply.

30. Section 17 also provides that where a public authority needs more time to arrive at a decision under the public interest test, it must clearly state this in its refusal notice together with an estimation of when a decision is likely to be reached. Even though the public authority is allowed to extend the time taken to consider the public interest test, it is still required within 20 working days of the request, to state under which exemption it is considering where the public interest lies.
31. In this case the complainant submitted his request on 20 September 2005 and the MoJ responded within 20 working days on the 14 October 2005 and explained that it was still considering the public interest test. However, this refusal notice failed to identify which exemption the MoJ was in fact considering the public interest under. The Commissioner has therefore concluded that the MoJ breached section 17(1)(b) of the Act because it failed to provide a refusal notice citing an a specific exemption, although the MoJ did comply with section 17(2) by issuing the refusal notice within 20 working days.

Exemption

Section 35(1)(a) – Formulation or development of government policy

32. Section 35(1)(a) states that information is exempt if it relates to the formulation or development of government policy. Section 35 is a class based exemption; this means that for the exemption to be engaged there is no requirement to consider if disclosure of the information may result in any harm, merely that the information relates to formulation or development of government policy.
33. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Section 35(1)(a) cannot apply to a finished product or policy which has been agreed, in operation or already implemented. Once a decision has been taken on a policy line, then it is no longer in the formulation or development stage.
34. In consideration of this case the Commissioner has been guided by the Information Tribunal decision in the case *DFES v Information Commissioner & the Evening Standard* in which the Tribunal commented on the term 'relates to' contained in section 35(1). The Tribunal suggested that the term 'relates to' could be interpreted broadly, and although this approach has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which caused no significant harm to the public interest. The Tribunal's approach also demonstrates that where the majority of the information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be considered as relating to section 35(1)(a).

35. The withheld information in this case constitutes a number of notes of meetings between DCA officials and stakeholders as part of the FLAR described above and one written response provided to the DCA by a stakeholder in relation to the issues involved in FLAR. The Commissioner accepts that this information was generated in relation to the Government's decision to review a number of aspects of legal aid policy. The discussions with the various stakeholders were undertaken so that the Government could identify the different options the stakeholders may have for the reform of legal aid. The discussions also allowed the Government to canvass views and opinions from the various stakeholders on the Government's early suggestions for how the system could be improved.
36. Therefore, the Commissioner is satisfied that the withheld information can be correctly described as relating to policy formulation and the exemption is engaged. However, the section 35 is a qualified exemption and therefore the Commissioner must consider the public interest test.

Public interest test

Arguments for disclosure

37. In the DFES case cited above the Tribunal indicated that the timing of the request was of paramount importance when considering the public interest in relation to section 35(1)(a):

‘Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. 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.”
38. With regard to the timing of this request, the complainant has argued that when he submitted his request in September 2005 the FLAR had in fact been completed and the outcome of this review was detailed in ‘A Fairer Deal for Legal Aid’ which had been published by DCA in June 2005. Therefore, disclosure of the requested information could not be considered to be premature, and thus compromise the policy formulation process, because the FLAR process had in fact been concluded.
39. The complainant has also argued that it is in the public interest to know whether options that had been suggested or discussed by the external stakeholders had in fact been rejected by the Government and not implemented. Similarly, it would also be in the public interest to know whether any options or policy ideas that the stakeholders had criticised or dismissed about proposed changes to the legal aid system had now been taken up by Government.
40. Furthermore, there is a strong public interest in furthering public understanding of, and participation in, the key issues of the day. The LSC's estimates that a total of two million people each year receive some form of legal aid funding. Given the significant number of individuals who could be affected by the changes in legal aid funding, disclosure could be in the public interest in order to inform a wider

debate about the consequences of the proposals. This issue could be particularly relevant given that the Government's proposed changes to the legal aid system have generated a significant level of criticism across the legal community. For example, the Law Society publicly opposed the proposals and there were suggestions that smaller law firms would be forced to merge or go out of business as a result of the reforms (source: <http://news.bbc.co.uk/1/hi/uk/6190276.stm>).

41. Disclosure may allow the public to develop a greater understanding of why the Government had decided to introduce these changes by identifying some of the problems with the existing legal aid system. Moreover, disclosure could inform the public that it was not just the Government that believed that there were serious problems with the legal aid system; rather independent experts in the judiciary and wider legal community also believed that there were faults with the existing system. By placing the requested information in the public domain the Government may reassure the public that changes to the legal aid system were necessary and thus improve confidence in need for an alternative system of legal aid funding.
42. In the complainant's opinion the requested information constitutes responses to a formal consultation process, rather than an internal policy review. Therefore consultees involved in such processes would expect that their responses would be placed in the public domain. Indeed, the complainant has suggested that consultees would usually wish their opinions to be placed in the public domain.
43. The MoJ has argued that the conclusions of the FLAR are in the public domain via the publication of a 'Fairer Deal for Legal Aid' and therefore the public interest in disclosure of the responses is met. However, the complainant has argued that there is nothing in that document to indicate what the responses were that the DCA received in response to FLAR.
44. Finally, the complainant argued that the public interest is not always in line with the Government's interests and the MoJ should not be allowed to rely on section 35 in order to withhold embarrassing or harmful information, the disclosure of which may be in the public interest.

Arguments against disclosure

45. The MoJ has explained that the views expressed by the individuals involved in the process were given on the basis that they would be treated confidentially, indeed a number of the meetings were held under Chatham House rules (i.e. views were recorded but not attributed). In the MoJ's opinion because of the assurance of confidentiality which was given to the respondents, this ensured that the views expressed were candid and enabled the MoJ to engage in free and frank discussion with those in the field. The stakeholders were encouraged to think widely and creatively and consider both policy proposals and first principles, including the consideration of the pros and cons of various approaches.
46. In the MoJ's opinion the stakeholders were only willing to express such candid views on the basis that they would not be placed in the public domain. If this requested information was therefore disclosed the MoJ's, and indeed other

government bodies such as LSC's, relations with these external stakeholders would be harmed and these stakeholders would be less willingly to provide their views again. In the MoJ's opinion such engagement with stakeholders is invaluable in helping the Government formulate policy and consequently premature disclosure of these views could hinder future policy making in this area, something which is clearly not in the public interest.

47. The MoJ has a different interpretation as to the significance of the timing of the request than the complainant. In the MoJ's opinion although FLAR was effectively concluded with the publication in June 2005 of 'A Fairer Deal for Legal Aid', the Government's policy development programme on legal aid had continued with the blueprint for reform developed during FLAR being taken forward by the way of various further steps. (Such further developments are outlined in findings of fact section above). Therefore, in the MoJ's opinion disclosure of the requested information would be premature because at the time on the complainant's request, the policy formulation in the area of legal aid review had not been completed and it was likely that the Government, via either the MoJ or LSC, may wish to return to those who provided the views in FLAR on the issues they raised originally or on new issues.

Balancing of public interest arguments

48. With regard to the timing of the request, the Commissioner accepts that at the time of the complainant's request, the FLAR had been concluded. However, in the Commissioner's opinion the FLAR represented just one stage in the Government's formulation and development of new policy in relation to legal aid funding. As is noted above following the publication of a Fairer Deal for Legal Aid, a number of further reviews and consultation exercises took place. Therefore, in the Commissioner's opinion at the time of the complainant's request in September 2006, it could be correctly argued that the Government policy was still being formulated and developed.
49. The Commissioner notes that the Tribunal in DFES suggested that 'a parliamentary statement announcing the policy...will normally mark the end of the process of formulation. There may be some interval before development'. In relation to the specifics of this case the Commissioner does accept that it could be argued that formulation was complete as early as November 2006 when the Government announced its proposed reforms to the legal aid system in the document 'Legal Aid Reform: the Way Ahead'. However, the Commissioner also notes that the Tribunal indicated that the simply because an announcement is made about Government policy it should not be assumed that information falling within the scope of section 35(1)(a) was no longer sensitive.
50. In the Commissioner's opinion the requested information consists of records of DCA's discussions with a variety of external stakeholders as part of a DCA led internal policy review. Therefore, the Commissioner does not accept the complainant's argument that the requested information in fact consisted of responses by consultees who would expect, and moreover actually want, their views and opinions to be placed in the public domain. Consequently, the Commissioner accepts that that the external stakeholders who took part in FLAR

would have different expectations to those who took part in a formal consultation exercise. The Commissioner believes that there is a clear evidence to suggest that the stakeholders believed that their views would not be disclosed; not only were the stakeholders assured that the views they expressed would be treated confidentially, a number of meetings were in fact held under Chatham House rules. Furthermore, having reviewed the nature of the information itself the Commissioner is satisfied that the stakeholders would have been unlikely to have expressed such candid and frank views if they knew that they would later be disclosed.

51. Given that the stakeholders had a genuine expectation that their views would not be placed in the public domain, the Commissioner also considers it logical to conclude that if the requested information were disclosed then the stakeholders would be less likely to engage with the Government and be less willing to provide such honest and open views in the future. Having reviewed the requested information the Commissioner is satisfied that such information is central to the Government's formulation and development of policy in this area.
52. In reaching this conclusion, the Commissioner has identified a key distinction between the sources of the requested information in this case (i.e. external stakeholders) and the sources of the requested information in the DFES Tribunal case. In the DFES case the requested information consisted of meetings reflecting the views of senior civil servants. The Commissioner notes that in the Tribunal's decision on the DFES case, it essentially rejected the DFES' argument that the threat of disclosure of civil servants advice would cause them to be less candid when offering opinions. The Tribunal stated that: 'we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service'. It went on to describe civil servants as "...highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions'. In short, disclosure of such information should not, and in all likelihood would not, discourage civil servants from doing their job properly and providing free and frank advice to Government when asked to do so.
53. However, in this case, the requested information does not consist of advice generated by civil servants, but rather by external stakeholders who were contributing to FLAR voluntarily. In contrast to the senior civil servants involved in the DFES case, the Commissioner does not believe that following disclosure of this information these external stakeholders, and indeed others in the legal community, would necessarily continue to freely engage with Government policy reviews and provide candid views.
54. In conclusion, given the timing of the request and the fact that disclosure would be likely to discourage not only these stakeholders, but possibly others, from engaging with Government policy reviews in the future, the Commissioner believes that the public interest favours withholding the responses. In reaching this decision, the Commissioner has taken into account the criticism the Government's changes to legal aid policy have generated, and the significant number of people who are affected by such changes. However, it is because of the fundamental importance of an efficient and cost effective legal aid, that the

Commissioner believes that it is in the public interest for the Government's detailed discussions with external stakeholders on these issues to be protected.

Request for the schedule of documents falling within scope of request

55. As the Commissioner has explained in the chronology above, the MoJ's position is that it does not hold a schedule of the withheld documents. However, the Commissioner's position is that where a request is made for a schedule or list of documents, even if the schedule itself does not exist, if the information which would be in the schedule is also part of other held information, the schedule will therefore be held by the public authority and therefore should be disclosed unless the contents of a schedule would also be exempt. (The Commissioner originally outlined this view in decision notice FS50070854 involving a request to the Foreign and Commonwealth Office). There is nothing to suggest in this case that the extraction of this information from all the information covered by the request would involve so much work that the appropriate cost limit under section 12 and the would be exceeded.
56. As the MoJ's position is that it does not hold a schedule of the information falling within the scope of the complainant's request, it has not provided the Commissioner with any further representations as to whether it considers such a schedule to be exempt from disclosure. Consequently, the Commissioner has simply considered whether disclosure of the schedule is exempt on the basis of section 35(1)(a).
57. As the information which would comprise such a schedule would be drawn from the withheld information itself, the Commissioner accepts, for the reasons discussed above at paragraphs 32 to 36, that the schedule does relate to the formulation of Government policy and therefore is exempt from disclosure on the basis of section 35(1)(a).
58. As the Commissioner has explained above, he has concluded that the public interest favoured withholding the requested information because disclosure was likely to result in stakeholders being less willing to provide candid views and opinions to the Government on the topic of legal aid reform.
59. The Commissioner understands that the participants in these discussions with the MoJ were given an assurance of confidentiality and indeed some of the notes were recorded under Chatham House rules. Consequently, the Commissioner accepts the participants would not expect that the fact they had contributed to the FLAR would made public, let alone the views that they had expressed also being disclosed. Therefore, the Commissioner accepts that if the names of the individual stakeholders were disclosed as part of a schedule then these individuals may be unwillingly to contribute to the future discussions with either the MoJ or the LSC. Furthermore, other stakeholders may be dissuaded from contributing to future policy reviews if they believed that their names would be disclosed as part of a schedule. For the reasons, discussed above, the Commissioner has concluded that there is a strong public interest in the MoJ being able to engage with stakeholders in future discussions on legal aid policy

and therefore is satisfied that the public interest favours withholding the names of the individuals.

60. However, the Commissioner does not believe that the MoJ's ability to engage with stakeholders in the future policy reviews would be impaired by the disclosure of an anonymised schedule with the names of the individuals removed. That is to say the MoJ could disclose a schedule which instead of revealing the identifies of individuals, simply summarises their position or role. Hypothetical examples could be, 'discussions with high street solicitor' or 'discussions with court manager' with the date of such meetings.

The schedule the MoJ acknowledges it does hold

61. As stated in the chronology above, the MoJ has explained that it does hold what it describes as a list of organisations and individuals it met as part of FLAR.
62. The Commissioner has reviewed this schedule and in his opinion this information does not fulfil the complainant's request for a schedule of the responses the MoJ met as part of FLAR. This is because the information that the MoJ acknowledges it holds is simply a list of **all** of the external stakeholders it met. In the Commissioner's opinion the complainant's request for a schedule of responses implies a more detailed and focused response is required. That is to say, a schedule of responses would very briefly describe each document (e.g. meeting note, letter etc), which stakeholder was involved, and the date of the response, if noted.
63. Obviously, some of the information contained in the schedule that the MoJ acknowledge holding does fall within the scope of the complainant's request, i.e. a list of all the stakeholders the MoJ met will include the names of the stakeholder who provided the particular responses which are the focus of the complainant's request. In the Commissioner's opinion the specific names of the stakeholders who appear on the list the MoJ acknowledge holding who provided responses covered by the scope of the complainant's request, are exempt on the basis of the arguments outlined in paragraphs 55 to 60. However, on the basis of the arguments in these preceding paragraphs the Commissioner is satisfied that an anonymised list would not be exempt.

The Decision

64. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The MoJ was correct to withhold the responses it received in relation to FLAR on the basis of section 35(1)(a).
 - The MoJ was correct to rely on section 35(1)(a) to not disclose the names of the individuals involved in FLAR.

65. However, the Commissioner has also concluded that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:
- The MoJ was incorrect to inform the complainant that it did not hold the schedule of the responses and therefore breached section 1(1)(a) of the Act.
 - The MoJ was incorrect to withhold an anonymised version of the schedule of the responses on the basis of section 35(1)(a).
 - The MoJ breached section 17(1)(b) of the Act by failing to specify in the refusal notice which exemption it was relying on..

Steps Required

66. The Commissioner requires the MoJ to provide the complainant with an anonymised schedule of the documentation falling within the scope of his request, including the information indicated in paragraph 60 of this Notice within 35 calendar days of the date of this notice.

Other Matters

67. The Commissioner wishes to note the similarities between the MoJ's refusal notice and that issued by the public authority in the following case considered by the Tribunal: *Berend v Information Commissioner & London Borough of Richmond upon Thames*.

68. As in the Tribunal case, the MoJ's refusal notice complied with some aspects of section 17, but not all. Specifically, the MoJ's notice extended the public interest test without citing a specific exemption. When the public authority in the Tribunal case did this the Tribunal suggested that the use of section 17(2)(b):

'as an attempt to "buy more time" to undertake the primary consideration of the material and thus circumvent the obligation under section 1(1) to confirm or deny what information was held within 20 working days is an inappropriate use of the provisions of the Act'

69. The Commissioner believes that same could be said of the MoJ's failure to provide a refusal notice which cited a specific exemption.

Failure to comply

70. 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

Reference: FS50113765



Information Commissioner's Office

in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

71. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 29th day of April 2008

Signed

**Graham Smith
Deputy 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 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) provides that –

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

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

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 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

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.