

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 March 2008

Public Authority: House of Lords Appointments Commission (the Commission)
Address: 35 Great Smith Street
London
SW1P 3BQ

Summary

The complainant requested the minutes of meetings of the Commission and any papers distributed to Commission members. The Commission disclosed some information but withheld some under sections 36, 37, 40 and 42. The Commissioner investigated and found that sections 36 and 37 are engaged but that in respect of section 36 and 37 the public interest favours disclosure of the information. The Commissioner found that section 42 is engaged and the public interest favours maintaining the exemption; and that section 40 is not engaged. The Commissioner requires the public authority to disclose the information withheld under sections 36, 37 and 40 within 35 calendar days of this notice.

The Commissioner's Role

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

The Request

2. The complainant has advised that on 6 December 2005 he made the following request for information to the House of Lords Appointments Commission (the Commission):

"Please can you send me copies of the minutes of all meetings of the House of Lords Appointments Commission since 1 January 2005, along with the agendas for those meetings and any papers distributed to Commission members for discussion or information."

3. The Commission responded on 2 February 2006 enclosing copies of the minutes of the meetings since 1 January 2005, agendas for those meetings and papers distributed to the Commission. It stated it had not included minutes from more recent meetings as they had not yet been agreed. The Commission stated that some of the documents had been redacted under section 36(2)(b) 'Prejudice to the effective conduct of public affairs', 37(1)(b) 'Communications with Her Majesty etc and honours', 40 'Personal Data' and 41 'Information provided in confidence' of the Act.
4. The complainant requested an internal review on 6 February 2006 of the decision to redact information from the document '*Developing the Commission's vetting policy (part II)*'. The complainant also appealed against the decision not to send him the draft minutes of the more recent meetings. He informed the Commission that his request had been for the 'minutes' and if the minutes are still in draft form then that is the form he wished to have them in. The complainant also requested the dates of the Commission meetings since the 18 October 2005.
5. The Commission carried out an internal review and communicated its findings to the complainant on 23 March 2006. The review concluded that the redactions in the '*Developing the Commission's vetting policy (part II)*' were still necessary but withdrew the application of section 41. The Commission explained that whilst the minutes for the more recent meetings were in draft form, the drafts themselves were exempt under section 36(2)(c) of the Act, the Commission did confirm that once the minutes had been agreed it would consider disclosing them to the complainant. The dates of the meetings since 18 October 2005 were provided.
6. On 2 June 2006 the Commission wrote again to the complainant regarding the 'draft' minutes. It informed the complainant that the minutes of meetings held since October 2005 had now been agreed and enclosed copies of the minutes, agendas and a paper distributed to Commission members for discussion. Some of the information was redacted from the documents under sections 36(2)(b), 37(1)(b), 40 and 42 'Legal professional privilege' of the Act.
7. On 8 June 2006 the complainant requested a review of the decision to redact information from the minutes, papers and agendas of the meetings since October 2005. The complainant confirmed that he was willing to accept the redactions under section 40 of the Act.
8. The Commission responded on 5 July 2006 confirming that the redactions are still necessary under section 36, 37, 40 and 42 of the Act. However, it did review the redaction in the 18 October 2005 minutes and found some were not necessary and therefore disclosed this additional information to the complainant.

The Investigation

Scope of the case

9. On 8 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled, the complaint, at this point, was only in relation to the redactions in the document '*Developing the Commission's vetting policy (part II)*' under section 36 and 37 of the Act.
10. On 6 July 2006 the complainant contacted the Commissioner to complain about redactions in the minutes, agenda and papers dated from October 2005 onwards under sections 36, 37 and 42 of the Act.
11. The Commissioner has therefore investigated the application of sections 36 and 37 to the redactions in '*Developing the Commission's vetting policy (part II)*' and the application of sections 36, 37 and 42 to the redactions in the minutes, agendas and papers of meetings which took place after October 2005. The Commissioner has also investigated the application of section 40 to the names of officials within all the withheld information.
12. The complainant is not disputing the application of section 40 to the names of individual nominees or to other personal information about them which could lead to their identification. The Commissioner has therefore only investigated the application of section 40 to the names of the party officials withheld and the name of the lawyer also withheld

Chronology

13. On 27 June 2007 the Commissioner began his investigation by contacting the Commission. The Commissioner asked the Commission to disclose to him copies of the un-redacted documents and provide further explanation regarding the application of all the exemptions.
14. On 17 August 2007 the Commission responded providing the Commissioner with an explanation regarding the application of all the exemptions and a copy of the information withheld – annotated to show where each exemption applies.
15. The Commissioner responded on 20 August 2007 explaining that he could see from the information sent through that section 40 had not only been applied to the names of individual nominees but also to the names of other officials. In light of this the Commissioner asked the Commission to give more information as to why disclosure of these names would breach any of the data protection principles. The Commissioner also asked the Commission to review its application of section 36 and 37 in light of the complainant's acceptance of section 40 as applied to nominees' names.
16. The Commissioner wrote again on 17 September 2007 asking the Commission for a copy of the legal advice referred to in the application of section 42 to

paragraphs within the withheld information. The Commissioner also asked for confirmation as to whom the minutes had been distributed to.

17. The Commission responded on 5 October 2007 providing further information regarding the distribution of the minutes and informed the Commissioner that it had now reviewed the application of sections 36 and 37 and disclosed some further information to the complainant.
18. The Commissioner wrote again on 18 October 2007 requesting further information regarding the application of section 42 and for a copy of the legal advice to which it refers. On 19 October 2007 the Commissioner telephoned the Commission to ask further questions regarding the application of section 40.
19. The Commission responded on 31 October 2007 providing further explanation regarding the application of section 42 and providing a copy of the legal advice, and the instructions to Counsel.
20. The Commissioner contacted the Commission on 27 November 2007 to ask the Commission to explain in more detail the positions of the two lawyers named in the minutes.
21. The Commission responded on 5 December 2007 explaining that one of the lawyers is a senior civil servant whose name could now be released, however the other lawyer is a junior civil servant and it still believed this name should be withheld.

Findings of fact

22. The Commission was established in 2000 and its key role is to recommend to Her Majesty the Queen, people for appointment as non-party-political life peers. It also carries out a vetting function in which it offers advice to the Prime Minister on the propriety of all nominations (including those from political parties) for membership of the House of Lords. The Commission carries out enquiries with political parties, government departments and the Electoral Commissioner.
23. The information being withheld is:
 - Developing the Commissioner Vetting Policy (part II):
 - Para 3, the names of two party officials and one civil servant (section 40); Para 5 – half a sentence redacted under section 36; Para 6 – withheld in full under section 36 and 37
 - Minutes of the Vetting Sub-Committee 3 November 2005
 - Para 3-8 in full withheld under section 37.
 - Minutes of the 32nd Meeting held on 16 November 2005
 - Para 6-11 withheld under section 37
 - Minutes of the 33rd Meetings held on 6 December 2005
 - Para 4 – withheld under section 42; Para 5-11 withheld under section 37
 - Minutes of the 34th Meeting held on 16th January 2006

- Name of one solicitors withheld under section 40; Para 4-5 – withheld under section 42; Para 8-13 – withheld under section 37
- Rejecting Unsuccessful Nominees Paper
 - Para 2-12 – withheld under section 36
- Minutes of the 36th Meeting held on 21 February 2006
 - Para 2-6 withheld under section 37
- Minutes of the 37th Meeting held on 9 March 2006
 - Para 2-6 – withheld under section 37; Para 7-8 – withheld under section 42

Analysis

Exemption: Section 36(2)(b)(ii) 'Prejudice to the effective conduct of public affairs'

24. Section 36(2)(b)(ii) states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to prejudice the free and frank exchange of views for the purposes of deliberation.
25. Information can only be exempt by virtue of section 36 if 'in the reasonable opinion of a qualified person' disclosure would be likely to lead to the above adverse consequences. In order to satisfy himself that the exemption is engaged the Commissioner must:
- Establish that an opinion was given
 - Ascertain who is the qualified person or persons
 - Ascertain when the opinion was given
 - Consider whether the opinion was objectively reasonable and reasonably arrived at.
26. The Commission has explained that the qualified person is the Chairman of the Commission. In considering the disclosure of the first set of minutes, his opinion was sought on the 21 December 2005 and given on 25 January 2006, at the internal review of this decision his opinion was sought on the 6 March 2006 and given on 9 March 2006. In considering the disclosure of the remaining minutes his opinion was sought on 22 May 2006 and given on 26 May 2006 and at the internal review of this decision his opinion was sought on 15 June 2006 and given on 4 July 2006.
27. In the document entitled 'Developing the Commission's Vetting Policy' section 36 was applied to the names of officials, half a sentence identifying a political party and a further paragraph. In considering the application of section 36 to these redactions the qualified person concluded that the information should not be disclosed as to do so would be likely to inhibit officials employed from contributing their views frankly and freely. In expanding on this the qualified person stated that they are likely to feel inhibited in expressing their party's views for fear of their identity being made public and a particular individual being associated with the view. The Commissioner considered that, for the purposes of the deliberation of policies proposed by the Commission there was a need to ensure that those

asked for their view on such proposal could given them honestly and that free and frank discussion could be maintaining. The qualified person stated that if this were to happen the developing of policy by the Commission would be prejudiced.

28. In the paper 'Rejecting Unsuccessful Nominees' paragraphs 2-12 have been withheld under section 36. The Commission explained that these paragraphs discuss policy development and in the qualified persons reasonable opinion disclosure would be of little public interest and would prejudice the free and frank discussion. He further found that the Commission needs space to develop its thinking and to explore options when developing policy or deliberating upon matters relating to its work, to do so effectively it needs to be able to exchange views in an open and candid manner. This includes making comments and communicating its opinions on political parties and the Government.
29. The Commissioner has considered the evidence which was before the qualified person when they arrived at their opinion. The Commissioner notes that the qualified person was briefed about the nature of the requested information, and given advice about relevant issues concerning the application of the exemption. Having considered this evidence, the Commissioner is satisfied that in this case the opinion of the qualified person was both substantially and procedurally reasonable in concluding that it was likely that disclosure of the requested information would, or would be likely to, lead to the relevant prejudice. The exemption is therefore engaged. It now falls to the Commissioner to consider the public interest arguments in either maintaining or disclosing the requested information.

Public Interest Test

30. Section 36 is a qualified exemption and is therefore subject to the public interest test. In balancing the public interest arguments the Commissioner must determine if the public interest lies in maintaining the exemption or in disclosing the information.
31. The Commission explained that it had considered whether there was any public interest in disclosure of the redacted information and whether releasing this information would in any way contribute to the public interest in knowing how the Commission's policies were developed. This was balanced against a clear public interest in the Commission developing appropriate and robust policies to which important stakeholders had had the opportunity to contribute to in an open and frank manner.
32. The Commission concluded that there was little public interest in the redacted information being made public and that doing so would not, in any significant manner, contribute to the transparency of the Commission. The Commission found that the public interest in seeing the redacted information was outweighed by the public interest in free and frank discussions between the Commission and its stakeholders as this was important in assisting the Commission in developing appropriate policies in order to conduct its work effectively.

33. In reaching his decision as to where the balance of the public interest lies, the Commissioner has considered the content of the redacted information. The first redaction consists of the names of party political officials; the second redaction refers to the name of a political party, this in the context of a previous sentence which indicates an opinion of the approach which should be taken by the Commission on a specific issue; the third redaction discusses a proposal; and the final redaction under section 36 discusses the policy and procedures for rejecting unsuccessful nominees.
34. The Commission's argument is that disclosure of the information contained in all the redactions would lead to members of the Commission being more inhibited in expressing their views which would undermine the Commission's ability to robustly and effectively develop its policies which would not be in the public interest. Specifically the Commission would not be able to operate as effectively as it does if the stakeholders felt inhibited in offering their views for fear of them being made public.
35. The redacted names appear in a paragraph suggesting that the three political parties had been consulted and all agreed on the Commission's proposals, the remainder of the paragraph has been disclosed to the complainant and the Commissioner is not convinced that the severity and extent of the prejudice demonstrated by the argument that disclosing the names would inhibit the party political officials from contributing fully to the policy process; outweighs any public interest in disclosure of the information. The Commissioner also notes that the public would expect party political officials to be involved in the process and to be consulted on new proposals. The information disclosed already indicates an accord from all three political parties of the Commission's new proposals.
36. The redaction in paragraph 5 is the end part of a sentence within a paragraph which has been disclosed to the complainant. The sentence suggests a preferred approach by the Commission to the 'residency qualification'. Paragraph 6 has been redacted in its entirety and discusses a new proposal and reactions. The Commissioner has viewed the redactions and considered that disclosure, rather than having the negative effect described by the Commission, would add to the public understanding of the issues being discussed and provide the public with a complete picture regarding this paper.
37. The information redacted from the Unsuccessful Nominees Paper in paragraphs two and three sets out the remit of the paper. The remaining paragraphs summarise the situation regarding the status of certain groups of nominees and the next steps for each group. These steps include sending out one of three draft letters which have been disclosed to the complainant. Having read the information the Commissioner does not believe that disclosure would have the adverse effect of inhibiting stakeholders, much of the discussions are factual or outline proposals to take forward certain nominees or how to handle their rejections. The information does not detail discussions, opinions or debates but outlines the options and offer a way forward for the Commission.
38. Whilst the Commissioner accepts that some stakeholders may feel more inhibited from disclosure of the information withheld under section 36 he is not convinced

that this argument is strong enough to outweigh the public interest in disclosure of the information.

39. The Commissioner had considered that at the time of the request the Commission's work had a high profile in the media due to the 'cash for honours' news item which in March 2006 led to a police inquiry into allegations of the sale of honours and peerages under the Honours (Prevention of Abuses) Act 1925. Disclosure of the information would have been, and continues to be in the public interest as it provides further transparency into the Honours process, will allow the public to robustly scrutinise the system currently in place and inform public debate into the appointments process. The Commissioner also notes that providing further information would help improve public confidence in the work of the Commission following the 'cash for honours' debates.
40. For these reasons the Commission finds that section 36 is engaged but the public interest favours disclosure. Accordingly the information requested covered by section 36 is not exempt from disclosure.

Section 37 'Communications with Her Majesty, etc. and honours'

41. Section 37(1)(b) provides that information is exempt if it relates to the conferring of any honour or dignity. This is a class based exemption and for it to be engaged the information in question must relate to the conferring of any honour, there is no prejudice to consider.
42. The Commission found that the information redacted from the papers and minutes relates to peerage appointments which are dignities conferred by the Crown and the redacted information relates to the process behind these appointments.
43. Some of the information redacted also relates to the conferring of a dignity on particular individuals and the Commission states it is therefore also covered by the exemption. The Commission explained that at the time of the request it was in the process of vetting a number of nominees when their names appeared in the media as a result of a leak.
44. The Commissioner is satisfied that the information redacted under section 37 relates to the conferring of an honour or dignity and that the exemption is therefore engaged.

Public Interest Test

45. Section 37 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
46. The Commission recognises that if appointments are to be valued the public will wish to know that the processes behind it are objective, accountable and

transparent. The Commission acknowledged the importance of public confidence in the integrity of the system and states it ensured it had taken the appropriate steps to make its policy and procedures known to the public. The Commission also stated that much of the information contained in the minutes was considered exempt under section 37 but having considered the public interest it was able to disclose the majority of this. However there was a need to record some confidential discussions about the policy behind the process especially relating to particular individuals.

47. The Commission found that the public interest in maintaining the exemption outweighed the public interest in disclosure as there was a need to maintain free and frank discussion, in order to reach agreement and to carry out its vetting role thoroughly. The Commission also argued that it has in place transparent policies and processes as to how the vetting process is conducted which is sufficient to protect the public interest in only suitable candidates being recommended for appointment.
48. The Commission also explained that at the time of the request it was in the process of vetting a number of nominees when their names appeared in the media as a result of a leak. The Commission felt that release of the information would not be in the public interest as it would have fuelled public speculation into what is a confidential process involving personal information. The vetting inquiries were incomplete when the minutes were written and the release of this information would have been likely to cause damage to some individuals who were in fact above question.
49. In reaching a decision as to where the public interest lies the Commissioner has considered the content of the information withheld and also the fact that the complainant has not disputed the application of section 40 to the names and other identifiers of individual nominees.
50. Having viewed the information the Commissioner finds that disclosure would increase transparency in the honours system and lead to increased public confidence in a system which has come under much recent criticism. Whilst the Commissioner recognises the concerns of the Commission he notes that all information which would lead to individual nominees being identified has been redacted and this is not in dispute.
51. The Commissioner finds that the public interest favours disclosure of the information withheld under section 37.

Section 42 'Legal professional privilege'

52. Section 42 of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.

53. Section 42 has been applied to paragraphs in the minutes of the meeting held on 6 December 2005 and the meeting held on 9 March 2006. The Commission state that this relates to advice given verbally by legal advisers at the meeting. As it is advice given by legal advisers, it attracts legal professional privilege. The Commission explained, in relation to the information withheld at paragraph 4 and 5 of the minutes of 16 January 2006, that whilst the content of these paragraphs did not reiterate the written advice or set out any details of that advice it does indicate the confidential subject matters on which legal advice was sought. On further clarification the Commission explained that what is being protected is the information contained in the instructions to their lawyers as well as the fact that legal advice was sought on a specific subject.
54. The Commissioner has viewed the information and considered the explanations provided by the Commission. The Commissioner notes that for the information to attract legal professional privilege it must consist of confidential communications made for the purposes of obtaining or providing legal advice. There is no requirement that the legal advice must relate to litigation.
55. The Commissioner is satisfied that the information withheld in response to the complainant's request under section 42 is confidential legal advice obtained by Commission from internal counsel.
56. The Commissioner is therefore satisfied that a claim to legal professional privilege could be maintained so that the exemption at section 42 of the Act is engaged.

Public Interest Test

57. Section 42 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information withheld under section 42
58. The Commission considered the public interest in this information and recognised the fact that transparency in the decision-making process and access to information upon which decisions have been made can enhance accountability. However, it also recognised that it is in the public interest that the decisions taken by the Commission are taken in a fully informed legal context without the fear of such advice being placed in the public domain.
59. The complainant argued that the appointment process for the House of Lords is currently a matter of intense public controversy. It is strongly in the public interest that debate on this matter is well informed. Proper public scrutiny of the Commission's work will assist in it adopting effective and appropriate procedures which will also have public support. The complainant further stated that if there is any process in a democratic society which requires full public confidence in its integrity, it is the process by which members of a legislative assembly get their position. This, he argued, can only be achieved through a policy of maximum openness.

60. The Commissioner recognises that there are strong public interest arguments for disclosing the information as disclosure would allow the public to understand the basis for Commission's decision making and outline any legal justification it has for certain decisions. However, The Commissioner is mindful that there is a strong element of public interest inherent in legal professional privilege which must be taken into account when considering the application of section 42. The Commissioner notes the tribunal case of *'Bellamy vs. the Information Commissioner and the DTI'* in which the Tribunal concluded that:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut cases"

61. The Commissioner has considered the arguments put forward by the Commission and considers these reasons demonstrate a strong argument for maintaining the exemption. These reinforce the strong public interest inherent in the notion of legal professional privilege. Whilst the Commissioner is mindful of the strong public interest in greater public understanding of how the Commission reaches decisions, there is a risk that disclosing confidential legal advice could undermine the Commission's ability to obtain this advice in a timely fashion and have confidence that the advice given is done so freely without the consideration of its wider disclosure.
62. For these reasons, the Commissioner has concluded that the public interest in maintaining the section 42 exemption outweighs the public interest in disclosure. Accordingly, the information requested covered by section 42 is exempt from disclosure.

Section 40 'Personal data'

63. Section 40 provides that information is exempt if the information is the personal data of someone other than the applicant, 'third party data', and disclosure of the information would breach any of the data protection principles. The term 'personal data' includes information about a living individual from which that individual can be identified.
64. In order for the Commissioner to reach a decision as to whether section 40 has been applied correctly the Commissioner must first consider if the information is personal data and then decide if disclosure would breach any of the data protection principles.
65. The complainant has not disputed the application of section 40 to the names of nominees and information which could lead to their identification, therefore the Commissioner has only considered the application of section 40 to the names of party officials and the lawyer within the documents. The Commissioner has considered the definition of personal data as defined in the Data Protection Act 1998:

*'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

66. The Commissioner considers the names of the officials and lawyers clearly falls within the definition of personal data this is because this information relates directly to an identifiable living individual. The Commissioner must therefore consider if disclosure would breach any of the data protection principles. The Commission has argued that disclosure would breach the first data protection principle which has two components:

The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

67. In considering whether disclosure of the names would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individuals reasonable expectations of what would happen to their personal data;
- The seniority of the persons in question;
- Whether they have refused to consent to the disclosure of the requested information;
- Whether disclosure would cause any unnecessary or unjustified damage; and
- The legitimate interests of the public in knowing the identities of the officials and lawyers, against the effects that disclosure may have on them

68. The Commission has argued that the party officials would have reasonably expected that their names not be placed in the public domain as they were participating in a representative capacity. It considered, therefore that disclosure of this information would have been unfair processing. The Commission clarified that the issue of anonymity was not discussed with the parties at the time as there was little evidence, at the time of the meeting, that the disclosure of the names would have caused them any unnecessary or unjustified damage or distress. The Commission also explained that disclosure of the name of the lawyer who was advising the Commission on its legal matters would also breach the first principle as it was of the view that the lawyer would expect their name to be kept out of the public domain in relation to advice given on a sensitive issue which at the time of the request had a great deal of media interest associated with it. The Commission

is of the view that the lawyer would not have expected their name to be made public as the release of such information would have been likely to have led to unwarranted media attention, causing unnecessary and unjustified distress. The Commission also clarified that the lawyer name being withheld is a junior civil servant.

69. Given the Commission's explanation the Commissioner does accept that the party officials had an expectation that their names would not be disclosed, however, the Commission has acknowledged that there was little evidence that disclosure would cause them unnecessary or unjustified damage or distress.
70. In relation to the lawyer, the Commission have demonstrated that as a junior civil servant they would not have expected their name to be placed in the public domain. The Commission has also demonstrated that disclosure may have caused them unnecessary damage and distress due to the high profile nature of the Commission's role and the media attention at the time.
71. In relation to the application of section 40 to the party official names, whilst they had an expectation that their names would not be disclosed, this does not necessarily mean that this expectation is a reasonable one. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. The Commissioner considers that public sector employees and those who work in carrying out public sector functions should expect some information about their roles and the decisions they take to be disclosed under the Act.
72. This approach is supported by a recent Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'
73. The names redacted are that of three party officials from each of the three main parties, the Commission explained they were acting as a representative for their party in an official capacity. The Commissioner is satisfied that this, combined with the assertion by the Commission that disclosure would not cause them any unjustified damage or unwarranted distress, demonstrates that disclosure of the official's names would not be unfair or unlawful.
74. In relation to the application of section 40 to the names of the lawyer the Commission has argued that the lawyer would have had a reasonable expectation of anonymity; and that disclosure would cause unnecessary and unwarranted damage or distress due to the high profile 'cash for honours' inquiry taking place at the time. The Commissioner notes that the lawyer is a Treasury Solicitor acting in an official capacity to provide legal advice to the Commission.

However, the Commission have also explained that the lawyer's name being withheld is a junior civil servant who accompanied a more senior civil servant on an ad hoc basis. The Commissioner believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions.

75. The Commissioner is satisfied that disclosure of the name of the lawyer who is a junior civil servant would be unfair and unlawful. The name of the lawyer being withheld is therefore exempt under section 40(2). However, the Commissioner has also found that disclosure of the names of the party officials would not be unfair or unlawful; he must therefore go onto consider if disclosure of their names would comply with the first data protection principle.

76. In order to comply with the first data protection principle it is necessary to satisfy one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is six. This states that:

'the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

77. The Information Tribunal in *House of Commons v Information Commissioner and Norman Baker MP* commented on how condition 6 should be interpreted and applied. The Tribunal found that the application of condition 6:

'involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 [i.e. condition 6] requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this case are members of the public...and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs'. (Tribunal at paragraph 90).

78. The Tribunal also found that 'because the processing must be "necessary" for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should personal data be disclosed'. Thus the burden of proof built into the public interest test that is applied to qualified exemptions is reversed. However, the Tribunal also noted that as a distinction can be drawn between information which relates to an individual's private life and an individual's public life, it suggested that 'the interests of the data subjects...are not necessarily the first and paramount consideration where the personal data being processed relate too their public lives'. The Tribunal's approach to condition 6 has influenced the Commissioner's view in this case.

79. In considering the legitimate interests of the data subject the Commissioner has considered the Commission's assertion that the disclosure of the names of the party official would not cause them any unjustified or unwarranted distress or damage. The Commissioner has also considered the assertion that due to the high profile nature of the Commission's role at the time disclosure would have led to media scrutiny of the individual's names. However, press coverage at the time did not focus on the role of the Commission but on the specific politicians and members of political parties.
80. The Commissioner has gone on to consider the legitimate interests of those to whom the data would be disclosed. The Commissioner believes that there is a strong public interest in disclosure of the names of individual which would enhance the transparency and openness of a process which has been tarnished by recent media attention. After considering the above points the Commissioner has concluded that the legitimate interests of those to whom the information would be disclosed outweighs those of the data subjects.
81. The Commissioner finds that the information is personal data but that disclosure of the names of the party official would not be in breach of the first data protection principle and that the information is therefore not exempt by virtue of section 40 of the Act.

The Decision

82. 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:
- (i) the application of section 42 to some of the requested information
 - (ii) the application of section 40 to the name of the lawyer withheld.
83. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- (i) the application of section 36 as the public interest favours disclosure of the information.
 - (ii) the application of section 37 as the public interest favours disclosure of the information.
 - (iii) the application of section 40 to the names of party officials.

Steps Required

84. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- (i) Disclose the information withheld under sections 36 and 37.

(ii) Disclose the names of party officials and two lawyers withheld under section 40.

85. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

86. 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

87. 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 12th day of March 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
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Cheshire
SK9 5AF**

Legal Annex

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides that –

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

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

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,

- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Communications with Her Majesty.

Section 37(1) provides that –

“Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household, or
- (b) the conferring by the Crown of any honour or dignity.”

Section 37(2) 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).”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) 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), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Legal Professional Privilege

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.”