

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 3 April 2008

Public Authority: The Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Department of Health (the "DoH") relating to a report published by the Standing Dental Advisory Committee in November 2003, entitled "Conscious Sedation in the Provision of Dental Care." The complainant requested copies of all minutes and correspondence relating to meetings and conclusions reached whilst this report was being drafted. The DoH withheld this information and cited section 35, arguing that the information related to the formulation or development of government policy. After investigating the case the Commissioner decided that the information in question did not relate to the formulation or development of government policy, and therefore he does not believe that the exemption is engaged. However, he does believe that the withheld information contains some information that is exempt from disclosure under section 40(2). Therefore he believes that the information in question should be disclosed, with the above personal data redacted. The Commissioner also decided that the DoH had failed to meet the requirements of section 17 of the Act.

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 Act. This Notice sets out his decision.

The Request

2. On 21 June 2005 the complainant emailed the DoH and requested the following information under the Act:

“All minutes and correspondence relating to meetings and conclusions reached in formulating the Standing Dental Advisory Committee “Conscious Sedation in the Provision of Dental Care” A Report of an expert group on sedation for dentistry commissioned by the Department of Health 2003.”

For ease of reference the report, “Conscious Sedation in the Provision of Dental Care”, will be referred to as the ‘Conscious Sedation Report’ throughout the rest of this Notice.

3. The DoH responded to this, and another request made by the complainant, in an undated letter sent to the complainant sometime prior to 18 July 2005. However, this letter did not answer the complainant’s request of 21 June 2005.

4. In an email dated 18 July 2005 the complainant contacted the DoH again and stated,

“I request that you furnish me with all minutes, communications and relevant information of the Standing Dental Advisory Committee for Conscious Sedation in the Provision of Dental Care, Report of an expert group on sedation for dentistry, commissioned by Department of Health, 2003.”

5. The DoH acknowledged this email in a letter dated 6 September 2005. This letter stated,

“With regard to the report of the Expert Group on Conscious Sedation convened by the Standing Dental Advisory Committee...As our earlier letter indicated, we considered that these papers were exempt from disclosure under section 35 of the Freedom of Information Act, relating to the formulation and development of government policy...this decision and the handling of the request will be reconsidered in the internal review.”

The ‘earlier letter’ referred to here was the undated letter referred to in paragraph 3 above. However as stated above this earlier letter did not refer to the complainant’s request of 21 June 2005, nor to information being withheld under section 35. As the letter of 6 September 2005 contains the first reference to the complainant’s request and the first reference to information being withheld under section 35 the Commissioner has taken the view that this forms the DoH’s refusal notice.

6. The DoH conducted an internal review, and in a letter dated 1 November 2005 informed the complainant,

“I am afraid that we remain of the view that these papers are exempt from disclosure under section 35 of the Freedom of Information Act, relating to the formulation and development of government policy. We have examined all the relevant papers and concluded that the exemption was correctly applied and that there are no grounds for seeking to overturn the Department’s decision to withhold this information. We accept the public

interest is served when people are able to assess the quality of advice supplied to Ministers and subsequent decision making. However these benefits have to be weighed against the need for objective advice and any deterrent effect disclosure might have on external experts who might be reluctant to provide advice if it could be disclosed in the future. In particular, we consider that advisers should be able to put forward innovative ideas without the fear that nascent proposals could be held up to ridicule.”

7. The DoH informed the complainant of his right to complain to the Information Commissioner.

The Investigation

Scope of the case

8. On 1 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the refusal to disclose the information in question was appropriate.
9. Although the complainant did not raise the point, the Commissioner has also considered whether the DoH breached section 17 of the Act.

Chronology

10. The Commissioner wrote to the complainant on 3 July 2007 and asked him to provide a copy of his initial request to the DoH, together with a copy of his request for an internal review.
11. The complainant was unable to provide the Commissioner with this. Therefore the Commissioner contacted the DoH on 16 July 2007 and asked whether it could provide him with a copy of these documents.
12. The DoH acknowledged this letter in a telephone call on 19 July 2007. During this conversation the DoH informed the Commissioner that there had been a problem when it issued its initial refusal to the complainant as this had not made any reference to the request, but that it had attempted to address this when it carried out the internal review (the Commissioner believes that this reflects the letter referred to at paragraph 3 above). It went on to confirm that it would be providing the Commissioner with a copy of the information he had requested. The DoH subsequently provided the Commissioner with a copy of the complainant's initial request, together with a copy of his request for an internal review, in a letter dated 20 July 2007.
13. The Commissioner wrote to the DoH again on 25 July 2007 and asked for a copy of the withheld information, together with its submissions in support of its use of

- section 35. He also asked it for information as to how it had carried out the public interest test.
14. The Commissioner did not receive a response to this letter. He contacted the DoH again on 31 August 2007 and asked for a response to his previous letter by no later than 18 September 2007.
 15. Despite this the DoH failed to provide the Commissioner with a response. He contacted the DoH by way of a telephone call on 25 September 2007. The DoH informed him that the response had been drafted but needed to be finalised, and that it would respond by 2 October 2007.
 16. Having received no response, the Commissioner contacted the DoH again on 4 October 2007. He was told that the response was still in draft form, and that the DoH would respond by 12 October 2007.
 17. Having received no response, the Commissioner emailed the DoH on 15 October 2007, and informed it that unless he received a response to his letter by 17 October 2007 he would issue an Information Notice.
 18. The DoH responded by way of a telephone call on 15 October 2007 and advised the Commissioner that it would need another two weeks before it was able to provide a substantive response, as the response was still in draft form. It asked for an extension to the deadline for response.
 19. The DoH then contacted the Commissioner by way of a telephone call on 16 October 2007. It informed him that the drafting of the response had been completed, that the response was awaiting approval, and that it was hopeful that the response would be issued by the end of the following week. It again asked for an extension to the deadline for response.
 20. The Commissioner refused to extend the deadline any further, and he informed the DoH that he believed it was appropriate for him to issue an Information Notice in regard to this case.
 21. The Commissioner issued an Information Notice on 17 October 2007.
 22. The DoH provided a substantive response on 5 November 2007. It provided a copy of the information it believed had been withheld, together with its submissions as to the application of section 35.
 23. The Commissioner contacted the DoH on 22 November 2007. He informed the DoH that after examining the information supplied to him it appeared that it did not fall within the scope of the request, as this information related to a report published in 2005, whilst the request was concerned with a report published in 2003. He gave the DoH a further description of the information that would fall under the complainant's request, and again asked for copies of the information withheld by the DoH, together with its submissions as to why it believed that this information should be withheld. He asked the DoH to respond within ten working days of receipt of the letter.

24. The DoH contacted the Commissioner by way of a telephone call on 11 December 2007 and informed him that it was not yet in a position to provide a response to his letter.
25. The DoH contacted the Commissioner again by way of a telephone call on 18 December 2007 and informed him that it was still not in a position to provide a response to his letter.
26. The DoH emailed the Commissioner on 19 December 2007 and offered an explanation as to why it had sent the wrong information. It explained that there had been a misunderstanding regarding the wording of the request, which had led it to believe that the request related to a later report which had been published in 2005. The DoH informed the Commissioner that it had now identified a number of documents which related to the request and would be forwarding these to the Commissioner shortly. It informed the Commissioner that it expected to be in a position to provide him with its arguments as to the application of the exemption by no later than 11 January 2008. In further communications that day the DoH provided the Commissioner with copies of the withheld information.
27. However, as the DoH had still not provided its submissions as to its use of the exemptions in relation to this information one of the Commissioner's solicitors wrote to the DoH on 20 December 2007. This letter reiterated the points made in the letter of 22 November 2007 (see paragraph 23 above), and asked for a full response by no later than 11 January 2008. This letter informed the DoH that if a full response was not received by this date the Commissioner would consider taking legal action.
28. The DoH contacted the Commissioner by way of a telephone call on 3 January 2008, and confirmed that it intended to provide a response by 11 January 2008.
29. On 10 January 2008 the DoH wrote to the Commissioner and provided a schedule of the withheld documents, together with its submissions as to why it believed that the information was exempt from disclosure. The DoH provided the Commissioner with background information as to the commissioning of the Conscious Sedation Report, and confirmed that it was still seeking to rely upon section 35(1)(a) to withhold the information, as it believed that it related to the formulation or development of government policy. The DoH also provided arguments as to why it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure.
30. In a letter dated 24 January 2008 the Commissioner contacted the DoH again. He explained that after examining the withheld information provided to him by the DoH there appeared to be unexplained gaps in that information. He listed these and asked the DoH to confirm whether it held any further information relating to these gaps. He also stated that if the DoH no longer held the information which related to these gaps it should inform him of this. He asked the DoH to respond within ten working days of receipt of the letter.

31. The Commissioner did not receive a response to this letter and wrote again to the DoH on 13 February 2008. He asked the DoH to provide a response to his previous letter by no later than 21 February 2008.
32. The DoH responded in a letter dated 19 February 2008. It informed him that it had provided all the information it held which related to this request, and provided an explanation as to why it did not hold any further information. Based on this explanation the Commissioner is satisfied that the DoH has provided him with all the information it holds which relates to this request.

Background Information

33. In 2001 the Chief Dental Officer approached the Standing Dental Advisory Committee (the "SDAC") and asked it to conduct a review of the guidelines on the use of conscious sedation in dental care.
34. The SDAC was established in 1946 to advise the Secretary of State for Health and the Central Health Services Committee on matters relating to services provided under the National Health Service Act 1946.¹
35. The terms of reference for the SDAC, as amended in the National Health Service Act 1977, state:

"It shall be the duty of a committee so constituted to advise the Secretary of State:

 - a. upon such matters relating to the services with which the committee are concerned as they think fit, and
 - b. upon any questions referred to them by the Secretary of State relating to those services."
36. The SDAC commissioned an expert working group, and a consultation was conducted, with the purpose of seeking comments on the suggested guidelines for conscious sedation. Following this consultation period the Conscious Sedation Report was published in November 2003, and is available on the DoH website.²

Analysis

¹ www.advisorybodies.doh.gov.uk/sdac/index.htm.

² www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4069257

Procedural matters

Section 17

37. Section 17(1) states that a public authority which is relying on a claim that the information is exempt must, within the time for complying with section 1, issue a refusal notice which:
- (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.

The full text of section 17 can be found in the Legal Annex at the end of this Notice.

38. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request.
39. The complainant made his request on 21 June 2005. The DoH did not issue a refusal notice until 6 September 2005.
40. This is outside of the twenty working days required by section 10 of the Act. The refusal notice was therefore in breach of section 17(1) of the Act.
41. Section 17(3)(b) requires that a public authority which in relation to a request for information under the Act is relying upon an exemption which is subject to a public interest test must in a refusal notice state the reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
42. The Commissioner notes that in this case although the letter dated 6 September 2005 referred to section 35, it did not provide any information as to how the DoH carried out the public interest test.

Exemptions

Section 35

43. Section 35(1)(a) of the Act provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption, and is therefore subject to the public interest test.
44. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy. The Commissioner's Awareness Guidance on section 35 states that in defining what government policy is,

“...there is a general consensus that policy is about the development of options and priorities for ministers, who determine which options should be translated into political action and when. The white paper 'Modernising

Government' refers to it as the process by which governments translate their political vision into programmes and actions to deliver 'outcomes' or desired changes in the real world...The information must relate to government policy as compared to 'departmental policy' or any other type of policy. This suggests that it is policy which requires Cabinet input, or represents the collective view of ministers or that it applies across government. This also suggests that it is a political process."³

45. Therefore an important consideration when determining whether something constitutes government policy is whether it involves an element of political decision making by members of the government, for example some form of ministerial consideration of an issue, or the exercise of a political judgment as to the direction to take on an issue or what priority to give to competing demands.
46. The Commissioner acknowledges that although the existence of political decision making in a process is a strong indicator that something constitutes government policy, this is not always an essential ingredient. Therefore the Commissioner has gone on to consider the nature of the requested information itself, the Conscious Sedation Report (which was the result of the requested information), and whether the Report relates to government policy.
47. The DoH has explained to the Commissioner that the commissioning of the Conscious Sedation Report was a policy review, which was carried out against a background of concerns raised about the use of sedation in dentistry. In its letter to the Commissioner dated 10 January 2008 the DoH stated that,

"A new policy had to be developed on the use of conscious sedation in dentistry. Accordingly in December 2001 the Department's Chief Dental Officer asked the Chair of the [SDAC] to conduct a review. SDAC were approached because clinical issues were involved on which the views of practising dentists and anaesthetists were required...The terms of reference of the [SDAC], as amended by the NHS Act 1977, state that "It shall be the duty of a committee so constituted to advise the Secretary of State upon such matters relating to the services with which the committee are concerned as they may think fit...".
48. The Commissioner has also noted the DoH's comments in its letter to him dated 5 November 2007. In this letter the DoH also referred to the SDAC's terms of reference, and argued that, "The fact that the report was produced under the SDAC's remit to provide advice to Ministers is in our view sufficient justification for invoking the exemption provided by section 35(1)(a)."
49. The Commissioner is aware that the DoH's comments in this letter were (mistakenly) referring to a different report to that referred to in the request. However, given the reference to the SDAC's terms of reference in the DoH's letter of 10 January 2008, and the close similarity between the report of 2005 (which also related to sedation in dentistry) and the Conscious Sedation Report, he believes that these comments reflect the DoH's position regarding the

³ Freedom of Information Awareness Guidance No.24, page 4

application of this exemption – namely that due to the SDAC's terms of reference the Conscious Sedation Report, and the background material to that Report, represent government policy.

50. The Commissioner is not persuaded by this argument. Clearly the terms of reference under which the SDAC operates mean that there will be occasions when reports produced by it will feed into the government's policy making process. However, it does not automatically follow that any piece of work produced by the SDAC relates to government policy.
51. Furthermore, although the DoH has stated that the Conscious Sedation Report was produced under the SDAC's duty to advise the Secretary of State upon such matters as they may think fit, after considering the contents of the Conscious Sedation Report it appears that in this instance rather than being advice to the Secretary of State, the Report was instead a document produced to give best practice guidance on the use of conscious sedation in dental care to dental practitioners.
52. In reaching this view the Commissioner has noted that in the Foreword of the Conscious Sedation Report the Chief Dental Officer discusses the background to the commissioning of the Report, and states,

“Recognising the need for clarity about the appropriate standards for conscious sedation the Standing Dental Advisory Committee established an expert group to make recommendations on good practice. This report provides recommendations for all practitioners providing conscious sedation whether in primary care or in hospitals.”⁴
53. The Commissioner has also noted a comment in the Preface which states that,

“...despite the publication of authoritative guidelines and reports on pain and anxiety control for dentistry it has become evident that there remain some areas where there is an element of confusion or lack of consensus...The following recommendations are designed to fully endorse and build upon the generic guidance and lay down specific guidance for the practice of Conscious Sedation in the provision of dental care.”⁵
54. The Conscious Sedation Report draws upon a body of previously published guidance, such as, “A Conscious Decision; Report of an expert group chaired by the Chief Medical Officer and Dental Officer,” which was published by the DoH in July 2002; and, “Implementing and Ensuring Safe Sedation Practice for Healthcare Procedures in Adults,” which was published by an intercollegiate working party under the auspices of the Academy of Medical Royal Colleges, and chaired by the Royal College of Anaesthetists in November 2001. The Commissioner has noted that not all this guidance was produced by the DoH.

⁴ Conscious Sedation Report, page 7.

⁵ Conscious Sedation Report, page 13.

55. After considering the contents of the Conscious Sedation Report the Commissioner believes that the Report was designed to build upon a body of pre-existing guidance on the use of sedation in dentistry, which had already been published by various bodies in the health sector and the medical profession.
56. Having considered the information provided to him, the contents of the Conscious Sedation Report, and bearing in mind the above points, the Commissioner does not believe that the information in question relates to government policy.
57. The Commissioner has not been provided with any compelling evidence to show that the Conscious Sedation Report relates to a high level government policy decision on the use of conscious sedation in dentistry. The Report does not set out or reflect goals, objectives or aspirations, nor does it discuss or explore options for the development of a government policy. Instead the Commissioner believes that the Report sets out what an expert group of professionals consider to be best practice, and the practicalities of how to achieve this best practice. As such the Commissioner does not believe that section 35 is engaged.
58. As the Commissioner has found that section 35 is not engaged he has not gone on to consider the public interest test in relation to this exemption.
59. The full text of section 35 can be found in the Legal Annex at the end of this Notice.

Section 40

60. Although the DoH has not cited this exemption, the Commissioner has noted that the information does contain the personal data of some individuals. He has therefore gone on to consider the application of this exemption to the names and contact details of individuals who responded to the consultation process, which took place prior to the publication of the Conscious Sedation Report in November 2003.
61. Section 1 of the Data Protection Act 1998 (the "DPA") defines personal data as data which relate to a living individual who can be identified:
 - from those data,
 - or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
62. In this instance the information in question contains the names, contact details and sometimes job titles of individuals. The Commissioner believes that this information is the personal data of these individuals.
63. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
64. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.

65. The first principle of the DPA requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has firstly considered whether the disclosure of this information would be fair.
66. In order to reach a view on whether the disclosure of this information would be fair he has considered what would have been in the 'reasonable expectations' of the individuals when they replied to the consultation – i.e. what would they reasonably have expected that their personal data would be used for. The Commissioner initially considered the consultation document, *Guidelines for conscious sedation in the provision of dental care*, which was issued by the DoH in December 2002, inviting comments to feed into the production of the Conscious Sedation Report.⁶ Having considered this document the Commissioner notes that there was no statement that the names and identities of individuals taking part in the consultation would be put into the public domain. He also notes, however, that there was no promise of confidentiality given to individuals providing a response to the consultation document.
67. However, the Commissioner believes that given the nature of the consultation process, where individuals (on their own behalf or as a representative of an organisation) were encouraged to give their full and frank opinions on the issue under consultation, those individuals would not have expected that their identities might be put into the public domain. Furthermore he notes that this consultation took place in late 2002 – early 2003, nearly two years prior to the introduction of the Act, and prior to the expectation of openness that the Act introduced.
68. Bearing this in mind the Commissioner believes that it would not have been in the reasonable expectation of the individuals for their names and contact details to be placed into the public domain. Therefore the Commissioner believes that it would be unfair to disclose the names and contact details of the individuals who took part in the consultation process, and as such the disclosure of this information would be in breach of the first principle of the DPA.
69. After forming this view the Commissioner has gone on to consider whether it would be possible to anonymise the consultation responses, by redacting the details of the names and contact details of the third parties.
70. It is the Commissioner's view that removal of the names and contact details of the third parties (except where that included the identity of the organisation the individual responded on behalf of) who provided responses for the consultation would sufficiently anonymise these responses, and that therefore disclosure of this information in this form would not breach the data protection principles.
71. He considers, however, that it is important to note that he does not believe that the comments of those who took part in the consultation process should be withheld. Furthermore he is of the view that when an individual responded to the consultation on behalf of an organisation, the identity of that organisation should not be redacted from the consultation response.

⁶ This is available at http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4016907.

72. The full text of section 40 can be found in the Legal Annex at the end of this Notice.

The Decision

73. The Commissioner's decision is that the DoH did not deal with the request for information in accordance with section 1(1)(b) of the Act in that it incorrectly relied upon section 35(1)(a) to withhold the information in question. The Commissioner also believes that the DoH failed to meet the requirements of sections 17(1) and 17(3).

Steps Required

74. The Commissioner requires the DoH to take the following steps to ensure compliance with the Act:

The DoH should disclose the requested information, except that which the Commissioner believes should be withheld under section 40.

75. The DoH must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

76. 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

77. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 3rd day of April 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Section 17

- (1) 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.
- (2) 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.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -
- (a) that, 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 authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (4)** A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5)** A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6)** Subsection (5) does not apply where –

 - (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7)** A notice under section (1), (3) or (5) must –

 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 35

- (1)** 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.
- (2)** Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

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

- (3) 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).
- (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

- (5) In this section-

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

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

"Ministerial communications" means any communications-

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

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

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

Section 40

- (1) 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.
- (2) 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.
- (3)** 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.
- (4)** 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).
- (5)** 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) he 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).
- (6)** 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.
- (7)** 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.