

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date** 23 June 2008

**Public Authority:** The Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

### Summary

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The complainant wrote to the Cabinet Office to request records of exchanges between Tony Blair and Rupert Murdoch. The Cabinet Office responded to the request by stating that the information could not be disclosed since the cost of complying with the request would exceed the appropriate limit of £600. During the course of the Commissioner's investigation the Cabinet Office altered its position to say that it no longer believed that the cost of complying with the request would exceed the appropriate limit. Instead, it subsequently disclosed some of the information to the complainant but withheld the remainder under section 35 (Formulation of Government Policy), section 40 (Personal Information), section 41 (Information Provided in Confidence) and section 43 (Commercial Interests). Having analysed the withheld information, the Commissioner has decided that all the remaining information should be disclosed to the complainant apart from two sentences within a specified document which he accepts is exempt under section 41. He has also decided that the Cabinet Office breached several procedural provisions of the Act in its handling of the request.

### The Commissioner's Role

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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

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2. On 28 November 2005 the complainant wrote to the Cabinet Office to request “the records of exchanges between Tony Blair and Rupert Murdoch subsequent to Blair’s assuming office as Prime Minister”.
3. The Cabinet Office responded to the request on 28 December 2005. It said that it was unable to comply with the request because to do so would exceed the appropriate limit. It explained that section 12 of the Act makes provision for public authorities to refuse requests where the cost of complying with them would exceed the appropriate limit, which is set at £600 for central government. The public authority suggested that the complainant may wish to refine his request to cover a six month period and said that if he were to do so then it may then be in a position to comply with the request.
4. On 31 January 2006 the complainant wrote to the Cabinet Office to request notes of exchanges between Mr Blair and Mr Murdoch for the six month period immediately following Mr Blair becoming Prime Minister in 1997.
5. The Cabinet Office responded on 28 February 2006 when it confirmed to the complainant that it did not hold any information falling within the scope of the request for the dates requested.
6. On 1 March 2006 the complainant wrote to the Cabinet Office to request an internal review of its handling of his request of 28 November 2005. At the same time he made a new request for information. This was essentially a repeat of the 28 November 2005 request in that the complainant asked to see, amongst other things, all exchanges between Mr Blair and Mr Murdoch for the years 1997 to 2006.
7. The Cabinet Office said that it would deal with the complainant’s request of 1 March as part of the internal review as the new request was substantially similar to the request of 28 November 2005. However, the Cabinet Office failed to respond to either the request itself or the request for an internal review.

## The Investigation

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### Scope of the case

8. On 13 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the Cabinet Office’s failure to disclose to him the notes of exchanges between Mr Blair and Mr Murdoch which he requested on 28 November 2005 and 1 March 2006.

9. The complainant also raised the Cabinet Office's failure to carry out an internal review. However, this issue is not addressed in this Notice because it is not a requirement of Part 1 of the Act.

## Chronology

10. On 18 May 2007 the Commissioner wrote to the Cabinet Office to request an explanation as to how it estimated that the cost of dealing with the request of 28 November 2005 would exceed the appropriate limit. The Commissioner also requested a full breakdown of the costs it expected to incur in dealing with the request.
11. In his letter, the Commissioner also drew the public authority's attention to the fact that, as far as he was aware, it had not yet responded to the complainant's request for internal review and information request dated 1 March 2006.
12. Despite several subsequent reminders the Cabinet Office did not respond to the Commissioner until 17 September 2007. At this point it explained that it had now responded to the complainant's request for an internal review and explained that it had now provided the complainant with further information. The Cabinet Office also provided the Commissioner with a copy of its latest letter to the complainant also dated 17 September 2007.
13. In its letter to the complainant, the Cabinet Office apologised for the delay in handling his request for internal review which it acknowledged was 'completely unsatisfactory'. In respect of the complainant's request for information about exchanges between Mr Blair and Mr Murdoch for the six month period immediately following Mr Blair becoming Prime Minister in 1997, it said that it was satisfied that it was correct to inform him that no information was held. For any information held after this date it said that the complainant had been informed that it would restrict searches for records after that date to a six month period in line with the cost limit £600. However it added that:

*"...the department should have explained that this is because such information might be held either electronically or manually and by a number of people and it was estimated that such a search would take one person three and a half working days in determining whether we hold the information, and locating, retrieving and extracting the information."*
14. The extra information disclosed by the Cabinet Office was a list of the dates of meetings and telephone conversations between Mr Blair and Mr Murdoch from January 1998 to June 2005.
15. On 28 September 2007 the complainant wrote to the Cabinet Office to request copies of these exchanges.
16. Given that the Cabinet Office had neither disclosed the requested information, nor submitted another reason why it believed the information was exempt, the Commissioner assumed that it was maintaining its position that the cost of complying with the request would exceed the appropriate limit. With this in mind

he approached the Cabinet Office on 16 October 2007 to again ask that it explain how it had estimated that the cost of complying with the request would exceed the appropriate limit, noting that it had failed to answer this when responding to his earlier letter.

17. The Cabinet Office responded to the Commissioner on 29 October 2007. It said that the complainant had been provided with a list of meetings / telephone calls between Mr Blair and Mr Murdoch and that therefore section 12 no longer applied. It informed the Commissioner that the complainant had now made a new request on 28 September 2007 to see any notes or minutes of these exchanges and that it was currently considering whether the information falls within one or more of the categories of exempt information listed in part II of the Act.
18. On 20 December 2007, the Cabinet Office provided a submission to the Commissioner in which it provided a comprehensive account of its current position. It provided him with the following:
  - An explanation that the complainant's request of 28 September 2007 was believed to be a new request and was treated as such;
  - A copy of the Cabinet Office's reply to the complainant's request of 28 September 2007, dated 17 December 2007;
  - Its view that the information held in relation to the request of 28 September 2007 is covered by the following exemptions under the Act: - section 35, 40, 41 and 43; and
  - A copy of the information covered by the request of 28 September 2007, annotated to show what exemptions apply.
19. The Cabinet Office's response to the complainant of 17 December 2007 informed him that it holds two documents which are relevant to his request:
  - i. A note dated 29 January 1998 which records a meeting which took place between the then Prime Minister (Tony Blair) and Rupert Murdoch and Mark Booth (BSkyB Chief Executive). Also in attendance were members of staff at 10 Downing Street.
  - ii. A short record of a telephone conversation between the then Prime Minister (Tony Blair) and Rupert Murdoch on 31 July 2002.
20. However, the Cabinet Office provided the following justification as to its application of exemptions to withhold the two documents:
21. Document One – 'Record of meeting'
  - i. Some of the information was withheld under section 41 (information provided in confidence and section 43(2) (prejudice to commercial interests):
    - Information at the meeting was given under the legitimate expectation of confidentiality to ensure that those at the meeting would be as free and frank in their discussions as possible.

- There is a public interest in knowing more about the companies which the Government meets and the subjects discussed with them. However...the information...would, if disclosed, be liable to cause real or significant harm to the commercial interests of the owner of the information.
  - The Government needs to engage in full and frank discussions with stakeholders, including those with commercial interests. Stakeholders need to be able to undertake these discussions without fear that the detailed nature and content of these discussions will be disclosed, resulting in them suffering real competitive damage.
- ii. The remainder of the information within the document is exempt from disclosure by virtue of section 35(1)(a) (formulation or development of government policy) with the public interest in maintaining the exemption outweighing that in disclosure. The following factors in favour and against disclosure of the information were taken into account:

In favour

- A public interest in knowledge of whom the Prime Minister meets since greater transparency will lead to a greater understanding of the way government works, and of the information on which it has based its decisions.
- Disclosure could allow for more informed debate, give a wider number of people the opportunity to contribute to that debate and to increase trust in the quality of the decision making.

Against

- The public interest in ensuring that advice should be broadly based. There may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice in the future because it might be disclosed.
- There is a need to ensure that views can be sought and opinions given honestly and frankly, in order to ensure that decisions are made on the basis of the fullest possible information.

22. Document Two – ‘Record of telephone call’

- i. Some of the information in this document is being withheld under section 40(2) of the Act (Personal Information):
- This information is the personal data of a third party and disclosure of it would contravene the data protection principles in Schedule 1 of the Data Protection Act 1998, and in particular the principle that personal data shall be processed fairly and lawfully.
- ii. For the remainder of the information the public interest falls in favour of disclosure:

*“At the end of the conversation, Murdoch asked how the Government would respond to the House of Lords Report on the Broadcasting Bill. The Prime*

*Minister said that the Government's position had long been clear and we would stick to it. We could not have discrimination between European and American companies operating in the UK. We were committed to an open media policy" (Extract from note)*

## Findings of fact

23. The complainant has been provided with a list of the dates of meetings and telephone conversations between Mr Blair and Mr Murdoch. The list contains 15 dates, the earliest being 29 January 1998 and the last being 18 June 2005. He has also been provided with an extract of a telephone conversation between Mr Blair and Mr Murdoch on 31 July 2002.
24. The Cabinet Office has said that section 12 is no longer being applied to the information the complainant originally requested on 28 November 2005.
25. The extract from the record of the telephone conversation, included in the Cabinet Office's submission to the complainant of 17 December 2007, is the sole information from the two documents which was supplied to the complainant. Exemptions were applied to the remaining contents which continued to be withheld. The withheld information which is the subject of this Decision Notice is therefore the remaining contents of the record of the telephone conversation between Mr Blair and Mr Murdoch on 31 July 2002 and the note dated 29 January 1998 which records a meeting which took place between Mr Blair, Mr Murdoch and Mark Booth (BSkyB Chief Executive).

## Analysis

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26. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

## Procedural matters

### Section 1 – General right of access to information held by public authorities

27. The Commissioner does not accept the Cabinet Office's view that the *list* of meetings and telephone calls between Mr Blair and Mr Murdoch supplied to the complainant on 17 September 2007 adequately covers the scope of his request of 28 November 2005, which the Commissioner considers to include the records of those exchanges.
28. Furthermore, the Commissioner is concerned that the Cabinet Office has treated the complainant's letter of 28 September 2007 as a new request. It is clear that the information the complainant requested at this stage was the information he originally requested on 28 November 2005 (and again on 1 March 2006) and that the complainant believed he had still not received a proper response to that request.

29. However, the Commissioner is satisfied that the Cabinet Office has now accounted for all the information held in relation to the complainant's request of 28 November 2005. That is the list of dates and meetings supplied to the complainant on 17 September 2007 and the two documents the complainant was notified of on 17 December 2007 and supplied to the Commissioner on 20 December 2007. The Commissioner is also satisfied that this information matches the scope of the information held in relation to the complainant's request of 1 March 2006.

### **Section 10 – Time for compliance with request**

30. Section 10 of the Act states that a public authority must comply with section 1(1) not later than the twentieth working day following the date of receipt.
31. As the list of the dates of meetings and telephone conversations between Mr Blair and Mr Murdoch from January 1998 to June 2005 falls within the request of 28 November 2005, the fact that the Cabinet Office did not supply the information until 17 September 2007 means that it breached section 10 of the Act.

### **Section 12 – Cost Limit**

32. Section 12 of the Act provides that a public authority is not obliged to respond to a request if it estimates that the cost of complying with the request would exceed the appropriate limit. Under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 the appropriate limit for central government departments is set at £600.
33. Whilst the Cabinet Office initially said that the cost of complying with the request would exceed the appropriate limit, it has now said that it is no longer applying section 12. However, the Commissioner notes that the Cabinet Office failed to answer the complainant's queries as to how the cost of complying with the request would exceed the appropriate limit. The Commissioner considers it to clearly have been good practice to have issued such an explanation. Nevertheless, as the Cabinet Office no longer wishes to rely upon section 12, the Commissioner has not considered whether it was reasonable in its application of this provision.

### **Section 17 – Refusal of request**

34. The Commissioner takes the view that if, during the course of his investigation, the Cabinet Office concluded that section 12 no longer applied then it should have either disclosed the information to the complainant or else provided an explanation as to why the information could not be disclosed. Following intervention from the Commissioner, the Cabinet Office eventually wrote to the complainant on 17 December 2007 clarifying what information was held in relation to his request, supplying some of it and applying exemptions to the remainder. However, this was more than two years after the complainant's original request. The Commissioner considers this delay in providing a full response to have been unacceptable.

35. Furthermore, in not relying upon these exemptions in the Refusal Notice of 28 December 2005, the Cabinet Office breached section 17(1) of the Act, which requires that such a notice is sent within twenty working days of the receipt of a request.

## Exemptions

### Section 40 – Personal Information

36. The Commissioner analysed the information within the 'Record of telephone call' which the Cabinet Office withheld under section 40(2) by reference to whether the information is (a) the personal data of a third party and, if so, (b) whether its disclosure would contravene one of the principles of the Data Protection Act 1998 (DPA).

37. In relation to section 40(2)(a), the Commissioner is satisfied that the requested information is personal data as defined in the DPA. That Act defines personal data as:

*...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...*

38. The information to which section 40 was applied relates to comments and opinions given by an identified individual. The Commissioner therefore considers it to be personal data. As such, section 40(2)(a) correctly applies to this information.

39. The Commissioner understands the Cabinet Office's argument to be that the provision under section 40(3)(a)(i) is satisfied by virtue of the disclosure of this information breaching the first data protection principle under the DPA. This would mean that section 40(2)(b) is also engaged. The first data protection principle requires that:

*"Personal data shall be processed fairly and lawfully, and, in particular, shall not be processed unless-*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 2 is also met"*

40. Condition 6 in Schedule 2 of the DPA legitimises the fair and lawful processing of non-sensitive personal data in cases where:

*'The process 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'.*



41. In determining whether release of the information would prejudice the interests of Mr Murdoch in the way in which condition 6 sets out, the Commissioner considered the decision of the Information Tribunal in *House of Commons v Information Commissioner and Leapman, Brook and Thomas* (EA/2007/0060). This decision examines the application of condition 6 in detail. The Tribunal's view was that there are essentially two tests involved for the condition to be satisfied; firstly whether disclosure is necessary for the purposes of the public's legitimate interests and, if so, secondly, whether disclosure would be unwarranted by reason of prejudice to the rights and freedoms of the data subject (in this case, Mr Murdoch).
42. The Commissioner analysed the sensitivity of the information to which section 40 was applied and also considered the extent to which its contents are also a matter of public knowledge. He also compared the nature of this information to that part of the document which was released to the complainant.
43. The Commissioner considers that the public does have a legitimate interest in the information withheld under section 40. Specifically, he believes it would further understanding of the interaction between an influential media owner and the Government in a democratic system. In relation to whether the disclosure of this information is necessary, the Commissioner accepts that there is some information already in the public domain at the time of the request which partially illuminates Mr Murdoch's relationship with the Government. However, the Commissioner does not believe there to be any such information which provides this particular insight.
44. The Commissioner does not characterise this information to have been provided by Mr Murdoch in a personal capacity; rather, given the purpose of this phone call, he considers it to have been provided in the capacity as head of a media organisation. As such, this information reduces the arguments against disclosure in relation to unfairness or unwarranted prejudice to the data subject in respect of the first data protection principle.
45. Following his analysis, the Commissioner decided that its release would not constitute an intrusion into the private life of the Mr Murdoch to any significant extent. He therefore concluded that the legitimate interests of the public in the disclosure of the withheld information outweigh the prejudice to the rights, freedoms and legitimate interest of Mr Murdoch. The Commissioner does not therefore consider that release of this information would breach the DPA.
46. As such, the Commissioner concludes that although the requested information is personal data, disclosure would not be unfair, a Schedule 2 condition is satisfied and therefore disclosure would not breach the data protection principles. The exemption in section 40(2) of the Act does not therefore apply. The Commissioner therefore requires that the remaining information contained withheld under section 40 be disclosed to the complainant.

## Section 35 – Formulation of Government Policy

47. The Commissioner notes that section 35(1)(a) was applied to the fifth, sixth, seventh, eighth and tenth paragraphs of the 'Record of Meeting'. This information recorded discussion involving the Prime Minister about the formulation of the Government's position on a policy matter. The Commissioner is therefore satisfied that this information engages the exemption under section 35(1)(a). However, section 35 is a qualified exemption and the Commissioner therefore proceeded to assess whether the balance of the public interest test favours the maintenance of this exemption.
48. In conducting his analysis the Commissioner also took into account the principles set out by the Information Tribunal in *DfES v the Commissioner and the Evening Standard* (EA/2006/0006, paragraph 75) which it stated should guide the weighing of the public interest in cases where section 35(1)(a) has been applied. They are:
1. The information itself
  2. 'Status' of information not relevant
  3. Protection for Civil Servants not Politicians
  4. Timing
  5. When is policy formulation or development complete?
  6. Information in the public domain
  7. The robustness of officials
  8. Junior officials
  9. Relationship between Officials and Politicians
  10. How will the public use the information?
  11. Names of civil servants
49. From the above factors, the Commissioner concluded the following to be relevant in this case:
- In favour of disclosure
- i. Public participation and debate in policy decisions
  - ii. Accountability for decisions taken
  - iii. Transparency
  - iv. Time elapsed since information was produced
  - v. Time elapsed since the policy was formulated
  - vi. Information in the public domain
- Against disclosure
- i. Loss of frankness and candour in policy making
  - ii. Effect on policy decisions
  - iii. Effect on the relations between Government and outside interests in the formulation of policy

50. In this case, the Commissioner considers the balance of the public interest under section 35(1)(a) to favour disclosure of the information. The Commissioner wishes to point out that he is unable to provide an indication as to the policy issue into which the withheld information fed. This is because it would be likely to compromise the content of the disputed information itself. However, he reached this conclusion in respect of the public interest test for the following reasons:
- i. By the time of the request, the information was over seven years old and the Government's policy on the issues discussed had been formulated and made public. Moreover, the issues discussed had been resolved. This reduces the sensitivity of the information.
  - ii. The information does not identify any differences within Government on the development of policy, nor does it identify Government considerations which could be considered to be controversial.
  - iii. Disclosure of this information should not therefore affect the future candour of officials and ministers or the way in which Government interacts with outside interests in the development of policy.
  - iv. Disclosure of this information would not adversely affect future Government policy formulation in this area.
  - v. This information would help further the public's understanding of the Government's reasoning behind policy decisions on the issues discussed and promote transparency in the decision-making process.
51. The Commissioner has therefore decided that the information withheld under section 35(1)(a) should be disclosed to the complainant.

### **Section 41 – Information Provided in Confidence**

52. The Commissioner notes that the Cabinet Office applied section 41 to the second, third, fourth and ninth paragraphs of the 'Record of Meeting'. This information recorded views, requests and explanations put forward by Mr Murdoch and Mr Booth.
53. In order for section 41(1)(a) to apply, the information must have been obtained from a source outside the public authority. In this case, the Commissioner is satisfied that the nature of this information is such that the Commissioner is satisfied that it constitutes information which was obtained by the public authority from "another person". This is because the information records comments provided to it by individuals from outside the public authority (and, indeed, the Government).
54. In order to determine whether disclosure of the withheld information would constitute an actionable breach of confidence (which would allow for section 41(1)(b) to apply) the Commissioner took the following considerations into account:

- Whether the information has the necessary quality of confidence about it;
  - Whether the information was communicated in circumstances importing an obligation of confidence; and
  - Whether disclosure of the information would be to the detriment of the party to whom the duty of confidence is owed.
55. Having analysed the material, the Commissioner is satisfied that the nature of the information contained within the second and third sentences of paragraph three meets all the above criteria. Moreover, he does not believe that the passage of time since the meeting took place has reduced the sensitivity of this information to the extent that any of these criteria may no longer be relevant. The Commissioner therefore accepts that section 41(1) applies to this information.
56. However, the Commissioner has concluded that the remaining information withheld under section 41 does not engage this exemption. He accepts that this information was supplied in circumstances importing an implied duty of confidence and that this duty remains. However, the Commissioner concluded that the information does not retain the *quality* of confidence. He arrived at this outcome for the following reasons:
- i. The information records comments provided by third parties acting in their capacity as senior representatives of a large corporate business. As such, the sensitivity around the information in question here is of a far more commercial nature. The Commissioner considers this to be very different from a situation where a private individual divulges information that is private and personal about themselves and their private life.
  - ii. As a result of the passage of time since the meeting took place, specifically in relation to subsequent developments, regulatory decisions and the performance of BSkyB and other companies mentioned as they apply to the matter under discussion, the Commissioner does not consider this information to have been sensitive in nature at the time of the request. Nor does he consider that this information would, if disclosed at the time of the request, be detrimental to the interests (personal or professional) of those to whom the confidence is owed.
  - iii. It would be unlikely that release of this information would deter an individual from taking the opportunity to participate in a meeting with the Prime Minister / Government of this nature.
57. As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, case law on the common law concept of confidence suggests that a duty of confidence can be overridden if there is an overriding public interest in the disclosure of the information. The Commissioner therefore proceeded to consider this public interest override in relation to the information to which he considers section 41 to apply, namely the second and third sentences of paragraph three of the 'Record of Meeting'.

58. In this respect, the Commissioner took note of the decision in *Derry City Council v The Information Commissioner* [EA/2006/0014], in which the Information Tribunal interpreted a Court of Appeal decision (*London Regional Transport v The Mayor of London*, 2001). These cases were considered in the context of commercial contractual confidentiality. Nevertheless, the Commissioner does consider the decisions to be of relevance to cases where an individual person(s) has supplied information in confidence, especially as in this case the information was supplied in Mr Murdoch's professional capacity.
59. In the *London Regional Transport* case the judge at first instance said an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. In the subsequent Court of Appeal hearing, this view was not expressly overturned but left the question open. Its final decision was to allow the disclosure in that case. In the *Derry* case, the Information Tribunal interpreted the Court of Appeal decision as meaning that:
- No exceptional case has to be made to override the duty of confidence that would otherwise exist.
  - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
60. In this case, the Commissioner therefore assessed whether this public interest override is relevant in respect of the information to which he considers section 41 to apply. He interprets the public interest test in deciding if a duty of confidence can be overridden to differ from the public interest test normally applied under the Act, in that the burden of proof is reversed:
- The FOI public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.
  - The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
61. In light of this interpretation, the Commissioner believes that it is important to fully appreciate the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. In particular, his view is that a duty of confidence should not be overridden lightly, particularly in a case such as this, where a duty of confidence is owed to an individual.
62. The wider public interest in preserving the principle of confidentiality:  
The Commissioner considers the relationship of trust, protected by the duty of confidence, operates to serve the public interest. In relation to the information to which the Commissioner considers section 41 to apply, he believes withholding the information would serve the public interest by encouraging parties to be as free and frank in their discussions as possible.

63. The interests of the confider:

The importance of the right to privacy is recognised by the Article 8 of the Human Rights Act 1998 which states that: "Everyone has a right to respect for his private and family life, his home and his correspondence." However, in this case, the Commissioner does not necessarily consider the real consequence of disclosing this information to be infringement of the confider's (Mr Murdoch's) privacy. Rather, he considers the interests of the confider in this case to be the need to protect Mr Murdoch's commercial interests and that there is a public interest in doing so. Nevertheless, the Commissioner recognises that in the case of any high profile individual there may be some overlap between their business dealings and their privacy in that the disclosure would contribute to shaping the public's perception of that person.

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

- i. The quality of confidence in the withheld information is of a higher degree than that in the information to which the Commissioner does not consider that section 41 applies.
- ii. Disclosure of the information would be likely to infringe upon Mr Murdoch's commercial interests.
- iii. Disclosure of this information would be likely to adversely affect the willingness of outside interests to engage in as free and frank discussions with Government as possible.
- iv. In respect of accountability and transparency, the public interest in the information held by the Cabinet Office will be sufficiently met by the release of the remaining contents of the record to which section 41 was applied.

### **Section 43 – Commercial Interests**

65. In addition to section 41, the Cabinet Office also applied section 43 of the Act to the second sentence of paragraph two and the whole of paragraph nine.

66. The Commissioner notes that the information to which section 43 was applied relates to commercial matters and activities regarding several persons and businesses. He also considers the information to relate to a commercial activity being conducted in a competitive environment. Furthermore, the Commissioner believes that, at the time the meeting took place, disclosure of this information would have been commercially sensitive and likely to have prejudiced the commercial interests of Mr Murdoch and BSkyB if disclosed. It may also have been likely to have prejudiced the commercial interests of another business referred to in this information.

67. However, by the time of the request, for the same reasons relating to passage of time identified in paragraph 56 (ii) of this Notice in relation to section 41, the Commissioner does not accept that disclosure of this information would have been likely at the time of the request to have resulted in prejudice to the commercial interests of any person. Therefore, the Commissioner does not accept that section 43 is engaged in relation to this information.
68. The Commissioner therefore concluded that the information withheld from the complainant should be released, with the exception of the second and third sentences of the third paragraph of the record of the meeting between Mr Blair and Mr Murdoch.

## The Decision

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

The application of section 41 (Information Provided in Confidence) to the second and third sentences of the third paragraph of the 'Record of Meeting'.

70. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Section 1 (General right of access to information held by public authorities) in relation to the Cabinet Office's interpretation of the scope of the complainant's request of 28 November 2005 and interpreting the 'request' of 28 September 2007 as a new request for information.
  - ii. Section 10 (Time for compliance with request) in relation to the time taken to supply the dates of meetings and telephone conversations.
  - iii. Section 17 (Refusal Notice) in its failure to adequately explain the application of the cost limit and in not relying within its Notice upon the exemptions which were subsequently applied to withhold some of the requested information.
  - iv. The balance of the public interest under section 35 (Formulation of Government Policy) to withhold information to which this exemption was applied.
  - v. The application of section 40 (Personal Information) to certain information contained within the 'Record of Telephone Call'.

- vi. The application of section 41 (Information Provided in Confidence) to certain information contained within the 'Record of Meeting' (but excluding the second and third sentences of the third paragraph of the 'Record of Meeting'.
- vii. The application of section 43 (Commercial Interests) to certain information contained within the 'Record of Meeting'.

## Steps Required

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71. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:

Disclose to the complainant all the information withheld from him falling within the scope of his request of 28 November 2005, excluding the second and third sentences of the third paragraph of the 'Record of Meeting'.

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

## Other matters

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73. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

74. The Cabinet Office failed to respond to the complainant's request for an internal review despite initially agreeing to do so. The public authority only provided the complainant with the outcome of the internal review several months after being made aware of the complaint to the Commissioner. The Commissioner considers this a significant non-conformity with the *Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000* issued under section 45 of the Act.

## Failure to comply

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



## Right of Appeal

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76. 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](mailto: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 23<sup>rd</sup> day of June 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

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### General Right of Access

**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.”

### Time for Compliance

**Section 10(1)** provides that –

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

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

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

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

### **Refusal of Request**

**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 17(3)** provides that -

“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.”

**Section 17(4)** provides that -

“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.

**Section 17(5)** provides that –

“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.”

**Section 17(6)** provides that –

“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.”

**Section 17(7)** provides that –

“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.”

## **Formulation of Government Policy**

**Section 35(1)** provides that –

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

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

**Section 35(2)** provides that –

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

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

**Section 35(3)** provides that –

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

**Section 35(4)** provides that –

“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.”

**Section 35(5)** provides that –

“In this section-

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

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

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

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

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

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

### **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.

**Information provided in confidence.**

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

**Commercial interests.**

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

**Section 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”