

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 29 April 2008

**Public Authority:** Department for Children, Schools and Families  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

### Summary

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The complainant asked DCSF for a copy of information that it held for the period November 2005 to September 2006 relating to the academy of which he is a proprietor. DCSF declined to provide the information on the grounds that the cost of complying with the request would exceed the appropriate limit (section 12). The complainant made revised information requests relating to shorter periods. DCSF declined to comply with one of the revised requests on cost grounds under the aggregation provisions, but provided some information in relation to the other requests, withholding the remaining information under the exemptions in sections 36(2)(b) and 42. The Commissioner found that DCSF was entitled to rely on section 12 and that it had correctly applied the exemptions in sections 36(2)(b) and 42 in relation to the majority of the withheld information. It had, however, misapplied the exemption in section 36(2)(b) to some of the information it held for which the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. The Commissioner also found that, in relation to one of the revised requests, DCSF had breached sections 10(1) and 17(1) of the Act.

### 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. Relevant legislation mentioned in the Notice is set out in full in Annex 1 below.

## The Request

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2. On 21 September 2006 the complainant asked the (then) Department for Education and Skills (now the Department for Children, Schools and Families (DCSF), which term is used throughout this Notice for ease of reference) for any material that it held which concerned him or Tyndale Academy ('the academy') since his last Freedom of Information request (in November 2005). (He also repeated an earlier request for access to a copy of the letter that had brought the academy to DCSF's notice, the refusal of which is the subject of a separate complaint to the Commissioner under case reference FS50098771). On 12 October 2006 DCSF said that, as this request covered an eleven month period, it estimated that it would take one person three and a half working days to determine whether it held the information and, if so, to locate, retrieve and extract it. DCSF said that the cost of such an exercise would exceed the appropriate limit of £600 and, in those circumstances, under section 12 of the Act it was not obliged to provide the information. DCSF suggested to the complainant that, if he were to make a new request for a narrower category of information, perhaps for a shorter period of time (two to three months), it might be able to comply with such a request within the appropriate limits.
3. On 23 November 2006 the complainant sought a review of the 12 October 2006 decision, disputing DCSF's conclusion that to comply with his request would exceed the cost limitations: he said that DCSF would already have had to search the relevant documents to prepare its response of 31 October 2006 to his subject access request under the Data Protection Act ('DPA'), and so much of the necessary work would have been done. He also made a new request for information held by DCSF about the academy for the period 1 September 2006 to 23 November 2006. On 19 December 2006 DCSF responded to that request, and supplied him with the relevant information, including a redacted email of 21 September 2006 headed 'Re Draft Decision letter- complaint from [the complainant]'. On 21 December 2006, the complainant sought a review of the 19 December 2006 decision, saying that it appeared to be incomplete in terms of DPA requirements in that the subject of the 21 September 2006 email caused him to believe that the entire email concerned him and the academy. He did not think it should have been redacted to the extent that it was and asked DCSF for an explanation. The complainant also made a new information request asking for DCSF's information about the academy held for the period 1 May 2006 to 31 August 2006, under both the Act and the DPA.
4. DCSF wrote to the complainant on 9 January 2007 saying that, because of the new request, it proposed to put the 23 November 2006 review request on hold. DCSF also said that it had not considered the information released on 19 December 2006 under the DPA because a request under the DPA had not been made. It suggested that the complainant now make a request.
5. On 24 January 2007 the complainant made a further information request, asking DCSF, under both the Act and the DPA, for information that it held relating to the academy for the period 1 January 2006 to 30 April 2006.

6. On 13 February 2007 DCSF's review panel upheld the section 12 decision for the period November 2005 to 21 September 2006; for the period 1 May 2006 to 31 August 2006 it found that certain information should be withheld under section 42 and other information under section 36(2); and, for the period 1 January 2006 to 30 April 2006, it said that, since the request for information was similar to the previous request and had been made within sixty working days of that request, the costs of providing the information would be aggregated under section 12 of the Act and regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). As the aggregated costs would exceed the £600 limit, DCSF said that it was not obliged to provide the information. DCSF said that, if the complainant was unhappy with the outcome of the review, it was open to him to apply to the Commissioner for a decision.
7. The complainant wrote to DCSF on 14 February 2007 saying that he wanted to appeal against the review decision, and asking for details of the cost analysis. DCSF replied on 6 March 2007, referring him to the analysis DCSF had supplied to him on 12 October 2006 (paragraph 2 above). It nevertheless expanded on that analysis, saying that in total some 399 emails and other pieces of correspondence fell within the remit of the request; two officials had spent a total of two days printing and sorting the emails/correspondence into categories and removing duplicate emails; officials would then have had to review the papers to identify those which fell within the remit of the request under the Act, which DCSF estimated would take one person one day; to extract information following advice, contacting third parties regarding their correspondence with DCSF and redacting information relating to third parties was also estimated as taking one person one day; in total this amounted to four days' work. DCSF said that a second calculation had also been applied using as a guide an estimate of five minutes per email, which would equate to 33 hours work.

## The Investigation

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### Scope of the case

8. On 13 March 2007 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled.
9. For the sake of clarity, in the light of a number of overlapping information requests (see the table at Annex 2 to this Notice), the Commissioner considers that the matters before him are the questions of:
  - a) whether the complainant's information requests were handled in accordance with the Act;
  - b) whether DCSF was entitled to rely on the restriction in section 12 of the Act and the Fees regulations to refuse to provide the complainant with information relating to the academy for the whole period from November 2005 to 21 September 2006;

- c) was DCSF entitled to rely on the exemptions in sections 36 and 42 as its grounds for withholding some information in the period from 1 May 2006 to 31 August 2006; and
- d) was DCSF entitled to rely on the aggregation provisions in the Fees Regulations to refuse to provide any information it held for the period from 1 January 2006 to 30 April 2006.

## Chronology

10. On 10 April 2007 the Commissioner contacted DCSF to seek sight of the withheld information for the period 1 May 2006 to 31 August 2006, and to ask for a more detailed analysis of its estimated costs of complying with the information request for the whole period. On 16 May 2007 DCSF replied, repeating its reasons for estimating that the cost of complying with the complainant's request under the Act would exceed the limit specified in regulations (see paragraphs 2 and 7 above).
11. In relation to the complainant's revised information request for information held covering the period 1 May 2006 to 31 August 2006, the Commissioner noted that DCSF was relying on the exemption in section 36(2) to withhold some of the information sought. Since that section required the opinion of a qualified person (for government departments, a Minister of the Crown) to the effect that disclosure would be likely to have the inhibiting or prejudicial effect set out in section 36(2), and having regard to the decision of the Information Tribunal in the case of *Brooke and the Guardian v BBC and the Information Commissioner* (Tribunal references: EA/2006/0011 and 13), on 12 July 2007 the Commissioner asked DCSF to provide more supporting information, specifically the submission made to the qualified person and his response, to enable the Commissioner to satisfy himself that both the opinion given, and the process by which it had been reached, were reasonable. DCSF replied on 21 August 2007, declining to provide the submission but setting out the advice that had been given to the qualified person (see paragraph 26 below).
12. On 16 October 2007 the Commissioner sought DCSF's confirmation that the review panel's decision of 13 February 2007 was the first decision relating to the complainant's information request for the period 1 May 2006 to 31 August 2006. He also asked DCSF to reconsider its estimate of the cost of complying with the information request for the whole period from Nov 2005 to 21 September 2006 on the assumption that the same documents needed to be searched for both the information request under the Act and for the complainant's subject access request under the DPA. On 22 November 2007 DCSF replied, confirming that the review panel's decision was the first in relation to the period from 1 May 2006 to 31 August 2006. As to the costs DCSF said that, while it might appear that much of the work would already have been done as part of the subject access request, the requests were under different regimes and concerned different issues. This meant that different searches would have needed to be carried out in respect of each. DCSF said that it was therefore its position that the estimate did not need to be reconsidered.

13. On 21 December 2007, in an attempt to clarify what factors it had taken into account when calculating its estimate, the Commissioner made further enquiries of DCSF. In its response of 15 January 2008, DCSF explained that the same documents had been searched for both the complainant's request for information under the Act and his subject access request under the DPA. However, the searches were completed by different officials, with that for personal information under the DPA being undertaken by DCSF's Data Protection Officer and that for references to the academy being undertaken by members of DCSF's Independent Education and Boarding Team. DCSF also said that it had not included the cost of printing out documents, removing duplicate emails and contacting third parties when estimating the costs of complying with the information request under the Act. DCSF recognised that these items did not appear to be covered by the Fees Regulations and they had only been mentioned as necessary steps in the overall process.
14. DCSF reiterated that, in total, 399 emails had been located that fell within the remit of the request under the Act, and there would have been a further requirement to undertake a paper search of the files for any other relevant correspondence. Many of the emails had multiple attachments, some of which also had further attachments of their own. Because of the large volumes involved, and complex attachment trails, it was necessary to print these out in order to undertake a thorough read-through of the documents. DCSF reiterated that the cost of time taken for printing out had not been included in the estimate. DCSF said that the next task was to undertake an initial read through in order to extract the information that was relevant to the request; this process was included in the estimate of costs. It was estimated that it would take five minutes per email for the first read through. DCSF said that this equated to 33 hrs, which was well over the disproportionate cost threshold set out in the Fees Regulations. DCSF said that this was a conservative estimate, bearing in mind the complexity and length of some of the emails, and did not include any further search through paper-based files.
15. In response to further enquiries by the Commissioner, DCSF said that the estimate of five minutes per email had been arrived at by looking at a sample of the emails/correspondence identified as being within scope of the request and working out an average time. DCSF said that the proportion of emails with attachments was approximately 35%. As to the paper-based files, DCSF said that, for the period in question, namely November 2005 to September 2006, the hard copy papers were about two inches thick. DCSF said that, since it believed that the estimated time to deal with electronic correspondence alone would take DCSF over the cost threshold the additional time taken to read through the file to see what was in scope of the information request had not been calculated, but a very rough estimate would be two to three hours.

## Analysis

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### Procedural matters

### Handling

16. The complainant has complained that DCSF delayed unduly in replying to his information requests under the Act. Under section 17(1) of the Act, a public authority that is to any extent relying on a claim that any information is exempt information must, within the time limit for so doing, give the applicant a notice that states that fact, specifies the exemption in question, and states (if not otherwise apparent) why the exemption applies. The time limit, under section 10(1) of the Act, is twenty working days. The equivalent provision for refusals to provide information under on cost grounds (section 12(1)) is section 17(5).
17. The complainant initially sought information on 21 September 2006. DCSF responded on 12 October 2006, declining to provide the information on the basis that to do so would breach the appropriate cost limits. The Commissioner therefore finds that DCSF did not delay unduly in responding to the complainant's information request, and did not breach section 17(5). On 23 November 2006 the complainant sought a review of the refusal and requested information held by DCSF for the period 1 September 2006 to 23 November 2006. On 19 December 2006 DCSF provided the information that it held for that period. Since this was within twenty working days, DCSF has complied with the statutory time limits in connection with that information request.
18. However, as regards the information request for the period 1 May 2006 to 31 August 2006 made by the complainant on 21 December 2006, the first occasion on which DCSF addressed that request was in the decision of its review panel on 13 February 2007. This was in excess of twenty working days and DCSF therefore exceeded the statutory time limit for providing the full substantive response relating to that period; it has therefore acted in breach of the requirements of sections 10(1) and 17(1) of the Act (that review panel also made the initial decision on the complainant's request, made on 24 January 2007, for information relating to the period 1 January 2006 to 30 April 2006: that was a timely response).

### Cost limits

19. Section 12 of the Act states that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate cost limit. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) stipulate that the appropriate limit on expenditure for central government departments is £600. Under regulation 4(3) of the Fees Regulations, the activities that can be taken into account in assessing whether the appropriate limit has been met or exceeded are:



- determining whether the authority holds the information;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and
- extracting the information from a document containing it.

The regulations specify that, for the purposes of the 'appropriate limit', the staff cost to a public authority of undertaking the activities mentioned above is to be calculated at £25 per hour. This means that, if it would take DCSF more than 24 hours (£600 divided by £25 per hour) to comply with the request, then the 'appropriate limit' would be exceeded and the information need not be provided.

20. The complainant has contended that much of the work necessary to comply with his information request would, in any case, have had to be done to respond to his subject access request. However, as DCSF has explained, while it was necessary to search the same documents for both the complainant's request for information under the Act and his subject access request under the DPA, the searches were for different information and were completed by different officials with different responsibilities and areas of expertise. While the Commissioner accepts that the task of locating the information would be common in both cases, the remaining activities would not be and the Commissioner therefore finds that the costs of those activities should be taken into account when calculating the overall cost of complying with the information request of 21 September 2006 under the Act.
21. DCSF has not broken down into its component parts the cost of meeting the information request of 21 September 2006. However, on the basis of looking at a sample of the emails/correspondence identified as being within scope of the request, it estimated that the average time for undertaking the activities outlined above equated to five minutes per email (which would amount to some 33 hours). In the light of the clarification received from DCSF (paragraph 15 above) which explained that a significant proportion of the emails in question contained attachments, many of which were multiple, the Commissioner considers that DCSF's average of five minutes is acceptable. This means that the estimated time to be taken to comply with the complainant's information request, would exceed 24 hours of work, and would be beyond the appropriate cost limit. The Commissioner therefore finds that DCSF was entitled to rely on section 12 to refuse to provide information for the whole period November 2005 to 21 September 2006.

## Aggregation

22. Regulation 5 of the Fees Regulations states that a public authority may aggregate requests for the purposes of estimating whether the appropriate limit would be exceeded in relation to any one of those requests. The Regulations state, so far as is relevant here, that requests can only be aggregated in the following circumstances:

- a) two or more requests for information must have been made to the same public authority;
  - b) they must be....from the same person....;
  - c) the requests must relate to the same or similar information; and
  - d) they must have been received by the public authority within a space of sixty consecutive working days.
23. The Commissioner has found that the cost of complying with the complainant's request for information made on 21 September 2006 for the period November 2005 to September 2006 would exceed the appropriate cost limit (see paragraph 23 above). On 23 November 2006, 21 December 2006 and 24 January 2007 the complainant made requests for some of the same (or similar) information and, since those requests fell within sixty consecutive working days of each other, DCSF contends that the costs of complying with them may be aggregated in accordance with regulation 5 of the Fees Regulations. The Commissioner accepts that the conditions set out in regulation 5 are satisfied and that DCSF was entitled to aggregate the costs of complying with the information requests of 23 November 2006 and 21 December 2006 and 24 January 2007.
24. While DCSF has released some of the information requested in response to the information requests of 23 November 2006 (for the period 1 September 2006 to 23 November 2006) and 21 December 2006 (for the period 1 May 2006 to 31 August 2006), it declined to do so in relation to the request of 24 January 2007 (covering the period 1 January 2006 to 30 April 2006) on the basis that, having aggregated the cost of complying with that request with the cost of complying with the earlier requests (a total period of eleven months), the appropriate limits would be exceeded. In view of the nature and volume of the emails and other documentation falling within the overall period in question, the Commissioner accepts that DCSF was entitled to reach that conclusion: it is not therefore required to comply with the information request of 24 January 2007.

### **Exemptions applied to the information requested on 21 December 2006 for the period 1 May 2006 to 31 August 2006**

#### **Section 36 (2)(b)**

25. DCSF has said that it is relying on section 36 (2) (b) of the Act to withhold some of the information requested. This exempts from the right of access information which, in the reasonable opinion of a qualified person would, if disclosed, inhibit, or would be likely to inhibit, the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. In the Information Tribunal's decision in *Guardian & Brooke v the Information Commissioner and the BBC (EA/2006/0011)* (paragraph 64) the Tribunal found that a 'reasonable opinion' for the purposes of section 36 is one which is "both reasonable in substance and reasonably arrived at".
26. The 'qualified person' in the case of government departments is a Minister of the Crown. DCSF has confirmed that the qualified person in this case was Lord Adonis, the Parliamentary Under Secretary of State for Schools and Learners.



His opinion was given on 9 February 2007. DCSF said that the Minister had agreed that there should be a review, by means of an initial consultation, of the definition of full time education in so far as it related to the registration of an independent school (a review that was underway at the time the Minister's opinion was sought and at the time when DCSF was considering the complainant's information request). The Minister was advised that disclosure of the information in question, which included a submission dated 27 June 2006 to the Minister regarding the proposed review (and other correspondence, including internal emails and DCSF's response of 6 June 2006 to enquiries raised by the Parliamentary and Health Service Ombudsman), would be likely to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation. The Minister agreed that releasing the information in question would be likely to inhibit freedom of expression and result in the kind of prejudice to the effective conduct of DCSF's affairs envisaged by section 36; he therefore concluded that the information should be withheld. As the opinion of the qualified person appears to be both reasonable in substance, and reasonably arrived at, the Commissioner accepts that section 36 is engaged.

### Public Interest Test

27. Section 36 is a qualified exemption. That is, once the exemption is engaged, the release of the information is subject to the public interest test. The test involves balancing factors for and against disclosure to decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
  
28. In its correspondence with the Commissioner, DCSF has emphasised that there was a strong public interest in protecting the ability of public authorities to have free and frank exchanges of views. The Commissioner accepts that that is so, but the need for frank and open exchanges has to be balanced with the necessity for public authorities to be transparent and accountable in their activities and functions. Also of significance is the timing of an information request, as confirmed by the Information Tribunal in *Department for Education and Skills v the Information Commissioner and the Evening Standard (EA/2006/0006)* in which the Tribunal stated that '*The timing of a request is of paramount importance*'. In the *Guardian/Brooke* case (see paragraph 25 above) the Tribunal stated that "the relevant time at which the balance of public interest has to be judged is the time when the request is considered by the public authority". In this particular case, at the time when DCSF was considering the complainant's information request of 21 December 2006, namely on 13 February 2007, DCSF was undertaking a consultation exercise regarding the definition of full time education. At that stage in the proceedings, it was in the public interest that DCSF's deliberations in its submission to Ministers and in its related correspondence remained outside the public gaze. The Commissioner therefore concludes that, in all the circumstances of the case, at the time DCSF was considering the complainant's information request, the public interest in maintaining the exemption in section 36(2)(b) outweighed the public interest in disclosing that information.

29. However, there remains certain information that the Commissioner considers should be released, namely the comments made by DCSF in response to enquiries made by the Parliamentary and Health Service Ombudsman (the Ombudsman). DCSF has already provided the complainant with the details of the queries raised by the Ombudsman and part of its response to those queries following a subject access request made by the complainant under the DPA. By the time of the complainant's information request the Ombudsman had reached her decision on his complaint. Having considered the withheld information, the Commissioner considers that the release of that information would have assisted the public in its understanding of the difficulties of resolving the question of what constitutes full time education and that, at the time of the information request, the public interest in maintaining the exemption was outweighed by the public interest in disclosing it. The Commissioner therefore finds that DCSF should release the outstanding information in its response to the Ombudsman (including the annexes to that response) to the complainant.

## Section 42 – Legal professional privilege

30. DCSF has argued that the legal advice contained in the information that it holds for the period 1 May 2006 to 31 August 2006 is covered by legal professional privilege, which is intended to protect the confidentiality of communications between lawyer and client, and that the exemption in section 42 therefore applies to that information.
31. Legal professional privilege has been described by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the Department of Trade and Industry* (Tribunal ref: EA/2005/0023; paragraph 9) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers...”. There are two types of privilege – legal advice privilege and litigation privilege. Advice privilege will apply where no litigation is in progress or being contemplated. The communications in question must be confidential, made between a client and a professional legal adviser acting in a professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
32. Having examined the withheld information the Commissioner is satisfied that the information in the documents in question falls within the terms of legal advice privilege. The Commissioner therefore considers that the exemption in regulation 42 is engaged. It is, however, a qualified exemption and therefore subject to the public interest test.

## Public interest test

33. In its response to the information request DCSF acknowledged that there is a public interest in public authorities being accountable for the quality of their decision making, and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. However, DCSF has also said that “disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests – both directly, by exposing its

legal position to challenge, and indirectly, by diminishing the reliance it can place on the advice having been considered without fear or favour. Neither of these is in the public interest.”

34. The Commissioner considers that transparency in the decision making process and access to information upon which decisions have been made will help determine whether or not a public authority is acting appropriately. The Commissioner, nevertheless, also recognises the strong inherent public interest in protecting confidential communications between client and legal adviser. He considers that it is certainly in the public interest for authorities to have the ability to consult openly with their legal representatives so that forthright views can be expressed without fear of that advice subsequently being made public.
35. In making his assessment of where the balance of the public interest lies the Commissioner is mindful of the Tribunal's decision in the *Bellamy* case, which concerned the specific exemption relating to legal professional privilege in section 42 of the Act. In paragraph 8 of the decision the Tribunal observed that *“there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned.”*
36. In summing up the Tribunal stated that *“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest”*. It concluded, at paragraph 35, that *“it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...”*.
37. In *Dr John Pugh MP v the Information Commissioner and the Ministry of Defence* (ref: EA/2007/0055) (which was cited with approval in *Mersey Tunnel Users Association v the Information Commissioner and Merseytravel* (ref: EA/2007/0052)) the Tribunal discussed the conclusion reached in the *Bellamy* case and in other Tribunal cases in which information covered by legal professional privilege had been considered. The Tribunal said at, paragraph 55, that, *“Unlike other exemptions, because of the body of judicial opinion from higher courts in relation to the importance of maintaining legal profession privilege, we accept that there is a strong element of public interest inbuilt into the exemption itself, but that this does not, in effect, convert the exemption into an absolute exemption. It makes no difference that legal professional privilege is a class exemption. For the Commissioner or the Tribunal to find that the public interest favours disclosure there will need to be equally weighty public interest factors in favour of disclosure in the circumstances of the particular case. This does not necessarily mean that it needs to be an exceptional case.”*
38. Notwithstanding the factors in favour of release referred to above, the Commissioner is of the view that those factors are not sufficiently strong in this case to override the public interest served by protecting confidential communications between client and legal adviser. The legal advice in question discusses DSCF's proposed response to the Parliamentary and Health Service Ombudsman's enquiries. DSCF must be able to formulate such responses with the benefit of the frank and free views of its legal advisers, particularly given that

it might be necessary to refer to that advice may be again should the complainant make further representations to the Ombudsman. The Commissioner does not consider that there are public interest arguments of sufficient weight to overturn legal professional privilege in this situation. It is therefore the Commissioner's judgement that, in all of the circumstances of this case, the public interest in maintaining the exemption in section 42 outweighs the public interest in disclosure, and that DCSF was therefore entitled to withhold the legal advice contained in the documents in question.

## The Decision

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39. The Commissioner's decision is that DCSF:

- breached section 10(1) of the Act in failing to provide some of the information requested on 21 December 2006 within 20 working days of receiving the request;
- breached section 17(1) of the Act in relation to the remaining information requested on 21 December 2006 by failing to issue a refusal notice within 20 working days of receiving the request;
- was entitled to rely on the restriction in section 12 of the Act and the Fees Regulations to refuse to provide the complainant with information relating to the academy for the whole period November 2005 to 21 September 2006;
- correctly withheld some of the information that it held for the period 1 May 2006 to 31 August 2006 under the exemption in section 36(2)(b), but was not entitled to rely on that exemption to withhold other information held for that period;
- correctly withheld the legal advice it held for the period 1 May 2006 to 31 August 2006 under the exemption in section 42;
- was entitled to rely on the aggregation provisions in the Fees Regulations to refuse to provide any information it held for the period 1 January 2006 to 30 April 2006.

## Steps Required

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40. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

to release to the complainant its full response of 6 June 2006 to the Ombudsman's enquiries.

41. 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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### Current public interest in the release of information

42. Although not forming part of the Commissioner's decision, if the complainant were to make the same information request now it is the Commissioner's view that the balance of the public interest would favour disclosure of the information contained in the submission of 27 June 2006 to Ministers on the definition of full time education. For the reasons which follow, the Commissioner therefore strongly recommends that DCSF now releases that information.
43. The consultation process advocated in the submission has now been completed. In the Commissioner's view, the release now of the advice and recommendations to Ministers in this particular case would be unlikely to inhibit the frankness of future discussions. The Commissioner also believes that release of the information in this instance would further public understanding of the complex issues surrounding the definition of full time education when applied to independent schools. This conclusion is consistent with the view of the Information Tribunal who, in its decision in *Lord Baker v the Information Commissioner and DCLG (Tribunal reference: EA/2006/0043)*, said, in paragraph 28, that:

*“ the strength of the argument in favour of disclosure and against maintaining the exemption is that disclosure will enable the public to form a view on what exactly happened and not on what it can otherwise only guess at”.*

The Tribunal concluded (paragraph 29) that, on the facts of the case that it was then considering:

*“ the disclosure, after the date when the Minister's decision had been promulgated, of the advice and opinions of civil servants in question would not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future”.*

44. If DCSF were to accept the Commissioner's recommendation, he would welcome the release to the complainant of the information in the submission of 27 June 2006.

## Failure to comply

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45. Failure to comply with the steps described in paragraph 40 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

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46. 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 29th day of April 2008**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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



## Annex 1

### Legal Annex

#### Freedom of Information Act 2000

##### **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.”

##### **Effect of Exemptions**

**Section 2(2)** provides that –

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

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

##### **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(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.”

## Exemption where cost of compliance exceeds appropriate limit

**Section 12(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

**Section 12(2)** provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

**Section 12(3)** provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

**Section 12(4)** provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

## 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(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.”

## Exemptions

### Prejudice to effective conduct of public affairs.

**Section 36(1)** provides that –

“This section applies to-

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

**Section 36(2)** provides that –

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

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

**Section 36(5)** provides that –

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

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

## Legal Professional Privilege

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

## The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

### The appropriate limit

**Regulation 3(2)** provides that –

“In the case of a public authority which is listed in Part 1 of Schedule 1 to the 2000 Act, the appropriate limit is £600.”

### Estimating the cost of complying with a request - general

**Regulation 4(3)** provides –

“In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in -

- a) determining whether it holds the information,
- b) locating the information, or a document which may contain the information,
- c) retrieving the information, or a document which may contain the information, and
- d) extracting the information from a document containing it.”

**Regulation 4(4)** provides –

“To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”

### Estimating the cost of complying with a request – aggregation of related requests

**Regulation 5(1)** provides –

“ In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority –

- a) by one person, or
- b) .....

the estimated cost of complying with any requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.”

**Regulation 5(2)** provides –

“This regulation applies in circumstances in which-

- a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
- b) those requests are received by the public authority within any period of sixty consecutive working days.”

## Annex 2

## Information requests: Complainant v DfES/DCSF (ref: FS50155503)

Date of request	Period covered	outcome	Date of decision	Comments
21/9/06	Nov 2005 – 21/9/06	Refused on cost ground	12/10/06	Upheld by DfES review panel on 13/2/07
23/11/06	1/9/06 – 23/11/06	Information provided	19/12/06	Not subject of this complaint
21/12/06	1/5/06 - 31/8/06	Released some info. Withheld some under sec 36(2) and 42.	13/2/07	Decision made by DfES review panel
24/1/07	1/1/06 - 30/4/06	Refused on cost grounds, applying aggregation provisions	13/2/07	Decision made by review panel