

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 30 June 2008

**Public Authority:** Home Office  
**Address:** Seacole Building  
2 Marsham Street  
London  
SW1P 4DF

### Summary

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The complainant requested documents relating to internal communications held by the Home Office relating to his company's use of the Freedom of Information Act. The Home Office refused to disclose this information under section 36 of the Act. The Commissioner has investigated and found that section 36 is engaged; however the Commissioner finds that the public interest favours disclosure of the information. The Commissioner requires the public authority to disclose the withheld information within 35 calendar days of this notice.

### 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. The complainant has advised that on 4 January 2007 he made the following request for information to the Home Office:

*"Please could you provide me with any documents relating to internal communication within Government departments relating to the use of the Freedom of Information Act by Matthew Davis or John Connor Press Associates Ltd. These can be copies of documents sent by the Home Office or documents received by the Home Office"*

3. The Home Office responded on 1 March 2007 informing the complainant that his information request had been dealt with under the provision of both the Act and the Data Protection Act. The Home Office stated that a thorough search had been undertaken to find all the 'personal data' held and enclosed this for the complainant. In addition to the information held about the complainant the Home Office also confirmed that it holds information about his company's use of the Act. The Home Office refused to disclose this by virtue of sections 36(2) (b) (i) and (ii) and 36(2) (c) of the Act.
4. On 17 April 2007 the complainant wrote to the Home Office requesting an internal review of the decision to withhold the information relating to his company's use of the Act.
5. The Home Office completed its internal review and communicated the findings to the complainant on 23 May 2007. The internal review upheld the decision to withhold the requested information, in relation to his company's use of the Act, under sections 36(2) (b)(i) and (ii) and 36(2)(c).

## The Investigation

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### Scope of the case

6. On 17 August 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant informed the Commissioner that his request was to establish if any memos or record had been made within the Home Office to pick out his company's requests for special attention.
7. The Home Office dealt with the original request and the internal review. However on 8 May 2007 following a reorganisation, some of the information held was transferred to the Ministry of Justice (MoJ). The Commissioner has involved both the MoJ and the Home Office in his investigation into the handling of this request and to gain access to the withheld information.
8. The Commissioner considers that the Home Office is the appropriate public authority for the purposes of the Decision Notice as they dealt with the initial request and internal review.

### Chronology

9. The Commissioner began his investigation on 1 October 2007 by writing to both the Home Office and the MoJ. In his letter to the Home Office the Commissioner requested a copy of the withheld information, further arguments regarding the application of the exemption and public interest test, and informed the Home Office that any decision notice would reference the Home Office as the relevant public authority.

10. The letter to the MoJ requested the MoJ to conduct a search of its records to locate any information held falling within the scope of the request and to provide these to the Commissioner for consideration. The Commissioner again explained that any formal notice would consider if the Home Office had dealt with the request in accordance with the requirements of the Act.
11. MoJ and the Home Office responded on 29 October 2007. Both public authorities explained that they had decided not to disclose the withheld information to the Commissioner as they felt that it was unnecessary for the consideration of the principles underlying the application of section 36. Further, both felt that disclosing the information would prejudice their ability to handle complaints effectively with the ICO.
12. On 13 December 2007 the Commissioner issued an Information Notice to both public authorities requiring them to provide the Commissioner with copies of the withheld information.
13. Both public authorities responded on 22 January 2008 providing the Commissioner with a copy of the withheld information. The Home Office and MoJ also expanded on their arguments for continuing to withhold the requested information under section 36.
14. On 25 January 2008 the Commissioner wrote again to the Home Office to ask some further questions regarding the opinion of the qualified person.
15. The Home Office responded on 1 February 2008 providing a full response to all the issues raised by the Commissioner.

## Analysis

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### **Exemption: Section 36 'Prejudice to the effective conduct of public affairs'**

16. Section 36(2) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information (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 be likely otherwise to prejudice, the effective conduct of public affairs.
17. Information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would, or would be likely to lead to the above adverse consequences. In order to establish that the exemption has been applied correctly the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons
  - Ascertain when the opinion was given;

- Consider whether the opinion was objectively reasonable and reasonable arrived at.
18. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*) (EA/2006/0011 and EA 2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply '*an opinion within a range of reasonable opinions*'. However, it also accepted that '*there may (depending on the facts) be room for conflicting opinions, both of which are reasonable*'. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
  19. The Home Office explained that the qualified person for the initial request was the Minister Gerry Sutcliffe MP, whose opinion was sought on 28 February 2007 and given on 1 March 2007. At the internal review the qualified person was the Minister Vernon Coaker MP whose opinion was sought on 17 May 2007 and given on 22 May 2007. The evidence they had before them in each case when formulating their opinion was a full submission along with arguments for and against release under section 36. A written record was not made of the Ministers' decision-making process and opinion other than that they were sent a detailed submission at each stage.
  20. The Commissioner has considered the evidence which was before the qualified person when they arrived at their opinion. The submission stated that there were a number of inhibitive effects to the free and frank provision of advice and views of officials for the purposes of deliberation which would occur if the material produced in the course of the complainant's requests were to be disclosed. If assessments which officials made whilst considering his request were disclosed then officials would be less likely to carry out similar robust assessments for fear of public disclosure of their views and possible criticism, for example, for adopting a cautious approach or recommending that high profile information is released or withheld. The end result of such behaviour would result in the department no longer being adequately able to assess Freedom of Information (FOI) requests to ensure that all decisions to release or withhold information are fully considered without the fear of this information being disclosed prematurely into the public domain.
  21. The submission to the Ministers also stated that section 36(2) (c) was engaged as the Act provides applicants with entirely adequate statutory rights should they be dissatisfied with any response that they might receive to an FOI request. Therefore, the requesting of such information by applicants to ascertain whether, in their belief, a request has been mishandled circumvents official complaints

processes and diverts resources that would be better employed answering other requests.

22. Having considered this evidence, the Commissioner is satisfied that in this case the opinion of the qualified person was both substantially and procedurally reasonable in concluding that it was likely that disclosure of the requested information would, or would be likely to, lead to the relevant prejudice. The exemption is therefore engaged.

### Public Interest Test

23. Section 36 is a qualified exemption the Commissioner must therefore decide if the public interest in favour of maintaining the exemption is outweighed by the public interest in disclosure of the requested information. In reaching a decision the Commissioner has considered the severity, extent and frequency of the prejudice.
24. The Home Office acknowledges that there are public interest arguments in favour of disclosure of the information. Openness and transparency in the FOI decision-making process are in the public interest because of the increased accountability that they bring to it. Disclosure would allow the public to see that decisions taken in relation to FOI requests were taken promptly and only after full consideration of all the relevant issues. Furthermore, disclosure would enable the public to understand better the reasoning behind these FOI decision.
25. However, the Home Office concluded that these factors are outweighed by those against disclosure. It is of vital importance that officials are able to discuss issues around potential FOI disclosures, and provide advice, in a full and entirely frank manner. The inadequate consideration that would result from such a lack of frankness, would adversely affect the quality of FOI decision making with the result that the public might not gain access to information that they should be able to, or alternatively information might be inappropriately disclosed. Furthermore it is not in the public interest for the reasoning behind decisions to be inadequately recorded because of the lack of accountability that this brings to the FOI process and the inefficiency and difficulties that this brings to the consideration of any internal review of ICO complaints. It is not in the public interest to divert valuable resources to FOI requests in which the applicant seeks to circumvent the official appeals process and reach their own conclusions, when the official appeals process, including recourse to the Information Commissioner, is robust and the best way of achieving redress in response to an incorrect decision.
26. The Commissioner rejects the argument that disclosure would result in a lack of frankness which would adversely affect the quality of FOI decision-making. He also rejects the argument that decisions would be less adequately recorded. The Information Tribunal in *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that '*we are entitled to expect of [civil servants] the courage and independence that... [is]...the hallmark of our civil service*', since civil servants are '*highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers*

*of conflicting convictions'* and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make officials responsible for providing advice and recording information less likely to perform their duties properly. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including the Home Office, to ensure that their officials continue to perform their duties according to the required standards.

27. The Commissioner acknowledges that the Act provides for scrutiny of departments' handling of FOI requests via a number of formal mechanisms, including internal review, complaints to the Information Commissioner and appeals to the Information Tribunal. These mechanisms constitute the appropriate forum for investigations into how individuals' requests have been handled.
28. However, the Commissioner notes that in this case the timing of the request is important. At the time of the request, all the complainant's FOI requests to the MoJ or the Home Office, falling within the scope of this request, had been resolved either through disclosure, because the complainant was satisfied with the response or because the complainant had exhausted the public authorities internal complaints procedure. He therefore does not consider that in this case disclosure of the information would be circumventing this procedure but could have the positive effect of increasing the complainant and public's confidence in the robustness of the public authority's internal procedures for handling information requests.
29. For these reasons the Commissioner finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

## The Decision

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30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that:

The public authority incorrectly withheld the requested information under section 36(2) (b) (i) (ii) and (c).

## Steps Required

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

Disclose the information withheld under section 36.

## **Other Matters**

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32. The Commissioner has viewed the information to be disclosed and notes it contains some personal details of third parties. The complainant has not requested this information and the Commissioner suggests the public authority should take account of the requirements of the Data Protection Act when disclosing the withheld information.

## **Failure to comply**

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

## Right of Appeal

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34. 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).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

**Dated the 30<sup>th</sup> day of June 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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



## Legal Annex

### Prejudice to effective conduct of public affairs.

**Section 36(1)** provides that –

“This section applies to-

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

**Section 36(2)** provides that –

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

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

**Section 36(3)** provides that –

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

**Section 36(4)** provides that –

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

**Section 36(5)** provides that –

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

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

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

**Section 36(6)** provides that –

“Any authorisation for the purposes of this section-

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

**Section 36(7)** provides that –

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

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