

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 October 2009

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

Summary

The complainant requested information created by the Policing Standards Unit during its intervention at Nottinghamshire and West Yorkshire police forces. He wished particularly to have sight of its evaluations and recommendations for improvement following poor performance assessments. The public authority originally refused to provide this information under section 36 (prejudice to the conduct of public affairs). At internal review it released some information and withheld the rest under sections 36(2) (prejudice to effective conduct of public affairs), 31(1) (law enforcement), 43(2) (commercial interests) and 40(2) (personal information).

The Commissioner has investigated and found that sections 31 and 43 are not engaged. He has found that section 36 is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The public authority's reliance on section 40 in relation to staff names was not challenged by the complainant so is not dealt with in this Decision Notice.

The Commissioner requires the public authority to disclose the information which has been withheld unless it is exempt by virtue of section 40(2). The complaint is therefore upheld.

The public authority's handling of the request resulted in breaches of certain procedural requirements of the Act.

The Commissioner's role

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

Background

2. The complainant is a researcher who has advised the Commissioner that he is particularly interested in the *“strategic analysis, recommendations and anything else which deals with the procedural issues around the recording of crime and the subsequent disposal of recorded crime”*.
3. His request centres on work done by the Policing Standards Unit (the “PSU”), which was asked to look into performance issues in Nottinghamshire and West Yorkshire Police forces. The PSU was set up in July 2001. In July 2007 the PSU merged with the Partnership Performance Support Unit to form the Police and Partnership Standards Unit (PPSU).

4. According to a Hansard entry from 15 July 2002 (<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/vo020715/text/20715w27.htm>), whilst it was still in existence:

“The [Police] Standards Unit exists to deliver the Government's commitment to raise standards and improve operational performance in the police and in crime reduction generally in order to maintain and enhance public satisfaction with policing in their area”.

“Its core objective will be to identify and disseminate best practice in the prevention, detection and apprehension of crime in all forces in order to reduce crime and disorder as well as the fear of crime”.

5. It further clarified that the PSU would work with forces to ensure the most effective use of intelligence, detection and successful prosecution procedures and that it would identify those forces which were under-performing.
6. By way of background, the complainant explained that he had a particular interest in the role of the PSU as he was undertaking a doctoral study on the impact of New Public Management, and the performance management regime associated with this form of control, on police accountability. He further stated that:

“Forces or individual Police Command Units which are performing below that of their most similar peers are subjected to the intervention of the Police Standards Unit (PSU) of the Home Office. However the assessment and subsequent recommendations made by the PSU are not made public which appears inconsistent with the government's policy on local accountability”.

7. The public authority advised the Commissioner that the PSU engaged with West Yorkshire Police in the summer of 2003. It also advised him that PSU collaboration with Nottinghamshire Police began in late 2002 and that this was stepped-up to a formal engagement following an HMIC inspection in early 2003. Some further information about the engagement at Nottinghamshire can be found via this link:
<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/370/370we06.htm>

8. The following information, which has previously been disclosed to the complainant, gives a further explanation about the Nottinghamshire engagement:

“Operation Focus, the overall programme of change across the force, is an integral part of the PSU engagement. As part of Focus, Accenture were commissioned to work closely with the Force, the Police Authority, HMIC and PSU to overhaul the way the force did business and to institute new arrangements.... The input of the Accenture consultants finished at the beginning of October 2004 although work continues in force to embed the workstreams and ensure the benefits are fully realised. PSU remains heavily involved in this.”

9. At the time of the request, the PSU were no longer engaged at West Yorkshire Police, having disengaged in November 2004. They were still engaged at Nottinghamshire Police.

The request

10. Following earlier correspondence, the complainant made a clarified request for information to the public authority on 22 December 2005. This was worded as follows:

“... thank you for the documents you sent me. Unfortunately they are not the documents that I am seeking access to. I requested copies of the documentation completed by the PSU staff when they intervened in Nottinghamshire Constabulary and West Yorkshire Police following their perceived poor performance. This documentation should contain an evaluation and a number of recommendations”.

Further information was requested but that is outside the scope of this investigation.

11. On 8 February 2006 the complainant chased a response from the public authority. He advised:

“I have not received a response to my request for the assessment and recommendations made by the PSU following

their intervention in Nottinghamshire and West Yorkshire Forces... Can we now move on to the Home Office's own internal appeals procedure for dealing with refused FOI requests, prior to referring the matter to the Information Commissioner".

12. On 10 February 2006, outside the time for compliance, the public authority responded. It reconfirmed that it had already provided copies of the PSU's published assessments of both forces from 2003. It also confirmed that it held further information but that it was exempt under section 36.
13. On 24 February 2006 the complainant again wrote to the public authority requesting an internal review of its refusal. He said that its response: *"appears to contradict the Government's stated objective of holding the police to account by making performance issues public"*; and that its stance was also: *"in marked contrast to HMIC, which publishes its reports, and individual forces, which have disclosed internal documentation, suitably abridged, on performance issues"*.
14. This was acknowledged by the public authority on 28 February, which advised that it would respond prior to 21 April 2006.
15. On 21 April 2006 the public authority extended its response date to 22 May 2006 saying that *"there is a very substantial volume of material that requires attention"*.
16. On 23 June 2006 the public authority again wrote to the complainant. It apologised for the delay and said that it intended to provide a response by 10 July 2006.
17. On 12 July 2006 the public authority sent out its internal review. It included some further information and exempted the remaining information under sections 36, 31(1)(a), (b) and (c), and 43(2). It also advised that the names of junior officials had been redacted as their names were *"not deemed to be relevant within the scope of the request, as the officials were acting on behalf of their relevant organisations in a corporate capacity"*. It invited the complainant to make further contact if he did not agree with this element of the refusal.

The investigation

Scope of the case

18. On 29 July 2006 the complainant wrote to the Commissioner. He clarified that he wished for disclosure of the documentation completed by the PSU following its engagement with Nottinghamshire Constabulary and West Yorkshire Police. He did not challenge the

public authority's removal of staff names, as referred to above, so the Commissioner will not further consider this issue. (Staff names were only cited by the public authority in respect of one document).

19. However, although this has at no point been cited to the complainant, the Commissioner notes that there is a further document which contains personal data. This document was included in a table which was sent to the Commissioner during the course of his investigation where it was annotated "*withhold section 40 – details on individual crimes*". No further explanation has been provided by the public authority at any stage. The Commissioner will consider the application of section 40 to this information in the relevant section below.
20. During his investigation the Commissioner was informed by the public authority that during its internal review it had significantly limited the amount of material under consideration. By way of explanation it advised the Commissioner:

"This decision was reached at the internal review stage after going through all the papers individually and identifying those which were written by PSU and provided to the forces, and those which were not."

"The requester specifically asked for 'copies of the documentation completed by the PSU staff when they intervened in Nottinghamshire Constabulary and West Yorkshire Police following their perceived poor performance' ... It is clear from the list of documents at annex A [provided to the Commissioner], which describes the documents considered, that they included information not relevant to the request. It became apparent during the conduct of the internal review that this was the case and the papers were fully vetted to ensure that only those within the requests [sic] remit were considered. We considered the wording of the request to be unambiguous and have therefore found only documents completed by PSU or HMIC to be relevant."

"We would refer you to the Information Tribunal's decision in the case of King (EA/2007/0085 – particularly paras 69 and 70) which finds that a request should be read objectively and that public authorities are not required to go behind the phrasing of a request."

21. Fifty-six documents were considered to be within the scope of the request at refusal stage. These documents were subsequently all reconsidered at internal review stage when many were discounted. To clarify what he is considering in this investigation, the Commissioner has broken down these 56 documents as follows.

- 4 documents were released in full at internal review stage so are out of the scope of this investigation.
 - 30 documents were withheld, either in part or in full, citing the exemptions considered later in this Notice. At internal review stage one of these was identified as being a duplicated item so there were, in reality, only 29 documents.
 - During his investigation the Commissioner identified a further duplicated document within the bundle considered at internal review stage. The total number of withheld documents was therefore 28.
 - A further 22 documents were deemed to be 'out of scope' by the public authority at internal review stage, which the Commissioner will consider below.
22. The public authority argued that 22 documents fell outside the scope of the request as the request specifically stated that it was for *"copies of the documentation completed by the PSU staff"* and these items had not actually been written by the PSU. However, the Commissioner advised the public authority that he was not minded to agree with this view and his reasons are stated below.
23. The Commissioner was advised by the public authority that the 22 documents were created by parties other than the PSU. On making further enquiries about their purpose and authorship the public authority advised him that:
- "Some pieces of work will have been suggested/requested by the force, some by PSU, some by HMIC – but in each case the decision to initiate the work is a joint decision."*
- "I have included ... a range of the documents considered not relevant to the request... Those that relate to Nottinghamshire Police are, as far as can be determined, authored by that police authority and/or Accenture, and not by PSU."*
24. The Commissioner notes that, based on the statements provided above, any of the documentation purporting to be written by Nottinghamshire Police was authored by the force *"and/or Accenture"*, i.e. anything authored by the police was also authored by Accenture too, nothing being authored by the police independently. The majority of the 22 documents were therefore actually created, either dually or in their entirety, by a third party consultancy, 'Accenture'.
25. The Commissioner was advised by the public authority that:
- PSU engaged the services of Accenture;
 - Accenture were working on PSU's behalf;
 - PSU worked closely with Accenture;

- Accenture's work informed and supported the endeavours of PSU to help improve force performance.

He also notes that disclosed information, as cited in paragraph 8 above, also clarifies the role of Accenture.

26. The Commissioner also notes that the public authority has released some documents to the complainant with Nottinghamshire Police's and/or Accenture's authorship at internal review stage. It has therefore obviously concluded itself that at least some of the information produced by these parties fell within the scope of the request.
27. The Commissioner has ascertained that one of the other third parties was engaged in working directly on behalf of the PSU at West Yorkshire Police. This was evidenced in minutes from one of the force's Command Team Meetings held on 10 February 2004 where it is stated under other business that the party was: "... with the force working on behalf of the Police Standards Unit." (<http://www.westyorkshire.police.uk/files/docs/CT100204.pdf>)
28. The title of another of the withheld documents, purporting to be authored by a further third party, clearly states that it was: "a joint initiative with the PSU and Nottinghamshire Police...".
29. To try to resolve their differences of opinion about the 22 documents the Commissioner met with the public authority on 22 April 2009. As a result of this it was agreed that 7 of the documents were in fact out of the scope and 10 were within scope. However, the authorship of the remaining 5 documents was unresolved.
30. The public authority held a further meeting with staff who had previously worked within the PSU on 4 June 2009. On 6 July 2009 it advised the Commissioner that at that meeting it had again concluded that the 5 documents remained outside the scope of the request, claiming that they were not authored by or on behalf of the PSU. In its letter to the Commissioner it further suggested that an additional 2 documents were not within scope. However, these additional 2 documents had been accepted as within scope at the time of the Commissioner's meeting with the public authority on 22 April 2009 and he remains of the view that they fall within the scope of the request.
31. Furthermore, the Commissioner does not accept the public authority's contention about the disputed 5 documents for the following reasons.
 - Although the staff who were involved with processing the original request were not available to explain why these documents were originally selected for consideration the Commissioner notes that they were, nevertheless, selected. These staff were obviously of the opinion that they were relevant.

- The Commissioner notes that all the documents were originally included in the public authority's submission to its qualified person. This opinion was subsequently given based on their inclusion and did not seek to either question this inclusion or remove them. It must therefore be assumed that the qualified person also accepted that they were within the scope of the request.
 - All 5 documents have 'Operation Focus' in their header. The same applies to many of the documents which are considered to fall within the scope of the request and the Commissioner has been given no valid reason which persuades him to treat these documents any differently.
 - At the meeting mentioned in paragraph 29, a member of staff who had previously worked for the PSU was unable to decide whether or not they fell within scope when he met with the Commissioner.
32. In light of this, the Commissioner has decided to include these 5 documents in the scope of his investigation. This means there are a total of 43 documents under consideration; 28 as identified at internal review stage plus 15 of those originally included at refusal stage.

The internal review

33. The public authority advised the Commissioner that when it had carried out its internal review a member of staff from the PSU reviewed the bundle of documents and, because it was not immediately obvious, identified the authorship of each item. Accordingly, it decided that it had originally considered too much information to have been within the scope of the request and it adjusted the scope accordingly. A revised schedule of documents, listing those items both within and outside of scope, was then submitted to the qualified person at internal review stage. Therefore, the same documents were considered by the qualified person at both refusal and internal review stages, but their inclusion within the scope of the request was revised for the latter.
34. When the Commissioner met with the public authority a retired member of the PSU staff was in attendance, again to consider authorship of the documents. On this occasion it was mutually agreed that 10 of the 22 documents which had been removed at internal review were in fact within scope; with the Commissioner subsequently identifying that a further 5 were also within scope where authorship was unclear. Therefore, these 15 documents were not subject to an internal review.
35. The Commissioner considers that the internal review is a chance for a public authority to reconsider its original decision and correct any mistakes. This evidently occurred in this case as the public authority's view of the scope of the request was changed at the time of the internal review. However, in the Commissioner's view the scope was changed

incorrectly. His view has now been largely accepted by the public authority.

36. Therefore, as a result of the public authority revising its view on the scope of the request, 15 documents have not been subject to an internal review. In light of this, further deliberations were invited by the Commissioner and, at a late stage of his investigation, some were received. The public authority did not seek the opportunity to undertake a further internal review.
37. The Commissioner would like to clarify that he has accepted that the original qualified person's opinion is valid in respect of the 15 documents. He is of the view that a lack of reconsideration at internal review stage does not make the original opinion invalid.

Chronology

38. The Commissioner wrote to the complainant on 5 February 2008 to advise him that he had begun his investigation and to clarify some areas of his complaint. The complainant responded on 6 February 2008.
39. On 7 February 2008 the Commissioner asked for copies of the withheld information and raised various questions. He asked for a response within 20 working days.
40. On 6 March 2008 the Commissioner chased the public authority's response. On the same date the public authority responded and asked for a time extension as it had been unable to locate its original paperwork and was therefore having to collate the material again. It asked for a ten working day extension to try to locate what it described as a "pile of papers" that was "about 30cm thick". The Commissioner agreed to an extension date of 25 March 2008 and advised the complainant accordingly.
41. On 25 March 2008 the Commissioner again chased the public authority's response. He was advised that the evidence would be posted that day.
42. The evidence provided, which was about 4cm thick, was received on 26 March 2008 and the Commissioner acknowledged its receipt to both parties. A separate covering letter from the public authority was received later, on 4 April 2008.
43. The letter of 4 April 2008 advised the Commissioner that:

"As you will recall I have had to reconstruct the original set of papers relevant to this request as those held at the time of the internal review have unfortunately been lost. When I asked for an extension of the deadline I said that I believed, on the basis

of the internal review papers, that the bundle of material would be 30cm thick. This has not proved to be the case as that 30cm seemingly also included those papers relating to the engagement undertaken by the Police Standards Unit (PSU) with West Yorkshire and Nottinghamshire police, but which were in fact not relevant to the request as they were not written by PSU. Nonetheless I have, thus far, been unable to locate an additional 6 documents relevant to this request, four of which were withheld and two of which were released in full.... I will continue to search for the four missing documents previously withheld and send them to you as soon as they are discovered”.

44. On 21 April 2008 the Commissioner raised some further queries with both the public authority and the complainant.
45. On 21 May 2008 the public authority responded to the Commissioner's queries. It advised that it was still looking for the misplaced documents.
46. On 22 May 2008 the Commissioner chased a response from the complainant. A reply was received on 25 May 2008.
47. On 29 May 2008 the Commissioner again contacted the public authority. He raised further queries and also sought replies to some of his earlier queries which remained unanswered. On 10 June 2008 the Commissioner chased a response.
48. On 18 June 2008 the public authority made a partial response and forwarded copies of the information which it had decided, at internal review stage, were not part of the scope of the request. On 20 June 2008 it also responded in respect of the Commissioner's remaining queries and mentioned at this point that some documentation still remained outstanding as it could not be located.
49. On 24 June 2008 the public authority sent two emails to the Commissioner with several attached documents. These included copies of information which had previously been supplied to the complainant by HMIC. This information was supplied to the Commissioner by way of answering a response to one of his previous queries, which was: *“Did the PSU itself ever produce any assessment or recommendations in relation to [Nottinghamshire Constabulary]?”*. The public authority advised the Commissioner that one of the HMIC reports it had now supplied to him formed *“the crux of this entire case”* and that this had been already supplied to the complainant by the HMIC, albeit in a redacted format. The Commissioner here notes that the complainant did not request any HMIC documentation and he does not therefore consider this report to be the *crux* of the request, although he does concede that it may serve a connected interest.
50. On 14 July 2008, the public authority advised the Commissioner that it had located the documents which it had previously mislaid.

51. On 12 August 2008 the complainant requested an update regarding his investigation. The Commissioner responded on the same day.
52. The Commissioner telephoned the public authority on 6 October 2008 to request that it consider releasing a schedule of all the withheld information to the complainant to let him know what information was being considered. The Commissioner did this in view of the large amount of information within the scope of the request, in his belief that the complainant might not actually require all of the information in order to satisfy his request.
53. On 7 November 2008 the public authority responded. It did not consent to disclosing a list of the information held as *"it would reveal too much about the information that was not disclosed"* and that *"the process of redaction will raise more questions than it will answer"*. It also advised the Commissioner that it had now forwarded him hard copies of the previously mislaid information in the post. The Commissioner confirmed his receipt of these on 12 November 2008.
54. During February and March 2009 there followed a series of exchanges between the Commissioner and the public authority as the Commissioner sought to obtain more information about the submission to the Qualified Person, the public authority's final view of the scope of the request and the documents held which were within the actual scope of the request. The Commissioner also suggested a meeting with a view to achieving a better mutual understanding of the points at issue.
55. On 3 April 2009 the public authority sent its response. It clarified that it had been having difficulty finding a member of staff who was able to identify which documents were either in or out of the scope of the request. It informed the Commissioner that it had now managed to identify a retired colleague who had agreed to a meeting with the intention of going through all the documents to identify which were, or were not, written by, or on behalf of, the PSU. It had arranged for a meeting on the 22 April 2009 and asked the Commissioner if he would wait until this date for a fuller response.
56. The Commissioner agreed to this and asked whether it would be beneficial if his representative also attended the meeting in case there were any more issues which came to light at that time. This suggestion was agreed by the public authority.
57. On 22 April 2009 the Commissioner attended a meeting with the public authority and a previous member of PSU staff. The main aim was to seek clarification as to which documents fell into the scope of the request. Of the 56 items under consideration agreement was reached on all but 5 of the documents where authorship was not clear; the public authority advised that it knew a further party who would be able

to determine their source and said their opinion would be sought. The Commissioner again suggested that a copy of the schedule be passed to the complainant which could result in him removing some documents from the scope of his complaint.

58. On 27 April 2009 the Commissioner wrote to the public authority. He included a revised schedule of documents showing which were deemed to be either in or out of the scope of the request. He asked whether release of the schedule had been reconsidered and sought an update about authorship of the 5 remaining documents. He requested a response within 10 working days, i.e. by week ending 15 May 2009.
59. On 1 May 2009 the public authority replied. It advised that the schedule could not be released. It also advised that the officer dealing with the case was about to go on leave and would not be returning until 18 May 2009. It therefore asked for a further time extension until later that week.
60. On 18 May 2009 the Commissioner wrote to the public authority and asked for a response by the end of the day on 21 May 2009. He advised that if one were not forthcoming he would make his decision based on the information he already had and that he would not accept any further submissions in the case.
61. On 21 May 2009 a response was received. This stated that section 36 was still being applied to all information within the scope of the request. Section 31(1)(a) and (b) was also cited in respect of some of the information. The public authority also stated that it had arranged a meeting for 4 June 2009 in respect of the 5 outstanding documents but, as this was later than the Commissioner's deadline of 21 May 2009, it had therefore maintained its original stance that the documents were outside the scope of the request. Nevertheless, it maintained that all 5 would be fully exempt under section 36 and partly exempt under section 31(1)(a) and (b).
62. The Commissioner advised that if he received any submissions as a result of the meeting on 4 June 2009 that he may take these into consideration if he had not yet made his decision.
63. On 6 July 2009 the public authority forwarded further submissions. It maintained its previous view that the 5 documents which remained under dispute fell outside the scope of the request. It also raised doubts on the inclusion a number of those documents which had been previously agreed as being in scope at the meeting held on 22 April 2009. In the event of the Commissioner not agreeing with its stance it also provided further public interest arguments.

Analysis

Procedural matters

Section 1(1)

64. Section 1(1) of the Act 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.”

65. The Commissioner has considered whether the public authority has complied with section 1(1)(a) and (b) of the Act.

66. As it confirmed that the information was held the public authority did not breach section 1(1)(a). However, for reasons which will be explained below, the Commissioner considers that all of the information which was withheld from the complainant, unless it was exempt by virtue of section 40(2), should have been released to him. Therefore, the public authority has breached section 1(1)(b) of the Act by failing to communicate the information to the complainant in response to his request.

Section 10(1)

67. Section 10(1) of the Act 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.”

68. The Commissioner has considered whether or not the public authority complied with section 10(1) of the Act.

69. As the public authority failed to confirm or deny that it held the requested information within 20 working days it breached section 10(1) in relation to its obligation under section 1(1)(a).

70. Additionally, for reasons which will be explained below, as the public authority did not provide the requested information to the complainant within the statutory time for compliance because it incorrectly applied exemptions, the Commissioner therefore considers that it again breached section 10(1) of the Act in relation to its obligation under section 1(1)(b).

Section 17

71. 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.”*

72. As it failed to issue a refusal notice within twenty working days the public authority breached section 17(1).

73. By failing to specify the relevant subsection of section 36 at either the refusal notice or internal review stage it also breached section 17(1)(b).

74. Section 17(3) of the Act provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information 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 exemption outweighs the public interest in disclosing the information...’*

75. The public authority did not provide an adequate public interest test, although some arguments against disclosure were given at internal review stage. By failing to do so it breached section 17(3)(a).

76. In its internal review the public authority stated that it had removed details of *‘junior officials’* but failed to cite any exemption. It later clarified to the Commissioner that it had applied section 40(2). By failing to provide the complainant with an adequate explanation at any point it breached section 17 (1)(b) and (c).

Exemptions

77. A schedule of the documents has been appended to this notice in a non-confidential annex. Where the title of the document has already been made available to the complainant it has been included. Where it has been withheld it has been numbered in the same manner adopted

by the public authority during this investigation. A full schedule of all the documents has been provided in a confidential annex.

78. The Commissioner will firstly consider section 36 as this exemption has been applied to all of the withheld information.

Section 36 – prejudice to effective conduct of public affairs

79. During the investigation the public authority confirmed that it was relying on the exemption at section 36(2)(b)(i) and (ii), and (c), in respect of all of the withheld information. This 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...

(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.”

80. In *R Evans v The Information Commissioner & the Ministry of Defence* the Tribunal commented on the relationship between s36(2)(c) and the other subsections of 36(2) because, in this case, the public authority claimed before the Tribunal that both section 36(2)(b)(i) and section 36(2)(c) applied to the withheld information. The Tribunal commented at (paragraph 53) that *“The principle arguments in favour of this exemption [36(2)(c)] advanced by the MOD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves feely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting.”* However, *if the same arguments are to be advanced, then the prejudice feared is not “otherwise”. Some prejudice other than that to the free and frank expression of advice (or views as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged.”*

81. The Commissioner’s view is that it will be acceptable to claim more than one limb of s36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection. Therefore, in order to engage section 36(2)(c), i.e. *otherwise* prejudice the effective conduct of public affairs, some prejudice other than that protected by another limb of section 36 must be shown. In this case he finds that no such other prejudice has been identified and he has not therefore considered part 36(2)(c) of the exemption any further.

82. 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 whether the exemption has been applied correctly the Commissioner must:

- establish that an opinion was given;
 - ascertain that it was given by a qualified person;
 - ascertain when the opinion was given; and,
 - consider whether the opinion was objectively reasonable and reasonably arrived at.
83. During the course of the investigation the Commissioner asked the public authority for details of the decision taken by the qualified person, in order for him to ascertain that an opinion was given and also that it was given by an appropriate person at an appropriate time.
84. The public authority advised the Commissioner that at its refusal stage the qualified person was the then Home Secretary, Charles Clarke. It further clarified that a second opinion had been sought at internal review stage when the information was reconsidered and, on this occasion, it had been given by another Home Office minister, Tony McNulty. The Commissioner is satisfied that both parties were appropriate 'qualified persons' as laid down in section 36(5) of the Act.
85. The Commissioner was advised that a written submission was passed to the appropriate person for his consideration on both occasions. The public authority provided the Commissioner with a copy of both submissions on 25 February 2009. It advised that the original opinion had been given on 9 February 2006, the day before it had issued its refusal notice. The second opinion had been given on 11 July 2006, on the day before issuing its internal review.
86. 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.
87. The Commissioner accepts that where evidence exists which suggests that disclosure would lead to a loss of candour in the future, then this is a factor that needs to be considered. However, he also recognises that it is not possible to actually prove what will happen in the future.
88. The Commissioner has been provided with evidence that the qualified person took the view of a key member of staff on each occasion by

way of an emailed submission. However, he notes that the later opinion was given in respect of different information than the earlier opinion. As shown above, some of the information not covered by the later opinion was subsequently deemed to be within the scope of the request. However, since this information had previously been included in the original qualified person's opinion, the Commissioner has concluded that all the information is covered by the initial opinion.

89. The first submission gave a general description of the nature of the information to be considered and the reasons for withholding it. The second submission also included annexes of documents which were under consideration. Except for one argument, for reasons which he has explained below, the Commissioner has formed the view that the opinion was reasonably arrived at, since both qualified persons were briefed by an appropriate staff member, and steps were taken to ensure that the qualified persons were apprised of the nature of the information in question.
90. The one area where the Commissioner does not concur that the opinion was reasonably arrived at relates to the age of the information requested. This is for the following reasons.
91. The Commissioner was advised, during his investigation, that the PSU engagement with West Yorkshire Police had started in summer 2003 and concluded in November 2004. He was also advised that the engagement with Nottinghamshire Police had started in late 2002 and ended around March 2007. He therefore notes that, at the time of the request (and indeed the internal review), the PSU was still engaged with Nottinghamshire and work was therefore ongoing. However, he notes that the public authority did not raise the fact that work was ongoing - as an issue bearing on either the prejudice or public interest tests - with the complainant at either refusal stage or internal review stage.
92. The public authority did raise the issue during the Commissioner's investigation:

“Given the fact that the engagement process had only very recently been concluded in relation to West Yorkshire, and was still ongoing in relation to Nottinghamshire, the harm that could be caused to these particular projects would have been very significant had it been known that candid documentation was to be released so soon after it was written.”
93. However, the Commissioner notes that, in the first submission it made to its qualified person, the public authority made an apparently contradictory argument in respect of the age of the information. In this submission it advised that disclosure of PSU assessments would present an *out of date view* of the forces' performance; this was given to support non-disclosure of the information. The Commissioner is therefore of the view that the qualified person was being invited to take

the view that information about work that was no longer ongoing was more likely to be exempt, on the grounds that it was 'out of date'. The latter submission to the qualified person, which was made prior to issuing its internal review, did not make any reference to the age of the information.

94. In the Commissioner's view, the submission to the qualified person was therefore flawed in relation to its characterisation of the age and currency of the information. The reasonableness of the qualified person's opinion was thereby undermined.
95. The public authority's other comments in support of the opinion that disclosure of the information would create the necessary prejudice are summarised as follows. That, in the opinion of the qualified person, disclosure of this information would prejudice the PSU's ability to conduct effective work with under-performing forces because engagements are centred on a high degree of honesty, trust and candour. Also, that releasing the information would undermine this trust and have a detrimental effect on PSU engagements as forces would no longer be willing to engage if the details could potentially be disclosed.
96. Whilst it is possible to argue against the opinion, this does not mean that the opinion is objectively unreasonable, and not based on good faith and the proper exercise of judgement. After considering the information supplied, the Commissioner has formed the view that the opinion of the qualified person is objectively reasonable in relation to these arguments. The Commissioner is therefore satisfied that the exemption under section 36(2)(b) is engaged in relation to the requested information.
97. Given this, the Commissioner has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.

Considering the public interest test

98. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* [EA/2006/0011 and EA 2006/0013], where the Tribunal considered the law relating to the balance of public interest in cases where section 36 applied. The Commissioner has followed the interpretation of the law relating to the public interest test, as set out in this decision, and notes and adopts in particular the following conclusions.
99. Unless there is any relevant exemption under the Act then the section 1 duties will operate. The "default setting" in the Act is in favour of

compliance – requested information held by a public authority must be disclosed except where the Act provides otherwise.

100. For an exemption to be upheld, the public interest in maintaining the exemption must outweigh the public interest in disclosure, as the 'presumption' of disclosure in the Act will operate where the respective public interests are equally balanced.
101. There is an assumption built into the Act that the disclosure of information by public authorities on request is in itself of value and will work in the public interest by promoting transparency and accountability in relation to the activities of public authorities. The strength of that interest, and the strength of the competing interest in maintaining any relevant exclusion or exemption, must be assessed on a case by case basis.
102. When it comes to weighing the balance of public interest, the likelihood, nature and extent of any prejudice should be considered.
103. It is important to note the limits of the reasonable person's opinion required by section 36(2). The opinion is that disclosure of the information would have (or would be likely to have) the stated detrimental effect. That means that the qualified person has made a judgement about the degree of *likelihood* that the detrimental effect would occur, does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.
104. The right approach, but consistent with the language and scheme of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgement required by section 2(2)(b), the Commissioner should form his own view on the severity, extent and frequency with which detrimental effect will or may occur.
105. As mentioned earlier in this notice, the public authority failed to provide an adequate public interest test. The only arguments it considered in favour of disclosure were in fact those presented to it by the complainant which are identified as follows.
106. When he requested an internal review, the complainant advised the public authority that its refusal: "*appears to contradict the Government's stated objective of holding the police to account by making performance issues public*". He further stated that the public authority's stance was: "*in marked contrast to HMIC, which publishes its reports, and individual forces, which have disclosed internal documentation, suitably abridged, on performance issues*".

107. The public authority countered these comments by pointing out that both HMIC and PSU produce a range of documents, some of which are public-facing and some of which are not intended for public inspection because of their sensitivity. It advised that proactive publication of information was made wherever possible.
108. The complainant further remarked that the public authority's position: *"not only denies the public the opportunity to hold police commanders to account but obscures the work of such an influential body as the PSU from public scrutiny"*.
109. The public authority advised the complainant that the PSU already published an annual Police Performance Assessment and had introduced a statutory requirement for all police authorities to produce Local Policing Summaries presenting performance information about their forces. This, it stated, was to enhance accountability, improve effectiveness and engage the public in the policing of their local community.
110. When considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure the Commissioner recognises that there are competing public interest arguments. He has gone on to consider these arguments in turn.

Public interest – in favour of maintaining the exemption

111. The Commissioner gives due weight to the qualified person's reasonable opinion that disclosure would inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and prejudice the effective conduct of public affairs.
112. The Commissioner notes that the focus of the public authority's arguments has been that disclosure would not be in the public interest. In its correspondence the public authority has attempted to illustrate how prejudice would occur and take effect. In considering these arguments, the Commissioner has been mindful of the public interest in a public authority having effective processes which allow it to openly debate issues of significant public interest without having the 'chilling effect' of potential disclosure inhibiting it from frankly considering areas of concern.
113. According to the public authority, disclosure: *"would prejudice the future conduct of PSU's engagements with under-performing forces"*. In its internal review it further qualified this comment with the following arguments:

"... PSU's engagements with under-performing forces are extremely sensitive negotiations which require careful handling and a degree

of honesty about performance failings to be effective. At the outset of all PSU engagements the priority is to develop a trusting relationship with the force.”

“For all of PSU’s existing and future engagements the disclosure of the documentation would prejudice the PSU’s ability to conduct effective work with under-performing forces.”

“The unit currently enjoys a constructive degree of candour from engaged forces which... would certainly diminish, or indeed disappear, if they were to find their comments in the public domain. This would have a detrimental effect on the success of PSU engagements and would deter many forces from willingly or voluntarily engaging with the unit.”

“... a successful engagement must be an open and honest assessment of the issues. If forces find these assessments in the public domain, they will be understandably defensive to any critique, increasing dramatically the difficulties of the already sensitive engagement process.”

“Release of this information could irrevocably affect the relationship between the service and the PSU and could severely prejudice PSU’s capacity to help forces improve performance.”

114. A further argument, which was only provided to the Commissioner during his investigation, was that the engagement process had only recently concluded at West Yorkshire Police, and was still ongoing at Nottinghamshire Police at the time of the request. The public authority therefore believed that: *“the harm that could be caused to these particular projects would have been very significant had it been known that candid documentation was to be released so soon after it was written”*.
115. The public authority also advised the Commissioner that it had taken into account the volume of information which was already available in the public domain about police effectiveness. Whilst the Commissioner understands that much is available he does not accept that this public interest argument holds much weight. The complainant has specifically asked for information which is not available. The complainant has also drawn the public authority’s attention to the fact that the HMIC provides much information about its own engagements with forces but, by comparison, very little is known about PSU engagements.
116. The public authority also advised the Commissioner that it considered it very unlikely that all the information would be suitable for disclosure even given the passage of time since the request. However, as it also stated that it had not actually conducted any proper assessment of the situation, the Commissioner has, again, given little weight to this argument.

Public interest – in favour of disclosing the information

117. The Commissioner fully accepts that there is a public interest in ensuring the free and frank exchange of ideas, the effective running of the process of deliberation within public authorities, and the accountability of public authorities.
118. Therefore, in considering this case, the Commissioner has been mindful of the strong generic public interest in openness, transparency, public understanding and accountability, in relation to the activities of public authorities.
119. He has gone on to consider these public interest issues in the light of the individual circumstances of this case.
120. As mentioned earlier in this notice, the public authority did not explain its assessment of the public interest test to the complainant. However, it did state the following arguments to the Commissioner during his investigation:

“We fully recognise that there is there is a very strong public interest in favour of openness in relation to police efficiency and effectiveness, on account of the hugely important role that the police play in society. Their effectiveness affects everyone in this country to a very significant degree. It is therefore important that the police are accountable to the public for the decisions that they take, the quality and effectiveness of the service they provide, and in the spending of taxpayers’ money in pursuing their objectives.”

121. It further submitted that, when a lack of effectiveness has become apparent, there is a strong public interest in showing the public how such issues have been addressed. The public authority reinforced the extent of this interest by saying that: *“a great deal of information is already published about police performance in this country, including for example, HMIC inspection reports (which are designed for public rather than internal consumption)”*.
122. The public authority also identified *“a very strong public interest in ensuring that the process of police improvement is as effective as possible”*.

Conclusion

123. The Commissioner understands the public authority’s concerns that the PSU’s engagements with forces involve sensitive negotiations and the development of a good working relationship with a high degree of trust. (However, he notes that this is also a requirement of any engagements which HMIC undertake with forces, yet their reports are published, albeit in a sanitised format). However, whilst he accepts that forces will be *“understandably defensive to any critique”* if the information requested were to be placed in the public domain, the Commissioner

notes that shortfalls in the performance of the police forces involved in this case were already in the public domain as a result of HMIC reports¹ and media articles². Therefore, the under-performance was already public and both forces were already open to criticism. Whilst the detail of the actual PSU engagement was not available its involvement was known. The Commissioner does not therefore accept that this argument carries much weight.

124. In the public authority's view the release of all the information requested would make future PSU engagements less effective as forces would be less willing to participate. In this particular case, the Commissioner is not entirely persuaded by this argument. Most of the withheld information actually relates to processes and procedures and suggestions as to how these can be improved, with the majority of the information being presented in a project style. He does not agree that the documents contain information which would cause participants to be less willing to contribute openly and fully in future engagements to any significant degree. There are 'personal comments' contained in one document but these are anonymised, so the source cannot be identified.
125. It is the Commissioner's view that those contributing to the PSU engagement do so in a professional capacity and it is part of their official responsibility to participate fully and frankly, and to express themselves in robust terms where the situation warrants it. The Commissioner does not accept that the release of the requested information would necessarily result in public sector employees failing to provide information or in their providing incomplete, inaccurate or anodyne information in the future. Should there be evidence of this, the organisations involved should take the necessary measures to ensure that staff continue to deliver the assistance that they are expected to provide as part of their official duties.
126. The public authority has not provided any convincing arguments that the release of this information would have the detrimental effect cited. It has alluded to a lack of co-operation and a perceived deterrent to willing or voluntary future engagements. However, the PSU were engaged on these two occasions because of under-performance and the Commissioner does not accept that either force realistically had any option other than to accept such an engagement in an effort to improve its performance. Either force's degree of co-operation may have been affected were future disclosure anticipated, but the Commissioner does not agree that this would be likely to any

¹ <http://inspectrates.homeoffice.gov.uk/hmic/inspections/baseline-assessments-ho-0304/wyorksbaseline10041.pdf?view=Binary>;
<http://inspectrates.homeoffice.gov.uk/hmic/inspections/baseline-assessments-ho-0304/nottsbaseline10041.pdf?view=Binary>

² http://www.timesonline.co.uk/tol/life_and_style/education/student/news/article427195.ece;
<http://www.guardian.co.uk/politics/2005/mar/15/ukcrime.prisonsandprobation>;
<http://www.independent.co.uk/news/uk/crime/clarke-investigates-struggling-police-in-nottinghamshire-528769.html>

significant degree, as it is in a force's best interest to be as effective as possible. Furthermore, it could be argued that public scrutiny might actually encourage a force to act so as to be seen to be co-operating. Accordingly, he also believes that any future work would still necessarily be conducted by the PSU.

127. The Commissioner considers that both the public authority and the police forces would have been aware of the onset of the Act, even though there was no requirement to process information requests until January 2005, which postdates the commencement of both these PSU engagements. As such he believes it is reasonable that they could have expected that such information could be the subject of a request for disclosure. This likelihood is even more apparent in light of the public interest in such matters, as was alluded to by the public authority above. The Commissioner notes that such a possibility did not appear to have hindered any co-operation between the parties at that time.
128. In the case of *Lord Baker v the Commissioner and the Dept for Communities and Local Government* [EA/2006/0043], the Tribunal commented that transparent provision of the full information behind a decision removes any suspicion of 'spin' and therefore promotes confidence in public authorities: *'by making the whole picture available, it should enable the public to satisfy itself that it need have no concerns on the point'*. Although the HMIC has published some reports about its own findings at both forces the PSU has not. Very little information about the PSU engagement with either force is readily available and the release of the requested information could better satisfy the public's concerns that its police service is effective or, in these cases, that any lack of effectiveness is being properly addressed.
129. The public authority has also stated that the timing of the request was such that one engagement had only recently ended and the other was ongoing.
130. The Commissioner accepts that the age of the requested information is a relevant public interest factor because, in many cases, it can be seen that its sensitivity decreases over time. Therefore, such an argument could, in his opinion, be a strong one in support of withholding the information.
131. However, the Commissioner notes that, in this case, the argument regarding the age of the information was not given to the complainant either at refusal or internal review stage. Furthermore, the public authority neglected to cover the point accurately in its submissions to either of the qualified persons. In fact, in the first submission it actually stated to the qualified person that it was not in the public interest to disclose the requested information because it would present an *out of date* view. The second submission omitted any reference to the age of the material.

132. The Commissioner therefore concludes that any argument regarding the age of the information carries little weight in this particular case. Its age was misrepresented to one qualified person and not mentioned to the other. It was never presented to the complainant at any stage. In fact, only one brief argument against disclosure was made to the Commissioner during his investigation, as cited in paragraph 138 above.
133. The public authority has not provided the Commissioner with any compelling arguments to support its position that disclosure would have a “chilling effect” on the co-operation of forces when engaging with the PSU in order to improve their performance or on the ability of the PSU to effectively conduct its engagements. Whilst the Commissioner is open to the idea that such a disclosure may not be presumed as being routinely expected, he believes all parties must be aware that, on occasion, the public interest in a topic may be of sufficient weight to provide for disclosure.
134. The Commissioner understands the public authority’s position that; *“By their nature, PSU’s engagements with under-performing forces are extremely sensitive negotiations which require careful handling and a degree of honesty about performance failings to be effective”* and that it is concerned that disclosure would result in the diminishment of its working relationships with forces. However, similar information is processed during HMIC engagements and the results are published without any apparent detrimental effect. The performance failings were public. The PSU engagement was also public.
135. Although not pointed out by the public authority the Commissioner also notes that the volume of information generated in the engagement with Nottinghamshire is particularly significant. This is because the original engagement revealed other areas of concern which were subsequently addressed by way of a number of further projects - there was no overarching report in existence which may have more succinctly covered the complainant’s request. The nature of the work undertaken by the PSU and the breadth of processes covered in the projects particularly serves the public interest in this case. It shows how deeply-rooted some problems were and the lengths taken by those concerned to improve performance and provide a better public service.
136. The Commissioner would also like to comment that the arguments presented by the public authority centre on a perceived lack of co-operation in the future by all police forces whereas there were few arguments presented which were directed at this particular request. He is not aware of any similar requests for information about other forces where the PSU has been involved which could add much weight to the perception that all forces would fail to co-operate with the PSU.
137. The Commissioner is not persuaded by the public authority’s arguments regarding the severity of the prejudicial effects that the

disclosure could cause, especially given the particular circumstances of this case. The Commissioner believes that the public interest factors of openness and accountability are of particular significance in this case. In considering this issue the Commissioner believes that there is a substantial public interest in the public's understanding of issues surrounding the under-performance of police forces as well as a substantial public interest in the effective running and provision of service to the public. This is especially the case with the police service which fulfils such a fundamental role in the lives of the population of the country as a whole.

138. In conclusion, the Commissioner has considered the competing public interest arguments, as set out above. He has considered all the arguments the public authority has stated in favour of maintaining the exemption and has decided that, although the exemption at section 36(2) was properly engaged, the public interest in maintaining the exemption does not outweigh that in disclosure.
139. As its citation of section 36 has not been upheld the Commissioner will now go on to consider the other exemptions cited by the public authority.

Section 31 (1)(a), (b) and (c) - law enforcement

140. Section 31(1)(a), (b) and (c) states that information is exempt if its disclosure would, or would be likely to, prejudice:
- (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;
 - (c) the administration of justice.
141. The public authority has cited this exemption in respect of 21 documents which are either partly or fully withheld. For the Commissioner to agree that this exemption is engaged the authority must demonstrate that disclosure of the requested information would, or would be likely to, prejudice any one of the subsections cited. The Information Tribunal case *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005] outlined its interpretation of "likely to prejudice". It confirmed, at paragraph 15, that: "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk*".
142. In other words, the risk of prejudice need not be more likely than not, but it must be substantially more than remote. As this is a qualified exemption, in addition to demonstrating the likelihood of prejudice, the authority must apply the public interest test, to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

143. In its refusal notice the public authority did not refer to section 31. This exemption was added at internal review stage when the reasons given were that:

“... it is clear that some of the information relates to operational policing matters of Nottinghamshire Constabulary. For example, detailed reports on the operation of Control Rooms and Forensic processing”.

144. It further stated that:

“... all police forces are subject to limited resources and a degree of prioritisation is necessary. If details of this type of prioritisation were made available to the public at large it would allow those seeking to commit criminal activity, especially those engaged in organised crime, greater freedom to operate. Such information could also prejudice the effective conduct of specific operations or targeted initiatives”.

145. Despite being invited to supply further arguments the public authority did not submit anything to support its citing of this exemption until its responses of 21 May 2009 and 6 July 2009. In both letters it stated:

“The publication of the information requested would lead to the identification of structural and methodological weaknesses in Nottinghamshire Constabulary. The work undertaken by PSU is built on trust and openness with police authorities and to disclose highly detailed information listing organisational, structural or cultural weaknesses will undermine future work to improve policing which is likely to resulting [sic] poorer policing performance. Equally, the documents contain information about methodology and capabilities, which if released could assist those seeking to evade detection. This will have a detrimental effect on the prevention and detection of crime.”

146. To ascertain whether or not the exemption is engaged the Commissioner has considered its application to each withheld item in turn. In some cases the whole document has been withheld whereas in other cases only part of it. In some instances the exemption has been applied to full sections of information and there is no detailed explanation from the public authority as to which specific parts, if disclosed, could be prejudicial. There is also no explanation as to why some information is withheld citing 31(1)(a), (b) and (c), whereas other information cites only 31(1)(a) and (b).

147. The Commissioner has therefore carried out a review of the contents to ascertain whether, in his opinion, disclosure of any of the information either would or would be likely to be prejudicial. His views are set out below. As previously stated, section 36 has also been cited in respect of the whole of the withheld information.

148. The withheld information is part of a key project from within 'Operation Focus' which looks at processes and focuses on improving performance. It centres on how to improve a named process and focuses on a particular section of the Constabulary.
149. Some of the withheld information can be briefly described as follows:
- the position and performance of the force
 - performance issues and proposed solutions, including process flows
 - performance data with charts and key issues
 - current initiatives within a Unit
 - anonymised comments from staff
 - a departmental action plan
 - review methodology
 - force structure and priorities
 - force scientific support strategy
 - forensic processes
 - control room briefing processes
 - resourcing processes
 - dealing with an incident and incident handling processes
 - training and guidance for officers
 - processes when dealing with victims of violent crime
 - performance management
 - the final benefits realisation report for a projects

Conclusion

150. The Commissioner has reviewed the information withheld under this exemption, and, in the absence of any detailed arguments by the public authority, he has not identified any information which he believes would have the prejudicial effects stated if it were to be disclosed. He therefore does not find that section 31 is engaged in respect of any of the information. It is therefore unnecessary for him to go on to consider the public interest test.

Section 43(2) – commercial interests

151. The public authority also sought to rely on section 43(2). This provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
152. In its internal review the public authority advised the complainant that:

“A small amount of information relates to potential business cases and costs for improvements in information technology and

communications systems. This information falls under exemptions contained in Section 43(2) of the FOIA...

"This exemption is also subject to a public interest test. Due to the importance of ensuring that the commissioning bodies' projected costings remain confidential if the information on the costs were released it would prejudice the public authorities' commercial interests. Therefore public interest therefore [sic] lies in withholding this information".

153. The Commissioner invited the public authority's further arguments when he commenced his investigation. At this point the public authority further advised that:

"A small amount of information was also withheld ... on the basis that it would be prejudicial to the police force's commercial interests. This information relates to potential business cases and the costs for improvements to information technology systems. At the time that this information was considered for disclosure its release would have prejudiced the police force's ability to obtain best value during any tendering process for the relevant work. While it was recognised that there is a public interest in ensuring that cost projections in accountability in demonstrating that public authorities' [sic] obtain best value through any tendering process. However it was considered that this was outweighed by the public interest in the police's ability to obtain best value not being undermined by the inappropriate disclosure of commercially sensitive information".

154. From the information provided it is therefore understood that the public authority believes that disclosure of the withheld information would prejudice the commercial interests of a third party - in this case a police force.
155. In order to engage this exemption the information needs to relate, either directly or indirectly, to commercial activities for the sale or purchase of goods and services.
156. The withheld information appertains to three proposed IT solutions to enable performance management. Within the documentation the information is clearly labelled as being *"estimates intended to provide a rough guide of the costs"* and *"not intended to be quoted as actual costs"*. Any costs provided are based on various assumptions, which are listed, and these include some broad figures to be used for comparison purposes. The documentation also goes on to discard one of these options and it states that the force will need to consider whether or not to tender for one of the remaining options.
157. Much of the withheld information relates to comparisons between the three options available and only a limited amount includes any pricing information about goods and services. However, as explained above,

this pricing information is intended only as a *rough guide* and the third party has specifically stated that any content is not intended to be quoted as an *actual cost*.

158. There is nothing within the documentation to suggest that the information itself would actually be used as part of any future tendering process. Whilst it is not possible to categorically state that none of the information would subsequently form part of a tendering process, the Commissioner believes that the lack of detail in respect of the actual purchase of goods or services held within it would make this prospect very unlikely.
159. The source of any figures is not clear and much seems to be based on 'ball park' estimates agreed between two parties. Where these estimates are derived from is not explained in any detail. Additionally, there is no detail provided about what any proposed solutions would be expected to deliver nor is there any breakdown about what is actually included within the suggested figures.
160. Furthermore, there are no dates within the document and it is not known at what stage of the PSU engagement it was produced. The Commissioner here notes that figures about IT become outdated very quickly and, even if the information were accurate, that it would become obsolete within a short time.
161. The prejudice test is not a weak test, and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. In this case the public authority has stated that it believes that prejudice would occur were the information to be disclosed. In such cases the Commissioner's view is that, whilst it need not be possible to prove that prejudice would occur beyond any reasonable doubt whatsoever, the possibility of prejudice must be at least more probable than not. In his Awareness Guidance no. 20³ he further explains:

"A public authority cannot be expected to prove exactly what would happen on disclosure. However, it is not sufficient for a public authority to put forward unsupported speculation or opinion; the public authority must be able to provide some evidence from which it can then extrapolate in order to come to a conclusion about what is likely."

162. Importantly, when considering prejudice to a third party's commercial interests the Commissioner believes that the public authority should have evidence that this does in fact represent or reflect the view of the third party. The public authority should not simply speculate in this

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_prejudice_adversely_affect_version_2.03_14_03_08.pdf

respect – the alleged prejudice should be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself.

163. This position was established by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* [EA/2006/0014]. In that case the public authority had claimed that releasing the requested information would prejudice the commercial interests of a third party with which it had a commercial relationship, and the Commissioner had considered the public authority's arguments in this respect. The third party was not represented at the Tribunal or joined in to the proceedings. The Tribunal decided to disregard the third party's commercial interests when reaching its decision on the grounds that the public authority could not expound them on behalf of the third party:

“Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that [the third party's] commercial interests would be likely to be prejudiced”.

164. The Commissioner has not concluded from this that only arguments provided by the third party itself can be taken into account. It may be that, due to time constraints for responding to requests, arguments are formulated by a public authority based on its prior knowledge of the third party's concerns. Where a public authority can provide evidence that such arguments genuinely originate in and reflect the concerns of the third party involved then the Commissioner may take them into account. Nevertheless, he considers that there is a presumption that, when an argument is adduced which relies on alleged prejudice to third parties, then evidence will need to be presented that the perception of potential prejudice is one which was shared by those third parties. No such evidence has been made available to the Commissioner in this case.
165. In the view of the Commissioner it was the responsibility of the public authority, in applying the section 43(2) exemption, to obtain sufficient evidence to demonstrate a real and significant risk of prejudice to the police force from release of the information. Without such evidence the public authority was not in a position to make a decision that section 43(2) was engaged. Accordingly, the Commissioner is not satisfied that the public authority has demonstrated that prejudice would occur.
166. Furthermore, the Commissioner has also considered whether or not the lower prejudice threshold of would be likely should have been applied to the information. However, for the same reasons, he believes

that no such prejudice has been evidenced by the public authority and no considerations from the police force itself, as the relevant third party, have been provided.

167. The Commissioner finds that the exemption at section 43(2) is not engaged.

Section 40(2) – personal information

168. The Commissioner accepts that the complainant raised no specific complaint in respect of this exemption, which the public authority cited in connection with document 9. Accordingly it has not been further considered, and he does not require this information to be disclosed.

The Decision

169. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act.
- By failing to provide the complainant with a refusal notice within 20 working days it breached section 17(1).
 - By failing to specify the relevant subsection of section 36 at either the refusal notice or internal review stage it breached section 17(1)(b).
 - By failing to provide an adequate public interest test it breached section 17(3)(a).
 - By failing at any point to provide the complainant with an adequate explanation regarding its use of section 40(2) it breached section 17 (1), (a), (b) and (c).
 - By failing to confirm whether or not it held the requested information within the statutory time limit it breached it breached section 10(1).
 - By incorrectly withholding the requested information, unless exempt by virtue of section 40(2), it breached section 1(1)(b) and also section 10(1) in relation to its obligation under section 1(1)(b).

Steps

170. With the exception of the information within document 9 (i.e. junior staff names) which the public authority has identified as being exempt under

either 40(2) of the Act, the Commissioner requires the public authority to disclose the remaining information.

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

Failure to comply

172. 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.

Other matters

Information held on behalf of another organisation

173. The Commissioner would like to clarify that engaging a third party to undertake work on a public authority's behalf does not mean that ownership of any resultant documentation remains with that third party. If this was the case then a public authority could be minded to sub-contract many of their services in order to forego disclosure of the resultant work. Although some of this issue was clarified when his representative met with the public authority to consider the 'disputed' documentation, the public authority's mistaken view caused much unnecessary delay.

Engagement with the ICO

174. In investigating complaints received under section 50(1) of the Act, the Commissioner is, in the majority of cases, reliant upon substantive submissions from public authorities. When public authorities do not respond to the ICO's enquiries within a reasonable timescale, the outcome is that an investigation is unnecessarily prolonged whilst the Commissioner attempts to secure a response. The Commissioner notes that, during the course of this investigation, the public authority consistently failed to meet the deadlines set by his complaints officers. The Commissioner would hope that, in future, the public authority will undertake to respond to his enquiries within the timescales set by his complaints officers.

The internal review

175. Part VI of the Act's section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information,

and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. While he recognises that in this case the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took almost five months for an internal review to be completed.

Right of Appeal

176. 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.
Website: 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 15th day of October 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Section (1) provides that –

Any person making a request for information to the 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 the information communicated to him.

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 16(1) provides that -

It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

Section 17 provides that –

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

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

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 31(1) provides that –

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,

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 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 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).