

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 November 2009

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

#### Summary

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The complainant requested information in relation to the issue of whether or not a public inquiry should be held into the London bombings which occurred on 7 July 2005. The Home Office refused the request citing the exemptions at sections 21 (information accessible to applicant by other means), 23 (information supplied by, or relating to, bodies dealing with security matters), 35 (formulation of government policy) and 36 (prejudice to effective conduct of public affairs). During the course of the Commissioner's investigation, the Home Office additionally cited section 42 (legal professional privilege) in relation to some of the withheld information.

The Commissioner has investigated and found that the exemptions are engaged. However, in relation to section 36, he finds the public interest in maintaining the exemption does not outweigh the public interest in disclosure. He therefore requires the Home Office to disclose the information withheld by virtue of section 36. The Commissioner has also identified a series of procedural shortcomings on the part of the public authority relating to delay (sections 10(1) and 17(1)) and failure to specify appropriately the exemptions cited and the reason they applied (section 17(1)(c)).

#### 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.

## Background

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2. There was a terrorist attack on London on 7 July 2005 in which four suicide bombers blew themselves up on the London underground and a London bus, killing themselves and 52 members of the public.
3. A statement from The Secretary of State for the Home Department (Mr Charles Clarke) was laid before Parliament on 15 December 2005. This stated that careful consideration had been given to:

*'the views of those who have asked the Government to establish a full public inquiry into the atrocities of 7 July. The Government does not believe that such an inquiry would add to our understanding of the causes of those atrocities, in particular when there are Parliamentary and other inquiries underway into these and related events'.*

4. The Home Office published its 'Report of the Official Account of the Bombings in London on 7 July 2005' on 11 May 2006. The report is described by the Home Office as '*summarising the discoveries the police, intelligence and security agencies have made so far*', including what is known about those responsible and how and why they carried out the attacks.

## The Request

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5. The complainant wrote to the Home Office on 26 June 2006 requesting:

*'Please would you let me know in writing if you hold information of the following description:*

*Information concerning:*

*The issue of whether a public inquiry should be held into the London bombings of July 7 2005'.*

6. The Home Office responded on 4 December 2006 confirming that it holds the requested information. However, it advised the complainant the information was exempt by virtue of section 21 (information accessible to applicant by other means), section 23 (information supplied by, or relating to, bodies dealing with security matters), section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of public affairs). In responding, the Home Office provided the complainant with links to some reports which it considered he might find useful.
7. The complainant requested an internal review on 4 December 2006.
8. The Home Office wrote to the complainant with the outcome of its internal review on 10 May 2007. It released some information to the complainant and confirmed

the remainder of the requested information was exempt by virtue of sections 23, 35(1)(b) and 36(2)(b)(i) and (ii). The Home Office acknowledged that it had initially failed to advise the complainant that sections 35 and 36 were not being used simultaneously and confirmed that these exemptions apply to different pieces of information.

## The Investigation

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### Scope of the case

9. On 11 May 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the timeliness with which the Home Office responded to his request for information.
10. In relation to its citing of section 21, the Commissioner notes that, in its initial response, the Home Office provided the complainant with links to some information which it considered to be within the scope of his request.
11. The Home Office has subsequently advised the Commissioner that some of these links are no longer live. However, as the complainant has not raised this as an issue, the Commissioner has concluded that the complainant is satisfied with the links the Home Office provided him with at the time of its initial response.
12. During the course of his investigation, the Home Office advised the Commissioner that it also wished to rely on section 42 (legal professional privilege) in relation to some of the withheld information.
13. In light of this, the Commissioner has focussed his investigation on whether or not the Home Office was correct in citing the exemptions in sections 23, 35, 36 and 42.
14. The complainant also brought to the attention of the Commissioner the nature of the information which was released to him. The Commissioner is satisfied, following his enquiries, that this does not raise an issue in relation to the requirements of Part 1 of the Act.

### Chronology

15. The Commissioner contacted the Home Office on 2 December 2008 asking it to confirm whether or not, given the passage of time, the withheld information could now be disclosed. If this was not the case, the Commissioner asked the Home Office to provide further information about its decision to apply the exemptions cited and further arguments in relation to the public interest test.
16. The Home Office requested an extension to the deadline for responding on two occasions.

17. On 9 April 2009, having been reminded of the Commissioner's powers under section 51 of the Act to issue an Information Notice, the Home Office responded.
18. On 1 May 2009 the Home Office advised the Commissioner that it wished to cite section 42 in addition to section 36(2)(b)(ii) for some of the withheld information. It also confirmed that it was seeking a letter from a senior Home Office official confirming that some of the information in this case is exempt under section 23.
19. The Deputy Director, Office for Security and Counter Terrorism, sent a letter to a Deputy Information Commissioner at the Information Commissioner's Office, on 16 June 2009, confirming that information withheld under section 23 was either received from one of the bodies listed in section 23(3) or is directly related to them.
20. The Commissioner wrote to the Home Office on 29 June 2009 requiring further clarification in support of its argument that the withheld information is exempt by virtue of section 23(1). In his correspondence, the Commissioner also reminded the Home Office that receipt of some of the withheld information was still outstanding and that, despite an indication that it would provide further arguments in support of it citing sections 35, 36 and 42, these had not been received.
21. On 3 July 2009, the Home Office provided a substantive response to the Commissioner's questions.

## Analysis

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### Exemptions

#### **Section 23 - Information supplied by, or relating to, bodies dealing with security matters**

22. Section 23(1) states:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

23. The Commissioner is prepared, in limited circumstances, to accept the assurance of a senior official that information withheld under section 23(1) has indeed been supplied by, or relates to, security bodies specified in section 23(3). He will only do so where the official occupies a position in relation to the security bodies which allows them genuinely to validate the provenance of the information, and where the official is independent of the public authority's process for dealing with freedom of information requests.
24. The Commissioner is satisfied that the Deputy Director, Office for Security and Counter Terrorism, occupies such a position in this case. Accordingly, he has

concluded, in the light of the representations made about the information and in all the circumstances of the case, that the information withheld by the Home Office under section 23(1) engages the exemption.

25. Since section 23(1) is an absolute exemption no public interest test applies and the Commissioner has therefore concluded that it is appropriate for the Home Office to withhold the information to which this exemption has been applied.

### **Section 35 – Formulation of government policy**

26. Section 35(1) of the Act provides that:

*'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-*

*(a) the formulation or development of government policy,*

*(b) Ministerial communications,*

*(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or*

*(d) the operation of any Ministerial private office.'*

27. In this case, the Home Office has confirmed it is relying on section 35(1)(b).

28. The exemptions in section 35(1) apply where the information 'relates' to the matters set out in the sub-sections. In this case, as the Home Office is citing section 35(1)(b), the Commissioner has considered the extent to which the withheld information relates to Ministerial communications.

29. In accordance with the Information Tribunal in the case of *Scotland Office v The Information Commissioner* (EA/2007/0070), the Commissioner considers the Ministerial communications exemption covers not only documents which are, in themselves, communications between Ministers but also documents which refer to Ministerial communications. In the context of this exemption, the Commissioner considers 'communications' to include written correspondence in any form.

30. The Commissioner notes that, in this case, the Home Office is withholding two distinct sets of information under section 35(1)(b). Having considered both sets of withheld information, the Commissioner is satisfied that the information is, or relates to, communications between Ministers and the exemption is therefore engaged.

31. However, as section 35 is a qualified exemption it is subject to a public interest test under section 2(2)(b) of the Act. This requires disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*.

### **Public interest arguments in favour of disclosing the requested information**

32. The Commissioner notes that a Home Office report into the events that took place on 7 July 2005 was published in May 2006. At the time of the complainant's request, in June 2006, therefore, the question of whether or not an inquiry into the London bombings should be held was likely to be an issue which still attracted significant public attention and debate. Consequently, disclosure at the time of the request could be in the public interest as it would contribute to this debate.
33. In this respect, the Home Office acknowledges that:
- 'disclosure would allow a more informed debate, give a wider number of people the opportunity to contribute and increase trust in the quality of decision making. It could also lead to an increased knowledge in the way Ministers communicate and come to decisions, in this case whether a public inquiry should take place.'*
34. With regard to public interest arguments that weigh in favour of disclosure, the Commissioner considers that there is an inherent public interest in the government being accountable for, and transparent about, decisions it has taken.
35. In general, he considers that the release of Ministerial communications would have the effect of promoting accountability and transparency, by reassuring the public that decisions, such as those into the issue of whether or not to hold a public inquiry, have been made after a variety of views has been expressed and a robust debate has occurred. Disclosure could therefore increase public confidence in the decision making process.
36. Equally, disclosure may be said to be in the public interest if the information reveals that insufficient debate took place into the issue of whether or not to hold a public inquiry. In essence, disclosure may reveal a weakness in the decision-making process and it would be in the public interest to reveal such a weakness to encourage a more detailed and reasoned assessment of arguments in the future.

### **Public interest arguments in favour of maintaining the exemption**

37. In favour of withholding the information, the Home Office argues that release of the Ministerial communications in this case:
- 'would go against collective responsibility which is a constitutional convention as described in the ministerial code. This states that "Collective responsibility requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while remaining a united front when decisions have been made". Ministers might feel inhibited from discussing all the options and risk available if they felt that their opinions were routinely published, this could lead to a less effective system of government.'*
38. The convention of collective responsibility allows Government to be able to engage in free and frank debate in order to reach a collective position and to present a united front once a decision has been made.

39. In the case of *Scotland Office v The Information Commissioner* (EA/2007/0070), the Information Tribunal addressed the issue of collective Cabinet responsibility, describing it as:

*'the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully. When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed'* (para 82.)

40. The Commissioner notes that, in this case, the Home Office argued that disclosure would breach the collective responsibility that decision makers had as Ministers. Although not all Ministers are Cabinet members, all Ministers are bound by the ministerial code to promote Cabinet positions to Parliament and the general public. Therefore the Commissioner's view is that all Ministers are bound by the collective Cabinet responsibility convention.
41. The Commissioner considers that the ability for Ministers to be able to engage in free and frank debate in order to reach a collective position, and to present a united front after a decision has been made, is a powerful argument when considering the public interest test.

### **Balance of the public interest arguments**

42. In the Commissioner's view, the mere fact that information comprises, or relates to, communications between Ministers does not of itself weigh in favour of maintaining the exemption.

43. On this subject, the Information Tribunal in the *Scotland Office* case (EA/2007/0070) stated:

*'Some communication may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated. The very fact that certain information constitutes Ministerial communication does not therefore mean that there is a public interest in non-disclosure'*.

44. The Commissioner therefore considers that, when applying the public interest test to information withheld under section 35(1)(b), the content of the communication is likely in itself to have a significant bearing on the decision of whether to disclose, since there must be some detriment to the public interest for the balance of the test to justify maintaining the exemption.
45. The Commissioner considers that the purpose of the exemption at section 35(1)(b) is to prevent disclosure of information that results in less robust and well considered Ministerial decisions and debates. In acknowledging that, amongst

other things, the role of Ministers includes executive decision making, he gives weight to the arguments that collective responsibility protects high level government decisions from becoming personalised and that disclosure risks inhibiting frankness and candour in debate and decision making.

46. In this case, having considered the content of the withheld information, he is satisfied that the information which falls within the scope of section 35(1)(b) represents substantive and significant Ministerial communications. He therefore considers it relevant, when balancing the opposing public interest arguments, to give considerable weight to the argument that disclosure would undermine collective responsibility.
47. In balancing the public interest, the Commissioner is conscious that the Information Tribunal in the Scotland Office case (EA/2007/0070) made it clear that the convention does not elevate section 35(1)(b) to the equivalent of an absolute exemption for information which engages collective cabinet responsibility. However, he also notes that two Tribunal decisions (EA/2007/0070) and (EA2007/0128) have commented that:

*'We accept that where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption';*

and moreover,

*'very cogent and compelling reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations'.*

48. The Commissioner recognises that when considering the public interest test the weight accorded to respect for the convention of collective responsibility will take account of all the circumstances of the case. In reaching his decision, the Commissioner is mindful of factors identified by the Tribunal, again in the case of *Scotland Office v The Information Commissioner* (EA/2007/0070):

*'Factors such as the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest' (para 87).*

49. Although the Tribunal did not expand upon what it meant by a 'live' issue, in this case the Commissioner considers that given the nature of the events of 7 July 2005 and given the fact that a major Home Office report on the subject was published only a short time in advance of the complainant making his request, it is appropriate to consider the issue as still being 'live' and therefore likely to be a matter of considerable public interest.
50. The Commissioner recognises that there is a public interest in the information withheld under section 35(1)(b) being disclosed in that disclosure would enable



the public to understand more about the decision making process and the roles Ministers played.

51. However, in this case, he finds the arguments in favour of maintaining the exemption more persuasive. He has therefore concluded that, in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(b) outweighs the public interest in disclosing the information.

## **Section 42 – Legal professional privilege**

52. This exemption applies to information that would be subject to legal professional privilege (LPP). In other words, section 42 sets out an exemption from the right to know for information protected by LPP.
53. LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice or documents created by or for lawyers for the dominant purpose of litigation. This exemption ensures that the confidential relationship between lawyer and client is protected.
54. In this case, the Home Office is citing section 42(1) which provides that:

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

## **Is the information privileged?**

55. Legal professional privilege (LPP) is a common law concept shaped by the courts over time. It is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter arguments.
56. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.
57. There are two categories of LPP – litigation privilege and legal advice privilege. In this case, the Home Office is claiming advice privilege.
58. Legal advice privilege may apply whether or not there is any litigation in prospect. In the Commissioner's view, this form of LPP covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice.
59. The dominant purpose of the communication must be to obtain legal advice, or to give it. The advice itself must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context.

60. In this case, the Home Office is citing section 42(1) in relation to a number of communications regarding the issue of an inquiry. On the basis of the above, and having viewed the withheld information, the Commissioner is satisfied that it constitutes legal advice privilege and he has consequently concluded that the exemption is engaged in respect of this information. He has therefore gone on to consider the public interest.

### **Public interest arguments in favour of disclosing the requested information**

61. The Home Office recognises that there is a public interest in public authorities being accountable for the quality of their decision making. In this respect, it acknowledges:

*'Ensuring that decisions have been made on the basis of good legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability'.*

### **Public interest arguments in favour of maintaining the exemption**

62. The Home Office argues that it is in the public interest that decisions of government are taken in a fully informed legal context, where relevant,

*'with the legal adviser able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them.....Without such comprehensive advice the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest'.*

### **Balance of the public interest arguments**

63. The Commissioner understands that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Information Tribunal recognised this in *Bellamy v Information Commissioner* (EA/2005/0023).
64. However, the exemption is not absolute and the Act therefore requires consideration of whether the public interest in disclosure in a particular case is strong enough to equal or exceed the public interest in legal professional privilege (LPP). When balancing the public interest in cases involving LPP the Commissioner considers relevant factors may include:
- the passage of time;
  - whether or not litigation is contemplated;
  - the amount of money involved;
  - whether or not a significant group of people are affected by the advice or resulting decision;

- a suspicion of misrepresentation or unlawful behaviour;
  - a lack of transparency in the rationale for the public authority's actions; and
  - the extent to which part of the information has already been disclosed.
65. The Commissioner recognises that the relevance of these factors will vary from case to case.
66. In the circumstances of this particular case, the Commissioner's analysis of the content and context of the information to which section 42(1) applies has led him to reach the following conclusions:
- the sensitivity and significance of the advice provided is such that the inbuilt weight of LPP in relation to this information is strong; and
  - at the time of the complainant's request, the advice provided remained 'live' in terms of the issues and interests to which it related.
67. The Commissioner has therefore concluded that in this case, the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.

### **Section 36 - Prejudice to the effective conduct of public affairs**

68. The Home Office cited section 36 in relation to the remaining elements of the withheld information, which includes a number of emails. 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 Cabinet of the Welsh Assembly Government,*
- (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'.*

69. Section 36 is only applicable to information which *'is not exempt information by virtue of section 35'*. The Commissioner notes that while the Home Office is claiming both exemptions in this case, he is satisfied that it is claiming sections 35 and 36 in relation to different elements of the withheld information.
70. In this case, in relation to some of the withheld information, the Home Office is claiming more than one limb of section 36(2)(b) for the same information, namely both (i) and (ii), those being the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. In other words, it is claiming that, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the ability of public authority staff and others, when deliberating or providing advice, to express themselves openly, honestly and completely or to explore extreme options.
71. For the remainder of the information withheld under this exemption, it is only citing section 36(2)(b)(ii), the free and frank exchange of views for the purposes of deliberation.
72. The first condition for the application of the exemption is the qualified person's reasonable opinion. Therefore, when considering whether or not section 36 is engaged the Commissioner will first consider whether the opinion of the qualified person that the inhibition described in the exemption would, or would be likely to, occur is objectively reasonable.
73. The term 'inhibit' is not defined in the Act. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
74. With regard to the meaning of the limbs of the exemption, the Commissioner considers that in this context, 'advice' may refer, for example, to recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified government employees, advice from external sources or advice supplied to external sources.
75. In his view, in the context of the exemption, 'deliberation' tends to refer to the evaluation of competing arguments or considerations that may have an influence on a public authority's course of action. It will include expressions of opinion and recommendations but will not include purely factual material or background information.
76. The exemption requires a degree of likelihood that the free and frank provision of advice / free and frank exchange of views for the purposes of deliberation will be inhibited by disclosure. In this regard, the Home Office has advised that, in this case, *'the Minister agreed that "it would be very likely to 'inhibit"'*. The Commissioner understands this to mean that the 'would be likely to', as opposed to the 'would', test is relevant in this case.

### The opinion of the 'qualified person'

77. Sections 36(2)(b)(i) and (ii) are engaged when, in the reasonable opinion of the qualified person, disclosure would or would be likely to lead to, respectively, inhibition of the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. When considering whether section 36(2)(b)(i) and (ii) are engaged, the Commissioner will take into account:
- whether an opinion was given;
  - whether the person who gave that opinion is the qualified person for the public authority in question;
  - when the opinion was given; and
  - whether the opinion is reasonable.
78. The Home Office has stated that the opinion that inhibition would be likely to result was given by Mr Tony McNulty, who, at the time of the request, was the Minister of State for policing, security and community safety. The Commissioner is satisfied that this was an appropriate 'qualified person' as laid down in section 36(5) of the Act. The Home Office also confirmed that the opinion was sought on 23 November 2006 and given on 24 November 2006.
79. Section 36(5)(a) provides that the qualified person for a government department will be any Minister of the Crown. It has been established, therefore, that an opinion was given, that this opinion was given by an qualified person for the Home Office and that this opinion was given on 24 November 2006.
80. The next step is to consider whether the opinion is reasonable. The Commissioner will generally take into account two main factors here: what the qualified person took into account when forming his opinion and the content of the withheld information itself.

### What is a 'reasonable opinion'?

81. In determining whether or not the opinion is reasonable, the Commissioner will consider the extent to which the opinion is both reasonable in substance and reasonably arrived at.
82. Regarding whether or not the process of arriving at the decision was reasonable, the Commissioner will take into account what the qualified person had in front of him when making his decision. In this respect, he will consider to what extent all the relevant factors were taken into account.
83. In this case, the Commissioner notes that the qualified person was provided with a submission at the time the initial response to the complainant's request was being prepared and then with a further submission at the internal review stage.
84. In relation to the initial submission, the Commissioner considers that the arguments for citing this exemption are weak. He also notes that, although the Home Office has advised that the submission informed the qualified person '*of all the details of the request and intended response*', it is not clear from the evidence

provided to the Commissioner during the course of his investigation whether the initial submission included a copy of the withheld information. In the Commissioner's view, the opinion of a qualified person will generally carry greater weight where this has been based, at least to some extent, on consideration of the information to be withheld.

85. The Commissioner is aware that the qualified person was provided with a further submission at the internal review stage and that this submission contained a summary of the withheld information. While recognising the improved quality of the submission at this stage, the Commissioner notes that it is only at this stage that the qualified person could be said to have been provided with information supporting a recommendation and contrary arguments in relation to the citing of this exemption.
86. However, an opinion arrived at using a flawed process may still be acceptable if it is overridingly reasonable in substance. This is in accordance with the Information Tribunal's comments in the case of *McIntyre v the Information Commissioner* which confirmed this approach:

*'where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion'*.

87. In determining whether or not the exemption is engaged, the Commissioner's view is that there should be clear, specific and credible evidence that the substance or quality of deliberations or advice would be materially altered for the worse as a result of disclosure.
88. In this case, despite being concerned about aspects of the initial stage of the process by which the opinion was arrived at, the Commissioner is satisfied that the opinion given is reasonable in substance. In reaching his decision, he has taken into account the nature of the withheld information as well as the evidence provided to the qualified person in support of the view that disclosure would be likely to, as opposed to would, inhibit both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
89. The Commissioner therefore finds the qualified person's opinion reasonable and the exemption engaged.

### **The public interest test**

90. The exemption at section 36(2)(b)(i) and (ii) allows for information to be withheld if its disclosure would, or would be likely to, inhibit the imparting or commissioning of advice or the offering or requesting of opinions or considerations, subject to the public interest test.
91. This means that even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

92. The Commissioner considers that it is acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection. However, he notes that, in this case, although the Home Office is citing multiple limbs of the exemption, the arguments it has put forward in support of its decision not to disclose the withheld information are, in the most case, general rather than specific arguments in support of each limb of the exemption.

### **Public interest arguments in favour of disclosing the requested information**

93. In support of his argument that it is in the public interest that the withheld information should be released, the complainant has argued that disclosure will:
- *uphold public confidence that the Home Office properly consults and listens to opinions about whether public enquiries are needed;*
  - *provide assurance that the issue of a public inquiry into the London bombings has been fully considered; and*
  - *ensure that public funds are spent correctly on learning the lessons of the London bombings.*

94. When considering disclosure, the Home Office acknowledges that:

*'In favour of the release of this information is the general public interest in openness and transparency which is particularly relevant when the information relates to the advice given to, and discussions with, Ministers on the issue of whether there should be a public inquiry into an event as significant as those in London on 7 July 2005. Seeing such material may lead to an increased trust and engagement between the public and the government, as such openness makes government more accountable to the taxpayer in terms of the quality of decisions taken and the spending of public money.'*

95. In favour of disclosure, the Home Office accepts that:

*'releasing the reports you have requested could provide the public with a more in depth insight into the decision making process surrounding whether to hold a public inquiry into the London bombings.'*

96. The Home Office has also expressed the view that:

*'The release of information withheld under this exemption would have the effect of informing public debate and may lead to an increased trust and engagement between the public and the government on counter terrorism. Such openness makes government more accountable to the taxpayer in terms of the quality of decisions taken, and the spending of public money.'*

### **Public interest arguments in favour of maintaining the exemption**

97. In favour of maintaining the exemption, the Home Office has argued in this case that Ministers and their officials need to be able to think through all the

implications of the options when deciding the matter of whether or not to set up a public inquiry. In particular, it has argued that they need to be able to undertake:

*'rigorous and candid assessments of the risks attached to whether an inquiry should take place and the other options on offer. It is important that officials should be able to put forward the frankest possible advice to ensure that the best possible decisions are reached. If officials felt inhibited from doing so through fear of disclosure the quality of decisions taken in relation to this matter, and in relation to other future significant issues, could be adversely affected'.*

98. The Home Office argues that disclosure of this information will harm this process and impact the way Ministers and their officials can think through all the implications of options when deciding matters.
99. The Home Office has argued that it is important that officials should be able to put forward the frankest possible advice to ensure that the best possible decisions are reached. In this respect, it has argued that the quality of decisions *'could be seriously adversely effected [sic]'* if officials felt inhibited.
100. Specifically in relation to the free and frank exchange of views, the Home Office has put forward the argument that disclosure:

*'might also have the harmful effect on the written record – avoidance of creating information that might be deemed disclosable within a relatively short period of time. This will have a seriously harmful effect on the free and frank exchange of views and a detrimental impact on policy making'.*
101. The Home Office has not explicitly argued the need for civil servants and Ministers to have a 'safe space' in which to debate 'live' issues and reach decisions aware from external scrutiny. However, the Commissioner's view is that there is a public interest in them being able to debate such matters without being hindered by external comment and/or media involvement.

### **Balance of the public interest arguments – free and frank provision of advice**

102. As the Home Office is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information under consideration.
103. The Commissioner has considered firstly the public interest arguments in relation to the free and frank provision of advice.
104. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, he will also consider the severity, extent and frequency of inhibition to the subject of the effective conduct of public affairs.



105. Looking at the information withheld under section 36(2)(b)(i), the Commissioner is satisfied that this can be regarded as the provision of advice on the issue of whether there should be a public inquiry into the events in London on 7 July 2005. He also notes that civil service officials are under a duty to provide appropriate advice to ministers and that, in his view, this duty necessitates that the advice is as free and frank as is required.
106. In considering whether or not the withheld information in this case constitutes 'free and frank' provision of advice, the Commissioner is mindful of the strength of the debate in relation to the matter of there being a public enquiry on this subject and the level of public awareness of, and concern about, the issue at the time.
107. Given the subject matter, he considers it likely that the withheld information on this subject would fall into the definition of 'free and frank' intended by the drafters of this section of the legislation.
108. Having accepted that the withheld information constitutes advice given freely and frankly, the next step is to consider the severity and extent of the inhibition likely to result from disclosure.
109. In this case, the Commissioner accepts the importance of ministers receiving free and frank advice from officials to the ability of the Home Office to function effectively. Having accepted the qualified person's opinion that the free and frank provision of advice would be likely to be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the provision of advice to the functioning of the Home Office.
110. With regard to the frequency of inhibition, having accepted that the provision of advice plays an important role in the functioning of the Home Office, it follows that such advice is provided frequently. The opinion of the qualified person in this case was not that disclosure would inhibit the free and frank provision of advice specifically in relation to the issue of whether to hold a public inquiry but, more widely, that disclosure could have an impact on the future provision of advice in relation to significant issues. The Commissioner accepts that the sensitivity of the issue will determine the inhibition in each case and that this in turn will dictate the frequency with which the inhibition will result.
111. It is in the public interest that a public authority, in this case the Home Office, is capable of functioning efficiently. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to this functioning, the Commissioner considers this contributes to the argument that it is in the public interest to maintain the exemption.
112. While the Commissioner accepts that inhibition is made more likely as a result of disclosure than in a case where there is no possibility of disclosure, he considers the argument in favour of maintenance of the exemption to be reduced as a result of the existence of the duty of civil service officials to provide advice to ministers.
113. In this respect, he gives weight to the Information Tribunal's comment in the case of *Scotland Office v the Information Commissioner* (EA/2007/0070) that '*...we*

*are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service'.*

114. When addressing the matter of the public interest in its initial response to the complainant, the Home Office argued that the public interest in understanding the events surrounding the 7 July bombings '*has been substantially met by the proactive release of as much information as possible about the attacks*'. In support of this, it provided the complainant with details of various published documents on the subject.
115. The Commissioner has taken into account the fact that there is already information in the public domain on the topic in question when considering the public interest arguments in relation to disclosure. When balancing the competing public interests in this matter, it is relevant, in his view, to consider the extent to which the release of the information in question will add to, or enhance, the public's understanding of the issues at stake. He also gives weight to the argument that there is a public interest in all information being made available to give the public the fullest possible picture.
116. The subject of the withheld information is also highly relevant to where the balance of the public interest lies. In this respect, the Commissioner notes the exceptional nature of the events of 7 July 2005.
117. The Commissioner acknowledges that, although the nature of the issue in this case may make the information more sensitive, it may also increase the public interest in disclosure. In this respect, he considers that terrorism in general was, at the time of the request, and continues to be, a matter of significant public interest.
118. When considering the public interest test, the Commissioner considers that the age of the information requested has an important bearing on the balancing of the public interest arguments to the extent that, in general, the public interest in maintaining the exemption will diminish over time. The Commissioner notes in this case that, in relation to the timing of the request, the withheld information was recent in nature.
119. As the Commissioner has already observed, in his view, the Home Office's arguments in favour of maintaining the exemption in this case appear, primarily, to be general arguments in relation to section 36 rather than being specific to the information in question. The Commissioner considers that, while wider arguments can be relevant, arguments specific to the facts of the case are likely to carry more weight when considering a qualified exemption as generic arguments would otherwise, in effect, elevate the exemption to an absolute exemption.
120. Therefore, taking all the circumstances of the case into account, the Commissioner considers that the desirability for openness and transparency through disclosing the withheld information outweighs the harm that disclosure would be likely to cause. Consequently, the Commissioner is satisfied that the public interest in disclosure of the information withheld by virtue of section

36(2)(b)(i) is not outweighed by the public interest in the Home Office maintaining the exemption.

### **Balance of the public interest arguments – free and frank exchange of views for the purposes of deliberation**

121. The Commissioner has next considered the public interest arguments in relation to the Home Office's claim that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. In other words, he has considered the arguments in relation to the information that the Home Office is withholding on the basis of section 36(2)(b)(ii).
122. He notes that, in this case, the public interest arguments in relation to section 36(2)(b)(ii) are broadly similar to those cited above in relation to section 36(2)(b)(i).
123. With regard to the free and frank exchange of views for the purpose of deliberation, the Commissioner recognises the complexity of the issues surrounding the question of whether to hold an inquiry, the significance and likely impact of the decision and the need, therefore, to be able to consult widely.
124. In this respect, the Commissioner gives weight to the argument that disclosure would give '*insight into the decision making process*' and that such openness would be in the public interest.
125. The Commissioner has given little weight to the Home Office's argument that disclosure might lead to poorer record keeping. This is in accordance with the Information Tribunals comment's in the case of *Lord Baker v the Commissioner and the Dept for Communities and Local Government* (EA/2006/0043).
126. Although accepting that some prejudice would be likely, the Commissioner is not persuaded that the likely prejudice would be severe or wide-ranging enough to carry significant weight in the public interest test.
127. In conclusion, the Commissioner does not find the public interest arguments for maintaining the exemption of sufficient weight to outweigh the arguments in favour of disclosure.

### **Procedural Requirements**

#### *Section 1 – General right of access*

128. Section 1(1) states:

*'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'.*

129. As the Commissioner considers that some of the withheld information should have been disclosed, he finds the Home Office in breach of section 1(1)(b) of the Act in that it failed to provide this information.

#### *Section 10 - Time for compliance*

130. 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.'*

131. In this case, the complainant made his request for information on 26 June 2006 but the Home Office did not issue its refusal notice until 4 December 2006. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the Home Office in breach of section 10(1) of the Act.

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

132. 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'.*

133. The Commissioner notes that, in taking more than 100 working days to issue its refusal notice, the Home Office was clearly in breach of the statutory timescale.

134. In this case the Home Office referred generally to sections 23, 35 and 36 in its refusal notice without specifying which sub-paragraph was being applied. It also failed to specify in sufficient detail why each exemption it was citing applied and to show clearly which of the public interest arguments related to which exemption. In addition, in relation to sections 35 and 36, it incorrectly cited the exemptions as '35(a)', '35(b)' and '36(b)' instead of 35(1)(a), 35(1)(b) and 36(2)(b)(i) and (ii).

135. In *Bowbrick v the ICO* the Information Tribunal stated that *'If a public authority does not raise an exemption until after the s17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect it is giving part of its notice too late'*. In this case, the Home Office failed to specify in its refusal notice an exemption, namely section 42, on which it relied during the course of the Commissioner's investigation.

136. The Commissioner has therefore concluded that the Home Office breached sections 17(1)(b) and 17(1)(c) of the Act in failing to supply a notice compliant with the requirements of that section within 20 working days.

## The Decision

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137. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- it breached section 1(1)(b) by not providing the complainant with the requested information wrongly withheld under section 36;
  - it breached section 10(1) by not confirming to the complainant within the statutory timescale that it held the requested information
  - it breached section 17(1) by not providing the complainant with a valid refusal notice within the statutory timescale;
  - it breached section 17(1)(b) by failing to specify the subsections of the exemptions claimed;
  - it breached section 17(1)(b) by failing to specify an exemption it later relied on; and
  - it breached section 17(1)(c) by failing to explain in sufficient detail why each exemption applied.

## Steps Required

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

The Home Office should provide the complainant with the information withheld by virtue of section 36(2)(b)(i) and (ii). This is identified in the separate confidential Schedule which has been provided to the public authority.

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

## Failure to comply

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140. 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

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141. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
142. On 27 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test (PIT). This recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. Whilst he recognises that the consideration of the public interest test in this case took place before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 110 working days for the authority to communicate the outcome to the complainant. In making this observation, the Commissioner notes that the authority advised the complainant that they required more time to respond to this request on at least four occasions.
143. Part VI of the 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. Whilst he recognises that in this case, part of the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 100 working days for an internal review to be completed.
144. While there is no requirement for the qualified person to sign a certificate or to give an opinion in writing, the Commissioner considers that it is good practice to keep a proper record of the opinion. In this case, the Home Office has advised that a written record would have been made of the decision making-process but that it is unable to locate the relevant document.

## Right of Appeal

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145. 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 16th day of November 2009**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### Section 1 General right of access

**Section 1(1)** provides that -

*'Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.'*

### Section 10 Time for Compliance

**Section 10(1)** provides that –

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

**Section 10(3)** provides that –

*"If, and to the extent that –*

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

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

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

### Section 17 Refusal of Request

**Section 17(1)** provides that -

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

*(a) states that fact,*

*(b) specifies the exemption in question, and*



(c) states (if that would not otherwise be apparent) why the exemption applies.'

**Section 17(3)** provides that -

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

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

*(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'*

### **Section 23 - Information supplied by, or relating to, bodies dealing with security matters**

**Section 23(1)** provides that –

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

**Section 23(2)** provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

**Section 23(3)** provides that –

“The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,

- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

**Section 23(4)** provides that –

“In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

**Section 23(5)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

### **Section 35 Formulation of Government Policy**

**Section 35(1)** provides that –

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

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

**Section 35(2)** provides that –

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

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

**Section 35(3)** provides that –

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

**Section 35(4)** provides that –

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

**Section 35(5)** provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between members of the Welsh Assembly Government,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government;

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

**Section 36 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 Welsh Assembly Government 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 Cabinet of the Welsh Assembly Government,
- (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 Welsh Assembly Government, means the Welsh Ministers or the Counsel General to the Welsh Assembly Government,
- (ga) in relation to information held by the National Assembly for Wales, means the Presiding Officer of the National Assembly for Wales,
- (gb) in relation to information held by any Welsh public authority (other than one referred to in section 83(1)(b)(ii)(subsidiary of the Assembly Commission), the Auditor General for Wales or the Public Services Ombudsman for Wales), means-
  - (i) the public authority, or

- (ii) any officer or employee of the authority authorised by the Welsh Ministers or the Counsel General to the Welsh Assembly Government,
- (gc) in relation to a Welsh public authority referred to in section 83(1)(b)(ii), means–
  - (i) the public authority, or
  - (ii) any officer or employee of the public authority authorised by the Presiding Officer of the National Assembly for Wales,
- (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,
- (ka) in relation to information held by the Public Services Ombudsman for Wales, means the Public Services Ombudsman 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.

## **Section 42 Legal Professional Privilege**

**Section 42(1)** provides that –

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

**Section 42(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”