

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 16 February 2009**

**Public Authority:** Department for Business, Enterprise & Regulatory Reform (BERR)  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Summary

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In April 2007 the complainant requested a copy of a report prepared by the Financial Reporting Review Panel for the then Secretary of State for Trade and Industry into the published accounts of the Rover Group. The public authority refused to disclose this report citing sections 31(1)(g) of the Act. This section allows a public authority to withhold information if its disclosure would, or would be likely to, prejudice any of the functions listed in section 31(2) of the Act. During the course of the Commissioner's investigation, the public authority confirmed that the functions it believed would be likely to be prejudiced if this report was disclosed were those listed at sections 31(2)(a) to (d). (These functions are: ascertaining whether any person has failed to comply with the law; ascertaining whether any person is responsible for any conduct which is improper; ascertaining whether circumstances would justify regulatory action; and ascertaining a person's fitness or competence in relation to the management of bodies corporate)

The Commissioner has concluded that disclosure of the report would be likely to prejudice the public authority's functions listed at sections 31(2)(a) to (d) and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. However, in dealing with this request the Commissioner has also concluded that the public authority committed a number of breaches of section 17 of the Act by providing a defective refusal notice.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 20 April 2007 the complainant's solicitors submitted the following request to the Department for Trade and Industry (DTI):

'we request that you provide us with a copy of the report prepared by the Financial Reporting Review Panel for the Secretary of State on the published accounts of the Rover Group up to 2003, referred to in the 31 May 2005 press release announcing the appointment of the Inspectors'.

3. The DTI replied to the complainant's solicitors on 9 May 2007 and confirmed that it did hold a copy of the report requested. The DTI also noted that the complainant had previously requested a copy of this report in a letter dated 3 June 2005 and the DTI had explained that in a response dated 1 July 2005 that it considered the report to be exempt from disclosure on the basis of the exemption contained at section 31(1)(g) of the Act. The DTI went on to explain that it did not intend to invoke section 14(2) of the Act to refuse this latest request given the time that had elapsed between the two requests.<sup>1</sup> However the DTI confirmed that it remained of the view that the report was exempt from disclosure on the basis of section 31(1)(g) of the Act and the public interest still favoured maintaining the exemption.
4. On 14 June 2007 the complainant's solicitors asked the DTI to conduct an internal review of this decision citing a number of reasons as to why it did not believe section 31 was engaged.
5. On 10 July 2007 the Department for Business, Enterprise & Regulatory Reform (BERR) confirmed to the complainant's solicitors that it had conducted an internal review and concluded that the report was exempt from disclosure on the basis of section 31(1)(g) of the Act and that the public interest favoured maintaining the exemption.<sup>2</sup>

## The Investigation

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### Scope of the case

6. On 1 September 2007 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant provided the Commissioner with a number of reasons to support its position that the exemption contained at section 31 was not engaged and even if it was, the public interest favoured disclosing the report.

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<sup>1</sup> Section 14(2) states that where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed.

<sup>2</sup> On 28 June 2007 the DTI ceased to exist and responsibility for dealing with this request passed to the newly formed Department for Business, Enterprise and Regulatory Reform.

## Chronology

7. The Commissioner contacted BERR on 8 May 2008 and asked to be provided with a copy of the withheld information. The Commissioner also asked BERR to clarify which sub-sections of section 31 it was relying on to withhold the report; section 31(1)(g) states that information is exempt if its disclosure would, or would be likely to, prejudice the exercise by any authority of its functions for any of the purposes specified in subsection 31(2) of the Act. However, BERR's correspondence with the complainant in relation to this case (i.e. the refusal notice of 9 May 2007 and the outcome of the internal review dated 10 July 2007) did not state which sub-section of 31(2) it believed to be engaged. (Albeit that the refusal notice supplied in response to the initial request of 3 June 2005 cited sub-sections 31(2)(a) to (d)).
8. Having received no response to his letter, the Commissioner wrote to BERR again on 17 June 2008 asking for a substantive response to the points raised in his letter of 8 May 2008.
9. On 7 July 2008 BERR wrote to the Commissioner and apologised for the delay in responding and explained that this was due to the need to contact a number of third parties. BERR explained that it would send a response to the questions raised in the letter of 8 May 2008 as soon as possible. BERR did however provide the Commissioner with a copy of the withheld report.
10. On 13 August 2008, having received no reply from BERR, the Commissioner informed BERR that if he did not receive a substantive response to his letter within a further 10 working days he would be forced to issue an Information Notice under section 51 of the Act.<sup>3</sup>
11. The Commissioner's letter of 13 August 2008 would appear to have 'crossed in the post' with a detailed response from BERR to the Commissioner which was also dated 13 August 2008. BERR's response confirmed that it sought to rely on sections 31(2)(a)-(d) as a basis to withhold the report. BERR also provided the Commissioner with a detailed explanation as to why it considered these sections to be engaged and why it believed that the public interest favoured withholding the information. BERR's response also noted that it may consider section 41 of the Act to be applicable but it did not seek to rely on it at present.
12. Having reviewed this response, the Commissioner contacted BERR again on 4 September 2008 and asked for clarification on a number of points in relation to the application of section 31 of the Act. The Commissioner also invited BERR to provide submissions to support its position that section 41 provided a further exemption upon which to refuse to disclose the report.
13. During the next few weeks BERR contacted the Commissioner on a number of occasions to explain that given the need to consult with a number of third parties

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<sup>3</sup> Under section 51(1) of the Act the Commissioner can serve an Information Notice on a public authority requiring it, within a time specified in the Notice, to provide the Commissioner with information so he can consider the public authority's compliance with the Act.

and because of staff changes within BERR, it was taking longer than it wished to provide the Commissioner with a response to his letter of 4 September 2008.

14. On 17 November 2008 the Commissioner received a substantive response from BERR. In this response BERR provided the further clarification that the Commissioner asked for in relation to the application of section 31. BERR also explained that it now considered sections 36(2)(b)(i) and 36(2)(c), as well as section 43(2) to provide a basis upon which to withhold the report. BERR did however confirm that it no longer sought to rely on section 41 of the Act.

### **Findings of fact**

15. The company MG Rover was formed when BMW sold the car making and engine manufacturing assets of the original Rover Group to the Phoenix Consortium in 2000. MG Rover went into administration on 8 April 2005.
16. On 15 April 2005 the then Secretary of State for Trade and Industry, Patricia Hewitt, requested that the Financial Reporting Council (FRP) arrange for a review of the accounts of MG Rover and its associated companies.
17. This review was carried out by the Financial Reporting Review Panel (FRRP), one of FRP's operating bodies. The FRRP's specific remit is in relation to compliance with the accounting requirements of the Companies Act 1985. It has the power to seek revision of defective accounts, through the courts if necessary. Where its examination of accounts raises matters which are for another authority to consider, the FRRP ensures that they are passed to that authority (e.g. BERR).
18. Following its initial review of cases, the FRRP takes a decision whether to seek revision of the accounts concerned. If it decides to do so, the FRRP's procedures involve a second stage which gives full opportunity for the parties concerned to respond to questions from the FRRP.
19. The FRRP would not normally seek the revision of the accounts of a company in administration or liquidation, as historical accounts have ceased to be of value to those dealing with the company and it is not an effective use of resources. FRRP decided that the financial condition of MG Rover, the age of the accounts and the passage of time since the acquisition of MG Rover by Phoenix Venture Holdings meant that it would not be an effective act of accounting regulation for it to initiate the procedures which would be necessary to secure revision of the accounts of any of the companies concerned.
20. However, FRRP delivered a report to the Secretary of State for Trade and Industry on 26 May 2005. In delivering this report the FRRP publicly stated that its assessment of MG Rover's accounts raised a number of questions relating to the affairs of MG Rover and its associated companies which the FRRP believed may be relevant for the DTI (now BERR) to consider. However, FRRP explained that it did not intend to make its report public because it was its policy to avoid commenting on publicly or publishing information on cases except where the company has agreed to issue amended accounts or given a commitment to

change its accounting practices in future sets of accounts. Neither of these outcomes applied in the case of MG Rover.<sup>4</sup>

21. On 31 May 2005 the then Secretary of State at the DTI, Alan Johnson, announced that having reviewed the report provided to him by FRRP he had decided to appoint independent inspectors to investigate and report on the affairs of the MG Rover Group, including Phoenix Venture Holdings Ltd and MGR Capital Limited.
22. These inspectors were the barrister Guy Newey QC and the forensic accountant Gervase MacGregor. They were appointed under section 432(2)(c) of the Companies Act 1985 which states that:

‘432. — (1) The Secretary of State shall appoint one or more competent inspectors to investigate the affairs of a company and report on them in such manner as he directs, if the court by order declares that its affairs ought to be so investigated.

(2) The Secretary of State may make such an appointment if it appears to him that there are circumstances suggesting—

(c) that persons concerned with the company’s formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members.’

23. In his press statement, the Secretary of State noted that ‘The FRRP have not published their report and given my decision to appoint independent inspectors I will not be releasing it. I have been advised that to do so would be prejudicial to those potentially affected by it and to the regulatory process.’<sup>5</sup>
24. At the time of the complainant’s request in 20 April 2007 the investigation under section 432 of the Companies Act was ongoing.<sup>6</sup> The part of BERR which is responsible for overseeing this investigation is the Companies Investigation Branch (CIB).

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<sup>4</sup> Details taken from the press release issued by the FRC on 26 May 2005 which can be viewed here: <http://www.frc.org.uk/press/pub0806.html>

<sup>5</sup> The Secretary of State’s full press release of 31 May 2005 can be viewed here: <http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=157951&NewsAreaID=2&NavigatedFromDepartment=False>

<sup>6</sup> In assessing section 50 complaints the Commissioner’s role is to consider the application of the exemptions and balance of the public interest test based upon the circumstances as they existed **at the time of the request**. This approach is in line with that adopted by the Information Tribunal in its decision in the case *Department for Business, Enterprise and Regulatory Reform v Information Commissioner (EA/2007/0072)*. At paragraph 110 of this decision the Tribunal stated that: ‘the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA’.

## Analysis

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### Exemption

25. Although BERR has argued that the report is exempt from disclosure on the basis of exemptions contained at sections 31, 36 and 43, the Commissioner has initially considered the application of section 31.

### Section 31

26. BERR has argued that the report is exempt on the basis of sections 31(2)(a)-(d) (these sections are listed in the legal annex which is attached to this notice).
27. For the purpose of considering whether this is correct the Commissioner has detailed below BERR's arguments as to why it considers the various exemptions contained within section 31(2) to be engaged; then detailed the arguments advanced by the complainant which support its position that the exemption is not engaged; and finally outlined his own view as to whether the report is exempt from disclosure.

### BERR's position

28. In submissions to the Commissioner, BERR explained that although the inspectors appointed under section 432 of the Companies Act 1985 are independent of BERR and they conduct their inspection accordingly, BERR still has the following responsibilities which regard to the inspectors, namely:
- Their appointment;
  - Supervising their work during the investigation;
  - Considering the inspectors' report once it is completed;
  - Deciding if the Report should be published or if any follow up action is necessary.
29. On this basis BERR argued that given its supervisory role in and ultimate responsibility for production (and ultimate use of) the inspectors' report, BERR argued that any prejudice that may occur to the inspection itself also amounts to prejudice to BERR's ability to exercise its functions in relation to the Inspection and in particular those functions listed at section 31(2)(a)-(d) of the Act.
30. BERR explained to the Commissioner that in its opinion it was not possible to apportion any particular part of the text of the report to a particular sub-section of 31(2)(a)-(d). Rather, in BERR's opinion the entire report was exempt from disclosure on the basis of all four sub-sections.
31. In support of this position BERR identified a number of different ways in which prejudice to the purposes of sections 31(2)(a)-(d) could occur. The Commissioner has summarised these arguments below. In providing these arguments BERR confirmed to the Commissioner that it believed that the likelihood of prejudice

occurring if the report was disclosed was one that 'would be likely' to occur as opposed to the higher test of likelihood, namely that prejudice 'would' occur.

(a) Disclosure would be likely to damage the Secretary of State's relations with other Regulators, including the FRRP

32. In its submissions to the Commissioner, BERR has emphasised the circumstances in which the FRRP provided the report to the Secretary of State. That is to say that it was provided explicitly on the basis that it would remain 'confidential'. In support of this position BERR highlighted the comments that FRRP publicly made when providing the report to support this position (see paragraph 20 above) and furthermore drew the Commissioner's attention to a recent letter from FRRP to BERR confirming that in August 2008 its position remained that it did not want the report to be disclosed under the Act.
33. Therefore, BERR has argued that if it disclosed the report it would damage its relationship with FRRP and as a consequence FRRP would be inhibited in the future with regard to providing BERR with information or sharing knowledge. By undermining this free exchange of knowledge and information about financial regulatory matters, BERR has argued that its ability to carry out the functions contained at sections 31(2)(a)-(d) would be likely to be prejudiced. BERR has noted that it cannot (or more precisely the Secretary of State) cannot 'require' the FRRP to produce such reports, such as that which is the focus of this case; rather in effect it relies on the voluntary co-operation of the FRRP to assist BERR.
34. Moreover, BERR has explained that the CIB, which is the part of BERR responsible for the inspection, is part of wider a regulatory framework which includes many regulatory bodies with a wider variety of roles and remits. BERR has explained that the CIB frequently shares information on a confidential basis with these regulators on the assumption that such information is provided in confidence and that it will not be disclosed to third parties (and thus not disclosed under the Act). BERR has argued that disclosure of the report would inhibit regulators from sharing information from the CIB on this basis and thus its ability to carry out the functions identified at section 31(2)(a)-(d) would be likely to be prejudiced.
35. BERR argued that given that it had never disclosed information which regulators had provided to it in confidence it could not provide the Commissioner with any documentary evidence which showed other regulators explicitly refusing to share such information with BERR again should the information which is the subject of this request be disclosed. However, BERR confirmed its view that if another regulator disclosed information which the CIB had provided to it in confidence in similar circumstances to this case, it would reconsider the way in which it engaged with that regulator including whether it would continue to share information with that regulator in the future.

(b) Disclosure would be likely to delay the Inspection timetable.

36. Disclosure of the report would allow the witnesses who will be interviewed by the inspectors access to report. BERR have argued that this would result in these

witnesses seeking to influence the inspectors' lines of inquiry by becoming distracted by perceived criticisms in the report and seeking to address them rather than focussing on issues the inspectors consider relevant. In BERR's opinion this would result in delay to the inspectors' timetable and ultimately this would be likely to prejudice BERR's ability to carry out the functions listed at section 31(2)(a)-(d).

37. BERR have also suggested that given the nature of the inspection it is inevitable that if the witnesses have access to the report they will want to engage in detailed correspondence with the inspectors. BERR has highlighted the fact that it is important for the inspectors to not only carry out a fair inspection, but also to ensure that this inspection is **seen** to be fair, and thus the inspectors will have to review and respond to any lengthy correspondence that it receives. BERR argued that it considered it to be unrealistic to suggest that dealing with any correspondence received from witnesses following disclosure of the report would not result in a negative impact on the timetable and progress of the inspection.

(c) Disclosure would lead to the distraction of witness interviewed by the Inspectors.

38. BERR has also argued that if the witnesses had access to the report this could prejudice the quality of the investigation itself because the witnesses could seek to alter the direction in which the inspectors wanted to take their inspection. BERR's basis for this argument appeared to focus on the fact that although the report was one of the reasons that the inspectors were appointed, it did not define the scope of the inspection. Rather, it was for the inspectors themselves to determine the lines of inquiry that should be pursued. BERR argued that this was an important element of ensuring that the inspection is effective and distracting the witnesses, by disclosure of the report, would inhibit the inspectors' ability to pursue their inspection as they saw fit and would thus prejudice the inspection process. (The Commissioner is satisfied that this effect i.e. the witness altering their behaviour which would ultimately result in the inspectors having to alter the approach of their investigation, is distinct from the prejudicial effect which is set out in paragraphs 36 and 37. i.e. that the change in witnesses' behaviour would result in the inspection process being delayed.)

(d) Disclosure would be likely to lead the inspectors and/or BERR having to address points in a piece-meal fashion.

39. Finally, BERR argued that disclosure of the report would require the inspectors to address issues raised not only by the witnesses but also from the press in a piecemeal fashion rather than dealing with questions once they had completed their investigation. BERR argued that it was appropriate for the inspectors to be able to conduct their investigation in a private space free from such interference, and to provide their conclusions at the end of the inspection where they could be understood in full context. Ultimately BERR argued that pre-empting these conclusions by disclosure of the report would damage the inspection process and make it difficult for BERR to exercise its functions in relation to the inspection and thus would be likely to result in the prejudicial consequences the exemptions contained at sections 31(2)(a)-(d) were designed to protect.



## The complainant's position

40. In the submissions made to the Commissioner in support of its complaint, the complainant advanced a number of reasons why it did not believe that the exemptions contained at section 31(2)(a)-(d) were engaged. The Commissioner has summarised these below and included them under the most appropriate of the four headings set out above which deal with BERR's prejudice arguments.

### (a) Disclosure would be likely to damage the Secretary of State's relations with other Regulators, including the FRRP

41. In relation to this argument, the complainant has argued that in its opinion the report was prepared by the FRRP on the understanding that it would be placed in the public domain. To support this position the complainant quoted the part of Alan Johnson's statement which read 'the FRRP have not published their report and given my decision to appoint inspectors I will not be releasing it' and suggested that this comment suggests that **but for** the inspectors being appointed the report would now be published. In the complainant's opinion it was inappropriate and unjustified for BERR to be suggesting that the report was confidential and that the FRRP had an expectation that it would not be published or released.

42. The complainant suggested that in some circumstances it could be reasonable to suggest that disclosure of information may deter people from providing BERR with information in the future; however it did not consider this to be a valid concern here because:

- The published accounts of the Rover Group to 2003 were publicly available and accordingly there would not appear to be any confidentiality or sensitivity associated with the underlying material upon which the report is based.
- As a Government panel, the FRRP presumably has an obligation to provide such information (i.e. the report) to BERR. Consequently, it is difficult to see what impact the provision of this particular document could have on FRRP's provisions of similar reports in the future.
- Disclosure of the report in this case should not be taken as setting a precedent for future cases and the decision to withhold or disclose information must be taken on a case by case basis. BERR's approach to disclosure of such information cannot be the same in all circumstances.

### (b) Disclosure would be likely to delay the Inspection timetable and (c) disclosure would lead to the distraction of witness interviewed by the Inspectors.

43. The complainant has argued that during the course of the investigation the witnesses (i.e. the Directors of MG Rover) were shown thousands of documents by the inspectors. In the complainant's opinion provision of this information had not resulted in the witnesses seeking to embroil the inspectors in any correspondence which might detract from their Investigation (either intentionally or otherwise). The complainant argued that it was therefore somewhat illogical for the witnesses to start behaving in this way. In the complainant's view this was

particularly true given the fact that the lengthy nature of the inspection had clearly had a negative affect on the lives of the witnesses and they had a clear interest in the inspectors concluding their investigations as quickly as possible.

44. Finally the complainant noted that the inspectors were very experienced and well qualified professionals and it seemed highly unlikely that they would allow themselves to be placed in situation in which their investigation would be compromised by the witnesses' actions.

#### The Commissioner's position

45. As noted above, section 31 is a prejudiced based exemption. This means that for the exemption to be engaged the public authority has to explain **how** the prejudice which the exemption is designed to protect will occur and then provide sufficient evidence to demonstrate that the likelihood of this prejudice occurring is one that is either likely to occur or would occur.
46. As noted above, BERR has explained that they believe that the likelihood of prejudice occurring is one that is likely to occur, rather than one that would occur, following disclosure; i.e. they are relying on the lower threshold.
47. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
48. The Commissioner has considered both BERR's and the complainant's views on how prejudice would occur and has outlined his findings below:

#### (a) Disclosure would be likely to damage the Secretary of State's relations with other Regulators, including the FRRP.

49. The Commissioner acknowledges that in the course of his investigation he has obviously had the opportunity to review and discuss with BERR various pieces of information (not least the withheld report) that the complainant inevitably has not had access to. Therefore, the Commissioner is in a position to reach a more informed opinion than the complainant with regard to the prejudicial effects of disclosing the requested information.
50. Nevertheless, the Commissioner feels that he is compelled to make it clear that he believes that the complainant's assumption that the report was prepared by the FRRP on the understanding that it would be placed in the public domain is misplaced. Rather the Commissioner agrees with BERR's position that the report was provided to the Secretary of State on a confidential basis with the

undertaking that it would not be distributed to third parties or placed in the public domain.

51. A number of factors have led the Commissioner to reach this conclusion: Firstly, the comments in the FRC press statement of May 2005 which indicated that it did not consider it appropriate to publish the report (see paragraph 20 above). Secondly, a letter of August 2008 in which the FRRP confirmed to BERR that it did not want the report released. Thirdly (and perhaps most importantly), the report which is the focus of this request is basically a preliminary review of MG Rover's accounts and would form the basis of the FRRP's letters to the company requesting further information – it therefore represents the first stage of the two stage process which the FRRP follows which is described in paragraphs 17 to 19. The Commissioner understands that any report produced at this stage by the FRRP would in no circumstances be disclosed to the company concerned, let alone made public.
52. Consequently, the Commissioner accepts that it is therefore reasonable to argue that if BERR disclosed the report, this would breach the confidence that FRRP assumed that BERR had agreed to follow by not disclosing the report. Furthermore, the Commissioner's accepts that it is logical to argue that if BERR disclosed this report, the FRRP (and indeed its parent body the FRC) would be less likely to provide BERR with similar information in the future. Although BERR could not provide the Commissioner with any specific example where this had happened, the Commissioner believes that BERR's affirmation that it would reconsider supplying such information to regulators, were those regulators to disclose information provided to them in confidence, is a compelling argument.
53. This leads on to consideration of the complainant's argument that as a Government panel, the FRRP presumably has an obligation to provide such information (i.e. the report) to BERR. The Commissioner accepts that this argument is not without merit; if BERR did have the statutory power to compel the FRRP to provide it with information so that it could undertake its regulatory functions it would be difficult to argue that disclosure of information provided on a voluntary basis would cease – BERR could simply compel FRRP to provide it with this information.
54. However, the Commissioner has established that the relationship with BERR and the FRRP is not one where BERR can compel or require the FRRP to provide it with the similar information to the report should FRRP refuse to provide it on a voluntary basis. Indeed, the Commissioner understands that the report in question was produced by the FRRP in essence as 'a goodwill exercise' to assist BERR at a time when there was a level of public concern around the collapse of MG Rover. That is to say, the FRRP would not normally consider the accounts of companies who have been placed into administration.
55. Therefore, on the basis that the Commissioner accepts that it is reasonable to argue that disclosure of the report would lead the FRRP to be less willing to provide similar information to BERR in the future, the Commissioner has to establish whether such a consequence could in fact lead to the prejudicial consequences that sections 31(2)(a)-(d) are designed to protect. (With regard to

what similar information BERR may receive from the FRRP in the future, the Commissioner recognises the specific circumstances of this report, described in paragraph 54. However, the Commissioner believes that in the future the FRRP may provide BERR with a preliminary review of a company's accounts, as in this case, albeit that such a review would very likely be into a trading company, rather than one which had been placed into administration.)

56. The Commissioner is satisfied that this is indeed a reasonable proposition for the following reasons:
57. The Commissioner is satisfied that the functions identified in these four sub-sections of the Act are ones that BERR clearly has a role in carrying out: with regard to section 31(2)(a) BERR (or one its agencies) are responsible for ascertaining compliance with a variety of pieces of legislation including the Companies Act which is the piece of legislation with which the FRRP regulates compliance. Furthermore, by implication ascertaining compliance with the Companies Act, BERR (or one its agencies) will inevitably carry out the functions contained at 31(2)(b)-(d). Indeed, by way of an example the CIB's remit includes:
  - Applying to the court to disqualify a director;
  - Prosecuting company officials or referring evidence to other investigators or prosecutors (e.g. the police or the Serious Fraud Office);
  - Referring information to other regulators or bodies to consider disciplinary or other action against their members (e.g. the Institute of Chartered Accountants, or the Law Society).
58. Therefore the Commissioner accepts that if BERR is not voluntarily provided with information from FRRP - who produce information which assists in carrying out these functions in respect of the Companies Act - it is possible that such prejudice will occur. Simply put the Commissioner is satisfied that there is a significant cross over between the types of information that the FRRP currently produces and provides to BERR and the actions BERR takes which are covered by 31(2)(a)-(d) in respect of compliance with the Companies Act.
59. With regard to the likelihood of this prejudice occurring, the Commissioner notes BERR has argued that its functions are in danger of being prejudiced not just if FRRP refuses to share information in the future but also if the many other regulators it works with decided to review the basis upon which they provide BERR (or more specifically CIB) with information.
60. The Commissioner understands that as part of its regulatory functions, BERR works with a variety of bodies which BERR describe as 'delivery partners'. These include agencies of BERR (e.g. Companies House); Executive NDPBs (e.g. Competition Commission); Advisory NDPBs (e.g. Low Pay Commission); Tribunals (e.g. Insolvency Practitioners' Tribunal) and Other Partners (e.g. FRC). The pieces of legislation which BERR and these delivery partners are responsible for regulating include a number of pieces of legislation in addition to the Companies Act, such as the Enterprise Act and the Partnership Act.

61. The Commissioner is somewhat reluctant to accept that organisations that are directly attached to BERR – such as agencies and NDPBs - would refuse to disclose information even following disclosure of the withheld information in this case. In the Commissioner's opinion such organisations are so closely attached to BERR that it is likely that they would be more willingly to continue to provide such information. (Indeed for the purposes of the Act, BERR is considered to be the public authority responsible for its agencies and NDPBs, as referred to above, and thus is considered to be the same organisation.) In essence, the Commissioner would expect that BERR would have sufficient sway or influence over such bodies in order to ensure that it was still provided with such information.
62. However, the Commissioner does accept that the organisations which are simply 'partner' regulators of BERR, and therefore independent from BERR, would not be under sufficient influence from BERR so as to make them continue to voluntarily disclose information, (precisely because of their more independent status). The Commissioner understands that there are 15 such partners who BERR works with, including regulators such as Ofcom, Office of Fair Trading and Postcomm, and also include the FRC.<sup>7</sup> In reaching this conclusion the Commissioner wishes to emphasise that he will not always accept that disclosure of information shared between regulators on a voluntary basis will result in prejudicial consequences to the functions of the regulators in question. Rather, he has reached this conclusion in this case given the explicitly confidential nature of the information requested.
63. Given the number of partner organisations that BERR works with the Commissioner accepts that the chances of a regulator (or regulators) altering their behaviour and refusing to voluntarily provide BERR with information it needs to under take the functions listed in 31(2)(a)-(d) increases the likelihood of prejudice occurring. Furthermore given the variety of pieces of legislation that BERR works with these partners to regulate, this prejudice could occur to BERR's functions in relation to any number of areas of corporate governance, e.g. on employment relations, energy market regulation or compliance with accounting procedures.
64. On the basis of the above, the Commissioner accepts that the likelihood of the prejudice occurring is one that can be correctly described as 'real and significant' and thus the exemption contained at sections 31(2)(a)-(d) is engaged.
65. In reaching this conclusion the Commissioner wishes to emphasise that he has taken into account the complainant's argument that disclosure of the information in this case should not be taken as setting a precedent for future cases. Indeed the Commissioner's approach is to consider each individual case on its merits and he agrees that whilst disclosure of information in one case may be prejudicial, disclosure of very similar information in future cases may not be. If the Commissioner were not to take such an approach he would be in danger of

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<sup>7</sup> (A full list of BERR's key delivery partners is available here: <http://www.berr.gov.uk/deliverypartners/list/page41860.html>).

creating a class based (and potentially absolute) exemption for the information that BERR had been provided with by other regulators.

66. However, in the particular circumstances of this case the Commissioner has accepted that the exemption is engaged given the specific conditions in which the FRRP provided BERR with the report, i.e. an explicit request that the report was not disclosed given the FRRP's established policy of not disclosing its initial review of accounts to the company in question, let alone placing such reports in the public domain. Furthermore, the Commissioner is conscious that that this matter could correctly be said to be, at the time of the request, a 'live' issue, i.e. the investigation into the matters covered by the report was ongoing.

(b) Disclosure would be likely to delay the Inspection timetable and (c) disclosure would lead to the distraction of witness interviewed by the Inspectors.

67. The Commissioner has dealt with these two prejudicial effects together because essentially their cause is the same: disclosure of the report will result in the witnesses altering their behaviour.
68. Although the Commissioner accepts the argument advanced by BERR – i.e. the investigation not only has to be fair, it also has to be seen to be fair – and thus it cannot simply ignore any communications that are received from the witnesses following disclosure of the report, he does not believe that the likelihood of such communications being received by the inspectors and resulting in prejudicial consequences is really one that can be described as real and significant for the following reasons:
69. By the time of the complainant's request in April 2007 the investigation had been underway for nearly 2 years. Although the Commissioner accepts that the content of the report did not define the scope of the subsequent Investigation, the various issues raised in the report were clearly ones that the Secretary of State expected the inspectors to consider: 'public interest requires that the issues raised by the FRRP and developments after 2003 when the last accounts were published be investigated by independent investigators'.
70. Therefore, in the Commissioner's opinion it would appear very likely that the various questions over the accounts that are set out in the report itself will have been raised with the various witnesses at some point during the lengthy investigation. That is not to say of course that all of the witnesses will have been provided with a detailed description of the content of the report; but in the Commissioner's opinion given the depth of the investigation it is inevitable that the witnesses will have gained much more than simply a flavour of the issues raised in the report; rather they are likely to have a relatively sound understanding of the issues raised by the FRRP (albeit that they may not know that these issues were ones that were highlighted by the FRRP rather than enquires which originated with the inspectors themselves). Consequently, although the Commissioner accepts that disclosure of the report will very likely result in the inspectors receiving some level of communication from the witnesses, he is not convinced that such communications are likely to be voluminous and lengthy in nature given the likelihood that the disclosure of the report may well simply

confirm various issues to the witnesses rather than reveal significant new information to them.

71. Similarly, the Commissioner is reluctant to fully accept the argument that witnesses will change their behaviour during interviews if they knew the content of the report; as argued above, the Commissioner considers it likely that the substance of the report is likely to be known to the witnesses and thus the risk that disclosure will highlight a raft of new issues to the witnesses that they will want to attempt to manipulate interviews is low.
72. Furthermore, the Commissioner has some sympathy with the complainant's argument that the individuals leading this inspection are well qualified and highly experienced professionals and thus are unlikely to allow themselves to be manipulated by witnesses to the extent that their investigation is significantly compromised. In the Commissioner's opinion given that the two individuals leading the investigation are respectively a QC and the head of Litigation Support and Forensic Accounting Department at a leading accountancy firm, they must have considerable experience of dealing with witnesses who, crudely put, may be unwilling to cooperate with the interview processes that they were conducting. The appointment of such experienced professionals is presumably precisely because they are adept at managing investigations in circumstances where those being interviewed are being investigated for some alleged fraud, misfeasance or other misconduct and may be unwilling to co-operate with the investigation.
73. Moreover, the Commissioner accepts the complainant's argument that the witnesses have a vested interest in the investigation being concluded as soon as possible and thus the suggestion that they would not engage in behaviour which would delay the conclusion of the investigation is plausible. However, the Commissioner would note that this argument could be said to be undermined by the suggestion that witnesses are likely to also want to ensure that the investigators findings reflect a 'positive' outcome for them and so may be willing to wait for the investigation to be concluded if it ultimately results in a more favourable outcome for them.
74. Ultimately, the Commissioner cannot predict with certainty how the witnesses will react if the report was disclosed (nor for that matter can the complainant or BERR). However, for the reasons highlighted above, the Commissioner considers it unlikely that even if the witnesses do engage with correspondence with the inspectors following disclosure of the report, this will be at a level sufficiently so to cause as to a real detriment to the inspectors' investigation. Similarly, for the reasons set out above, although the Commissioner accepts that even if witnesses did change their behaviour in the remaining interviews, the likelihood of this prejudicing the investigation (and BERR's functions set out at sections 31(2)(a)-(d)) is not one which can be described correctly as real and significant.

(d) Disclosure would be likely to lead the inspectors and/or BERR having to address points in a piece-meal fashion

75. As explained in the preceding paragraphs the Commissioner is reluctant to accept that simply a change in behaviour by the witnesses will significantly

prejudice the investigation. However, the Commissioner has more sympathy with BERR's argument that the disclosure of the report will lead to the inspectors (and presumably BERR) having to deal with interest from the press. The key reason for the Commissioner drawing this distinction is the fact that, as suggested above, during the course of the lengthy investigation he believes that the witnesses will have become aware of the majority of the content of the report. However, the Commissioner is aware that the public in general, including the press, have not been provided with details of the ongoing investigation and therefore the Commissioner believes that if the report was disclosed it would reveal to the public, including the press, significant details about the questions that the FRRP raised having reviewed the accounts of MG Rover and its associated companies.

76. Although in correspondence with the Commissioner BERR appeared to accept that it had sufficient mechanisms in place to deal with enquires from the general public which arise in relation into the investigation into MG Rover, BERR maintained that if the report was disclosed the inspectors would be forced to deal with enquires from the press and this would invade the private space which it needed in order conduct its investigation.
77. The concept that the inspectors need a private space in which to carry out their investigation bears some similarities to the 'safe space' argument often advanced by government departments who seek to rely on section 35(1)(a) of the Act to withhold information. The crux of this argument is that policy makers need a safe space in which to formulate policy and debate live issues and reach decisions without being hindered by external comment and/or media involvement.
78. Applying the logic of this concept to this case, the Commissioner accepts that it is plausible to argue that the effectiveness of the inspectors' investigation is likely to be compromised if it has to deal with media involvement. This could lead simply to the inspection being delayed if the inspectors have to respond to press articles on an ongoing basis, or more significantly may lead the inspectors to having to ensure that issues are addressed in their investigation simply because they have been highlighted as matters of concern in the press. The Commissioner accepts that both consequences could materially affect the investigation and thus by implication compromise BERR's functions as set out in sections 31(2)(a)-(d) with regard to the affairs of MG Rover. In reaching this conclusion the Commissioner accepts that delay in BERR being able to carry out these functions in itself equates to these functions being prejudiced.
79. The Commissioner believes that the likelihood of this prejudice occurring essentially comes down to two issues; firstly, whether there are in fact issues in the report which are likely to attract press interest and secondly, if so whether the inspectors and/or BERR can manage such press interest without a significant level of prejudice occurring. Clearly, the Commissioner cannot reveal the content of the report as to do so would negate the purpose of this notice, but he believes that he can confirm that in his opinion there are a number of issues set out in the report which would be likely to be of interest to the press. The Commissioner notes that the collapse of MG Rover in 2005, and the subsequent investigation, was a matter of considerable public interest which generated significant press coverage, not just locally in the Midlands but also nationally. Furthermore, even a



brief internet search of news stories on 'MG Rover' reveals that even some time after collapse of MG Rover, the issues surrounding the issue continue to attract press attention with several national newspapers carrying stories on the collapse of MG Rover and ongoing investigation in addition to ongoing coverage in trade publications such as *Accountancy Age*.<sup>8</sup> The Commissioner is therefore satisfied that if the report was disclosed it is likely to result in news stories which the Inspectors and/or BERR would have to address.

80. With regard to whether the taking of such steps would be likely to prejudice the investigation, the Commissioner is not wholly convinced that simply replying to potential media stories would be likely to substantially prejudice the investigation. Given that BERR has acknowledged that it has sufficient processes in place to deal with enquires that may be received from the public following disclosure, the Commissioner is somewhat reluctant to completely accept that disclosure of the report will lead to enquires from the press to such a degree that the inspectors and/or BERR's functions will be prejudiced. Nevertheless, the Commissioner does recognise the different level of pressure that may be placed on a public authority in dealing with a number of individual enquires from members of the public and the pressure placed on a public authority in dealing with enquires from various media outlets, especially if the story in question becomes 'headline news'.
81. However, the Commissioner is more prepared to accept that if there was increased press focus on the ongoing investigation, the inspectors may well have to ensure that issues are addressed in their investigation simply because they have been highlighted as matters of concern in the press. In accepting this point, the Commissioner believes that it is important to note that although the FRRP report triggered the appointment of the inspectors, their subsequent investigation may not necessarily include an in-depth consideration of all of the issues identified in the FRRP report. The Commissioner accepts that if the inspectors have to begin to investigate issues that they previously did not intend to consider, or indeed re-consider issues in order to ensure that their final report will cover such issues in a fashion which will deal with the press queries, then this will be likely to prejudice BERR's functions as set out at sections 31(2)(a)-(d).
82. For the reasons set out above, the Commissioner is satisfied that disclosure of the report would be likely to prejudice BERR's functions set out at sections 31(2)(a) to (d) of the Act.

### **The public interest test**

83. However, section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

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<sup>8</sup> See: *AccountancyAge*, 27 November 2008, '[Inquiry into MG Rover collapse still rolling on](#)'; FT.com, 20 October 2007, '[Fury as bill for MG Rover probe passes £10m](#)'; FT.com, 26 May 2008, '[Costly MG Rover inquiry drags on](#)'; *AccountancyAge*, 16 March 2007, '[MPs want end to BDO's inquiry into Rover collapse](#)'.

84. In undertaking this analysis the Commissioner is of the opinion that there is sufficient cross over between the exemptions contained at 31(2)(a) to (d) of the Act so that the public interest test in relation to the four separate exemptions can be considered together.
85. The Commissioner has set out below the various relevant public interest arguments that have been advanced by both BERR and the complainant in addition to including a number of arguments of his own. The Commissioner wishes to note that in considering the public interest test he can only consider the public interest in non-disclosure which is inherent in the exemption. Therefore, although BERR highlighted a number of arguments as to why disclosure would not be in the 'general' public interest (e.g. because of damage to the reputations of the various directors identified in the report) the purpose of section 31 is not to protect against such harm and therefore the Commissioner has not taken such arguments into account.

#### Public interest arguments in favour of disclosing the Report

86. There are a considerable number of people who are interested in what happened at MG Rover in the period leading up to its administration in April 2005. These people include the approximately 6,000 employees of MG Rover, as well as suppliers and other stakeholders. To the extent that disclosure of the report would assist these groups understand how MG Rover ended up in administration, disclosure could be said to be in the public interest.
87. There is underlying public interest in the Government being accountable for and transparent about decisions that it has taken. Consequently disclosure could be said to be in the public interest if it added to the public's understanding of the action taken by the Government following the collapse of MG Rover. The Commissioner considers such actions to be the Government's decision to appoint independent inspectors to investigate and report on the affairs of the MG Rover Group.
88. Disclosure at the time of the request could have helped the directors and witnesses in preparing their submissions to the inspectors and giving any last evidence which could have assisted the inspectors. Consequently, disclosure would not then in fact be counter productive to the inspection process but could result in a more in-depth investigation which is also concluded quicker, both outcomes which could be clearly said to be in the public interest.
89. The inspection process has taken a considerable period of time and incurred a significant cost to the tax payer. By March 2007 the cost of the investigation was £8m and by April 2008 the cost of the Investigation had reached £12.2m.<sup>9</sup> The investigation has already taken a considerable more amount of time than originally intended. Disclosure would be in public interest if it added to the public's understanding as to why the process was taking so long.

#### Public interest arguments in favour of withholding the Report

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<sup>9</sup> Figures taken from '[Costly MG Rover inquiry drags on](#)' FT.com 27 May 2008

90. There is a public interest in the investigation being concluded as quickly as possible and by implication at the least cost to the tax payer. Disclosure would not be in the public interest as it would be likely to lead to delays in the investigation process.
91. It is not in the public interest that BERR's relationship with the FRRP and other regulators are damaged to the extent that these bodies are less willingly to provide BERR with information that it needs to undertake its functions contained in 31(2)(a)-(d). It is in the public interest that corporate behaviour is effectively and efficiently regulated.
92. In particular it is in the public interest that companies respect and trust the organisations that regulate them. Disclosure of this particular report could lead to the reputation of FRRP being harmed if it faces criticisms of the comments in the report which were never intended to be anything other than an initial assessment and not placed in the public domain. (The Commissioner recognises that in many cases it is possible to mitigate the negative consequences of disclosing information by setting it into context. To some extent in relation to the disclosure harming FRRP's reputation this could be achieved by emphasising the fact that the report was only ever intended as an initial assessment and does not represent the in-depth and detailed investigations the FRRP also undertake. However, in order for this report to be placed sufficiently into context in terms of the FRRP's reputation, it is likely that disclosure of other preliminary reports undertaken by the FRRP would be needed in order to demonstrate that the FRRP initial findings in this case are consistent with the approach taken in other initial assessments. However, disclosures of other initial assessments are in themselves likely to be prejudicial.)

#### Balance of public interest arguments

93. In balancing the public interest arguments the Commissioner believes that significant weight should be given to disclosure of information which would add to the public's understanding of the affairs of MG Rover given the numbers of people and organisations affected by the company's collapse. Similarly, to the extent that disclosure would add to the public's understanding of, and hold the Government to account for, the actions it had taken following the collapse disclosure could also be said to be in the public interest. These factors could be said to have particular weight given the fact that at the time of the complainant's request in April 2007, the investigation which began in May 2005 had not been completed and those affected by MG Rover's collapse were awaiting the outcome of the Government's investigation into the issue. In the word of Alan Johnson's press statement of May 2005: 'People want to know what happened'.
94. However, as explained above, as the FRRP report is based solely on a review of the publicly available accounts of the MG Rover Group, the evidence upon which the FRRP based its conclusions is already in the public domain. Consequently, disclosure of the report would not reveal new factual evidence surrounding the collapse of MG Rover. In making this point the Commissioner accepts that as the report contains evidence which is already in the public domain, this could be

disclosed without the prejudicial effects described above. However, given the structure of the report – i.e. the FRRP's analysis is inextricably linked to the factual data upon which their analysis is based – the Commissioner does not believe that it is practically possible to extract and disclose such information.

95. The Commissioner would attribute less weight to the arguments that disclosure would ensure that the witnesses would be better informed about the scope of the investigation and this would lead to a more complete investigation and ultimately a quicker investigation. Having had the opportunity to review the report in depth and given the experience of the two individuals leading the investigation, the Commissioner would be reluctant to conclude that disclosure of the information would result in a substantially more complete investigation. Given the time that the investigation has taken to date (and indeed the cost), the Commissioner would suggest that the investigation clearly represents one that is detailed and forensic and ultimately the value that could be added by more informed witnesses is one that is far from clear or certain.
96. Furthermore, the Commissioner also believes that significant weight has to be placed on the public interest arguments surrounding the consequences of disclosure resulting in regulators refusing to provide BERR with information in the future. The Commissioner accepts that it is strongly in the public interest that corporate behaviour in the UK is effectively and efficiently regulated for the benefit of businesses, and their shareholders, as well as consumers. The Commissioner is also conscious that the disclosure of this information is likely to affect not only BERR's relations with FRRP (and the FRC) but also BERR's relations with the other regulators that it deals with, e.g. Ofcom, Postcomm and the Office of Fair Trading. Consequently, the public interest in non-disclosure must be given significant weight given the fact that disclosure would affect BERR's relations with a variety of partners and thus BERR's ability to effectively regulate, and assist in the regulation of, a diverse range of sectors is likely to be prejudiced. (Albeit that the Commissioner accepts that this could be mitigated to some extent, but not conclusively, by the fact that disclosure of this report could not be seen as a routine disclosure of information shared between regulators on a voluntary basis. Rather it would be a disclosure of information after due acknowledgement to the weight which needs to be placed on protecting the regulator process).
97. Furthermore, although the Commissioner accepts that the length of the investigation (and by implication the cost of the investigation) is something for which the Government has been criticised, he does not believe that disclosure of information which is the subject of this request would necessarily hold the Government to account for why the investigation had taken so long.
98. Ultimately, although the Commissioner accepts that there is a strong public interest in disclosure of information which would inform the public about the events surrounding the collapse of MG Rover, the Commissioner believes that this is outweighed by two factors: Firstly, the public interest in ensuring that the inspectors' investigation into this matter is not prejudiced by having to consider issues identified by the press that they have decided do not merit further consideration. Secondly, and more significantly, it is very much in the public

interest that BERR can carry out effective regulation by sharing information with partner organisations in the future. Simply put although disclosure may inform the public about this specific investigation, disclosure would be likely to prejudice future investigations into a potentially wide variety of regulatory matters.

99. Consequently, the Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
100. On the basis that the Commissioner has concluded that the report is exempt from disclosure on the basis of section 31(2)(a)-(d), he has not gone on to consider whether the report is also exempt by virtue of the exemptions contained at sections 36(2)(b)(i), 36(2)(c) and 43(2) of the Act.

## Procedural matters

### Section 17

101. Section 17(1) of the Act sets out some of the details that a refusal notice must contain when a public authority is relying on an exemption to withhold information which falls within the scope of a request. This section reads:

‘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.’

102. In the refusal notice which was issued on 9 May 2007, BERR simply stated that it was relying on section 31(1)(g) of the Act to withhold the requested information. As noted above, this section provides that information is exempt if disclosure of information would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). However, in its refusal notice BERR did not indicate which subsections of 31(2) it considered to apply in this case. Therefore, the Commissioner has concluded that by failing to do so, BERR did not comply with sections 17(1)(b) and 17(1)(c) and thus breached these sections of the Act.
103. Section 17(1) also requires that a refusal notice is issued within the time of complying with section 1(1) of the Act. This time period is set out at section 10(1) of the Act and is 20 working days following the date of receipt of the request.
104. In this case the refusal notice of 9 May 2007 was provided to the complainant within 20 working days of its request which was submitted on 20 April 2007.

105. However, as the Chronology section explains, during the course of the Commissioner's investigation BERR also sought to rely on the exemptions contained at sections 36(2)(b)(i), 36(2)(c) and 43(2) of the Act. In line with the Information Tribunal's approach in *Bowbrick v Information Commissioner (EA/2005/0006)* the Commissioner believes when a public authority will have breached section 17(1) of the Act if it later relies on exemptions that it did not specify its refusal notice (or communicate to the applicant within 20 working days of his request).

## The Decision

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106. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The information requested by the complainant is exempt from disclosure by virtue of the exemptions contained at sections 31(2)(a) to (d) of the Act and in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
107. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- By not stating in its refusal notice which sub-sections of 31(2) it was seeking to rely on the Commissioner has found that BERR breached section 17(1)(b) and 17(1)(c) of the Act.
  - Furthermore, by not citing the exemptions contained at sections 36(2)(b)(i), 36(2)(c) and 43(2) upon which it later sought to rely the Commissioner has also concluded that BERR breached section 17(1) of the Act.

## Steps Required

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108. The Commissioner requires no steps to be taken.

## Other matters

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109. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
110. As detailed in the decision of the Information Tribunal's decision in *Bowbrick* the fact that an exemption is introduced after the initial refusal does not in itself disentitle an authority from relying upon it. However, as detailed in 'The Decision' section of this Notice, the Commissioner would inevitably find that the authority had breached the requirements of section 17 by failing to inform the applicant of

the exemption it sought to rely on within the appropriate timescale. In effect, the authority would be providing part of its refusal notice too late.

111. Furthermore, the application of an alternative or additional exemption at a late stage may suggest the initial refusal or internal review (or possibly both) was not afforded appropriate consideration.
112. In light of this the Commissioner expects BERR to take steps to minimise the likelihood of additional exemptions being applied during the course of future investigations.
113. Additionally, the course of his investigation, the Commissioner has encountered considerable delay on account of BERR's reluctance to meet the timescales for response set out in his letters. Accordingly the Commissioner does not consider BERR's approach to this case to be within the spirit of the Act. As such he will be monitoring the BERR's future engagement with the ICO and would expect to see improvements in this regard.

## Right of Appeal

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114. 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 16<sup>th</sup> day of February 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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



## Legal Annex

### 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 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

### Section 2(2) provides that –

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

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

### 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 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 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-

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

**Section 31(2)** provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

**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 41(1)** provides that –

“Information is exempt information if-

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

**Section 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).”