

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 03 February 2010

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

Summary

The complainant sought the identities of the legal advisers in the Home Office and the status of their education and professional qualifications. The Home Office refused the request under section 21 of the Act as it stated that some of the information was accessible to the applicant by other means. The Home Office withheld the remaining information under sections 36(2)(c) and 36(2)(b) of the Act. The Commissioner found that the Home Office had incorrectly applied section 21 of the Act as the Home Office did not provide a precise link or other direct reference to the information and so was not reasonably accessible to the complainant. The Commissioner also found that section 36(2)(c) was engaged in relation to all of the withheld information but that section 36(2)(b) was not. However the Commissioner decided that the public interest in maintaining the exemption did not outweigh the public interest in favour of disclosing of the information. Therefore the Commissioner requires the Home Office to disclose the requested information to the complainant.

The Commissioner's Role

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

The Request

2. On 7 December 2006 the complainant made the following request to the Home Office:

"2. (a) Please can you advise me as to the identity of the some 50 lawyers who are currently in your branch:

(b) Please can you specify for me which are:

- I. Practising professionals mandated to satisfy post qualification and continuing educational requirements of their branches of the profession or;*
- II. Which, if any, are no longer have [sic] current professional legal qualifications and are not entitled to practice and/or are not required to satisfy the mandatory post qualification and continuous education requirements required of those who hold current professional legal qualifications?*

(c) In respect of each lawyer please specifying [sic] which branch of the profession they belong to?

3. Please can you provide me with the recorded information that you have regarding your procedures for dealing with conflicts of interest and details of any instances in which the conflict has led to separate representation.

4. What procedures exist to ensure that when there is a statutory requirement that one party is to be independent of the other that independence is not only done but is seen to be done by ensuring completely separate representation and advice.”

3. The Home Office responded to the complainant on 9 January 2007. In relation to part 2(a) of the request the Home Office advised that some of its lawyers' names were already available via the Civil Service Year Book and on the Home Office website, however they did not provide the website address. The Home Office advised that this information was exempt from disclosure under section 21 of the Act, as it was already reasonably accessible to the complainant.
4. In relation to the information which did not fall under the section 21 exemption, the Home Office advised that this information was exempt under section 36 of the Act, as disclosure would or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.
5. In relation to part 2(b) of the request the Home Office advised that all barristers and solicitors employed by the Home Office were required to undertake continuing professional education, and all were currently doing so.
6. In relation to part 2(c) of the request, the Home Office again applied the exemption at section 21 to information which it considered was already in the public domain, and the exemption at section 36 to the remainder of the information.
7. In relation to parts 3 and 4 of the request, the Home Office advised the complainant that it did not hold any recorded information.
8. On 9 January 2007 the complainant contacted the Home Office. The complainant advised that the Home Office ought to have offered him an internal review of its response, and confirmed that he wished to request such a review. The

complainant did not give any reasons for his dissatisfaction with the Home Office's response.

9. On 13 March 2007 the Home Office responded to the complainant. The Home Office advised that it had now completed an internal review, and had decided to uphold its original response. The Home Office clarified that in citing the exemption at section 36 of the Act, it intended to rely on subsections 36(2)(b)(i) and (ii), and 36(2)(c).

The Investigation

Scope of the case

10. On 5 June 2007 the complainant wrote to the Commissioner to request that he investigate the way his request was handled by the Home Office. The complainant did not raise any specific grounds for complaint for any parts of his request. The Commissioner is satisfied that parts 2b,3 and 4 of the request were dealt with in accordance with the Act, therefore this investigation is limited to a consideration of parts 2a and 2c.

Chronology

11. Unfortunately the Commissioner's investigation was delayed owing to the large volume of complaints received by his office. The Commissioner wrote to the Home Office on 17 April 2009 to request information in relation to the Home Office's handling of the request.
12. Following additional correspondence between the Home Office and the Commissioner, on 10 July 2009 the Home Office provided the Commissioner with the information he had requested.

Analysis

Exemptions

Section 21: information which is accessible to the applicant by other means

13. Section 21 of the Act provides an exemption for information which is reasonably accessible to the applicant by other means. Section 21 may be engaged even where payment is required. A full text of section 21 is available in the Legal Annex at the end of this Notice.
14. In respect of part 2a and 2c of the request the Home Office informed the complainant that some of the information was reasonably accessible through the Civil Service Year Book and through the Home Office website. It also stated that some of the information was available through the Bar Council or the Law

Society. When responding to the complainant's internal review request the Home Office confirmed that there may be a subscription payable for access to the Civil Service Year Book and that some of the information available from the stated locations may now be out of date or incomplete.

15. The Commissioner has considered whether the requested information was 'reasonably accessible' to the complainant and whether section 21 is therefore engaged. The Commissioner agrees that the Home Office holds all of the requested information but also notes that the Home Office acknowledged that only some of the information is available through the other sources it identified, such as the Civil Service Year Book, the Law Society and the Bar Council. The Commissioner has therefore considered whether the Home Office provided clear direction as to where the information could be accessed or found and how reasonably this could be accomplished.
16. The Home Office has stated that only some of the requested information is available through identified sources (i.e. the Civil Service Year Book and the Home Office website). The Commissioner is of the view that the Home Office has not been detailed or specific enough about directing the complainant to this information as it has only stated the general website or publication within which the information may exist. Taking into account the Tribunal decision in *Ames v ICO & Cabinet Office* [EA/2007/0110] the Commissioner is of the view that it would not be reasonable to expect the complainant to trawl through large databases of complex information on a website containing multiple sources which also hold large volumes of other data. Therefore the Commissioner is of the view that the information is not reasonably accessible to the complainant and that section 21 is not engaged.

Section 36: prejudice to effective conduct of public affairs

17. Section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36(2) to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to prejudice the effective conduct of public affairs. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown.
18. A full text of section 36 can be found in the Legal Annex at the end of this Notice.
19. The Commissioner notes that the Home Office is relying on several limbs of section 36(2) for the withheld information, namely 36(2)(b)(i) and (ii), and section 36(2)(c). These subsections apply in slightly different circumstances:
 - Section 36(2)(b)(i) applies if disclosure of the information would, or would be likely to inhibit the free and frank provision of advice
 - Section 36(2)(b)(ii) applies if disclosure of the information would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, or

- Section 36(2)(c) applies if disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

20. The Commissioner is of the view that it is acceptable to claim more than one limb of section 36(2) as long as arguments can be made in support of the claim for each individual subsection.

Opinion of the qualified person

21. In order to establish whether the section 36(2) exemption has been applied correctly the Commissioner firstly considers it necessary to:

1. Ascertain who was the qualified person or persons for the public authority in question;
2. Establish that an opinion was given;
3. Ascertain when the opinion was given; and
4. Consider whether the opinion given was reasonable.

22. In deciding whether the opinion was 'reasonable' the Commissioner has been assisted by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that 'in order to satisfy the subsection, the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).

23. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood on that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.

Is the exemption engaged?

24. The Home Office claimed reliance on section 36 in its refusal notice dated 9 January 2007 and confirmed that it had sought the advice of a qualified person, namely Baroness Scotland. At the time of the request Baroness Scotland was a Home Office Minister and the Commissioner is therefore satisfied that Baroness Scotland was a qualified person at the time of the request for the purposes of section 36 of the Act.

25. The Commissioner has been provided with information relating to the opinion of Baroness Scotland. Her opinion was initially sought and given on 19 December

2006 and again on 6 March 2007 for the purposes of the internal review. The Commissioner notes that it was not until the internal review stage that the Home Office clarified which subsections of section 36 it was relying on. His decision therefore focuses on the opinion as it stood at 6 March 2007.

26. The Commissioner has been provided with a summary of the evidence presented to Baroness Scotland and notes the Home Office has further confirmed that the summary combined with the detailed response to the complainant of 19 January 2007 is a record of the decision of Baroness Scotland. The Home Office confirmed to the Commissioner that Baroness Scotland was provided with a draft of the letter setting out the public interest arguments and this was approved by her as an accurate reflection of her opinion.
27. At the internal review stage the qualified person's opinion indicated its reliance on section 36(2)(b)(i) and (ii), and section 36(2)(c), although the Commissioner notes that specific arguments were not provided in relation to each of these limbs and it is not entirely clear why each was believed to be engaged. However the Commissioner has considered the opinion's arguments in the context of each limb.
28. The Commissioner has also considered the level of prejudice. Section 36 provides for two levels with regard to the likelihood of prejudice, 'would prejudice', and 'would be likely to prejudice'. The opinion of the qualified person as detailed in the letter to the complainant dated 9 January 2007 does not give a clear indication of whether the risk of any prejudice occurring was considered to be one that 'would be likely to' occur, or whether the risk met the higher test of 'would occur'. On this matter the Commissioner has again noted the comments of the Information Tribunal in the case of *Ian Edward McIntyre v Information Commissioner & MOD [EA/2007/0068]* in which the Tribunal explained that:
- “...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.” (paragraph 45)
29. The Commissioner has therefore assumed that it is the qualified person's position that should the information be disclosed the likelihood of inhibition or prejudice occurring is one that is simply likely to occur, rather than one that would occur.

Section 36(2)(b)(i) and (ii)

Free and frank advice

Free and frank exchange of views

30. The Home Office has advised the Commissioner that generally its decision to withhold the names of its legal advisers is based on the seniority of officials. The Home Office is of the view that there is a presumption that senior civil servants should expect their names to be in the public domain. However, junior officials' names, if released into the public domain, could result in them being linked to particular policy areas and therefore could result in them receiving unwarranted attention undermining their ability to advise Ministers effectively.

31. The Commissioner considers that this argument potentially relates to the exemption at section 36(2)(b)(i) and (ii), in that the disclosure of information linked to an individual's work in the Home Office could lead to that individual being less frank and forthcoming in terms of the advice and opinions they offer. This could affect the quality of decision making and policy development, and thus could prejudice the effective conduct of public affairs.
32. However, the Commissioner has not seen any evidence to suggest that the qualified person considered these arguments in sufficient detail in respect of each limb. The Commissioner is therefore of the view that the opinion of the qualified person regarding free and frank advice was not reasonably arrived at. The Commissioner has also considered whether the opinion was reasonable in substance and has concluded that it was not. The information provided by the Home Office appears to relate more strongly to arguments of distraction of officials rather than inhibition of the free and frank provision of advice. The Commissioner considers there is insufficient evidence of a causal link as to why disclosing the fact that certain individuals are Home Office lawyers would alter their behaviour when giving legal advice or exchanging views, and therefore he is not satisfied that the exemption at section 36(2)(b)(i) or 36(2)(b)(ii) is engaged in relation to any of the withheld information.

Section 36(2)(c)

Otherwise prejudice the effective conduct of public affairs

33. In order to engage section 36(2)(c) – **otherwise** prejudice the effective conduct of public affairs – some other prejudice other than that protected by another limb of section 36 must be indicated. The exemption at section 36(2)(c) is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another specific exemption.
34. The Commissioner has seen a summary of the evidence provided to the qualified person as detailed at paragraph 26 of this Notice. The Home Office told the Commissioner that the qualified person decided that disclosure of the names of Home Office officials could lead to distraction of those officials should they be inundated with direct calls and correspondence from members of the public and therefore distracting them from their ordinary daily work loads. The opinion stated the belief that this might occur and also that the association of a particular official with a specific area of work that could be considered sensitive such as terrorism or immigration could also cause additional distraction and possibly harassment from members of the public, should that fact become known to a member of the public. Such distraction from their work could impact on the efficiency and effectiveness of Home Office officials and cause delays to the function of the department. They have supported this view by informing the Commissioner that should the names of officials be released it might be relatively easy for them to be contacted directly via the Home Office switchboard resulting in the disruption described.

35. The Commissioner has considered the information provided by the Home Office and he is of the view that the opinion appears to be reasonably arrived at and objectively reasonable, taking into account the steps outlined in paragraphs 21 to 23 of this Notice. He is therefore satisfied that prejudice would be likely to occur and that section 36(2)(c) is engaged in relation to the information that has been withheld.

Public interest

36. Section 36(2)(c) is a qualified exemption and therefore the Commissioner must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian and Brooke v Information Commissioner & BBC* [EA/2006/0011 & 0013] indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

'88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.

37. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

38. The Home Office told the complainant that they had considered the public interest in disclosing the requested information. They stated that disclosure would aid openness and allow the public to know who advises Ministers and officials to ensure that the Home Office acts lawfully. They also said that it would allow the public to form a view on whether the lawyers within the Home Office are properly trained and competent. The Home Office believes that there is public interest in the public having an understanding of the process and quality of legal advice within the department and that openness, transparency and accountability are important to the public.

Public interest arguments in favour of maintaining the exemption

39. The Commissioner understands the view of the Home Office that disclosure of the names of Home Office officials could lead to distraction of those officials should they be inundated with direct calls and correspondence from members of the public and therefore distracting them from their everyday work loads. The Home Office has stated that they believe that this may happen. In particular they state that this would be especially so for junior officials who do not have the benefit of a secretary to 'field' unsolicited calls from the public. The Home Office also state that the association of a particular official with a specific area of work that could be considered sensitive such as terrorism or immigration could also cause additional distraction and possibly harassment from members of the public should that fact become known to a member of the public. Such distraction may impact on the efficiency and effectiveness of Home Office officials and cause delays to the function of the department.
40. The Commissioner notes that the focus of the Home Office argument is that it would not be in the public interest to disclose the information. The Commissioner understands that the Home Office believes that disclosure of the identities of the lawyers in the Home Office Legal Advisers Branch could lead to distraction of those officials should they be inundated with direct calls and correspondence from members of the public and therefore distracting them from their ordinary daily work loads. The Home Office have supported this view by informing the Commissioner that should the names of officials be released it would be relatively easy for them to be contacted directly via the Home Office switchboard resulting in the disruption described.
41. The Home Office also informed the Commissioner that the association of a particular official with specific areas of sensitive work such as terrorism or immigration could also cause additional distraction and possibly harassment from members of the public. The Home Office have stated that they proactively publish the names of senior staff on the Home Office website as a matter of course unless individuals are associated solely with security matters. They affirm that junior staff names are not published as they are not in public facing roles and any additional transparency arguments in the disclosure of their identities would be outweighed by the concerns in relation to unwarranted attention and disruption to their work. The Home Office informed the Commissioner that there are procedures in place to direct members of the public with a legitimate interest in contacting the relevant lawyer on specific matters. The Home Office also told the Commissioner that the role of their legal advisors is to provide advice to the Home Secretary, Ministers and officials and that they are not resourced to advise members of the public, and even if they were there could be potential conflicts of interest.

Balance of the public interest arguments

42. As described at paragraph 23 of this Notice the Commissioner considers that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and therefore does not necessarily imply any particular view as to the severity or extent of such inhibition or prejudice or how often it may occur, save

that it will not be so trivial, minor or occasional as to be insignificant. Therefore, the Commissioner has given due weight to the opinion of the qualified person when assessing the public interest, and has considered the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

43. The Commissioner understands that the Home Office believes the public interest in maintaining the exemption outweighs the public interest in disclosing the identities of its legal officers. They have provided the Commissioner with their view that should the information be released their officials may be subject to calls and correspondence and possibly harassment from members of the public causing a distraction to their work and therefore prejudicing the effective conduct of public affairs. They believe that this outweighs the arguments for transparency and confidence arguments put forward as public interest arguments to disclose the information.
44. The Commissioner accepts that the release of the information would be likely to cause the harm described, however the Commissioner is not convinced that the harm would be severe or frequent enough to outweigh the public interest in disclosure. He has considered whether the Home Office internal policies and procedures for handling such interest from the public should be robust enough to deal with unsolicited calls no matter what the seniority of the staff member. The Commissioner has taken the view that the existing policies for directing enquiries from members of the public are already in place and effective and could be extended if required. Accordingly the Commissioner does not believe that the harm or distraction would be so significant as to be unmanageable. He is also uncertain as to why revealing a list of names of junior Home Office lawyers would result in people calling them, or how it would disclose who was involved in particular areas of work.

Section 40(2): personal information relating to third parties

45. The exemption under section 40(2) of the Act applies to information which is the personal data of an individual other than the applicant, where disclosure of the information would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA). The DPA defines personal information as:

“...data which relate to a living individual who can be identified
 - a) from those data, or
 - b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”
46. The Commissioner notes that the withheld information in this case comprises the names of Home Office lawyers and their status within the profession, which is obviously personal information relating to these individuals. The Commissioner is also mindful of his dual role as the data protection regulator, so even though the Home Office has not considered the exemption at section 40 of the Act, the

Commissioner has exercised his discretion and considered it appropriate to do so.

47. The Commissioner considers that the relevant data protection principle in this case is the first data protection principle as set out at Schedule 1 to the DPA. The first data protection principle states that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met.

First data protection principle

48. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individuals' reasonable expectations of what would happen to their personal data;
 - Whether the individuals specifically refused to consent to the disclosure of the requested information; and
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals.

The Commissioner has not seen any evidence that consent was refused.

49. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Page 8 of the guidance states that:

'Whether the information relates to the individual's public life (ie their work as a public official or employee), or their private life (ie their home, family, social life or finances). Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position and whether they have a public facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (ie the official's family)

50. The Commissioner considers that it is good practice to have a policy on routine disclosure of names at certain levels, in certain roles or in certain circumstances, however this does not always mean that the names of more junior staff should always be withheld. Often it will not be unfair to release their names as the context will not be sensitive or controversial. The fact that a public authority has not specifically advised employees or officials about the implications of the Act is not a bar to disclosure, as they should anyway be aware of the Act's existence.
51. The Commissioner understands that the Home Office distinguishes between junior and senior lawyers within the department and on this basis (albeit in the

context of their arguments for the application of section 36) they argue that the junior officials' names should not be released. However the Commissioner understands that both junior and senior legal advisors are required to be legally qualified to work in the department (as either solicitors or barristers) and that they perform roles in the capacity of qualified legal advisors, responsible for providing advice to ministers and officials and also drafting legislation. The Commissioner notes that the practising certificate fees for Solicitors and Bar Council practising certificate fees for Barristers are paid by the department and therefore from the public purse.

52. The Commissioner has inspected the personal data withheld under section 40(2), and has considered the information provided by the Home Office. The Home Office has described some of the lawyers on the list as junior, in that they are not employed on Senior Civil Service grades. However the Commissioner's view is that these individuals could by no means be considered junior members of staff in the everyday sense of the word. Indeed the Commissioner considers that these individuals have to exercise a significant level of judgement, give opinions based on a high level of legal knowledge, and correspond on subject matters specific to that level of legal knowledge and experience. As such he does not consider them to be junior staff with little or no expectation of their names entering the public domain.
53. The Home Office told the Commissioner that disclosure of the names of junior officials may cause distraction from their duties. The Commissioner believes that the staff involved in this case are sufficiently senior to expect to be able to stand over their opinions and work. Therefore the Commissioner does not consider that it would be unfair to any of the individuals to release their names.

Would it be unlawful to disclose the information?

54. The Commissioner having decided that disclosure of officials' names and status would not be unfair has gone on to consider whether the processing would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting the information and he is satisfied that the disclosure would not be unlawful in this respect.

Schedule 2 conditions

55. The sixth condition provides that:

"personal data shall be processed in accordance with the rights of the data subjects under this Act"

56. It establishes a three part test which must be satisfied:

- There must be legitimate interests in disclosing the information,
- The disclosure must be necessary for a legitimate interest of the public, and
- Even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.

57. The Commissioner believes there is a legitimate interest in the Home Office being as open and transparent as possible and that there is a general public interest in knowing who provides legal advice to Ministers and officials and who is responsible for drafting secondary legislation. The Commissioner is of the view that disclosure of the names in question is necessary to achieve that aim.
58. Having already established that the processing is indeed fair, the Commissioner is also satisfied that the release of the individuals' names would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subjects. The Commissioner is satisfied that the information relates only to those individuals' professional lives and does not intrude on their private and family lives. The Commissioner believes that disclosure of a list of names would be unlikely to lead to the linking of those names with particular policy areas and therefore it would not be likely that those individuals would receive excessive phone calls or other such disruption or harassment likewise, there is no evidence to suggest that disclosure would compromise their personal lives.

Procedural breaches

59. The Commissioner finds that the Home Office did not comply with section 1(1)(b) and section 10(1) of the Act in wrongly withholding the information. The Commissioner further finds that the Home Office breached section 17(1) of the Act for failing to specify the relevant subsections of section 36 within 20 days of the request.

The Decision

60. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in that it wrongly applied section 21(1) of the Act and wrongly withheld information under sections 36(2)(b)(i) and (ii), and 36(2)(c), thus breaching section 1(1)(b) of the Act.
61. The Commissioner also finds breaches of section 10(1) and 17(1).

Steps Required

62. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Release the information at parts 2a and 2c of the request
63. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

65. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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

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

Dated the 3rd day of February 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

General right of access to information held by public authorities

Section 1 of the FOIA provides:

- (1) 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 the information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

Time for compliance with request

Section 10(1) of the FOIA provides:

- (1) ...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.

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

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

Section 36(2) provides that –

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

(a) would, or would be likely to, prejudice-

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
- (iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

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

Section 36(4) provides that –

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

Section 36(5) provides that –

“In subsections (2) and (3) “qualified person”- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,

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

Section 36(6) provides that –

- “Any authorisation for the purposes of this section-
- (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.”

Section 36(7) provides that –

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

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House,

would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Section 40 Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) 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), and

(b) does not arise in relation to other information if or to the extent that either—

- (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would

(apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.