

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 June 2010

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
Westminster
London
SW1P 3BT

Summary

The complainant wrote to the Department for Children, Schools and Families (now the Department for Education) and requested various pieces of information regarding the ContactPoint Data Security Review. The public authority disclosed some of the requested information, but withheld other parts under sections 31(1)(a), 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 38(1)(a), 38(1)(b) and 42. It also informed her that some of the information she had requested was not held. The Commissioner focused his investigation on two elements of the request – namely for the minutes of meetings held to discuss the ContactPoint Data Security Review, and a full copy of the ContactPoint Data Security Review Report. This information was withheld under sections 31(1)(a), 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) and 38(1)(b). During the course of the investigation the public authority also sought to rely upon section 42 to withhold some of the information. The public authority also stated that it was now prepared to disclose some of the previously withheld information. After investigating the case the Commissioner decided that some of the information had been correctly withheld under sections 31(1)(a), 36(2)(b)(i) and 36(2)(b)(ii). However, he also decided that some of the information withheld under sections 31(1)(a), 36(2)(c), 38(1)(b) and 42(1) was not exempt, and should therefore be disclosed. He also found that the public authority had not met the requirements of sections 1, 10 and 17.

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.

Background

2. ContactPoint is a national database which holds data about every child in England under the age of 18.¹ It holds the following information:
 - Name, address, gender, date of birth and an identifying number for all children in England (up to their 18th birthday).
 - Name and contact details for:
 - parents or carers, educational setting (e.g. school) and primary medical practitioner (e.g. GP practice);
 - other service providers (e.g. health visitor, social worker or lead professional), and an indicator for whether a Common Assessment Framework (CAF) exists; and
 - in some cases, contact details for sensitive services (defined as sexual health, mental health and substance abuse).
3. Security concerns were raised whilst ContactPoint was under development, and the Children's Minister announced in November 2007 that there would be a Security Review of the database.² This review was carried out by Deloitte and Touche LLP, and an Executive Summary of the Security Review Report was published in February 2008.³ It is this Security Review Report which forms the main focus of the complainant's requests in this case.

The Request

4. The complainant contacted the Department for Children, Schools and Families ("the public authority") in an email dated 21 April 2008. She

¹

<http://www.dcsf.gov.uk/everychildmatters/strategy/deliveringservices1/contactpoint/about/contactpointabout/>

² <http://news.bbc.co.uk/1/hi/education/7115546.stm>

³ <http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-0502.pdf>

noted that the Executive Summary of the ContactPoint Data Security Review had been published on 1 February 2008, and asked for the following information:

- (a) All previous drafts of the Executive Summary.
- (b) Copies of any messages sent by electronic mail concerning the Executive Summary.
- (c) The minutes of meetings held to discuss the ContactPoint Data Security Review and the names of those attending the meetings.
- (d) A full copy of the ContactPoint Data Security Review Report (the "Report").

For ease of reference these will be referred to as requests (a) to (d) throughout the rest of this Notice.

5. The public authority responded in an email dated 20 May 2008. It informed the complainant that the information which it believed should be withheld was exempt from disclosure under sections 31(1)(a), 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 38(1)(a) and (b), and 42. It then provided more detailed arguments relating to each of the requests:

Request (a) – it informed the complainant that it did not hold any copies of previous drafts of the Executive Summary.

Request (b) – it informed her that, "some information in emails concerning the Executive Summary is being withheld under s42," but did not specify what information was held, or whether it was seeking to rely upon this exemption to some or all of this information.

Request (c) – it informed her that this information was being withheld under sections 36(2)(b).

Request (d) – it disclosed the headings from section 2 of the Report, but informed her that the rest of the information was exempt under sections 31(1)(a), 36 and 38(1)(b).

6. The complainant emailed the public authority on 7 July 2008 and asked for an internal review. In particular she asked for a review of the exemptions used to withhold the information requested in requests (b) to (d). In relation to request (a) she asked for further information to support its statement that this information was not held.

7. The public authority carried out an internal review, and responded in an email received by the complainant on 19 August 2008. It informed her that after carrying out an internal review it had upheld its use of the exemptions previously cited. In addition to this, in relation to request (a) it confirmed again that it did not hold any of the earlier drafts of the Executive Summary. In relation to request (b) it informed her that the emails it had applied section 42 to actually related to the Report, rather than the Executive Summary, and therefore fell outside the scope of the request. Finally it provided further information about its use of section 36 – including the identity of the qualified person.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 16 October 2008 to complain about the way her request for information had been handled.
9. The Commissioner wrote to the complainant in an email dated 20 July 2009, and asked her to clarify whether she wished to complain about the public authority's response to requests (a) and (b). If he did not hear back from her within ten working days he would focus his investigation solely on its handling of requests (c) and (d).
10. The Commissioner did not receive a response from the complainant, and therefore the focus of this case has been the public authority's response to requests (c) and (d).
11. Although not referred to by the complainant, the Commissioner has also considered the public authority's compliance with the requirements of sections 1, 10 and 17 of the Act.

Chronology

12. The Commissioner wrote to the complainant on 10 August 2009. He noted that he had not received any response in relation to his email of 20 July 2009 (see paragraph 9 above), and was therefore only considering the public authority's responses to requests (c) and (d).
13. On the same day the Commissioner wrote to the public authority and asked for a copy of the withheld information. He asked it to provide further submissions to support its use of sections 31(1)(a), 36 and 38(1)(b). In relation to request (c) he noted that it had informed the complainant that this information was being withheld under section

- 36(2)(b) as it believed that disclosure, "would...hinder the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation..." Given this wording he informed it that he was proceeding on the basis that it was relying upon sections 36(2)(b)(i) and 36(2)(b)(ii) to withhold this information. In relation to request (d) he noted that it was not clear which part of section 36 it was relying upon, and he asked it for further clarification of this. He asked for a response within 20 working days.
14. The Commissioner wrote to the public authority again on 14 September 2009. He noted that he had not received any response to his letter of 10 August 2009, and asked for a response by no later than 30 September 2009. He also drew the public authority's attention to his power to issue an information notice under section 51 of the Act.
 15. The public authority responded in a letter dated 30 September 2009. It provided a copy of the withheld information, and further submissions to support its use of the exemptions. In regard to its use of section 36 and request (c) it confirmed that it was relying upon sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). In relation to request (d) it was relying upon section 36(2)(c).
 16. Following a telephone conversation on 1 December 2009, the Commissioner wrote to the public authority on 7 December 2009. In this letter he asked the public authority to provide further submissions to support its use of the cited exemptions. He asked for a response by no later than 15 January 2010.
 17. The Commissioner emailed the public authority on 26 January 2010 and noted that he had not yet received a response to his previous letter. He asked for a response by no later than 9 February 2010. He drew the public authority's attention to his power to issue an information notice under section 51 of the Act.
 18. The public authority provided a response on 9 February 2010. It had carried out a detailed line by line analysis of the withheld information, and provided the Commissioner with further submissions to support its use of sections 31(1)(a), 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) and 38(1)(b). It also informed the Commissioner that it was now relying upon section 42 to withhold some of the information that fell under request (c). Finally it informed the Commissioner that it now believed that some of the previously withheld information could be disclosed.
 19. The Commissioner emailed the public authority again on 31 March 2010 and asked it for clarification as to the information falling under request (c) that it was prepared to disclose. He also asked it for further

clarification as to which exemption it was seeking to apply to which piece of information. Finally he asked it to provide further submissions to support its late use of this exemption.

20. The public authority responded on 19 April 2010, and provided further submissions in response to the queries raised by the Commissioner.
21. The Commissioner emailed the public authority on 23 and 26 April 2010 and asked it to provide some additional information regarding its use of section 36. This information was provided by way of a telephone call on 11 May 2010 and an email on 13 May 2010.

Analysis

Exemptions

22. The public authority has relied upon sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), and 42 to withhold the outstanding information that falls under request (c). It has relied upon sections 31(1)(a), 36(2)(c), and 38(1)(b) to withhold the outstanding information that falls under request (d).
23. The Commissioner has considered the application of each of these exemptions in turn.

Section 31(1)(a)

24. Section 31(1)(a) states that information which is not exempt by virtue of section 30 (information held for the purposes of investigations and proceedings conducted by public authorities) is exempt if its disclosure under the Act would or would be likely to prejudice the prevention or detection of crime. This is a qualified exemption, and is therefore subject to the public interest test.
25. Although it initially applied this exemption to the whole of the Report (request (d)), during the course of the investigation the public authority informed the Commissioner that it now only sought to apply it to four specific passages in the Report. These four passages are identified in the Confidential Annex attached to this Notice. The public authority has argued that the release of this information would prejudice the prevention and detection of crime.
26. The full text of section 31 can be found in the Legal Annex at the end of this Notice.

Would the release of this information prejudice, or be likely to prejudice, the prevention and detection of crime?

27. In *Hogan v ICO and Oxford City Council* [EA/2005/0026 & EA/20005/0030] the Tribunal stated that the application of the prejudice test involves three steps,

“First there is a need to identify the applicable interest(s) within the relevant exemption....Second, the nature of the ‘prejudice’ being claimed must be consideredA third step for the decision-maker concerns the likelihood of occurrence of the prejudice.”⁴

The Commissioner has considered each of these steps in turn.

28. The relevant applicable interest in this exemption is the prevention or detection of crime.
29. In this case the public authority has argued that the disclosure of the passages referred to at paragraph 25 above would compromise the security of the ContactPoint database to such an extent as to make illicit access to the database highly likely, and would also increase the likelihood of individuals seeking to access the system. It has argued that such illicit access may lead to individuals:
- accessing the details of children and using this information for illicit and criminal purposes;
 - using this information to assist in identity theft or fraud; and
 - using this information to attempt to trace individuals (parents and/or children) who have left a place or person.
30. In addition to this, the public authority has also stated that accessing the ContactPoint database illicitly would, in itself, be a criminal offence. The Commissioner believes that this is a reference to section 1 of the Computer Misuse Act 1990 which states that:

“(1) A person is guilty of an offence if—

- (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, or to enable any such access to be secured;
- (b) the access he intends to secure, or to enable to be secured, is unauthorised; and

⁴ EA/2005/0026 & EA/20005/0030, paras 28 to 34.

- (c) he knows at the time when he causes the computer to perform the function that that is the case.
- (2) The intent a person has to have to commit an offence under this section need not be directed at—
 - (a) any particular program or data;
 - (b) a program or data of any particular kind; or
 - (c) a program or data held in any particular computer.”
- 31. Having considered these arguments the Commissioner accepts that the arguments made by the public authority, and the potential prejudices identified in those arguments, directly relate to the prevention or detection of crime.
- 32. When considering the second step as set out in paragraph 27 above, the Commissioner must be persuaded that the nature of the prejudice that has been argued is ‘real, actual or of substance’ and not trivial nor insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
- 33. The nature of the prejudice argued by the public authority is that if the withheld passages were disclosed, this would compromise the security of the ContactPoint database to such an extent as to make it highly likely that individuals would be able to gain unauthorised access to the information on the database for illicit and criminal purposes.
- 34. Given the nature of the information contained on the ContactPoint database, the Commissioner is satisfied that if the prejudice argued by the public authority were to occur this would be real and of substance, and not trivial or insignificant. He therefore finds that the second stage of the test is satisfied.
- 35. The Commissioner has gone on to consider the likelihood of the prejudice as argued by the public authority. In this case the public authority has stated that it believes that the disclosure of the passages referred to above would prejudice the prevention or detection of crime.
- 36. In considering this the Commissioner has been guided by the views of the Tribunal in *Hogan v ICO and Oxford City Council* [EA/2005/0026 & EA/2005/0030], where it noted that,

“The s.31(1) prejudice test is not restricted to ‘would be likely to prejudice’. It provides an alternative limb of ‘would prejudice’.

Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge.”⁵

The Commissioner has interpreted this to mean that in cases where a public authority has argued that disclosure would cause prejudice, whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.

37. In its letter to the Commissioner dated 30 September 2009 the public authority stated that,

“The [Report] contains a range of information that would have been useful to individuals seeking to attack the system. It identifies vulnerabilities, weaknesses and actual risks; details technical information about design, and identifies security controls...In addition it contains information which could be used to reverse engineer the associated text or content of information alluding to such a vulnerability or risk.”

38. It argued that disclosure of the whole Report would prejudice the prevention or detection of crime as:

- exposing details of the security arrangements would make ContactPoint a potential threat for people who present a real threat to the safety and security of vulnerable children and adults;
- releasing details of the security controls which protect the details of children would not only make it highly likely that some individuals would attempt to access these details, but it would also make it much more likely that some would succeed;
- disclosure may also assist opponents of ContactPoint in attempting to break into the system, in order to try and demonstrate security flaws; and
- disclosure would assist individuals in attempting to break into the system in order to obtain the information contained within it for identity fraud.

39. After considering these arguments the Commissioner wrote to the public authority on 7 December 2009. Whilst acknowledging the seriousness of the arguments, he also noted that it had applied these arguments to the whole of the Report. He noted that he was not at present persuaded that the disclosure of the whole Report would compromise security to such an extent as to make it highly likely that

⁵ EA/2005/0026 & EA/2005/0030, para 36.

individuals would be able to access the database for illicit purposes. He asked it to provide him with more detailed submissions to support its use of this exemption.

40. The public authority provided further submissions in its letter dated 9 February 2010. It was at this stage that it informed the Commissioner that after reconsidering the withheld information, it now only sought to rely upon this exemption in relation to four specific passages in the Report (see paragraph 25 above). It also confirmed that it was now prepared to disclose some of the previously withheld sections of the Report.
41. In relation to the four passages it again argued that disclosure would be highly likely to compromise the security of the ContactPoint database and that,

“...the greater likelihood of successfully breaching the security of the system would also make it more likely for attacks to try and gain access to the system.”

In addition to this, it also provided specific arguments relating to each of these passages. However, due to the nature of these arguments the Commissioner does not believe that they can be put into the public domain.

42. The Commissioner recognises the seriousness of the public authority's arguments, particularly given the nature of the information contained in the ContactPoint database, and the potential ramifications were the security of that database to be compromised. However, he has had to consider whether the disclosure of the four passages from the Report would have the prejudicial effects argued by the public authority, or whether that prejudice would be more probable than not were the information to be disclosed.
43. The Commissioner has carefully examined the passages in question, and has considered at length the public authority's arguments. Bearing in mind the level of the technical detail contained in the passages in question, the Commissioner is not persuaded that the disclosure of this information would have the prejudicial effects argued by the public authority. In reaching this view the Commissioner has concluded that the submissions provided by the public authority, whilst providing great detail of the potential ramifications were this information to be disclosed, have offered little detail as to how this prejudice would happen (e.g. how the disclosure of the information contained in these four passages would compromise the security of the ContactPoint database to such an extent as to make unauthorised access to it more

probable than not). In addition to this, given the high profile of the ContactPoint database, the nature of the information contained in that database, and the widely reported concerns in relation to its security systems (see paragraph 3), the Commissioner is not persuaded that the disclosure of the passages from the Report would make it more likely for determined individuals to try and access the database.

44. Although not argued by the public authority, the Commissioner has gone on to consider whether the disclosure of any of the information in the four passages would be likely to cause the prejudice described in paragraphs 37 to 41 above.
45. In reaching a decision on the question of the likelihood of prejudice the Commissioner has been mindful of the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) V Secretary of State for the Home Office [2003] EWHC 2073*, and followed by the Tribunal in the case of *John Connor Press Associates Limited v ICO [EA/2005/0005]*, where the Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that, "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."⁶
46. In reaching a decision on the likelihood of prejudice the Commissioner also believes that the public authority should be able show some causal link between the potential disclosure of the withheld information and the prejudice it has argued is likely to occur.
47. The Commissioner has again considered the public authority's arguments and the contents of the withheld information.
48. In relation to three of the passages, bearing in mind the level of the technical detail contained in the passages and the public authority's submissions, the Commissioner is not persuaded that disclosure would be likely to cause the prejudice argued by the public authority. Therefore in relation to this information, the Commissioner does not believe that this exemption is engaged. These three passages are identified in the Confidential Annex.
49. However, in relation to one of the passages identified by the public authority, the Commissioner is persuaded that the disclosure of that paragraph would be likely to have the prejudicial effect argued. In reaching this view the Commissioner has noted the contents of this passage, and the level of technical detail about the structure of the

⁶ EA/2005/0005, para 15.

ContactPoint database. The Commissioner is persuaded that the disclosure of this passage would be likely to allow an individual to identify parts of the system to attempt to illicitly access, and make it more likely for that attempt to be successful.

50. Therefore, the Commissioner believes that section 31(1)(a) is engaged in relation to one of the passages identified by the public authority (this passage is identified in the Confidential Annex). He has therefore gone on to consider whether the public interest in disclosing this paragraph is outweighed by the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the requested information

51. The Commissioner recognises the public interest in promoting openness, transparency, public understanding and accountability in relation to the activities of public authorities. The public interest in increasing public understanding is particularly strong in relation to the implementation of systems that may affect them and/or their children.
52. The Commissioner recognises that ContactPoint is a high profile national database, and that concerns have been raised by both the press and campaign groups about it. One of the main grounds of concern has been the security of the system, and the potential for unauthorised access to the information on the database. As noted at paragraph 3 above, the Security Review which forms the focus of this case was ordered following security concerns raised whilst the database was under development. Given these security concerns, and the sensitive nature of the information contained on the database, the Commissioner believes that there is a strong public interest in increasing the public understanding of the quality of the security systems protecting this database, and informing the public debate on this subject.

Public interest arguments in favour of maintaining the exemption

53. The public authority has argued that it is not in the public interest to facilitate crime of any kind, and that, "where this could also result in harm to children and/or their parents or carers, the public interest in withholding is even stronger."
54. The public authority has also argued that steps have already been taken to inform the public about ContactPoint's security,

“...There was already information about the actual types of data held, and the security measures being taken to protect it, in the public domain. Local authorities and the [public authority]...had for some months made information available to the public...about ContactPoint...This included information about security policy, and the [public authority] considered that further technical details about the system hierarchy and vulnerabilities were not necessary to meet the public interest in transparency.”

55. The Commissioner notes that there is an inherent strong public interest in avoiding likely prejudice to the prevention of crime. In this case he has also taken into account the nature of the information contained in the ContactPoint database, and the potential repercussions were the security of that database to be compromised. The Commissioner believes that the potential repercussions strengthen the inherent public interest factors in the maintenance of this exemption. Given the nature of the information on the database, the Commissioner believes that were the security of the system to be compromised, the potential repercussions to the individuals whose information is on that database would be highly likely to occur.

Balance of the public interest arguments

56. The Commissioner considers that there are weighty public interest arguments on both sides in this case. He notes the high profile of the ContactPoint database and the nature of the information contained on that system. The concerns that have been raised publically and the fact that there was a review of the database's security mean that there is a strong public interest in increasing the public understanding of the quality of the security systems protecting this database.
57. However, the Commissioner also believes that the public interest factors in favour of maintaining the exemption are particularly strong in this case. He believes that the public interest in avoiding the potential affects to the individuals whose information is on that database, particularly weighty – especially given the potential vulnerabilities of those individuals.
58. After considering these points, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner believes that this information should be withheld under section 31(1)(a).

Section 36

59. In this case the public authority has sought to apply sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to various parts of the withheld information.

60. The relevant parts of section 36(2) state that,

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

[...]

- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. “

The full text of section 36 can be found in the Legal Annex at the end of this Notice.

61. The public authority has argued that information falling under request (c) is exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) on the grounds that disclosure of certain parts of the minutes 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 be likely otherwise to prejudice the effective conduct of public affairs.

62. The public authority has also argued that information falling under request (d) is exempt under section 36(2)(c) on the grounds that disclosure of certain parts of the Report would otherwise prejudice the effective conduct of public affairs.

63. This information is identified in the Confidential Annex attached to this Notice. The Commissioner notes that one of the pieces of information that the public authority has applied section 36(2)(c) to is the passage from the Report which he has found is exempt from disclosure under section 31 (see paragraph 50 and 58 above). Therefore he has not gone on to consider the application of section 36(2)(c) in relation to this piece of information.

64. The Commissioner has first considered the application of section 36(2)(c) to the information falling under request (d).

Request (d)

65. Information can only be exempt under section 36(2) if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences listed at paragraph 60 above. In order to establish whether the exemption has been applied correctly the Commissioner must:

- establish that an opinion was given;
- ascertain that it was given by a qualified person;
- ascertain when the opinion was given; and,
- consider whether the opinion was objectively reasonable and reasonably arrived at.

If the Commissioner decides that the exemption is engaged he must then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

66. 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. In this case the Commissioner has established that the reasonable opinion was given by the Parliamentary Under-Secretary of State. The Commissioner is satisfied that the Parliamentary Under-Secretary of State was a qualified person for the purposes of section 36 of the Act. In addition to this, the public authority has also confirmed that the qualified person gave his opinion on 20 May 2008.
67. In reaching a view on whether the qualified person's opinion is a reasonable one the Commissioner has been guided by the views of the Tribunal in *Guardian & Brooke v ICO & the BBC* [EA/2006/0011 & EA/2006/0013]. This found that a qualified person's opinion under section 36 is reasonable if it is both reasonable in substance and reasonably arrived at. It elaborated that the opinion must therefore be "objectively reasonable" and based on good faith and the proper exercise of judgement, and not simply an opinion within a range of reasonable opinions. However, it also accepted that there may (depending on the facts) be room for conflicting opinions, both of which are reasonable. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary

from case to case and that conclusions about the future are necessarily hypothetical.⁷

68. The Commissioner has first considered whether the qualified person's opinion was reasonably arrived at.
69. In a letter dated 13 May 2010 the public authority informed the Commissioner that the qualified person was not provided with a copy of the withheld information prior to making his decision to apply section 36 to the information in question in this case. It noted that this had not been done because of the volume of information in question. It added that the qualified person had been given the option to examine the withheld information if he so wished, but that this had not been done. In addition to this it also noted that the qualified person had given his opinion in relation to a similar request for the Report in April 2008. Given this, the profile of ContactPoint and the Security Review, and the identity of the qualified person, the Commissioner believes that the qualified person would have been familiar with the factors and arguments for applying this exemption in this case.
70. In addition to this, the public authority has confirmed that the qualified person was only asked to consider whether section 36(2)(c) was engaged in relation to this information – he was not asked to reach a view on the public interest test.
71. In relation to what evidence was considered by the qualified person when determining whether this exemption is engaged the public authority has stated that he took into account the following,

“...Owing to the fact that the details of the full security report have never been disclosed to the public it would have been impossible for the Minister to have direct evidence of the effect on the effective conduct of public affairs if the report were released, but the [public authority] believed that a breach of ContactPoint would have been much more likely if this report had been released...

...The Minister considered this to be critical to his consideration of the effect of the release of the information requested...The [public authority] takes its responsibilities in relation to the protection of information about children and vulnerable adults extremely seriously, and particularly so when release of this information would endanger them. It has been careful to avoid such a release of information specifically because release of this report could

⁷ EA/2006/0011 & EA/2006/0013, paras 60 & 64.

endanger the security of the ContactPoint system. For this reason it is unable to draw on direct evidence relating to any particular breach that this is what happens if information is released.”

The public authority has also provided a copy of the submission to the qualified person, which asked him to consider the application of section 36 in this case.

72. The fact that the qualified person did not have sight of the withheld information when they were asked to give their opinion represents a flaw in the process of the application of section 36. However, having considered the factors that the qualified person took into account when reaching their opinion, the Commissioner is satisfied that he only took into account relevant factors. Therefore, in view of all of the above he is satisfied that the qualified person’s opinion was reasonably arrived at.
73. The next steps for the Commissioner are to consider whether the qualified person’s opinion was a reasonable one (i.e. whether it is reasonable in substance) and, if so, whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
74. The public authority has explained that the basis for the qualified person’s opinion, under section 36(2)(c), is twofold.
75. Firstly, it has argued that the disclosure of the parts of the Report it has identified would compromise ContactPoint’s security controls by potentially making it easier for those seeking to access the system unlawfully to succeed. Therefore disclosure “could endanger the security of the [...] system.”
76. If the security systems were compromised, the public authority’s ability to deliver an effective public service would be disrupted. It has explained that,

“In delivering all of its services the [public authority] recognises that its paramount duty is not to put children or vulnerable adults at risk through its actions, and to actively protect them to the upmost of its ability. ContactPoint is designed to improve the delivery of public services by supporting better communication amongst practitioners, facilitating a more co-ordinated and swifter service delivery to children, young people and their families, and faster and more effective intervention if necessary, as well as saving practitioners millions of wasted hours a year. However, no public service could be considered effective if any

individuals were exposed to harm through the release of information which was in fact created for the purposes of increasing security.”

The compromising of the security systems would lead to ContactPoint users (such as local authorities) and the general public losing faith in the security of the database. This would, in turn, lead to users being less inclined to use the database, and less likely to want to provide “key contact information” to populate the database. In addition to this, it would also lead to the general public becoming more resistant to having their own and their children’s details put on the system.

77. The public authority went on to explain that,

“The consequent reduction in accurate information, and use by practitioners, would have had a direct impact on the benefits ContactPoint was (and is) being designed to achieve – to provide a quick way to find out who else is working with the same child or young person, to help improve support available to those children and young people.

...This would have a broader impact – making it harder to achieve the wider scale reforms in the delivery of children’s services, of which ContactPoint is a key element. As the system is designed to bring together practitioners, make intervention more effective and possibly even save children’s lives, the impact of failure could be of the utmost importance.”

78. Secondly, the public authority has explained that due to their nature, security reviews and subsequent reports (such as that which is the focus of this case), focus on negative aspects of systems and areas for improvement. Therefore, if the information from the Report withheld under section 36(2)(c) were to be disclosed it, “would be likely to be presented in a misleadingly and one-sided way, with a risk to public confidence in the security of ContactPoint.” The misrepresentation of the contents of the Report, and the subsequent drop in public confidence would be prejudicial to the effective conduct of public affairs, “as it could reduce the quality of the data on ContactPoint, and the system’s use by practitioners.” The Commissioner believes that this is effectively the same argument as argued in the previous two paragraphs.

79. The public authority has gone on to explain that a loss of public confidence could lead officials to revisit debates and issues which have already been resolved, diverting them from their essential tasks –

consequently prejudicing the effective conduct of public affairs. It has also explained that,

“...because of the risk of these consequences [their emphasis] there is a risk that officials would not ask for security reviews with this focus on negative aspects of a system, nor engage in frank and full discussion of the full range of security (and indeed other) issues.”

This would be prejudicial to the effective conduct of public affairs as it is important that security reviews continue to focus on areas which need to be addressed, and that officials are able to consider all possibilities properly in order to give Ministers the best advice.

80. After considering this last argument at length the Commissioner does not believe that it describes potential consequences that would fall under the heading of “would otherwise prejudice...the effective conduct of public affairs”. In reaching this view the Commissioner has been mindful of the views of the Tribunal in *Evans v ICO & the Ministry of Defence* [EA/2006/0064], which commented on the relationship between s36(2)(c) and the other subsections of 36(2). In that case the public authority claimed before the Tribunal that both sections 36(2)(b)(i) and 36(2)(c) applied to the withheld information. The Tribunal commented that

“The principle arguments in favour of this exemption [section 36(2)(c)] advanced by the MOD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves feely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting.” However, if the same arguments are to be advanced, then the prejudice feared is not “otherwise”. Some prejudice other than that to the free and frank expression of advice (or views as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged.”⁸

81. In addition to this, the Commissioner has also been mindful of the views of the Tribunal in *McIntyre v ICO & the Ministry of Defence* [EA/2007/0068]. This commented on the intention behind the exemption at s36(2)(c), and said that,

“...this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government

⁸ EA/2006/0064, para 53.

to withhold information, but which are not covered by another exemption, and where disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure."⁹

82. Bearing this in mind, the Commissioner believes that in order to engage section 36(2)(c) – **otherwise** prejudice the effective conduct of public affairs – some prejudice other than that protected by another limb of section 36 must be shown. In relation to these arguments, the Commissioner believes that the public authority's arguments that officials would be inhibited from requesting reviews in the future, or be inhibited from discussing security issues in a full and frank manner, would relate to the prejudicial effects described in sections 36(2)(b)(i) and/or 36(2)(b)(ii). As such, he does not believe that these arguments should have been taken into account when considering whether section 36(2)(c) was engaged.
83. In order to reach a view on whether this is a reasonable opinion and reasonable in substance, the Commissioner first of all needs to fully understand what the opinion was.
84. The qualified person has argued that disclosure of the information in the Report would prejudice the effective conduct of public affairs by:
- critically undermining the security of the ContactPoint database, thereby undermining the security of the database, and making unauthorised access much more likely; and
 - allowing the contents of the Report to be discussed and presented in a misleading and one sided way – focussing on the negative aspects of the Report.
85. This would in turn:
- Undermine public confidence, and the confidence of users, in the ContactPoint system. This would lead to a drop in the quality and quantity of the information being put into the system, and would make users less likely to use it. This would not only impact on the effectiveness of the ContactPoint database, but would also negatively impact on the benefits that the system is designed to bring.

⁹ EA/2007/0068, para 25.

- Lead to issues that have already been resolved being debated again, diverting lead officials in the public authority from essential tasks.
- Make it unlikely for security reviews to be structured in this way again, and have an inhibitory effect on officials commissioning such reports. This would have a knock on effect on the quality of advice given to Ministers by officials.

In relation to the last point, and as noted at paragraph 82 above, the Commissioner does not accept that this is a valid issue to be considered in relation to the application of section 36(2)(c), and therefore he has not considered this factor any further.

86. The key to reaching a view on whether these arguments are reasonable in substance is that the qualified person has said that these prejudicial effects would occur.
87. In considering this opinion the Commissioner has been guided by the views of the Tribunal in *Hogan v ICO and Oxford City Council* [EA/2005/0026 & EA/2005/0030], as quoted at paragraph 36 above.¹⁰ Therefore the Commissioner believes that in this case the qualified person's opinion is that if the information is disclosed prejudice is at least more probable than not.
88. Therefore, when considering whether the above opinion is reasonable in substance, the Commissioner has considered whether the above prejudicial effects are more probable than not. In order to reach a view on this he has considered whether, if this information were to be disclosed, it is more probable than not that security would be compromised, or that the contents of the Report would be misrepresented, to such an extent as to have the prejudicial effects listed in the bullet points at paragraph 85 above.
89. In relation to the first of these consequences (i.e. the compromising of the security systems), bearing in mind the level of the technical detail contained in the passages, the Commissioner is not persuaded that the disclosure of this information would compromise the security systems as argued by the public authority (see paragraph 43 above).
90. In relation to the second of these consequences, the Commissioner finds it hard to accept that the sections of the Report withheld under section 36(2)(c) would be misrepresented and misreported to such an extent as to make the subsequent prejudicial effects identified by the qualified person more probable than not to occur. Whilst he appreciates

¹⁰ EA/2005/0026 & EA/2005/0030, para 36.

that the ContactPoint database is a controversial one, and that the contents of this Report would be likely to be of great interest to opponents of the database, he is not convinced that disclosure would make it more probable than not for the prejudicial effects argued by the public authority to occur.

91. For these reasons the Commissioner does not accept that the opinion of the qualified person, in relation to this information is a reasonable one. As such he finds that section 36(2)(c) is not engaged in relation to this information. Although for other exemptions it may be acceptable for the Commissioner to replace the level of likelihood of prejudice argued by the public authority with his own view of its likelihood and then carry this through to the public interest test this will **not** be the case for section 36. If it is the qualified person's opinion that prejudice "would" occur it is not for the Commissioner to change the basis on which the exemption is engaged. His options are to either accept the Qualified Person's opinion on likelihood as it stands, or to reject the engagement of the exemption altogether if the opinion is not "reasonably arrived at" and "objectively reasonable". Whilst finding the exemption to be not engaged may seem a harsh approach – especially when contrasted with the Commissioner's approach to other exemptions where if the "would" threshold is not met he may accept "would be likely to" instead – the Commissioner considers that this is the nature of the section 36 exemption. Section 36 makes special provision for the qualified person's opinion to be given particular weight, in recognition of the considered judgement that a qualified person is expected to be able to bring to the task of providing such an opinion. The down side of giving the qualified person's opinion due weight is that if he gets it wrong the engagement of the exemption will fall on this basis. Therefore, and as noted above, this exemption is not engaged.
92. As he has found that section 36(2)(c) is not engaged, the Commissioner has not gone on to consider the public interest test in relation to this information.

Request (c)

93. The public authority has relied upon sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold extracts from the minutes of the ContactPoint Project Board meetings – where those meetings discussed the Security Review.
94. The Commissioner has first considered whether the opinion to apply these exemptions was reasonably arrived at.

95. As noted at paragraphs 66 and 69 above, the public authority has informed the Commissioner that the qualified person gave his opinion on 20 May 2008. The public authority has also confirmed that the qualified person did not have sight of the withheld information when he gave this opinion. The Commissioner is, however, satisfied that the qualified person was familiar with the issues surrounding this request.
96. In addition to this, and as noted at paragraph 71 above, the public authority has provided the Commissioner with some information as to the issues that the qualified person took into account when determining whether section 36 is engaged. It has also provided him with a copy of the submission that was given to the qualified person at that stage.
97. The fact that the qualified person did not have sight of the withheld information when they were asked to give their opinion represents a flaw in the process of the application of section 36. However, having considered the points that the qualified person took into account when reaching his opinion, the Commissioner is satisfied that he only took into account relevant factors. Therefore, in view of all of the above he is satisfied that the qualified person's opinion was reasonably arrived at.
98. The next steps for the Commissioner are to consider whether the qualified person's opinion is a reasonable one (i.e. whether it is reasonable in substance) and, if so, whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
99. The public authority has explained that the basis for the qualified person's opinion to apply sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) is as follows.
100. In relation to section 36(2)(b)(i) the public authority has argued that disclosure of this information would be likely to have a prejudicial effect on the free and frank provision of advice by inhibiting officials from providing advice during the deliberative process. It has argued that the ContactPoint Project Board should be allowed space to develop their thinking, provide advice, explore options and exchange views freely and frankly. This would be inhibited by disclosure. These inhibitory effects could have resulted in, "distorted or restrained dialogue," which would impact on the quality of advice given to Ministers.
101. The public authority has provided the same arguments in relation to section 36(2)(b)(ii), arguing that the inhibitory effects referred to in the previous paragraph would also be likely to have a prejudicial effect

on the free and frank exchange of views for the purposes of deliberation.

102. In relation to section 36(2)(c), during the investigation of the case the public authority informed the Commissioner that it no longer believed that the disclosure of any of the contents of the minutes would compromise the security of the ContactPoint database. Instead it has relied upon two other arguments.
103. Firstly, it has argued that disclosure of the withheld information could mean that in the future expert advice would not be sought, due to a reluctance of those who might supply it to engage in debate where their contribution might be disclosed. This would impact on the quality of service being delivered and the value for money that that service represented. It might also mean that the Government would be forced to spend additional public funds in the future in order to rectify avoidable mistakes.
104. The Commissioner is not convinced that this is a valid argument to consider in relation to section 36(2)(c). As noted at paragraphs 80 to 82 above, the Commissioner believes that in order to engage section 36(2)(c) some prejudice other than that protected by another limb of section 36 must be shown. In this instance he believes that the public authority's argument that external experts would be reluctant to provide expert advice relates to the prejudicial effects described in section 36(2)(b)(i). Therefore he does not believe that this argument should have been taken into account when considering whether section 36(2)(c) was engaged in relation to this information.
105. The second argument the public authority put forward was that if disclosed, some of the sections of the minutes could be misinterpreted and cast doubt on the independence of the Security Review. This would, in turn, potentially undermine public confidence in ContactPoint, leading to the prejudicial effects discussed at paragraphs 76 to 79 above.
106. In relation to the arguments regarding sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c), having considered the circumstances in which the opinion was given, the contents of the withheld information to which it relates, the context in which the material was created, and the timing of the request, the Commissioner is of the view that the opinion of the qualified person is a reasonable one in substance. Therefore these exemptions are engaged in relation to this information. The Commissioner has gone on to consider the public interest test in relation to these exemptions.

107. In reaching a view on the public interest the Commissioner has noted the comments of the Tribunal in *Guardian & Brooke v ICO & the BBC* [EA/2006/0011 & EA/2006/0013], which held that the application of the public interest test in section 36 cases requires a consideration of the following factors:

- (a) The lower the likelihood is shown to be that the prejudice or inhibition will occur, the lower the chance that the balance of the public interest will favour maintaining the exemption.
- (b) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
- (c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.
- (d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and the effective conduct of public affairs.
- (e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.¹¹

However, the Tribunal qualified the first of these factors by stating that it was for the qualified person to decide whether prejudice was likely, and thereby whether the exemption was engaged. However, in making

¹¹ EA/2006/0011 & EA/2006/0013, para 87.

a decision on the balance of the public interest, the Tribunal (and therefore the Commissioner) would need to make a decision as to the severity, frequency, or extent of any prejudice that would or might occur.

Public interest arguments in favour of disclosing the requested information

108. As noted at paragraph 51 above, the Commissioner recognises the public interest in promoting openness, transparency, public understanding and accountability in relation to the activities of public authorities. The public interest in increasing public understanding is particularly strong in relation to the implementation of systems that may affect them and/or their children. He also believes that given the high profile nature of the database, and the public concerns about the security systems protecting it, there is a strong public interest in increasing the public understanding of the quality of those systems, and informing the public debate on this subject.
109. The public authority has acknowledged that there is a public interest in increasing transparency in government processes, and how public money has been spent. In addition to this, it has also recognised that there is a public interest in increasing public understanding of decisions that have been taken that affect them or their children. It has also argued that disclosure could have increased public confidence that the Government was doing all it could to ensure that the database was as secure as possible, and that decisions were being made on the basis of the best available information.

Public interest arguments in favour of withholding the requested information

110. In relation to sections 36(2)(b)(i) and 36(2)(b)(ii) the public authority has argued that Ministers and officials need space in which to develop their thinking and explore options concerning the ContactPoint project. Disclosure of information on such discussions with colleagues, consultant advisors and external IT providers would have been likely to affect the free and frank provision of advice and inhibit discussions in the future. This would not be in the public interest.
111. It has also argued that if officials and their advisors were unable to freely discuss the findings of the Security Review this could have adversely affected the quality of advice to Ministers, officials and stakeholders, compromised key implementation strategies and impeded the decision making process. This would not be in the public interest.

112. In relation to section 36(2)(c) the public authority has again argued that the disclosure of the withheld information could undermine public confidence in the ContactPoint database, leading to the prejudicial effects as described at paragraphs 76 to 79 above. It is in the public interest to avoid these prejudicial affects.
113. Finally, in relation to all three exemptions it has argued that disclosure would have meant that in the future, appropriate expert advice would not be sought. This would impact on the quality of advice available, which would not be in the public interest. However, and as noted at paragraph 104 above, the Commissioner does not believe that this is a valid argument in relation to section 36(2)(c). Therefore he has not gone on to consider this public interest argument in relation to section 36(2)(c).

Balance of the public interest arguments

114. The Commissioner has first considered the balance of the public interest in relation to the information withheld under sections 36(2)(b)(i) and 36(2)(b)(ii).
115. In relation to both sections 36(2)(b)(i) and 36(2)(b)(ii) the public authority has argued that the minutes contain frank discussions regarding the Security Review, and that disclosure would be likely to inhibit officials from taking part in such a deliberative process, because of the possibility of the discussions being disclosed. It has also argued that the Project Board should be allowed space to develop their thinking, explore options and exchange views freely and frankly.
116. After considering these arguments the Commissioner believes that they can be described as a chilling effect argument and a safe space argument. The Commissioner has considered each of these in turn. As noted at paragraph 107 above, in reaching a view on the public interest one of the factors to take into account is the severity, frequency or extent of any prejudice/inhibition that would or might occur. He has taken this into account when considering these arguments.
117. A chilling effect argument is directly concerned with the potential loss of frankness and candour in debate / advice which, as a result, would lead to poorer quality advice and less well formulated policy and decisions. This would not be in the public interest.

118. In considering this argument the Commissioner has been mindful of the views of the Tribunal in *DFES v ICO & The Evening Standard* [EA/2006/0006] which stated that,

“The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.”¹²

119. In reaching a view on the weight to attach to this argument the Commissioner has been mindful of the contents of the withheld information. Although he is unable to discuss in detail the contents of the withheld information, the Commissioner notes that they reflect free and frank discussions about the security review process that was underway at that time. As noted above, the ContactPoint database was a high profile project, and concerns about the security systems had been raised publically. The Commissioner accepts that issues surrounding the security systems and the Security Review were politically sensitive, especially around the time that the Review was being carried out and decisions were being made as a result.
120. With regard to the timing of the request, and the effect that this might have on any chilling effect the Commissioner notes that the request was made on 21 April 2008, and the meetings of the ContactPoint Project Board that the minutes relate to, were held on 19 December 2007 and 31 January 2008. In addition to this, the Report was not completed until February 2008. Given the timing of the request, and its proximity to the completion of the Report, the Commissioner has considered whether the issues that were discussed at the meetings were still live at the time of the request. During the course of the investigation the public authority informed the Commissioner that,

“...the request centres on the data security review commissioned in December 2007. The report focused on security controls over data in use during the development phase of ContactPoint, and security controls incorporated into the design for the deployment and live operations of ContactPoint during 2008 and beyond. The only parts of the Minutes in [the] scope of the request record discussions relating to that review, which were necessarily held before the project went live.”

¹² EA/2006/0006, para 75(i).

Bearing this in mind, and also noting that the ContactPoint database was still in a development stage at the time of the request, the Commissioner is satisfied that at the time the request was received the issues that had been under discussion at the meetings in question were still live.

121. When considering chilling effect arguments the Commissioner considers that as the argued impact gets wider, it will be more difficult for convincing arguments to be sustained. This may particularly be the case for the widest ranging arguments – that disclosures relating to policies, where the process of formulation or development is complete, and historic issues would affect the frankness and candour of contributions to future live policies and debates. However, in this case the Commissioner is persuaded that the issues surrounding the Security Review and the development of the security controls were still live at the time of the request. Therefore, due to the timing of the request and the potential sensitivity of the issue under discussion, the Commissioner is persuaded that the disclosure of the withheld information would be likely to have a chilling effect as argued by the public authority. Furthermore, he is persuaded that this inhibition would have been likely to have been severe and (at the time) frequent.
122. The Commissioner believes that 'safe space' arguments are about the need for a safe space to formulate policies, debate live issues, and reach decisions without being hindered by external comment and/or media involvement. In reaching a view on the strength of an argument of this kind the Commissioner is especially mindful of whether the information relates to an issue that was live at the time of the request. In this case, and as noted above, the Commissioner is persuaded that the minutes relate to a matter that was still live at the time of the request. Therefore he finds that given the timing of the request, hindrance to the safe space would have been likely, severe and frequent. This strengthens the public interest in favour of maintaining the exemption.
123. The Commissioner believes that there is a strong public interest in increasing understanding of the security measures that have been put in place to protect the ContactPoint database, especially given the nature of the information contained in it and the concerns that had been raised publicly about the quality of those security systems. The Commissioner also notes that the ContactPoint project cost a lot of public money, and he believes that there is a significant public interest in increasing accountability of how public funds are spent.
124. As he has noted at paragraph 107 above, in making a decision on the balance of the public interest the Commissioner will take into account

- the severity, frequency, or extent of any prejudice that would or might occur.
125. In this instance the Commissioner has been particularly mindful of his findings that the issues that were under discussion at the meetings were still live at the time of the request. Given this and the political sensitivity of ContactPoint, the Commissioner believes that it would be very likely that the inhibitory affect argued by the public authority would happen again during the development of the database. Therefore the Commissioner believes that were the information to be disclosed, the potential prejudice to the free and frank provision of advice, and the free and frank exchange of views, would be likely to have been frequent and widespread whilst this stage of the ContactPoint project was still under development. The Commissioner does not believe that this would be in the public interest.
 126. The Commissioner believes that the public interest factors in favour of maintaining this exemption to be significant. In particular he believes that there is a significant public interest in avoiding the likely chilling effect on the provision of free and frank advice, and the free and frank exchange of views, in relation to the development of the security systems for the ContactPoint database. This is especially the case given the contents of the ContactPoint database, and the importance that the development of the security systems takes into account the best advice possible. Taking this into account the Commissioner is persuaded that the public interest in avoiding likely prejudice to this important process is particularly weighty.
 127. On balance the Commissioner has therefore concluded that, in the circumstances of this case, the public interest in maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) in relation to the information withheld under these exemptions, outweighs the public interest in disclosing this information. Therefore this information should be withheld.
 128. In relation to section 36(2)(c) the Commissioner notes that the public authority has argued that disclosure could undermine public confidence in the ContactPoint database, leading to the prejudicial affects as described at paragraphs 76 to 79 above.
 129. As noted above, in making a decision on the balance of the public interest, the Commissioner will take into account the severity, frequency, or extent of any prejudice that would or might occur. The Commissioner notes that at the time of the request the development of ContactPoint (and the security concerns that had been raised) was high profile and any disclosure of information about the Security Review would have been likely to attract the attention of the public and the

media. He accepts that given the level of interest in the project, and the concerns that had been raised by pressure groups and some elements of the media, if the withheld information was disclosed, there would be the potential for it to be misrepresented. This could, potentially have a damaging effect on public confidence in the ContactPoint database. However, in reaching a view on the weight to attach to this public interest argument the Commissioner has considered the nature of the withheld information. Whilst he is obviously unable to comment on its contents, he notes that there is only a limited amount of information withheld under this exemption. He also believes that were this information to be disclosed the public authority could issue a statement to accompany it, in order to counteract any misrepresentation.

130. Bearing these points in mind the Commissioner does not believe that any prejudice that would be likely to occur were this information to be disclosed would be likely to occur with any frequency or severity. Therefore he does not find this public interest argument particularly weighty.
131. As noted at paragraph 123 above, the Commissioner believes that there are strong public interest arguments in favour of disclosure. Therefore, and bearing in mind the above comments, the Commissioner finds that the public interest in maintaining this exemption does not outweigh the public interest in disclosure.
132. Therefore the information that falls under request (c) that has been withheld solely under this exemption should be disclosed.

Section 38

133. Section 38(1)(b) states that information is exempt if disclosure would, or would be likely to, endanger the safety of any individual. This is a qualified exemption, and is therefore subject to the public interest test.
134. Although it initially applied this exemption to the whole of the Report, during the course of the investigation the public authority informed the Commissioner that it now only sought to apply it to four specific passages in the Report. These four passages are identified in the Confidential Annex attached to this Notice. The public authority has argued that the disclosure of this information would endanger the safety of any individual.
135. The Commissioner notes that one of the passages that the public authority has applied section 38(1)(b) to is the passage from the Report which he has found is exempt from disclosure under section 31.

Therefore he has not gone on to consider the application of section 38(1)(b) to this piece of information.

136. The full text of section 38 can be found in the Legal Annex at the end of this Notice.

Would the release of this information endanger, or be likely to endanger, the health and safety of any individual?

137. As with section 31(1)(a), the first steps in considering this exemption are to establish that the arguments advanced by the public authority are relevant to the exemption and to whom the predicted endangerment would result. The public authority has advanced the same argument here as in connection with section 31(1)(a) (see paragraph 29 above) – that disclosure of the passages would compromise the security of the ContactPoint database to such an extent as to make illicit access to the database highly likely, and would also increase the likelihood of individuals seeking to access the system. Given the contents of the information on the ContactPoint database, the Commissioner accepts that the arguments of the public authority are relevant to the endangerment described in this exemption and that the subjects of the endangerment have been identified.
138. Turning to the likelihood of this endangerment, the Commissioner has considered whether endangerment would occur. The test for this is as set out at paragraph 36 above, that prejudice/endangerment must at least be more probable than not.
139. The public authority's main arguments to support its use of this exemption are the same as those set out in relation to section 31(1)(a) – as set out in paragraphs 37 to 41 above.
140. Again, the Commissioner recognises the seriousness of these arguments, particularly given the nature of the information contained in the ContactPoint database, and the potential ramifications were the security of that database to be compromised. However, he has had to consider whether the disclosure of this information would have the prejudicial effects argued by the public authority, or whether that prejudice would be more probable than not were the information to be disclosed.
141. As noted at paragraph 43 above, having considered the level of technical detail contained in these passages, and the public authority's submissions, the Commissioner is not persuaded that the disclosure of this information would have the prejudicial effects argued by the public authority.

142. The Commissioner has gone on to consider whether the disclosure of these passages would be likely to cause the prejudice described in paragraphs 37 to 41 above. The test for this is as set out in paragraph 45 and 46 above.
143. Again, the Commissioner has considered the withheld information and the public authority's submissions at length. However, in relation to this information the Commissioner is not persuaded that disclosure would be likely to cause the prejudice/endangerment argued by the public authority.
144. Therefore section 38(1)(b) is not engaged. The basis for this conclusion is that the Commissioner does not accept that disclosure of the three passages from the Report would or would be likely to undermine the security systems of ContactPoint, as argued by the public authority. As he has found that this exemption is not engaged, the Commissioner has not gone on to consider the balance of the public interest.

Section 42

145. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. This is a qualified exemption, and is therefore subject to the public interest test.
146. The full text of section 42 can be found in the Legal Annex at the end of this Notice.
147. The public authority has applied this exemption to two sections of the minutes that fall under request (c). This information has been identified in the Confidential Annex attached to this Notice. The Commissioner notes that he has found one of these sections exempt from disclosure under section 36(2)(b)(ii). Therefore he has not gone on to consider the application of section 42(1) to this piece of information.
148. The Commissioner has first considered whether the exemption is engaged.
149. Legal professional privilege covers communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the dominant purpose of litigation.
150. In this instance the information in question is an extract from the minutes of a meeting of the ContactPoint Project Board, where one of the attendees stated that they would consider a legal matter and would

seek advice on it. The public authority has argued that this falls under this exemption as it relates to information created by seeking or receiving specific legal advice.

151. Bearing in mind the contents of the information in question, and the high level nature of the information, the Commissioner is not persuaded that this information relates to a communication between a lawyer and their client for the purpose of obtaining legal advice. Therefore, the Commissioner does not believe that section 42 is engaged in relation to this information. Furthermore, as the public authority has not relied upon any other exemption in relation to this information, the Commissioner believes that this information should be disclosed.

Procedural Requirements

152. Section 1(1) states 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.”

153. Section 10(1) states 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.”

154. As the Commissioner has decided that some of the withheld information is not exempt from disclosure under any of the exemptions cited by the public authority, he believes that this information should have been provided to the complainant in line with the duty at section 1(1)(b). The public authority's failure to do so therefore constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request the public authority also breached section 10(1).
155. In addition to this, during the course of the investigation the public authority informed the Commissioner that it no longer sought to rely upon any exemption in relation to some of the previously withheld information. As this information was not disclosed within 20 working

- days of the request the Commissioner believes that this is also in breach of sections 1(1)(b) and 10(1).
156. The Commissioner has also considered whether the public authority has complied with its obligations under section 17(1).
157. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal 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.
158. During the course of the investigation the public authority sought to rely upon section 42 to withhold some of the information that fell under request (c). However, it did not cite this exemption in the refusal notice or the internal review in relation to this request. For this reason the Commissioner believes that the public authority did not comply with the requirements of section 17(1).
159. The full texts of sections 1, 10 and 17 can be found in the Legal Annex at the end of this Notice.

The Decision

160. 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:
- Some of the information that fell under request (c) was correctly withheld under sections 36(2)(b)(i) and 36(2)(b)(ii).
 - Some of the information that fell under request (d) was correctly withheld under section 31(1)(a).

The information that can be withheld is identified in the Confidential Annex attached to this Notice.

161. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority did not deal with the request for information in accordance with section 1(1)(b) insofar as it inappropriately

relied upon sections 31(1)(a), 36(2)(c), 38(1)(b) and 42(1) to withhold some of the requested information. In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).

- As noted above, during the course of the investigation the public authority stated that it no longer sought to rely upon any exemption in relation to some of the previously withheld information. As this information was not disclosed within 20 working days of the request the Commissioner believes that this is also in breach of sections 1(1)(b) and 10(1).
- The public authority also failed to meet the requirements of section 17(1) in that it failed to notify the complainant that it was also seeking to rely upon section 42(1) to withhold some of the requested information in relation to request (c).

Steps Required

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

The public authority should disclose the withheld information as set out in the Confidential Annex attached to this Notice.

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

Failure to comply

164. 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

165. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). 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 sent.

Dated the 22nd day of June 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

Section 1

- (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 information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority –
 - (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4) The information –
 - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (1) 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.
- (2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3) If, and to the extent that –
 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.
- (4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5) Regulations under subsection (4) may –
 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6) In this section –

“the date of receipt” means –

 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.

- (2) Where—
 - (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

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

- outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Section 31

- (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2) 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,
 - (e) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Section 36

- (1) 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.
- (2) 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.
- (3) 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).
- (4) 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".
- (5) 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.
- (6) 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.
- (7) 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 38

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to-
- (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

Section 42

- (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.