

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 1 September 2010**

**Public Authority:** Capacity Builders  
**Address:** 77 Paradise Circus  
Birmingham  
B1 2DT

#### Summary

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The complainant requested information relating to the decision by the public authority to cease its funding of the Third Sector Leadership Centre. The public authority disclosed the information held apart from the advice its board had received from officials in relation to handling the proposed announcement to withdraw the funding. The handling advice was withheld on the basis of the exemption at section 36(2)(b)(i). The Commissioner found that the exemption was not engaged and has ordered the public authority to disclose the handling advice. The Commissioner consequently found the public authority in breach of sections 1(1)(b) and 10(1) (access to requested information and time for compliance with request). He additionally found the public authority in breach of section 17(1)(b) (refusal notice).

#### The Commissioner's Role

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

#### Background

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2. Capacity Builders is a non-departmental government agency responsible for improving the advice and support available to charities and voluntary groups in England.

3. The Third Sector Leadership Centre (the Centre) was established in 2006 by the National Council for Voluntary Organisations (NVCO) in collaboration with the Association of Chief Executives of Voluntary Organisations to improve leadership skills across charities and voluntary groups (i.e. the third sector). The Centre was, until early 2009, funded by Capacity Builders.
4. Following a review in 2008, Capacity Builders agreed to continue to fund the Centre beyond 2009 if it was able to devise a sustainable business plan. The NCVO submitted a business plan to Capacity Builders in January 2009 and Capacity Builders subsequently released a statement in February 2009 that it would cease its funding of the Centre in March 2009.

## The Request

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5. On 12 February 2009 the complainant requested the following information:  
  
    '.....copies of all correspondence and internal documents relating to the performance and funding of the Third leadership Centre since 2008',  
    and  
  
    '.....a copy of the business plan for the centre submitted by the NCVO in January 2008 and a copy of the minutes of the meeting at which the plan was discussed.'
6. On 09 March 2009 the public authority responded. It disclosed 6 documents to the complainant but requested more time to consider whether 2 additional documents could also be disclosed.
7. On 07 April 2009 the public authority wrote back to the complainant. Some additional information was disclosed but all of the contents of a document entitled; 'handling advice to the Board dated 4 February 2009' was withheld on the basis of an exemption at section 36 of the Act.
8. On 24 April 2009 the complainant requested a review of the decision not to disclose the information in the handling advice of 04 February 2009.
9. On 01 May 2009 the public authority responded. The response which was sent by the same individual who had been handling the case suggested that there was no further need to review the decision

because the requests had been dealt with exhaustively. The public authority nonetheless went on to provide some clarity and additional explanation regarding the decision to withhold the 'handling paper'

## **The Investigation**

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### **Scope of the case**

10. On 24 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant primarily asked the Commissioner to review the public authority's decision not to disclose the 'handling advice' of 04 February 2009

### **Chronology**

11. Following an exchange of correspondence between the public authority and the Commissioner's customer service team, the public authority supplied the Commissioner with a copy of the 'handling advice' (also referred to in this Notice as the 'disputed information') it had withheld from the complainant.
12. Following the allocation of the complaint to a case officer, the Commissioner wrote to the public authority on 30 June 2010 requesting additional submissions on the application of section 36.
13. The public authority responded on 20 July 2010.

### **Analysis**

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14. A full text of all the statutory provisions referred to in this part of the Notice can be found in the Legal Annex.

### **Exemptions**

#### Section 36

15. The public authority confirmed that it had relied on the exemption at section 36(2)(b)(i).
16. The exemption at section 36(2)(b)(i) can only be engaged if, in the reasonable opinion of a qualified person (QP), the disclosure of the

relevant information under the Act would or would be likely to inhibit the free and frank provision of advice.

17. The public authority informed the Commissioner that its Chief Executive, Matt Leach is the designated QP for the purposes of section 36 of the Act. This designation was authorised by the Minister for the Third Sector on 16 March 2009 pursuant to his statutory power under section 36(5)(o)(iii) of the Act. A copy of the authorisation was also provided to the Commissioner.
18. The Commissioner is satisfied that at the time of the request, Matt Leach, the Chief Executive was the designated QP for the purposes of section 36.
19. The Commissioner specifically asked the public authority to provide him with a copy of the QP's opinion and copies of the submissions the QP was provided with to assist him in reaching a decision on the application of section 36(2)(b)(i).
20. The Commissioner also asked the public authority to clarify whether it was the reasonable opinion of the QP that the disclosure of the withheld information 'would' or 'would be likely to' result in the harm identified under section 36.
21. The public authority explained that in its view all of the Commissioner's queries had been addressed in an internal email of 01 May 2009 from the Chief Executive. A copy of the email was supplied to the Commissioner for the purposes of the investigation.
22. As the Commissioner understands it, the email in question was written in response to the complainant's request for the public authority to review its decision to withhold the disputed information. It was sent by the Chief Executive to another official who was directly handling the complainant's requests.
23. Although the email response was not strictly speaking in response to a request to provide an opinion, the Commissioner is satisfied that because the QP explained why he considered the disputed information exempt on the basis of section 36, it constitutes a QP's opinion within the meaning of section 36. It does seem however that although the QP had decided by 07 April 2009 that the section 36 exemption was engaged, his opinion was not properly documented until 01 May 2009.

Was the Opinion given reasonable in substance and reasonably arrived at?

24. A number of Information Tribunal decisions have established that in order to satisfy the intention of section 36(2), the QP's opinion must both be reasonable in substance and reasonably arrived at.<sup>1</sup>
25. The Commissioner agrees with the Tribunals' interpretation and therefore next considered whether the QP's opinion was reasonable in substance and reasonably arrived at. The Commissioner considers that the test to determine the reasonableness of the opinion is an objective one.
26. Although there are clearly flaws in how the opinion was recorded, the Commissioner considers that, on the whole, the opinion was reasonably arrived at. Ideally, the opinion should have been documented prior to actually relying on the exemption rather than after the complainant had requested an internal review. Nevertheless, the Commissioner is satisfied that the QP had considered the disputed information and did not, in the words of the Tribunal in the Brooke case, reach his decision 'by (merely) the toss of a coin...'<sup>2</sup> The email of 01 May 2009 from the QP clearly suggests that he had carefully considered not just the disputed information but all of the information within the scope of the requests. There is no suggestion from the content of the opinion that irrelevant factors were taken into consideration, and it is clear that the arguments considered were directly relevant to the exemption claimed.
27. In terms of the reasonableness of the opinion, the QP stated that the disclosure of the disputed information 'would significantly prejudice the ability of officers of the organisation to provide free and frank advice to our Board on the handling of announcements of decisions they made' (emphasis added) which 'would significantly inhibit the provision of such advice to the board'. He expressed concerns that consequently officers might be less candid in future when providing handling advice to the Board. Additionally, disclosure could result in discussions between officers pursuant to the provision of handling advice taking place outside of defined government structures.
28. The Commissioner therefore established that the QP was expressing an opinion in relation to the application of the exemption at section 36(2)(b)(i). The Commissioner made this position known to the public

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<sup>1</sup> This point was however first considered in detail by the Information Tribunal in *Guardian & Brooke v The Information Commissioner & the BBC – EA/2006/0011 & EA/2006/0013* (Brooke). See also, *McIntyre v The Information Commissioner & the Ministry of Defence – EA/2007/0068* (McIntyre)

<sup>2</sup> At Paragraph 63

- authority in his email of 30 June 2010 and the public authority did not disagree.
29. The exemption at Section 36(2)(b)(i) applies to information which in the reasonable opinion of the QP would, or would be likely to, inhibit the free and frank exchange of advice if disclosed.
  30. In terms of assessing the degree of likelihood that an inhibition would or would be likely to occur, the Commissioner considers that, 'would inhibit' places a much stronger evidential burden on a public authority and must be at least more probable than not.
  31. The starting point should as always be with the disputed information although the Commissioner is also mindful of the fact that the consequential effect of disclosure is the primary focus of the exemption.
  32. The Commissioner has carefully considered the disputed information and the opinion of the QP as expressed in the e-mail dated 01 May 2009. He notes that the e-mail did not explain why or in what way the disclosure of the disputed information would affect the ability of officers to provide full and frank advice. In the absence of any explanation of a causal link between disclosure of the information in question and the ability of the officers concerned he finds that it was not objectively reasonable for the QP to reach the view that he did.
  33. The Commissioner accepts the general point that there may be circumstances where it would be reasonable to anticipate that the disclosure of advice provided by officials could have an inhibiting effect on the extent of their candidness in future. This would be on the basis that officials might be less willing to be free and frank in their comments if they feared, based upon past experience of FOI disclosures, that their advice would become public. The Commissioner would usually expect such arguments to be supported by reference to the specific information in question.
  34. He notes that in this case the QP clearly stated that the ability, rather than the willingness, of the officials to be free and frank would be compromised. He also notes that the content of the opinion contains no explanation as to why disclosure of the particular information in this case would affect the willingness of officials to provide free and frank advice, and no evidence that the QP actually considered this point. As section 36 relies upon the opinion of the QP it is not for the Commissioner to make arguments, such as those detailed in the previous paragraph, on the QP's behalf.

35. In any case, with regard to the specific content of the information, the Commissioner is of the view that a reasonable observer would have expected the statements recommended to be made by the Board. In his view, there is nothing specific in the statements which could have come as a surprise to observers. The Commissioner considers that this further supports his view that it was not objectively reasonable for the QP to have concluded that it would have been more probable than not that the disclosure of those statements would have an inhibiting effect on the frankness and candour of officers when providing advice to the Board in the future. The Commissioner also notes that the information in the background section of the handling document is mostly factual. Again he considers that this supports his view that it was not objectively reasonable to conclude that disclosure would have resulted in the inhibiting effect anticipated.
36. The Commissioner is mindful that the timing of a request<sup>3</sup> is sometimes a crucial determinant of the likely effect of disclosure. Whilst the Commissioner acknowledges that there may be valid reasons in principle for not disclosing advice so soon after it was provided he notes that the QP's opinion did not reference or rely upon any such reasons. He further considers that the content and nature of the advice also forms a fundamental part of any consideration as to the likely consequential effect of its disclosure on the provision of similar advice in future.
37. The QP's opinion was not specific regarding how the actual content of the handling advice would (if disclosed) contribute in inhibiting the free and frank provision of advice in the future. No reasoning was given to support the QP's contention that the ability of officers to be free and frank would be prejudiced by disclosure of this information. Similarly, no causal link between a disclosure of the handling advice and a reduction in the willingness of officers to be free and frank was even argued.
38. The Commissioner therefore finds that the handling advice was incorrectly withheld on the basis of the exemption at section 36(2)(b)(i) of the Act because he does not consider the QP's opinion to be reasonable in substance.
39. The Commissioner has not gone on to consider whether the lower level of prejudice (i.e. would be likely to inhibit) applied because in his opinion that would amount to forming a view on the application of the section 36 exemption rather than assessing the reasonableness of the QP's opinion..

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<sup>3</sup> In this case, the requests were made within the same month the decision was taken to withdraw the funding.

## Procedural Requirements

40. Section 17(1)(b) states that a public authority should, if denying access to requested information, issue a refusal notice to the applicant within 20 working days specifying the exemption(s) it relied on to withhold the requested information.
41. The Commissioner finds the public authority in breach of section 17(1)(b) for failing to specify within 20 working days that it was relying on the exemption at section 36(2)(b)(i). He additionally finds the public authority in breach of section 17(1) for issuing its refusal notice outside of the statutory 20 working days.
42. A public authority is required by virtue of the combined provisions of section 1(1)(b) and 10(1) of the Act to disclose requested information within 20 working days.
43. The Commissioner therefore first finds the public authority in breach of section 10(1) for disclosing the information which was made available to the complainant on 07 April 2009 outside of the statutory 20 working days
44. The Commissioner additionally finds the public authority in breach of sections 1(1)(b) and 10(1) for not disclosing the handling advice of 04 February 2009 within 20 working days.

## The Decision

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45. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

## Steps Required

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46. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
47. Disclose the handling advice of 04 February 2009 to the complainant.
48. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.



## Failure to comply

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

## Other matters

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50. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
51. Part VI of the section 45 Code of Practice (the "Code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. Paragraph 38 of the Code recommends that any written expression of dissatisfaction from a requester should be handled in accordance with an authority's complaints or 'internal review' procedure. The Commissioner echoes these recommendations and his guidance (published February 2007) sets out the benefits of thorough, independent internal reviews. In addition to promoting conformity to the Code, internal reviews provide a mechanism for a requester's concerns to be addressed at an early stage, potentially resulting in fewer complaints about the handling of a request being made to the Information Commissioner. In this instance, despite being explicitly asked by the requester, the public authority declined to conduct an internal review. The Commissioner expects that, in future, the authority's practice in this regard will conform to the recommendations of the Code.
52. The Commissioner is also concerned that adequate records were not kept in relation to the process by which the Qualified Person reached his opinion. The opinion itself should have been properly documented before the refusal notice was issued and any prior discussions or submissions leading up to the opinion should have also been documented and copies of the relevant documents provided to the Commissioner for the purposes of his investigation. In future complaints against the public authority on the application of section 36 exemptions, the Commissioner would expect to see significant improvements in how the public authority records the process leading up to the Qualified Person's opinion.

## Right of Appeal

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53. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

**Dated the 1<sup>st</sup> day of September 2010**

**Signed .....**

**Lisa Adshead  
Group Manager**

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

## Legal Annex

### General Right of Access

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

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

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

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

**Section 1(2)** provides that -

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

**Section 1(3)** provides that –

"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."

**Section 1(4)** provides that –

"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."

**Section 1(5)** provides that –

“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).”

**Section 1(6)** provides that –

“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”.”

### **Time for Compliance**

**Section 10(1)** provides that –

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

**Section 10(2)** provides that –

“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.”

**Section 10(3)** provides that –

“If, and to the extent that –

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

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

**Section 10(4)** provides that –

“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.”

**Section 10(5)** provides that –  
“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –  
“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.”

### **Refusal of Request**

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

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

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

**Section 17(2)** states –

“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."

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

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

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

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

**Section 17(4)** provides that -

"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.

**Section 17(5)** provides that -

"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."

**Section 17(6)** provides that –

“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.”

**Section 17(7)** provides that –

“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.”

**Prejudice to effective conduct of public affairs.**

**Section 36(1)** provides that –

“This section applies to-

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

**Section 36(2)** provides that –

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

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

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

**Section 36(3)** provides that –

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

**Section 36(4)** provides that –

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

**Section 36(5)** provides that –

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,



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

**Section 36(6)** provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

**Section 36(7)** provides that –

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

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.