

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 May 2010

Public Authority: Department of Health
Address: Skipton House
80 London Road
London
SE1 6LH

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Department of Health ("DoH") for advice from the Chief Medical Officer (CMO) to the Secretary of State for Health in August 1990 regarding the litigation over the infection of haemophiliacs with HIV through contaminated blood products. The DoH refused the complainant's request as it stated that the information was exempt from disclosure by virtue of section 36(2)(b)(i) and (ii). The Commissioner has reviewed the withheld information and considers that section 36(2)(b)(i) or (ii) is not engaged as section 35(1)(a) is applicable. The Commissioner also considers that the DoH breached sections 1(1)(b), section 10(1) and section 17(1) when responding to the request.

The Commissioner's Role

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

The Request

2. The complainant made a request to the DoH on 10 March 2008 for the following information:

"advice from the Chief Medical Officer (CMO) given to the Secretary of State for Health in August 1990 regarding litigation over the infection of haemophiliacs with HIV through contaminated blood products."
3. On 1 August 2008 the DoH responded to the complainant's request. It stated that the requested information was exempt from disclosure under section 36(2)(b)(i) and (ii) of the Act. It explained that these exemptions apply if disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Furthermore it concluded that the balance of public interest favoured maintaining the exemption.
4. As the complainant was dissatisfied with the response he received he wrote to the DoH on 21 August 2008 and asked it to carry out an internal review.
5. On 18 June 2009 the DoH wrote to the complainant with the result of the internal review it had carried out. The DoH upheld its application of section 36(2)(b)(i) and (ii).

The Investigation

Scope of the case

6. On 22 June 2009 the complainant made a formal complaint to the Information Commissioner's Office.
7. The Commissioner has considered whether the DoH was correct to withhold the requested information under section 36(2)(b)(i) and (ii) of the Act.
8. Upon considering the withheld information the Commissioner considered that it was information which related to the

formulation or development of government policy and therefore section 35(1)(a) was applicable. His reasons for reaching this conclusion are outlined in the analysis section of this Notice. As section 35(1)(a) is applicable in this case section 36(2)(b)(i) or (ii) cannot be engaged because these sections are mutually exclusive. Section 36(1)(a) states that:

“(1) This section applied 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”

The full text of section 36 is detailed in the attached Legal Annex.

9. In this case the Commissioner has exercised his discretion to consider whether or not the requested information should be withheld under section 35(1)(a) despite it not being cited by the DoH. In exercising this discretion in this case the Commissioner took into account the profile of the issue, the nature of the withheld information and the fact that the DoH did make relevant arguments but just identified the wrong exemption.

Chronology

10. The Commissioner contacted the DoH on 8 October 2009 in order to discuss its handling of the complainant's request.
11. On 19 November 2009 the DoH responded to the Commissioner and provided its submissions in relation to its handling of this request and a copy of the withheld information.

Analysis

Exemption

Section 35(1)(a)

12. Section 35(1)(a) of the Act provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore

- subject to the public interest test. The full text of section 35 is detailed in the attached Legal Annex.
13. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.
 14. The Commissioner has considered the case of *DfES v The Information Commissioner & Evening Standard* (EA/2006/0006) in which the Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of the information rather than on a line by line dissection. The Commissioner has therefore looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a minute dissection of the content of the information. This is the approach the Commissioner took in a previous decision notice reference FS50129487. When considering whether the exemption is engaged he has also applied a broad interpretation of the term 'relates to' bearing in mind the Tribunal's comments in the aforementioned decision (paragraphs 50 to 59).
 15. The requested information is a letter dated 20 July 1990 containing advice from the then CMO to the then Secretary of State for Health regarding HIV infection of haemophiliacs through contaminated blood. The advice addresses how to formulate and develop government policy on compensation for the infected haemophiliacs. In particular whether the Government should pay any further compensation outside of a court settlement.
 16. The Commissioner has also looked at the findings of the UCL report 'Understanding the Formulation and Development of Government Policy in the Context of FOI'¹. This report to the Information Commissioner's Office (ICO) was commissioned in October 2008 to provide amongst other 'deliverables', an exploration of what is meant by the term 'government policy'

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/research_and_reports/ucl_report_government_policy_in_the_context_of_foi.pdf

and incorporate case studies that track the evolution of government policy from initiation to completion and examples of subsequent development. This report indicated that the type of information which could be classed as relating to the formulation and development of government policy was broad. An example of one of the categories of information which the report found could fall under section 35(1)(a) was operational issues requiring political judgement. The example given in the UCL report relates to the Coal Health schemes. Following legal action by miners the courts required British Coal to establish schemes to compensate miners for the health problems caused by their work, the liability for the schemes later passed to the government. Although the broad parameters of the schemes were set out by the courts, the details are the subject of negotiation between the government and miners' representatives and can be politically sensitive. MPs from mining areas regularly lobby the government, which also has to consider whether decisions taken in respect of these schemes could set precedents for the future. So although much of the negotiations can be seen as simply implementing the courts' directions, other decisions require the political judgement of ministers and these can be considered to be policy formulation or development.

17. The Commissioner considers that the more wide ranging the consequences of the ministerial decision and the more politically sensitive the decision is, the more likely it is that we would accept it to be policy making. In this case the decision taken by the government not to make any further compensation payment in or around July 1990 did have wide ranging consequences and was an extremely sensitive political decision.
18. The Commissioner therefore considers that the withheld information relates to the formulation or development of government policy and therefore falls within the exemption contained at section 35(1)(a) of the Act.

Public Interest Test

19. As noted above section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DfES v The Information Commissioner* and the

Evening Standard (EA/2006/0006) the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

Public Interest in Maintaining the Exemption

20. The Commissioner notes that the policy in this case was the government decision made in or around July 1990 not to make any further payment for the purpose of compensating haemophiliacs infected with HIV through contaminated blood, outside of a court settlement. The Commissioner considers that the policy formulation and development in relation to this decision was complete at the time of the request because the UK government took the decision in or around July 1990 not to pay any further compensation to haemophiliacs infected with HIV, in relation to which the then CMO provided advice dated 20 July 1990 to the then Secretary of State for Health. The complainant made his request for information on 10 March 2008. Therefore the safe space to formulate and debate the policy decision away from external comment and pressure was no longer required. The Commissioner has not therefore attributed any weight to this argument.
21. The DoH also argued that disclosure of the withheld information would have a chilling effect on frankness and candour during the formulation and development of government policy. The Commissioner considers that the term chilling effect can cover a number of related scenarios, which argue a progressively wider impact on frankness and candour. The first is where disclosure would impact upon contributions to the particular policy in question. The second is where disclosure would affect the candour of discussions when different policies are being developed. In both these scenarios the policy in question remains under active consideration. The third and widest scenario is a chilling effect on frankness when developing different policies even though the policy to which the withheld information relates has been completed.
22. In this case, as the Commissioner has found that the formulation and development to support the policy decision relevant to this case was complete, there can be no chilling effect on the frankness and candour of debate on that particular policy

- decision. Therefore no weight can be attributed to the first chilling effect scenario. However the Commissioner does accept that disclosure could potentially have a wider chilling effect upon current and future debates and discussions on this and similar policy issues. The Commissioner considers that in this case, the issues surrounding compensation of haemophiliacs are still ongoing, despite the fact that the government made a decision regarding compensation in 1990. He considers that it can be argued that disclosure may have a chilling effect on the formulation and development of current decisions relating to this specific issue.
23. The DoH has argued that the CMO's role is unique and one which Ministers are reliant upon for independent and expert advice. The DoH suggested that the value of CMO advice currently and in future could be affected adversely if it had to be tailored for public consumption or in other words became less free and frank. The Commissioner has therefore taken this into account when assessing the chilling effect argument set out above.
 24. When considering the DoH's submissions about the chilling effect the Commissioner has also taken into account Tribunal and High Court decisions in previous cases which have addressed such arguments. In the case of *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* the Tribunal considered the extent to which the disclosure of particular information requested under the Act could be said to create a 'chilling effect'. It referred to its earlier decision of *HM Treasury v Information Commissioner (EA/2007/0001)* and stated that "it was the passing into the law of the FOIA that generated any chilling effect [rather than the potential disclosure of any particular piece of information], no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential...Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity."
 25. In this case the Commissioner considers that a CMO occupies a senior role and should be willing to provide robust and independent advice when necessary even in the face of a risk of publication. Taking this into account along with further evidence provided by the DoH which is contained at paragraph 1 of the

- confidential annex to this Notice, this adds little weight to the chilling effect argument. The Commissioner also notes that the information was 18 years old at the time the request was made and this would reduce the likelihood and severity of any chilling effect.
26. The Commissioner is also aware of the potential chilling effect that disclosure could have upon ministers, civil servants and others involved in the policy formulation and development process. This is because although the particular policy in this case was complete at the time of the request, the issue of compensation for haemophiliacs infected with HIV through contaminated blood is still an ongoing issue in relation to which other policies are currently being formulated and developed.
 27. The Commissioner accepts that at the time the request was made litigation on the issue in question was possible but the DoH has not provided any convincing arguments as to how disclosure of the requested information would be likely to impact on the candour of discussions related to any decisions about government's response to litigation on the issue.
 28. The Archer Inquiry was ongoing at the time the request was made in 2008. This was an independent non statutory inquiry, set up, "to investigate the circumstances surrounding the supply to patients of contaminated NHS blood and blood products; its consequences for the haemophilia community and others afflicted; and suggest further steps to address both their problems and needs and those of bereaved families"². Again the DoH have not provided any convincing arguments as how disclosure of the withheld information would be likely impact on the candour of any policy deliberations related to a government response to the Archer Inquiry.
 29. As there are current policies being debated on this issue, the Commissioner does consider it appropriate to give some weight to the argument that disclosure would result in a chilling effect on candour and frankness in relation to related policy decisions. He considers that disclosure may affect the frankness and candour of current debate surrounding policies on the issue of compensation of haemophiliacs infected with contaminated blood and their families.

² <http://www.archercbbp.com/>

30. In the case of *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department*³ Mr Justice Mitting stated that chilling effect arguments, “are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between (paragraph 38)”.
31. The Commissioner has also considered the timing of the request and how it affects the weight of the chilling effect argument. The relevant policy decision was taken in or around July 1990. It had therefore been completed for a significant amount of time by March 2008 which is when the request for information was made. However the DoH has highlighted that some individuals who were involved in the formulation and development of the particular policy decision in question, are still politically active. Again further submissions provided by the DoH are set out at paragraphs 2 and 3 of the confidential annex to this Notice. Taking into account the arguments detailed within the confidential annex, notwithstanding the time that had elapsed since the policy decision was taken, the Commissioner considers that the relevant chilling effect argument, that disclosure may reduce the frankness and candour of debate on current policies relating to this issue is deserving of some weight.

Public Interest in Disclosure

32. The Commissioner considers that the following public interest factors in favour of disclosure are relevant in this case.
33. Disclosing the requested information would further understanding of and participation in the public debate surrounding the issue of government compensation for haemophiliacs infected with HIV through contaminated blood. It

³ Export Credit Guarantees Dept v Friends of the Earth (2008) EWHC 638 (Admin) 17 March 2008.

would allow the public to engage in a more informed debate of this issue. Whilst the advice requested dates back to 1990 the issues surrounding it are still ongoing and the subject of widespread public debate. The issues still attract a substantial amount of media interest which in this case reflects the wider public concern surrounding this matter. Even though a substantial period of time elapsed between completion of the policy decision and the making of the request, as the issue covered by the policy decision in question is ongoing the Commissioner does accept that disclosure would enable the public to participate in current debate from a significantly more informed position. This is because disclosure would provide the contextual background and history to the current ongoing debate. The Commissioner therefore considers that there is a high level of public interest in disclosure of this information as it would provide background which may enable the public to further feed into the current debate on this issue.

34. Disclosure would promote the accountability and transparency of the process of making the policy decision. Placing an obligation on Ministers and government officials to make reasoned decisions based on all available information will improve the quality of decisions and administration. In this case the Commissioner considers that there is a significant public interest in releasing the requested information as it would help to provide a background of the information which was taken into account when the policy decision was made in or around July 1990 not to make any further compensation payment to haemophiliacs infected with HIV through contaminated blood, outside of a court settlement, at that time. The Commissioner considers that there is a strong public interest in ensuring transparency and accountability surrounding the policy decision taken in 1990, particularly as the issues covered by the policy decision reached in or around July 1990 are the subject of current debate. The issues covered by the requested information has a significant impact upon those individuals affected and their families and the Commissioner considers that there should be significant weight to the argument that they should be provided with as much information as possible to give them a clear understanding as to how decisions were reached historically and which also provides background to decisions which are currently under debate.

Public interest conclusion

35. The Commissioner does not consider that there is a safe space argument in this case to support the public interest in favour of maintaining the exemption. The Commissioner also does not consider that any weight can be attributed to a narrow chilling effect argument.
36. The Commissioner considers that a CMO must be expected to provide full and candid advice as part of their professional duties. Ministers and government officials must also be expected to debate fully and candidly on issues in order to make policy decisions. Taking this into account and the DoH's submissions listed at paragraph 1 of the confidential annex to this Notice, he does not accept that they will be easily discouraged from contributing fully during future policy formulation process if the requested information were released. He has not given significant weight to this chilling effect argument. He does however consider that as there is current formulation and development of policies on this particular issue some weight should be given to the chilling effect argument that the frankness and candour of current discussions on this issue could be reduced. In reaching this view he has also noted that some of the individuals involved in the policy formulation and development relevant to the requested information in this case, remain politically active. Therefore notwithstanding the time which has elapsed since completion of the policy in question, the Commissioner does attribute some limited weight to this chilling effect argument for this reason.
37. The Commissioner has balanced the arguments for maintaining section 35(1)(a) against the arguments in favour of disclosure. He considers that each of the arguments for releasing the requested material have very significant weight. Whilst the Commissioner has attributed some weight to the chilling effect argument, he has considered the significant impact upon the individuals who were infected by contaminated blood and the strong public interest arguments in favour of disclosure; he considers that the balance of public interest in this case favours disclosure of the requested information.
38. The exemptions in section 35 and 36 are mutually exclusive. In a previous decision notice, reference FS50086299, it was stated that "since section 36 does not apply to information which is

exempt by virtue of section 35, and the Commissioner has decided that section 35 does in fact apply to all the information in this case, the information therefore cannot be exempt by virtue of section 36. This remains the case even though the Commissioner has concluded that, by virtue of the section 2 public interest test, the duty to disclose remains." Following this approach it has not been necessary to consider section 36 in this case.

Procedural

Section 1(1)

39. Section 1(1) of the Act 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."

40. The Commissioner has considered whether the DoH has complied with section 1(1) (a) and (b) of the Act.

41. The DoH provided the complainant with a response on 1 August 2008 refusing to disclose the requested information under section 36(2)(b)(i) and (ii) of the Act in response to the request made on 10 March 2008. The internal review dated 18 June 2009 upheld this decision.

42. For the reasons given above, the Commissioner considers that the information withheld from the complainant should have been released at the time of the request. In failing to communicate the information to the complainant at that time the DoH breached section 1(1)(b) of the Act.

Section 10(1)

43. Section 10(1) of the Act provides that: -

- “Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”
44. The Commissioner has considered whether or not the DoH complied with section 10(1) of the Act.
45. As the DoH did not confirm that it held the requested information within the statutory time for compliance, it breached section 10(1) of the Act in relation to its duties under section 1(1)(a) of the Act. Furthermore as the DoH did not provide the requested information to the complainant within the statutory time for compliance, the Commissioner considers that it breached section 10(1) of the Act in relation to its obligation under section 1(1)(b).

Section 17

46. Section 17(1) states 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.”*

47. The Commissioner has considered whether the DoH has complied with section 17(1) of the Act.
48. The DoH did not provide the complainant with a refusal notice until five months after the request was received. In failing to supply a refusal notice within twenty working days the DoH breached section 17(1) of the Act.

49. The Commissioner therefore considers that the DoH breached section 17(1) in its handling of this request.

The Decision

50. The Commissioner's decision is that section 35(1)(a) is engaged in this case however the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
51. The Commissioner considers that the DoH breached section 1(1)(b), section 10(1) and section 17(1) in its handling of this request.

Steps Required

52. The Commissioner requires the DoH to provide the complainant with the requested information within 35 calendar days of the date of this notice.

Failure to comply

53. 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

54. Although this does not form part of this Decision Notice the Commissioner wishes to highlight the substantial length of time the DoH took to conduct the internal review in this case. The Freedom of Information Good Practice Guidance No.5 states that:

“... the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. There may be small number of cases which involve exceptional circumstances where it may be reasonable to take longer. In those circumstances, the public authority should, as a matter of good practice, notify the requestor and explain why more time is needed.

In our view, in no case should the total time taken exceed 40 working days. In such cases we would expect a public authority to be able to demonstrate that it had commenced the review procedure promptly following receipt of the request for review and had actively worked on the review throughout that period.”

55. The Commissioner does not consider that the DoH dealt with this case in accordance with the guidance set out above. He will continue to monitor the DoH in this regard in any future complaints that he receives.

Right of Appeal

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

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

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 17th day of May 2010

Signed

**Steve Wood
Head of Policy Delivery**

**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."

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

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

Section 35(2) provides that –

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

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

Section 35(3) provides that –

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

Section 35(4) provides that –

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

Section 35(5) provides that –

“In this section-

“government policy” includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

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

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.