

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 September 2010

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Summary

The complainant requested all unpublished background information held by the public authority about the End of Custody Licence Scheme. The public authority refused to disclose the information requested, with the exemptions provided by sections 35(1)(b) (information relating to Ministerial communications), 36(2)(b)(i) (inhibition to the free and frank provision of advice), 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 41(1) (information provided in confidence) cited. The Commissioner finds that a minority of this information was exempt from disclosure by virtue of section 36(2)(b)(i), but that, in relation to the remainder of the information, none of the exemptions cited are upheld and the public authority is required to disclose this information to the complainant. The Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 1(1)(b), 10(1), 17(1) and 17(3)(b).

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 the following information request on 27 November 2007:

"Please disclose copies of all unpublished (ie not already in the public domain) background information to include but not limited to internal assessments, reports, analyses and assessments evaluating the End of Custody Licence Scheme."

3. The chronology following this is somewhat confused as it appears that there were two refusal notices. The papers provided to the Commissioner show that there was a response dated only as 2008 which refused the request and cited section 35 of the Act. No subsection of section 35 was cited. This response stated specifically that this was a full reply to the request and that the complainant should request an internal review if dissatisfied with this refusal.
4. The second refusal notice was dated 1 September 2009. This refused the request on the basis that the exemptions provided by sections 35(1)(b) (information relating to Ministerial communications), 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views) and 41(1) (information provided in confidence) were engaged. The public interest test was addressed in a generalised fashion, rather than separately in relation to each of the qualified exemptions cited.
5. The issue of there apparently having been two refusal notices was raised with the public authority during the Commissioner's investigation, but the public authority did not offer any explanation about this. The Commissioner takes the second refusal notice to be substantive and notes that this was delayed by approximately 21 months; a period he considers to be grossly excessive.
6. The complainant responded to this on 28 October 2009 and requested the public authority to carry out an internal review. The public authority responded with the outcome of the review on 4 November 2009. The refusal under sections 35(1)(b), 36(2)(b)(i) and (ii) and 41(1) was upheld. Again the public authority addressed the balance of the public interest in a generalised fashion, rather than separately in relation to each of the qualified exemptions cited.

The Investigation

Scope of the case

7. The complainant contacted the Commissioner in connection with this request on 4 November 2009. The complainant disputed the exemptions cited by the public authority and gave the following grounds for her complaint:
 - *“There is an overwhelming public interest in increasing public understanding of matters relating to the management of prisoners and any policies introduced to alleviate prison overcrowding.*
 - *The public has a right to be reassured that robust systems are in place to ensure that offenders who have been released early from prison pose no risk to public safety.*
 - *There is a clear public interest in the public being assured that this scheme is being effectively managed.*
 - *There is a public interest in knowing that if the End of Custody Licence Scheme needs to be improved what these improvements are and how public safety will be improved.*
 - *It should also be borne in mind that the probation service does not need to carry out a risk assessment of prisoners released under the End of Licence Scheme. There is a public interest in knowing why this decision was taken.”*
8. The complainant was contacted at the outset of the investigation to ascertain if she wished to continue with this case despite the End of Custody Licence scheme having ended, as covered below at paragraph 13. The complainant responded to this and confirmed that she did wish to continue with this case.

Chronology

9. The Commissioner contacted the public authority in connection with this case on 24 November 2009 and asked the public authority to respond with a copy of the information that fell within the scope of the request and that had been withheld from the complainant. The public authority responded on 2 December 2009 with copies of the withheld information.
10. The Commissioner contacted the public authority again on 4 March 2010. The public authority was asked to respond confirming which of the exemptions cited were believed to be engaged in relation to each

item of the withheld information and to provide further reasoning for the citing of these exemptions.

11. The public authority responded with the requested clarification on 1 April 2010. It maintained that the exemptions provided by sections 35(1)(b), 36(2)(b)(i), 36(2)(b)(ii) and 41(1) were engaged.

Background

12. The public authority describes the End of Custody Licence Scheme (ECL) as follows:

"On 19 June 2007 the then Lord Chancellor announced the introduction of a presumption in favour of release from custody on licence for prisoners serving between 4 weeks and 4 years for the final 18 days of their sentence subject to meeting strict eligibility criteria and providing a release address. The first releases under this scheme occurred on 29 June 2007."

13. The ECL scheme has now been ended, with the last releases under ECL taking place in April 2010. The Justice Secretary stated the following in relation to the cancellation of the ECL scheme:

"I have always recognised that, while necessary as a temporary measure, it was inherently unsatisfactory and potentially damaging to public confidence in justice - confidence which is otherwise high, particularly in the light of falling crime."

Analysis

Exemptions

Section 35

14. The public authority has cited section 35(1)(b). This provides an exemption for information which relates to Ministerial communications. This is a class based exemption; this means that, if the information in question conforms to the class of information described in the exemption, it is exempt. This exemption is also qualified by the public interest, meaning that if the public interest in the maintenance of this exemption does not outweigh the public interest in disclosure, the information should be disclosed. This section is set out in full in the

attached legal annex, as are all other sections of the Act referred to in this Notice.

15. Turning first to whether this exemption is engaged, section 35(1)(b) has been cited in relation to a letter from the Justice Secretary to the Prime Minister. Given this, the Commissioner considers it clear that this information is within the class specified in section 35(1)(b). This section specifies information that relates to Ministerial communications. The information in question is a Ministerial communication, so clearly conforms to this description. The exemption provided by section 35(1)(b) is, therefore, engaged in relation to this information.

The public interest

16. Having found that this exemption is engaged, it is necessary to go on to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the arguments advanced by the complainant and by the public authority, as well as what the content and subject matter of the information suggests about the balance of the public interest. Of no weight, however, would be any suggestion that the public interest favours non disclosure on the basis that the information is within the class specified in the exemption. This point was made by the Information Tribunal in the case *Scotland Office v The Information Commissioner* (EA/2007/0128) in which it stated:

“it is not possible to raise the exemption to a de facto absolute one simply because the information relates to, or is, ministerial communications.” (paragraph 78)

17. Covering first the reasoning advanced by the public authority as to why it believed that the public interest favoured the maintenance of this exemption, the refusal notice suggested that the public authority believed that disclosure in this case could lead to inhibition to how free and frank Ministerial communications are in future. This argument is similar to 'chilling effect' arguments that are regularly cited where the exemptions provided by the subsections of section 35 are cited. The term chilling effect refers to the notion that disclosure would lead to future inhibition to the candour of, in the case of section 35(1)(b), Ministers when communicating with other Ministers. The weight that the Commissioner affords to chilling effect arguments will depend on how closely they relate to the subject of the communications in question and the extent to which they are supported by evidence.
18. In this case, the subject of the Ministerial communication is the ECL scheme. The public authority has made no suggestion that a chilling effect would occur to other Ministerial communications about the ECL

scheme, rather its stance appears to be that a generalised chilling effect would occur to Ministerial communications through the disclosure of this information. This argument from the public authority is weakened by the failure to relate it to the subject covered by the information in question here. This argument is further weakened by the absence of evidence that supports this argument.

19. The Commissioner has also taken into account that the communication in question was between the Justice Secretary, a senior and long serving member of the government, and the Prime Minister. The content of this communication records that this came about through a request for clarification made by the Prime Minister. In the absence of persuasive evidence, the Commissioner does not consider it feasible to suggest that the Justice Secretary, given his experience, seniority and the fact that he had been asked for clarification by the most senior member of the government, would have allowed a chilling effect to hamper his response to the Prime Minister's request for clarification. For these reasons, the Commissioner does not consider the chilling effect argument made by the public authority to carry any weight as a factor in favour of maintenance of the exemption.
20. The public authority published statistics on a monthly basis showing the numbers of releases that had been made under the ECL scheme. It may, therefore, argue that any public interest in disclosure had been satisfied through this information made publicly available and so further disclosure is not necessary. In response to this argument the Commissioner would note that this proactive publication by the public authority is positive, but that where public interest in relation to a topic exists, this public interest will extend to all information relating to that topic. The extent of that public interest will depend on the content of the information that has not been made available, but the Commissioner would not accept an argument that public interest in information that is not available has been satisfied by separate, albeit related, information having been made available.
21. Turning to what the content of the information in question suggests about the balance of the public interest, the Commissioner notes that this focuses mainly on the decision to make the monthly statistics on ECL scheme releases available and the reasoning behind this. Were it the case that this correspondence covered only this issue, rather than also covering the reasoning behind the ECL scheme, it could be argued that the public interest in this information would be reduced as disclosure would add little to the debate about the ECL scheme. However, the content of this correspondence also sets out the reasoning behind the ECL scheme and the predicted consequences had it not been adopted, or if it were to be amended. The Commissioner

also notes that the adoption of the ECL scheme was controversial and that penal policy is an issue that is perpetually high on the political agenda. Given this, the Commissioner believes that there is a legitimate public interest in the disclosure of the content of the information in question here and that this is a factor in favour of disclosure of considerable weight.

22. The arguments advanced by the complainant are set out above at paragraph 7. In short the complainant argues that there is a public interest in understanding the reasoning behind the ECL scheme and how it is working in practice. The Commissioner agrees that these are valid arguments and this public interest is covered above in the factor relating to the content of the information.
23. The conclusion of the Commissioner is that the public interest in maintenance of the exemption does not outweigh the public interest in disclosure. As noted above, that the information in question is within the class described in the exemption is not itself of relevance to the balance of the public interest. The sole argument advanced by the public authority was the suggestion that a chilling effect may result to future Ministerial communications through disclosure of this information, an effect that the Commissioner does not believe is a likely consequence of disclosure of the information in question here. The legitimate public interest in the content of this information therefore tips the balance in favour of disclosure.

Section 36

24. The public authority has cited sections 36(2)(b)(i) (inhibition to the free and frank provision of advice) and 36(2)(b)(ii) (inhibition to the free and frank exchange of views for the purposes of deliberation) in relation to the information specified below at paragraphs 30 to 36. Consideration of these exemptions is a two stage process. First the exemptions must be engaged and, secondly, as this is a qualified exemption similarly to section 35(1)(b), the public interest in the maintenance of these exemptions must outweigh the public interest in disclosure.
25. Turning first to whether the exemptions are engaged, sections 36(2)(b)(i) and (ii) can be cited only where the reasonable opinion of a specified qualified person (QP) is that the inhibition described in these sections would be at least likely to result. In considering whether these exemptions are engaged, the Commissioner will cover the following:
 - who the QP is for the public authority;
 - whether that person gave an opinion;

- when this opinion was given;
 - whether this opinion was reasonably arrived at and reasonable in substance.
26. Section 36(5)(a) provides that the QP for a government department is any Minister of the Crown. The public authority has stated that Claire Ward acted as QP in this case, who, the website of the public authority records, was Parliamentary Under Secretary of State at the time of the refusal of the request. As to when this opinion was given, the public authority did not confirm this despite being asked to do so, but did provide a copy of a submission provided to the QP in relation to the complainant's request that was dated 22 June 2009. The Commissioner accepts this submission as evidence that an opinion was given by a Minister of the Crown and that this opinion was given sometime between the date of the submission and the date of the refusal notice.
27. Turning to whether this opinion was reasonably arrived at, the issue here is the process undertaken by the QP in forming their opinion. If, for example, the QP had formed their opinion of the basis of a toss of a coin, the Commissioner would conclude that the opinion had not been reasonably arrived at. In this case, as already noted, the QP was provided with a submission setting out the issues around this request to assist in the formation of their opinion. The public authority supplied a copy of this submission to the Commissioner's office. Whilst the arguments set out in the submission lack detail, these are relevant to the inhibition described in sections 36(2)(b)(i) and (ii). This submission also refers to a "sample" of the information having been attached. The Commissioner assumes, therefore, that the QP viewed part of the information in question. On the basis of the content of the submission and the QP having viewed some of the information in question, the Commissioner accepts that the QP's opinion was reasonably arrived at.
28. As to whether this opinion was objectively reasonable in substance, the Commissioner has reached separate conclusions about the separate classes of information in relation to which this exemption has been cited. The submission records that the reasoning for the opinion was that:
- "if officials suspected that [information] relating to deliberations, concerns and evaluation of the ECL scheme would be prematurely made public, they would be less inclined to be candid in expressing opinions in future."*
29. The submission goes on to say that this lack of candour would have a negative impact upon future policy making. Despite having been asked to do so, the public authority did not specify whether the opinion of the

QP was that inhibition *would* result, or *would be likely* to result. In the absence of this clarification, it is assumed that the opinion of the QP was that inhibition would be likely to result.

30. The first document is correspondence between the Justice Secretary and the Leader of the Opposition. It is not clear why the opinion of the QP was that officials would be likely to be inhibited through disclosure of this correspondence. This letter is not attributed to any official and its content does not explain why the QP believed that inhibition would be likely. The public authority has provided no explanation in relation to this specific document and in the absence of this and on the basis that the source and content of this correspondence do not appear relevant to the concern of the QP reflected in the submission, the Commissioner does not accept that the opinion of the QP was objectively reasonable in relation to this information. The exemptions provided by sections 36(2)(b)(i) and (ii) are not, therefore, engaged in relation to the letter from the Justice Secretary to the leader of the opposition.
31. The second class of information in connection with which these exemptions have been cited is correspondence between the public authority and Napo (a trade union) and between the public authority and the Metropolitan Police Service. The Commissioner notes first that the submission records that the reasoning of the QP was that disclosure would be likely to lead to inhibition to officials, not to any third party. This argument is not, therefore, relevant to the incoming correspondence sent from these two organisations to the public authority.
32. Secondly, these letters are finalised, suggesting that they represent the considered and substantive view of the public authority to the issues discussed within. The basis for the opinion of the QP appeared to be similar to what is often argued in connection with the exemption provided by section 35(1)(a) (information relating to the formulation and development of government policy); that disclosure of information recording the formulation and development stages of the work of officials would result in a chilling effect (or, in other words, in inhibition). The Commissioner may have been more inclined to accept that the opinion of the QP was reasonable if these letters were in draft form and revealed the advice and exchanges of officials about the final content of these. In the event, the information in question does not record the formulation of these letters and so the Commissioner is not clear how the concern described in the submission is relevant to these letters.

33. Thirdly, one of these letters is signed by the Justice Secretary, rather than being attributable to any official and, therefore, similarly to the correspondence between the Justice Secretary and the leader of the opposition, it is not clear how disclosure of this could impact upon the candour of officials. As a result, the Commissioner does not believe that the opinion of the QP is objectively reasonable in relation to this information and the exemptions provided by sections 36(2)(b)(i) and (ii) are not, therefore, engaged in relation to the correspondence between Napo and the public authority or in relation to the correspondence between the public authority and the Metropolitan Police Service. The public authority has also cited the exemption provided by section 41(1) in relation to the Napo correspondence and this exemption is covered below.
34. The third document in question here is a draft of a Ministerial statement on the ECL scheme. That this document is draft and is likely to have been prepared by an official for the approval of a Minister suggests that the reasoning given in the submission may be relevant to this information. The content of this draft undermines this suggestion, however. This is a recitation of facts rather than, for example, ideas for how the ECL policy could be made more successful. In the absence of specific arguments from the public authority in relation to this document, the Commissioner is not clear why the QP believed that it was likely that disclosure of this would inhibit the candour of officials and so does not believe that the opinion of the QP is objectively reasonable in relation to this information. The exemptions provided by sections 36(2)(b)(i) and (ii) are not, therefore, engaged in relation to this draft Ministerial statement.
35. The fourth document is a note titled 'Media Handling' and advises on the lines that should be taken by officials within the public authority in response to anticipated questions about the ECL scheme. Whilst the opinion of the QP was that disclosure of this document would be likely to result in inhibition, the purpose of this document means that the relevant part of its contents would be recited in response to any of the anticipated questions. The Commissioner is not clear as to why the QP believed that disclosure of this document in response to the complainant's request would be likely to result in inhibition, given that it appears that at least part of the content of this document would be disclosed in response to relevant media enquiries. The Commissioner does not believe that the opinion of the QP is objectively reasonable in relation to the media handling note and, therefore, the exemptions provided by sections 36(2)(b)(i) and (ii) are not engaged in relation to this information.

36. The final information in question here consists of two submissions prepared by officials for Ministers. It is more clear that this is information of the nature that the submission to the QP appeared to envisage. These submissions record advice provided by officials in relation to the implementation of the ECL scheme and options in relation to this. Given that these submissions record officials providing advice to Ministers, the Commissioner considers it conceivable that this advice could be subject to an inhibitory impact. The Commissioner concludes, therefore, that the opinion of the QP that inhibition to the free and frank provision of advice was a likely result of the disclosure of the submissions was objectively reasonable and that the exemption provided by section 36(2)(b)(i) is engaged in relation to this information.

The public interest

37. Having concluded that section 36(2)(b)(i) is engaged in relation to the submissions, the Commissioner has considered whether the public interest in maintaining this exemption outweighs the public interest in disclosure. In accepting that the opinion of the QP was reasonable, the Commissioner has accepted that disclosure here would be likely to inhibit the provision of free and frank advice in future. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs these concerns.
38. In the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption "*involved a particular conundrum*", noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (paragraph 88).
39. In the Tribunal's view, the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, "*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*" (paragraph 91).
40. This means that whilst the Commissioner should give due weight to the reasonable opinion of the QP when assessing the public interest, he can

and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

41. On the issue of the severity and extent of the inhibition resulting from disclosure here, the Commissioner accepts the importance of Ministers receiving free and frank advice from officials to the ability of the public authority to function effectively. Having accepted the QP's opinion that the free and frank provision of advice would be likely to be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the provision of advice to the functioning of the public authority.
42. As to the frequency of inhibition, having accepted that the provision of advice from officials to Ministers plays an important role in the functioning of the public authority, it follows that such advice is provided frequently. The opinion of the QP here did not appear to be that disclosure would be likely to inhibit the free and frank provision of advice on the specific issue of the ECL scheme, but that inhibition would be likely to result to the process of officials providing advice to ministers. The Commissioner would not, however, accept that the frequency of the inhibition here would be as high as in every case where advice is provided by officials to Ministers. Instead, this inhibition would occur only as frequently as where issues of similarly high sensitivity as the management of the prisons population are discussed.
43. Having accepted the opinion of the QP as reasonable, the Commissioner recognises that this inhibition would result with some frequency; potentially in any situation where an official provides advice to a minister on an issue of similar sensitivity as that which is the subject of the information in question here. It is in the public interest for the public authority to be capable of functioning effectively. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to the ability of the public authority to conduct itself effectively, this contributes to the argument that maintaining the exemption is in the public interest.
44. Turning to public interest arguments in favour of disclosure, civil service officials are under a duty to provide appropriate advice to Ministers. This duty extends to ensuring that it is as free and frank as necessary. Whilst the Commissioner accepts that, notwithstanding this duty, inhibition is made more likely as a result of disclosure than in a case where there is no possibility of disclosure, the argument in favour of maintenance of the exemption due to the severity of the inhibition is reduced as a result of the existence of this duty.

45. The subject of the withheld information is highly relevant to where the balance of the public interest lies here. The issue of how the prisons population is managed, particularly given that pressure on the capacity of the prisons system was a current issue at the time of the request and refusal, is a matter of significant and legitimate public interest. That disclosure of the information in question here would aid transparency in connection to and add to public understanding about steps taken by the public authority towards coping with the pressure caused by the volume of the prisons population contributes to the argument that the public interest here favours disclosure.
46. Further to this point is that the use of the ECL scheme has been a matter of public debate. Questions about the appropriateness of the ECL scheme were acknowledged by the Justice Secretary, as recorded in the quote above at paragraph 13. Whilst the ending of the ECL scheme and this statement by the Justice Secretary postdate the request and the refusal and so are not directly relevant here, they do have relevance to the extent that this is an acknowledgement from the government that questions about the appropriateness of the ECL scheme were legitimate. To the extent that disclosure here would contribute to this debate, this would be in the public interest. Disclosure would also be in the public interest where this would help to explain the decision to extend the ECL scheme and where any suspicion of 'spin' exists surrounding the explanations for this scheme given previously.
47. The Commissioner has recognised valid arguments here that the public interest favours disclosure of this information. Amongst these, the argument that carries most weight is that related to the contents of the withheld information. The issue of management of the prisons population is clearly of substantial public interest.
48. However, the Commissioner, having accepted that the opinion of the QP that disclosure would be likely to inhibit the free and frank provision of advice is objectively reasonable, has also recognised that, given the central role that the provision of advice from officials to Ministers has to the work of the public authority, this inhibition would be extensive and of some frequency. For the public interest to favour disclosure where this would result in extensive and somewhat frequent harm to the ability of the public authority to function effectively, it would be necessary for the arguments favouring this to be appropriately compelling.
49. The Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Whilst the Commissioner has recognised valid public interest

arguments in favour of disclosure, the arguments in favour of maintenance of the exemption are compelling given the extent and frequency of the inhibitory impact on the public authority. The arguments in favour of disclosure, whilst valid, are not sufficient to at least equal this factor in favour of maintenance of the exemption.

Section 41

50. Section 41(1) has been cited in relation to correspondence between the public authority and the trade union Napo. Section 41(1) provides that information provided to a public authority in confidence is exempt. For this exemption to be engaged there are two conditions that must be fulfilled. First, the information must have been provided to the public authority by a third party; this exemption cannot be engaged in relation to information created by the public authority itself. This is referred to here as an "A to B transfer".
51. Secondly, the disclosure of this information must constitute an actionable breach of confidence. The Commissioner's approach in this case is that, for the purposes of section 41(1), a breach of confidence will be actionable if:
- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).
52. This is in line with the direction provided by the High Court in the case *Coco v A N Clark (Engineers) Limited [1968] FSR 415*:
- "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself [...] must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."*
53. The Commissioner recognises that *Coco v Clark* does not represent the only test of confidentiality, however he considers it an appropriate test to use in the present context. However, as stated in the Ministry of Justice guidance on section 41, a breach of confidence will no longer be actionable if there is a defence that this breach was in the public interest.

A – B transfer?

54. As noted above, the public authority has cited this exemption in relation to an exchange of correspondence between it and Napo. The stance of the public authority appears to be that this exemption covers both the correspondence received from and sent to Napo. The Commissioner accepts that there was an A to B transfer in relation to the correspondence received by the public authority from Napo. However, in relation to the correspondence sent by the public authority to Napo, it is clear that this is information created by the public authority; it was not provided to it by any third party. The correspondence sent by the public authority to Napo was not provided to the public authority in an A to B transfer and so the exemption provided by section 41(1) is not engaged in relation to this information.

Quality of confidence?

55. The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. As the Commissioner has concluded above that section 41(1) is not engaged in relation to the correspondence sent from the public authority to Napo, this test is only considered in relation to the correspondence from Napo to the public authority.
56. The clearest means by which to establish that information has the quality of confidence is for the public authority to evidence that the confider was given a specific guarantee of confidentiality at the time that the information was provided. In this case the public authority has not stated that a guarantee of confidentiality was given and so the Commissioner assumes that it was not. Neither has the public authority provided any other reasoning or description to the Commissioner as to why it considers that these letters have the quality of confidence, despite being asked to do so. In the absence of a specific guarantee of confidentiality and any other reasoning on this point from the public authority, the Commissioner has considered the content of this information and what this suggests about confidentiality.
57. The content of these correspondences covers concerns that Napo had about the operation of the ECL scheme. They also include background documents based on research carried out by the public authority into the impact of the ECL scheme. The Commissioner is unconvinced that Napo would have had a strict expectation of confidentiality in relation to this correspondence at the time of the request, for the following reasons.

58. First, the Commissioner assumes that the position of Napo as having some concerns about the operation of the ECL scheme would not have been confidential at the time of the drafting of the letters. These letters contain reference to an emergency motion of the National Executive Committee of Napo concerning the operation of the ECL scheme; it is likely that Napo would have publicised this motion to its membership.
59. Secondly, the correspondence between the public authority and Napo mentions that Napo released to the media some of the information provided as an attachment with its correspondence. This reduces the credence of the suggestion that Napo had a strong expectation of confidentiality in relation to this information.
60. The conclusion of the Commissioner is that the exemption provided by section 41(1) is not engaged. Having concluded that this exemption was not engaged in relation to the correspondence sent from the public authority to Napo, the Commissioner went on to consider whether this exemption was engaged in relation to the correspondence received by the public authority from Napo. In the absence of the public authority confirming that a specific guarantee of confidentiality had been made in relation to this information, or any other argument from the public authority as to why it believed this correspondence to be confidential, the Commissioner considered what the content of this correspondence suggested about whether this held the quality of confidence. On the basis that it is unlikely that the fact that Napo had concerns about the operation of the ECL scheme was confidential and that Napo released information about its concerns to the media, the Commissioner does not believe that this correspondence has the quality of confidence. As this conclusion has been reached at this stage, it has not been necessary to go on to consider any of the other tests for this exemption to be engaged that are set out above.

Procedural Requirements

Sections 1 and 10

61. In refusing to disclose to the complainant within twenty working days of receipt of the request the information that the Commissioner now concludes was not exempt, the public authority failed to comply with the requirements of sections 1(1)(b) and 10(1).

Section 17

62. In failing to respond to the request within 20 working days of receipt, the public authority did not comply with the requirement of section 17(1).

63. In failing to address the balance of the public interest adequately in either the refusal notice or the internal review response, the public authority did not comply with the requirement of section 17(3)(b).

The Decision

64. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 36(2)(b)(i) correctly in relation to two Ministerial submissions. However, the Commissioner concludes that sections 36(2)(b)(i) and 36(2)(b)(ii) were not engaged in relation to the remainder of the information to which these exemptions were believed to apply, and that section 41(1) was not engaged in relation to correspondence between the public authority and Napo. In relation to correspondence between the Justice Secretary and the Prime Minister, the Commissioner's decision is that the exemption provided by section 35(1)(b) is engaged, but that the public interest in the maintenance of this exemption does not outweigh the public interest in disclosure.
65. As outlined at paragraphs 61 to 63 above, the Commissioner has also found procedural breaches in respect of sections 1(1)(b), 10(1), 17(1) and 17(3)(b).

Steps Required

66. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose to the complainant the information that the Commissioner has concluded is not exempt. That is: all information identified by the public authority as falling within the scope of the request, apart from the two Ministerial submissions.
67. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

68. 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

69. 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.

70. 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 1st day of September 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Section 1

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 10

Section 10(1) provides that –

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

Section 17

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(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 35

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 36

Section 36(2) provides that –

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

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

Section 41

Section 41(1) provides that –

“Information is exempt information if-

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