

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 January 2011

Public Authority: The Department for Education (formerly DCSF)
Address: Sanctuary Buildings
Great Smith Street
Westminster
London
SW1P 3BT

Summary

The complainant requested information from the Department for Children, Schools and Families now known as the Department for Education (the "DfE") regarding a *'Review of Academies'*. The public authority withheld the information under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). During the course of the investigation the public authority also sought to rely upon section 44 to withhold some of the information, though this exemption was later withdrawn. The public authority subsequently disclosed some of the previously withheld information which is now in the public domain. After investigating this complaint the Commissioner has decided that the exemption at 36(2)(c) is not engaged. He finds, however, that sections 36(2)(b)(i) and 36(2)(b)(ii) of the Act are engaged and he has concluded that the public interest in maintaining these exemptions is outweighed by the public interest in disclosure and therefore he has ordered that the information should be disclosed. Additionally the Commissioner has decided that the DfE breached sections 1(1)(b), 10(1) and 17(1).

The Commissioner's Role

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

Background

2. The DfE has outlined the work of the Prime Minister's Delivery Unit (the PMDU) to the Commissioner. The PMDU began in 2001 with a remit to strengthen the Government's ability to deliver the Prime Minister's key public service priorities. The PMDU is based in the Treasury reporting to the Prime Minister and the Chancellor and working in partnership with government departments to ensure a joint understanding of issues, data sharing and a commitment to action.
3. The DfE also outlined the role of Academy Schools to the Commissioner. Academies are all-ability state funded schools which are established and managed by sponsors from a wide range of backgrounds. Academies are intended to raise educational standards and improve provision.

The Request

4. The complainant made the following request for information to the DfE (at that time the DCSF) on 9 June 2009:

"Following our conversation I understand that the Department remains unwilling to release a copy of the report by the Prime Minister's Delivery Unit on which the Secretary of State for Children Schools and Families based his proposals for extending and accelerating the academies programme, announced on 29 February 2008. Notwithstanding that position, I believe that it would be in the public interest to publish the report. Consequently I would be grateful if you treat my request for a copy of the report under the Freedom of Information Act 2000. I look forward to receiving the Department's reply within the deadline of 20 days allowed under the Act."
5. The DfE responded on 6 August 2009 stating that the requested information was being withheld under section 36(2)(b) and 36(2)(c). In this response the DfE gave its public interest arguments.
6. The complainant asked for a review of this decision on the same day.
7. On 14 August 2009 the DfE conducted an internal review which upheld the original decision to withhold the information, whilst acknowledging that some of the information was in the public domain. It was pointed

out to the complainant that Price Waterhouse Cooper's evaluations of the Academies from 2003-2008 appeared on the DfE's website.

The Investigation

Scope of the case

8. On 17 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider his view that the public interest was best served by the publication of the Report.
9. Although the DfE relied on section 21 (see Legal Annex) with regard to some of the requested information for part of the Commissioner's investigation, the Commissioner does not intend to consider this exemption further as the information was subsequently released to the complainant.

Chronology

10. On 8 December 2009 the Commissioner wrote to the DfE, asking for a copy of the submissions given to the qualified person in order for her to reach an opinion. The Commissioner asked several additional questions.
11. On 4 February 2010 the DfE responded, explaining that the submission to the qualified person focussed on the reasons why the DfE believed section 36 to be engaged. However, the qualified person's attention was drawn to the possible publication of the data-based elements of the report.
12. In the same letter the DfE stated that it intended to release some statistical information that was already in the public domain to the complainant and confirmed that it was relying on the rest of the information being withheld under sections 36(2)(b)(i), 36(2)(b)(ii) and section 36(2)(c) as prejudicial to the effective conduct of public affairs. The DfE also confirmed that it was relying on the lower threshold of prejudice "would be likely to prejudice/inhibit" as a result of the disclosure of the requested information.
13. Additionally the DfE provided its public interest arguments in favour of and against the maintenance of each exemption.

14. The DfE also introduced a late exemption – section 44(1)(a) to part of the requested information, here referred to as 'named slide 1' and 'named slide 2'.
15. It was claimed by the DfE that this material was 'raw' unpublished data that departments are permitted to provide to the PMDU for performance management purposes and not intended for publishing. As this data was not intended to be published the DfE stated that it was subject to the *Statistics and Registration Service Act 2007*. The DfE explained that some of the data had concluded its validation and was in the public domain by the time of the request and thus subject to section 21 'Information accessible to the applicant by other means'. The remaining data was not published and was not intended to be published as National Statistics.
16. The data in 'named slide 1' has now been amended and published in its amended form but the DfE argued against disclosure for the original data as "inappropriate and misleading" and possibly a breach of the Statistics and Registration Act 2007. The data on 'named slide 2' had not been verified or published anywhere at the time the request was made.
17. On 17 February 2010 the Commissioner asked the DfE to reconsider the application of section 36 and whether section 35(1)(a) was the more appropriate exemption.
18. The DfE replied on 8 April 2010 maintaining its position and explaining its reasoning. The '*Report on Academies*' had been commissioned after the decision was made to expand the target for Academies from 200 to 400 and that it could be argued that the information involved the assessment, analysis and implementation of policy.
19. On 28 April 2010 the Commissioner wrote to the DfE accepting that section 36 was the correct exemption to be applying in this case as opposed to section 35. However, he asked the DfE for further public interest arguments to support its application of section 36.
20. On 11 June 2010 the DfE explained why information relating to a control group was redacted when information in statistical form that formed part of the same statistical slide was released. As the control group was created "ex-post" it was considered "quasi-experimental". The DfE stated that applying an experimental model to public policy raises ethical concerns and that no permission had been sought to publish data on the outcomes of the analysis.

21. In the same correspondence the DfE confirmed that it was relying on the *Pre-Release Access to Official Statistics Order 2008* quoting the following:

"6.- (1) An eligible person who receives pre-release access must not disclose-
(a) the statistic,
(b) any part of a publication where that part includes that statistic, or
(c) any suggestion of the size or direction of any trend indicated by that statistic, until after the official statistic has been published."
22. On 3 June 2010, having established that the information the DfE had identified as releasable to the complainant had not been provided to him, the Commissioner asked that it be released.
23. On 8 September 2010 the Commissioner queried the application of section 44 to 'named slide 1' and 'named slide 2'. The Commissioner gave his opinion that the *Pre Release Access to Statistics Order 2008* did not apply in these circumstances. The term "pre-release access" is defined in the *Statistics and Registration Service Act 2007* Act at section 11(8) in relation to official statistics as "*access to statistics in their final form prior to publication*". Therefore, the regulations set out the rules and principles relating to granting access to statistics in their final form prior to publication.
24. In the letter from the DfE to the Commissioner of 11 June 2010 the DfE stated: "*It should also be noted that the data in slides 7 and 19 is in unamended provisional form...*" On 8 September 2010 the Commissioner wrote to the DfE to express the view that the statistics in the slides are not "in their final form prior to publication" and as a consequence the regulations did not seem to apply to them.
25. On 16 September 2010 the DfE agreed that the data was not in a pre-release state and that the statutory bar did not apply. The DfE conceded that the application of section 44 to this withheld information did not apply but that it still wished to rely on its application of section 36.

Analysis

Substantive Procedural Matters

Exemptions

Section 36

26. The full text of section 36 can be found in the Legal Annex at the end of this Notice.
27. During the course of the investigation the Commissioner asked the DfE to confirm which parts of section 36 it was seeking to rely upon. In response the DfE confirmed that it was relying on section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c). On 4 February 2010 the DfE confirmed that it was content to release background information which would be provided to the complainant. All the remaining information, the DfE stated, comprised of analysis, comment and findings from the PMDU's assessment which it continued to withhold under sections 36(2)(b)(i) and (ii) and section 36(2)(c).
28. Section 36(2)(b)(i) states 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 would or would be likely to, inhibit the free and frank provision of advice. This is a qualified exemption and is therefore subject to the public interest test.
29. Section 36(2)(b)(ii) states that information to which the section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. This is a qualified exemption and is therefore subject to the public interest test.
30. Section 36(2)(c) states 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 would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. This is a qualified exemption and is therefore subject to the public interest test.
31. Information can only be exempt under sections 36(2)(b)(i), (ii) or (c) if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to lead to the adverse consequences described at paragraphs 28 to 30 above. If the Commissioner decides that the

exemptions are engaged he must go on to consider whether the public interest in maintaining these exemptions outweighs the public interest in disclosure.

32. During the course of the investigation the Commissioner asked the DfE for details of the decision taken by the qualified person, in order for him to ascertain that an opinion was given and also that it was given by an appropriate person at an appropriate time.

Opinion of the qualified person

33. On 8 December 2009 the Commissioner asked the DfE to provide further details as to how the qualified person's opinion had been obtained in order to establish whether section 36 had been correctly applied in relation to the qualified person. In order to do so he needed to:
- establish who the qualified person was for the public authority;
 - confirm that an opinion was given by the qualified person;
 - confirm when the qualified person gave their opinion;
 - consider whether the qualified person's opinion was reasonable.
34. On 4 February 2010 the DfE responded stating that the qualified person was Parliamentary Under-Secretary for Schools. The DfE confirmed that the following information was provided to the qualified person on 4 August 2009:
- the request for information;
 - the withheld information;
 - a written submission regarding the possible application of this exemption;
 - and a draft refusal notice.
35. The Commissioner accepts that the qualified person was designated as a qualified person for the purposes of section 36 of the Act.
36. The DfE has advised that the decision to apply sections 36(2)(b)(i), (ii) and 36(2)(c) was made by the qualified person on 4 August 2009. Therefore the Commissioner is also satisfied that the decision to apply this exemption was made at an appropriate time.
37. In reaching a view on whether the qualified person's opinion is a reasonable one the Commissioner has been guided by the view of the Tribunal in *Guardian & Brooke v ICO & the BBC* [EA/2006/0011 & EA/2006/0013]. This found that a qualified person's opinion under section 36 is reasonable if it is both reasonable in substance and

reasonably arrived at. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.¹

38. The Commissioner notes that the qualified person signed her agreement to the submission which had not differentiated between “would” or “would be likely to” cause the prejudicial or inhibitory effects. The Commissioner’s view is that if it has not been specified by the public authority the lower evidential test should be applied in relation to the qualified person’s opinion. However, the DfE later clarified its position in correspondence with the Commissioner, confirming that it was relying on the lower evidential test of “would be likely to” cause the prejudicial/inhibitory effects.
39. The Commissioner is of the view that “would be likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. However, it requires a lesser evidential burden than “would prejudice”.
40. The request for information was supplied to the qualified person as part of the ‘background’ to a consideration of the arguments for not disclosing the information. The ‘background’ also contained the fact that the PMDU had been consulted and had confirmed that it considered the requested information to be confidential advice and that reports such as the *‘Review of Academies’* are not published.
41. Arguments provided for refusing the disclosure of the information were presented to the qualified person as the following:
 - Referring to section 36(2)(b) the DfE claimed that future free and frank discussions with stakeholders would be likely to be prejudiced if views given in confidence were disclosed. An informed reader could easily identify the origin of several sections including those illustrated by direct quotes which would be likely to prejudice the conduct of future discussions with stakeholders. Though the specific subsection 36(2)(b)(i) was not identified its definition in the Act was provided.
 - Referring to section 36(2)(c), the DfE stated that future relations between the PMDU and the DfE could be harmed if the report was

¹ Found at http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf

published and this could prejudice the effective conduct of public affairs

- Referring to section 36(2)(b) the DfE argued that officials needed to be able to develop their views and give free and frank advice to Ministers and, although it acknowledged that the advice given in the report was “not contentious”, its publication could have an impact on future reviews and be likely to inhibit the free and frank exchange of views for the purposes of deliberation. Though the specific subsection 36(2)(b)(ii) was not identified its definition in the Act was provided.

In the absence of any written opinion from the qualified person this was the basis upon which the qualified person arrived at her decision.

42. The Commissioner has first considered whether the qualified person’s opinion was reasonable in substance. In reaching his view the Commissioner has taken into account the fact that the report was only intended for a limited audience within the DfE and government. It is also clear from assurances given by the DfE to participants in the compilation of the report that information was gathered in confidence and therefore was not intended for wider dissemination. As a result the Commissioner considers it is not unreasonable to conclude that disclosure of the information would be likely to have some inhibitive effects as defined by sections 36(2)(b) (i) and (ii) and therefore in relation to these exemptions he is satisfied the qualified person’s opinion was reasonable in substance.

43. However he is not satisfied that this is the case in relation to section 36(2)(c). This is because in relation to this section a public authority must be able to show some prejudice other than that protected by another limb of section 36. In *R Evans v The Information Commissioner & the Ministry of Defence* EA/2006/0064 the Tribunal commented on the relationship between s36(2)(c) and the other subsections of 36(2). In this case the public authority claimed before the Tribunal that both section 36(2)(b)(i) and section 36(2)(c) applied to the withheld information. The Tribunal commented that:

“Some prejudice other than that to the free and frank expression of advice (or views as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged.” (paragraph 53)²

44. The Commissioner considers the basis of the opinion that section 36(2)(c) was engaged and finds that it was purely speculative. The Commissioner cannot see a reasonable basis for an opinion that

² Found at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i245/Evans.pdf>

relations would be likely to break down between the DfE and the PMDU over the disclosure of the information in this case to the extent that the conduct of public affairs would be affected, as it has claimed. The PMDU is also subject to FOIA and it is the Commissioner's view that the opinion of the qualified person under this limb was not reasonable in substance. The opinion at section 36(2)(c) is intended to apply to those cases where it would be necessary in the interests of good government to withhold information but which are not covered by another specific exemption. The Commissioner has therefore concluded that the opinion of the qualified person in relation to section 36(2)(c) is not reasonable in substance.

45. In deciding whether the opinion was reasonably arrived at the Commissioner notes that the written submission provided to the qualified person clearly relates to the request that was made by the complainant. The arguments made in both the submission and the refusal notice relate to the requested information. Having considered these factors the Commissioner is satisfied that the qualified person only took into account relevant factors when reaching the decision to apply sections 36(2)(b)(i) and (ii). However he has concluded that the information provided to the qualified person with regard to section 36(2)(c) wasn't reasonably arrived at as it did not differentiate sufficiently between section 36(2)(b) and 36(2)(c). Though later arguments supporting the application of section 36(2)(c) were presented to the Commissioner by officials from the DfE such as the PMDU possessing an "audit-like" function this factor was not presented to the qualified person.
46. Consequently the Commissioner has decided that section 36(2)(b)(i) and (ii) is engaged for all of the information redacted under this exemption. He is satisfied that the qualified person gave his opinion after taking into account only relevant factors and that the opinion was both reasonably arrived at and reasonable in substance. Therefore, he has found that section 36(2)(b)(i) and (ii) are engaged and has gone on to consider the public interest test. However, the Commissioner finds that section 36(2)(c) is not engaged.

Public Interest Test

Public interest arguments in favour of maintaining the exemptions

47. On 4 February 2010 the DfE put forward its public interest arguments in favour of maintaining each exemption:

Section 36(2)(b)(i):

- Officials from the PMDU considered their reviews to be

confidential advice to Ministers and that such reports are not published.

- Information from fieldwork was gathered “in confidence”. Participants were informed that their views and opinions could be given without fear of the information being released or attributed to them. If disclosed, participants might be deterred from giving advice in future.

Section 36(2)(b)(ii):

- It is important for the process of effective government that officials be allowed freedom to develop their views and give free and frank advice to Ministers and not be inhibited by the possibility of publication. Disclosure of the report would therefore be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
- PMDU methodology depends on contributors being entirely frank in the evidence submitted and the views they set out. To ensure this, the PMDU provides explicit assurance in fieldwork that reports will not be made public.
- Release of the information in this case might inhibit fieldwork participants from placing any confidence in PMDU assurances in the future creating a powerful disincentive to freely giving their views or engaging in discussions in future investigations. This could endanger the future operation of the PMDU methodology.
- If officials felt there was a risk of their findings and advice being published, it would be likely to lead to them being less frank in their reporting, drawing conclusions and providing advice in future policy reviews.
- PMDU's analysis for this report had taken the form of an unannounced control group, release of which schools were selected for the group (and why) and the aggregation of data into control group averages would damage their ability to proceed in this way on all other assessments. The rationale for PMDU is to be able to speak bluntly to the Prime Minister and departments on performance issues. If the analysis was made public this would result in challenges to ‘protect reputations’, or arguments for inclusion in the control group, which in turn would divert resources from the PMDU's analytical activity and substantially slow their ability to deliver their objectives.

Public interest arguments in favour of disclosing the requested information

48. The DfE provided the following arguments in favour of disclosing the requested information in the same letter:
- Transparency and openness – the fact of the existence of the report was in the public domain. It had previously been referred to by Ministers and in a Departmental Press Release. Maintenance of the exemption may have raised suspicions about the motivation for not releasing the report.
 - There had been widespread media and political interest in the PMDU report. This had been demonstrated by the tabling of Parliamentary Questions and other FOI requests received by the Department
 - Release of the report might have ended speculation as to its content both at the time of the request and in the future.
 - As the report contained a large amount of data analysis it might further public understanding of the Academies Programme in general.

Balance of the public interest arguments

49. The Commissioner is satisfied that there is a strong public interest in the disclosure of the withheld information in order that the public might have a better understanding of the process by which the implementation of government policy is assessed, with regard to its strategy of diversity in secondary school education. The Commissioner notes that the Academy programme and its expansion was a significant change to the secondary school system and represents a new model for delivering secondary education. There is a significant public interest in understanding how the evidence base, stakeholder views and analysis feed into the report. The Academy programme has been the subject of significant debate by parents, educational professionals and other groups with an interest in the educational system. The issue of measuring and evaluating the success of Academy schools has itself been a matter of significant debate. There is a significant public interest in understanding the full picture and providing further information, as it removes any suspicion of spin. The relevance of this factor was acknowledged by the Information

Tribunal in Rt Hon Lord Baker of Dorking CH v Information Commissioner at paragraph 24.³

50. The Commissioner finds that the severity of the prejudice would be limited, considering the content of the information, the comments made by the department about sensitivity and the lack of attribution of comments to individuals. Although he accepts that some stakeholder organisations can be identified, he has reached the view that the disclosure of this particular information would not cause significant detriment to similar processes in the future. The Commissioner also notes that comments made to DfE by PDMU were highly generalised and gave the impression of class based approach, that all documents of this nature must be withheld. Whilst, the Commissioner accepts the qualified person's opinion was reasonable, as it did focus on the specifics of the request, he has not accorded the comments of PDMU significant weight.
51. The Commissioner also notes that the withheld information included recommendations and an implementation plan. Any matters for implementation were projected to have been concluded prior to the request for information being made. As the implementation plan as set out in the Report did not appear to last beyond the end of 2008 it is difficult to accept that any severe and widespread inhibitory effects would have ensued from its release in response to the request for information in June 2009.

Procedural Requirements

Section 1(1)(b): duty to provide information

52. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

53. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received.

³ Found at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i95/Lord%20Baker.pdf>

54. As the Commissioner finds that the public authority wrongly withheld the requested information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.
55. In addition the Commissioner notes that the response from the DfE was provided outside the 20 days for compliance with the Act.

Section 17(1) Refusal of Request

56. Section 17(1) states that
1)A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
(a)states that fact,
(b)specifies the exemption in question, and
(c)states (if that would not otherwise be apparent) why the exemption applies.
57. The Commissioner finds that the public authority was in breach of section 17(1) because it failed to cite exemptions at section 44 and section 21 to the complainant that it later relied upon.

The Decision

58. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act by incorrectly relying on sections 36(2)(b)(i) and 36(2)(b)(ii) and 36(2)(c) of the Act.

As a consequence the DfE breached sections 1(1)(b), and 10(1) of the Act in failing to provide the requested information to the complainant in response to his request within the statutory time limit.

The DfE also breached section 17(1) in failing to cite exemptions it later relied on.

Steps Required

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

Provide the requested information '*Review of Academies*' to the complainant.

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

Failure to comply

61. 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

62. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

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

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

Dated the 10th day of January 2011

Signed

**Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

1 General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

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

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

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

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

10 Time for compliance with request.

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

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

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

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

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

(4) The [Secretary of State] may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

- “the date of receipt” means—
 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank

holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

17 Refusal of request.

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

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

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

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

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

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (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.

21 Information accessible to applicant by other means.

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

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or

under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

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

36 Prejudice to effective conduct of public affairs.

(1) This section applies to—

(a) information which is held by a government department or by [the Welsh Assembly Government] and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

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

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii) the work of the Executive Committee of the Northern Ireland Assembly, or

(iii) the work of the Cabinet of the Welsh Assembly Government.

(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.