

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 January 2011

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Summary

The complainant requested information held by the Foreign and Commonwealth Office ('FCO') regarding an allegation which appeared in The Observer. The allegation was that the British government had solicited a letter from the US Administration to substantiate its claim that the publication of a summary of Binyam Mohamed's treatment would lead to a reconsideration of the intelligence sharing relationship between the US and the UK. The FCO refused to provide the information it held citing the exemptions contained at the following sections of the Act: 23(1), 27(1)(a), 27(2), 35(1)(a) and 42(1). The Commissioner has concluded that the majority of the documents falling within the scope of the request are exempt from disclosure on the basis of one of the exemptions cited by the FCO, predominantly on the basis of section 27(1)(a). However, the Commissioner has also concluded that although a small number of documents fall within the scope of the exemption contained at section 35(1)(a) of the Act, the public interest in maintaining the exemption does not outweigh the public interest in disclosure of these documents.

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. On 18 February 2009 the complainant wrote to the Foreign and Commonwealth Office (FCO) and submitted a letter containing a request for information. The relevant sections of the letter below:

'The latest allegation, published in the Observer and elsewhere on 15 February, are of considerable concern to the APPG [All Party Parliamentary Group on Extraordinary Rendition].

The specific allegation is that the Foreign Office solicited a letter from the US Administration to substantiate its claim that the publication of a summary of Binyam Mohamed's treatment would lead to a reconsideration of the intelligence sharing relationship between the US and the UK. This can only entrench the suspicion of a cover-up.

The UK Courts have already substantiated claims made by me, among others, that the UK 'facilitated' the interrogation of Binyam Mohamed at time when they knew he was being detained incommunicado and without access to a lawyer. These further allegations, if true, would lend support to those who argue that the UK Government has been attempting to conceal the extent of its involvement in extraordinary rendition, that is, the kidnapping of people and the taking of them to places where they may be maltreated or tortured.

The most appropriate way that the Foreign Office can dispel this impression would be to publish all relevant information on this issue, including correspondence with the US Administration, redacted where necessary.

With that purpose in mind, by this letter I am requesting a copy of all information relevant to the above allegations. This will include, but not be limited to, correspondence and any other communications (oral or written) with the US Administration, including notes and minutes of meetings; and any other information, such as internal departmental and cross-departmental communications (oral and written), notes and minutes of internal meetings and any other pertinent documents. I am making this request under the Freedom of Information Act'.¹

¹ The Observer article in question can be viewed here:
<http://www.guardian.co.uk/world/2009/feb/15/foreign-office-guantanamo-torture>

3. The complainant received a response from the then Foreign Secretary, David Miliband, on 10 March 2009. In this response the Foreign Secretary noted that:

'You raised the specific allegation that the "the Foreign Office solicited a letter from the US Administration" implying that FCO did this in an underhand way. This is not true. The US position was always consistent and clear in respect of the damage of disclosure. In the context of discussions with the US, where my officials made clear the importance of disclosure to Mr Mohamed's legal team, my officials also explained that the proper course of action would be for the US to make an authoritative statement of their position.

The State Department's Legal Adviser, John Bellinger, wrote to the FCO's Legal Adviser, Daniel Bethlehem, on 21 August. We provided this letter immediately to the Court, Special Advocates, and subsequently to Binyam Mohamed's solicitors, Leigh Day & Co. Extensive quotations from the letter are included in the 29 August open judgment of the Court. I am enclosing the letter from Mr Bellinger, which I have also placed in the Library of the House, following a request from Rt Hon William Hague MP.'

4. The Foreign Secretary confirmed to the complainant that he would receive a formal response to his freedom of information request in due course.
5. The FCO contacted the complainant and provided him with a formal response to his request on 24 April 2009. In this response the FCO confirmed that it held information falling within the scope of his request. However the FCO informed the complainant it considered this information to be exempt from disclosure on the basis of the exemptions contained at the following sections of the Act: 23(1), 27(1)(a), 27(2), 35(1)(a) and 42(1). For the qualified exemptions, the FCO explained why it had concluded that the public interest favoured maintaining these exemptions.
6. The complainant contacted the FCO on 17 June 2009 and asked for an internal review to be conducted. In asking for this review the complainant submitted detailed arguments to support his position that the various exemptions had been incorrectly relied upon. The complainant also noted that in its refusal notice the FCO simply confirmed that it held information of the 'description specified' in his request. The complainant argued that such a broad confirmation failed to indicate whether the FCO held the various forms of information

specified in his request, e.g. correspondence with the US Administration and internal departmental communications. The complainant asked the FCO to clarify what form the relevant information took, in line with its duty contained at section 16 of the Act.

7. The FCO informed the complainant of the outcome of the internal review on 11 September 2009. The review upheld the application of all of the exemptions cited in the refusal notice. The FCO also informed the complainant that 'with several hundred documents assessed it is not practicable to set out into what category each document would fall, neither is it readily apparent what assistance this would offer'.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 8 November 2009 in order to complain about the FCO's handling of his request. The complainant's grounds of complaint were as follows:
 - The failure to provide adequate assistance under section 16 and properly explain the extent to which the exemptions were being claimed as required by section 17.
 - The failure to consider the application of the exemptions contained at sections 23, 27, 35 and 42 properly, including for the qualified exemptions a failure to apply the public interest test correctly.
9. During the course of his investigation the Commissioner confirmed with the complainant that his request **only** sought information which related to the specific allegation in The Observer that the UK solicited a letter from the US Administration to substantiate its claims that the publication of a summary of Binyam Mohamed's treatment would lead to a re-consideration of the intelligence sharing relationship between the UK and the US. That is to say the complainant was clear that his request did not seek information held by the FCO about the other allegation referred to in his letter of 18 February 2009 which he sent to the FCO, i.e. 'substantiated claims...that the UK "facilitated" the interrogation of Binyam Mohamed'.

Chronology

10. Unfortunately, due to a backlog of complaints received under the Act, it was not until 18 February 2010 that the Commissioner wrote to the FCO in respect of this complaint. In this letter the Commissioner asked to be provided with copies of the withheld information along with detailed submissions to support the FCO's reliance on the various exemptions quoted in the refusal notice.
11. The Commissioner received a response from the FCO on 30 April 2010. In this response the FCO explained why it considered sections 27, 35 and 42 to apply to various parts of the withheld information. The Commissioner was also provided with the parts of the information to which the FCO had applied these exemptions. In respect of the information which had been withheld from the complainant on the basis of section 23(1) the FCO explained that given the sensitive nature of this information it had also removed this information from the documents provided to the Commissioner.
12. Having reviewed the withheld information that had been provided to him, the Commissioner contacted the FCO again on 2 June 2010 in order to clarify a number of outstanding points. In respect of the information that the FCO had not originally provided to him because it had been withheld on the basis of section 23(1), the Commissioner explained that in previous similar instances he had been provided with a letter from a particular individual within the public authority confirming the provenance of such material and thus confirming why section 23(1) would apply. The Commissioner invited the FCO to provide such a letter in respect of this information.
13. The FCO provided the Commissioner a response to his outstanding queries on 29 June 2010.
14. The FCO subsequently provided the Commissioner with a letter in respect of the information that had been withheld on the basis of section 23(1) of the Act on 1 July 2010.
15. On 25 August 2010 representatives of the FCO and representatives of the Commissioner's office met to discuss a number of ongoing complaints, including the complaint which is the subject of this Notice.

Analysis

Substantive Procedural Matters

16. As indicated in the Request section above the FCO has relied upon a number of exemptions to withhold the documents falling within the scope of this request. Some of these documents have been withheld on the basis of multiple exemptions whilst other documents have been withheld on the basis of just one exemption. In order to clarify which exemptions have been applied to which documents the Commissioner has created a schedule which is attached to this notice. This schedule indicates which exemptions the FCO has applied to which documents and the ICO's conclusions in respect the application of these exemptions. The Commissioner's reasoning for reaching these conclusions is below and begins with a consideration of the application of section 27(1)(a). (If the Commissioner concludes that a document is exempt from disclosure on the basis of one exemption he has not gone on to consider whether it is also exempt on the basis of any further exemptions cited by the FCO.)
17. However, before setting out such analysis the Commissioner has to deal with the FCO's position in respect of the document numbered 24. Although the FCO provided the Commissioner with this document with its response of 30 April 2010, the FCO suggested that document 24 was a copy of another document provided to the Commissioner. The Commissioner identified the fact that document 24 was not in fact a duplicate of any of the other documents provided to him and therefore in his letter of 2 June 2010 the Commissioner asked the FCO to confirm which exemptions it was seeking to rely on to withhold this document.
18. In its response of 29 June 2009 the FCO explained that this document had been included in error and it did not in fact fall within the scope of the request. As this explanation makes reference to the content of the document itself, the Commissioner is not able include details of this explanation in full.
19. However, having considered this explanation and having reviewed the content of document 24, the Commissioner is of the opinion that it does fall within the scope of the request. The Commissioner believes he can explain why he has reached this conclusion without comprising the content of the document in question: quite simply although the document may not include any evidence which directly refutes (or supports) the allegation contained in The Observer article, the focus of the document remains the letter which was provided to the UK by the US. In the Commissioner's opinion the complainant's request is

sufficiently broad - given that it seeks 'a copy of **all** [emphasis added] information relevant to the above allegations' – to include documents in which the letter sent to the UK is directly discussed, even if the allegations themselves are not.

20. In light of this finding, and in light of the fact that the FCO has not provided the Commissioner with any submissions to support a position that it is exempt from disclosure, the Commissioner has concluded that document 24 should be disclosed to the complainant.

Exemptions

Section 27(1)(a) – international relations

21. Section 27(1)(a) provides that information is exempt from disclosure if its disclosure would, or would be likely to prejudice relations between the United Kingdom and any other State.
22. In order for a prejudice based exemption, such as section 27(1)(a), to be engaged the Commissioner believes that the following three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
23. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to

contain or limit damage which would not have otherwise have been necessary'.²

The FCO's position

24. In support of its engagement of section 27(1)(a) the FCO explained that the information in question consisted of information provided to the UK by the US on a confidential basis and also information which evidenced the nature of such exchanges. The FCO noted that there is a routine understanding that in such exchanges the information provided shall be considered confidential in nature and protected by the receiving government. The FCO noted that the US government had made it publically clear on a number of occasions that they attached great importance to this principal being scrupulously observed. The FCO explained that since the Binyam Mohamed case the US government had become even more sensitive to what they see as the risk that the UK government may disclose information provided to it on a confidential basis. The FCO confirmed that the US had been very clear that any further disclosure of exchanges in the Binyam Mohamed case would have (as opposed to being likely to have) a prejudicial impact on this relationship. Consequently the FCO argued that disclosure of the requested information could clearly prejudice its relations with the US.

The complainant's position

25. In his submissions to the Commissioner the complainant argued that the FCO had failed to adequately demonstrate that disclosure of the information would be likely to prejudice UK and US relations to the degree needed to engage the exemption. In making this point the complainant drew the Commissioner's attention to the fact that current indications from the US Administration are that they are in favour of greater openness on the issue of possible human rights abuses in recent times. The complainant argued that the broad policy change in the US suggested that disclosure of the information he requested was not likely to prejudice the UK relationship with the US.
26. The complainant also made reference to a recent High Court case decision which ordered the release of information held by the British Government and relating to the treatment of Binyam Mohamed; the complainant highlighted the fact that the judgment had noted that 'the risk to national security is not a serious one'.³

² *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

³ *R (oao Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (Admin)

27. The complainant also noted that the information he had requested related to the FCO's actions and it was difficult to see why the release of any information appertaining to an allegation concerning the FCO's actions could 'prejudice' the UK's relations with the US.

The Commissioner's position

28. The Commissioner accepts that the FCO's argument that disclosure of the information would prejudice its relationship with the US is clearly an interest that is inherent in section 27(1)(a) of the Act. Thus the first criterion set out in paragraph 21 is met.
29. With regard to the second criterion, having reviewed the information withheld on the basis of section 27(1)(a) of the Act, the Commissioner has established that it clearly constitutes information provided to the UK by the US and also constitutes information which records the nature of such exchanges. Therefore, contrary to the complainant's suggestion that the requested information only relates to the FCO's actions, in the Commissioner's opinion the information falling within the scope of this request also includes information which reveals details of US opinions and decisions. On this basis the Commissioner accepts that it is logical to argue that disclosure of the information falling within the scope of the request could affect the UK's relations with the US. Moreover, the Commissioner accepts that the resultant prejudice which the FCO believes would occur is one which can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
30. With regard to the third criterion, the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
31. As noted above, in submissions to the Commissioner the FCO argued that disclosure of the withheld information **would** result in the

prejudice to the UK's relations with the US. The Commissioner is prepared to accept that this higher level of prejudice is met on the basis of the following factors:

32. Firstly, the US's underlying expectation that information provided to the UK in respect of the Binyam Mohamed case should be not disclosed. Secondly, having reviewed the particular information that the US officials have provided to the FCO which falls within the scope of this request, the Commissioner is very clear that such information was provided in the strong expectation that it would not be disclosed. Thirdly, the content of the many of the exchanges are frank and candid in nature. Fourthly, where the requested information does not consist of actual exchanges with the US but consists of internal FCO documents, the Commissioner is satisfied that such documents sufficiently reference the exchanges with the US that disclosure of these documents would have a similar effect to disclosure of the exchanges themselves.
33. The Commissioner wishes to stress that it is the cumulative weight of these factors – rather than simply one of these factors on its own – which means that the likelihood of a diplomatic response being needed if the information was released is one that is not simply likely to be necessary but one that would be necessary. In other words it is the content of the information itself allied to the nature of the US and UK's relationship in terms of this particular issue that has allowed the Commissioner to reach this conclusion.
34. In reaching this conclusion the Commissioner has taken into account the arguments advanced by the complainant but has concluded they should not materially affect his position for the following reasons:
35. The Commissioner does not dispute the fact that there would appear to have been a change in US policy towards alleged human rights abuses since President Obama took office in January 2009. However, the Commissioner notes that when disclosures have been made by the US, for example the publication of confidential documents on interrogation techniques, these disclosures have clearly been made after careful consideration within the Administration itself. Therefore, the Commissioner does not accept that such 'openness' means that the US has tacitly accepted that information provided to other States on any associated topics or cases is in effect 'fair game' for disclosure. This is especially true when the information is frank in nature and was provided in confidence, which as explained above the Commissioner certainly accepts that the information in this case was.

36. With regard to the court case referenced by the complainant, the Commissioner recognises that in the complainant's opinion this case has a significant bearing not just on the engagement of section 27(1)(a) but also on the public interest test for the various exemptions cited by the FCO. Therefore whilst recognising the centrality of Mr Mohamed's treatment to both, the Commissioner wishes to make very clear the distinction and differences he believes exist between the issues at the heart of the quoted court case and associated litigation, and the issues at the heart of this complaint.
37. It is the Commissioner's understanding that the court case concerned disclosure of intelligence information (or a summary thereof) provided by the US to the UK in respect of the detention and interrogation of Mr Mohamed. The court's focus was to determine whether such information should be disclosed, by the British government, to Mr Mohamed's legal team for the purposes of mounting a defence to any charges he may face. The British Government, represented by the Foreign Secretary, refused to provide the information requested because it believed that disclosure of information would damage the intelligence sharing relationship between the UK and the US.
38. With regard to the information that falls within the scope of this request the Commissioner notes that its focus and content is not in fact such intelligence information itself, but the broader issue of how disclosure of this intelligence information by the UK may harm UK-US relations.
39. Furthermore, and of particular significance, is the nature of prejudice being considered by the court and the type of prejudice relevant to the consideration of section 27(1)(a). As evidenced by the quote from the court's decision selected by the complainant, the court was primarily concerned with the harm which may occur to the UK's national security following a change to US' willingness to share intelligence information with the UK. In the context of the Act and the engagement of section 27(1)(a) the test of prejudice (and thus the engagement of the exemption) is very different. In this context, as the Tribunal suggested EA/2006/0040, the Commissioner simply has to decide whether disclosure of the information would call for a particular diplomatic response. In the Commissioner's opinion it is correct to argue that disclosure of information can call for a particular diplomatic response whilst stopping well short of resulting in a change in the way in which intelligence information is shared and thus having a direct impact on one State's national security. Therefore the Commissioner is satisfied that it is not contradictory for him to conclude that the exemption contained at section 27(1)(a) is engaged despite the comments of the

court's decision referenced by the complainant concerning harm to national security.

Public interest test

40. However section 27(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2(2)(b) of the Act and whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest arguments in favour of disclosing the requested information

41. The FCO acknowledged it was clearly in the public interest that the public had confidence in the government's handling of Binyam Mohamed's case. This was because of the fact that the case touched upon the fundamental duty of the State to protect its citizens, and in particular its obligations under international conventions not to be involved in torture, cruel or inhumane treatment.
42. In the specific circumstances of this case the FCO acknowledged that in light of the fact that there had been allegations that the government had acted improperly, there was a clear public interest in the government placing as much information into the public domain as possible in order to 'correct' the public record.
43. The complainant also argued that disclosure was necessary for the purposes of transparency. In his opinion such transparency was vital because of the gravity of the issues at the heart of this case; again the complainant drew a parallel between the public interest in disclosure of this information and the public interest identified in the court judgment referenced above.
44. The complainant also argued that the allegations in The Observer article formed part of a much broader debate on the UK's alleged involvement in the US rendition programme. Disclosure of the requested information in this case could be used to inform this public debate.

Public interest arguments in favour of maintaining the exemption

45. The FCO argued that there was a strong and inherent public interest in the UK having effective and efficient relations with foreign States. This public interest clearly included the UK being able to have free and frank discussions with foreign States and, as part of such discussions, being

provided with confidential information. The FCO also highlighted that the efficiency of such relations was also dependent on the UK being able to discuss such exchanges internally. In the particular circumstances of this case the FCO highlighted the importance of the UK's relations with the US and the centrality of this relationship to protecting the UK's national security.

Balance of the public interest arguments

46. With regard to attributing weight to the public interest arguments in favour of disclosing the information the Commissioner notes that they focus on issues often cited in any consideration of the public interest test, namely improving transparency, increasing public confidence and informing public debate. However, as such concepts are inherent to the Act this should not diminish their relevance to this case. Furthermore, the Commissioner believes that in this case each of the three arguments attract a very significant amount of weight. This is because of the issues at the heart of this case, namely the practice of extraordinary rendition and more specifically the detention and interrogation of Binyam Mohamed whilst in US custody and the British government's knowledge of his treatment. In the Commissioner's opinion the matters under discussion were of very weighty importance indeed. In particular the Commissioner would place great weight and significance on the argument that in light of the previous controversy concerning the British government's alleged knowledge of Binyam Mohamed's treatment, there was a need for disclosure of all information associated with this case in order to ensure complete transparency.
47. However, as with any consideration of the public interest test the Commissioner has to focus on the content of the information and to what extent the disclosure of the particular information requested would serve the specific interests which have been identified. Again, at this stage the Commissioner would highlight the distinction between the documents considered under the court case (and associated litigation) identified by the complainant, and the information within the scope of the request in this case. As discussed above, whilst the information considered by the court cases consisted of documents exchanged between the UK and US directly concerning the treatment of Binyam Mohamed, the focus of the withheld information in this case are exchanges between the UK and US discussing the disclosure of the information at the heart of this litigation.
48. Therefore in the Commissioner's opinion it would be incorrect to say that disclosure of the information falling within the scope of this request that has been withheld on the basis of section 27(1)(a) would,

for example, reveal key details, previously unknown, about the treatment of Binyam Mohamed. (In contrast for example to the disclosure of the seven paragraphs of information that the Court of Appeals ordered the Foreign Secretary to disclose in its judgment in February 2010.⁴)

49. Nevertheless, the Commissioner accepts that disclosure of the information would provide the public with a clearer understanding of the UK's views and actions in relation to the disclosure of the very information which would have (and indeed did once it was disclosed) reveal details of what the British government knew about Binyam Mohamed's treatment and detention. Thus the Commissioner believes that disclosure of the information falling within the scope of this request would still, to a notable extent, serve the compelling weight that should be attributed to the three public interest arguments identified above in favour of disclosing the information.
50. With regard to attributing weight to the public interest in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed if the nature of the information provided to the UK by its foreign partners was negatively impacted, either through information ceasing to be provided or the candid nature in which that information was provided being affected. This is especially true of relationships with its key partners, such as the US, and also particularly so when the issues that need to be discussed in a free and frank way are of such significance as those at the heart of this case. Furthermore, in the particular circumstances of this case as the Commissioner has concluded that prejudice would occur, not simply be likely to occur, he accepts that this adds further weight to the arguments in favour of maintaining the exemption.
51. In conclusion the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, and by a very narrow margin, the Commissioner has concluded that the public interest favours maintaining the exemption. The Commissioner has reached this decision for three reasons: Firstly, although disclosure of the information would inform the public about the circumstances surrounding the allegation in The Observer concerning the letter provided to the UK, it would not go as far as informing the public about the British government's alleged role in other aspects of Binyam Mohamed's case (e.g. his detention, treatment or subsequent release)

⁴ The seven paragraphs in question can read here <http://www.reprieve.org.uk/casebriefingbinyammohamedvsforeignoffice>

or other extraordinary rendition issues. Secondly, if the need to disclose information about the Binyam Mohamed case in order to ensure complete transparency is taken to its logical conclusion, then arguably the position that could be reached is that **all** information held by the British government concerning Mr Mohamed's case would need to be disclosed. Given the classified and sensitive content of some of this information (for example the information that has been withheld in this case on the basis of section 23) its difficult to see how such a position would be sustainable. Thirdly, having considered the content of the withheld information the Commissioner believes that its disclosure would not simply have a profoundly negative effect on the UK's relations with the US in respect of its diplomatic relations with the US with regard to the this case and issues of extraordinary rendition, but also on the UK's relationship with the US in respect of many other topics and diplomatic discussions. It is this factor, i.e. the wider more generalised effect of prejudice that would flow from disclosure, to which the Commissioner has attached most weight to in reaching his conclusion on the balance of the public interest.

Section 35(1)(a) – formulation and development of government policy

52. The FCO has also argued that some of the information is exempt from disclosure on the basis of section 35(1)(a) of the Act. This section states 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'

53. Section 35 is a class based exemption, therefore if information falls within the scope of a particular provision of section 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these activities.

54. The FCO has explained to the Commissioner that the policy to which it believes this information relates is the government's formulation of policy in respect of Binyam Mohamed. Furthermore, the FCO noted that the case of Binyam Mohamed touched upon a number of vital government policies, such as the policy of protecting the UK's intelligence sharing relationship with the US. The FCO did not provide the Commissioner with any other such examples but did argue that these policies were important to a specific FCO departmental strategic

objective concerning counter terrorism, weapons proliferation and their causes.

55. The Commissioner recognises that the term 'policy' is not a precise term and to some extent what is regarded as policy depends upon context. However, there would appear to be a general consensus that policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action and when. The white paper 'Modernising Government' refers to it as the process by which governments translate their political vision into programmes and actions to deliver 'outcomes' or desired changes in the real world.
56. Policy can be sourced and generated in a variety of ways. For example, it may come from Ministers' ideas and suggestions, manifesto commitments, significant incidents such as a major outbreak of foot and mouth disease, European Union policies, public concern expressed through letters, petitions and the like. Proposals and evidence for policies may come from external expert advisers, stakeholder consultation, or external researchers, as well as civil servants. Policy is unlikely to include decisions about individuals or to be about purely operational or administrative matters. For instance decisions about applications for licenses or grants are not likely to involve the formulation of policy but rather its application.
57. With regard to drawing a distinction between the stages of formulation and development, the Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
58. In terms of applying these concepts to the particular facts of this case the Commissioner is prepared to accept that the government's approach to the case of Binyam Mohamed can be correctly described as

a government policy for the purposes of section 35(1)(a). Although Mr Mohamed's case obviously focuses on one individual, the Commissioner accepts that the government's position and handling of this case has broader dimensions and wider consequences. For example, the fact that the government's approach to the case of Binyam Mohamed has a potential to impact on the UK's relations with the US means, in the Commissioner's opinion, there is a clear political dimension to Mr Mohamed's case. Furthermore having examined the information that has been withheld it is clear that the handling of Mr Mohamed's case involved clear examples of decision making which involved the development of options and priorities for Ministers. Furthermore, having reviewed the information in question the Commissioner also accepts that it would be correct to describe the information as relating more to the formulation, as opposed to the development of government policy, in respect of the Binyam Mohamed case.

59. The Commissioner is also prepared to accept that protecting the intelligence sharing relationship is clearly a central plank of UK foreign policy and can therefore be correctly described as 'government policy' for the purposes of section 35(1)(a). However, the Commissioner does not believe that the information withheld on the basis of section 35(1)(a) relates directly to the formulation or development of that particular policy.
60. In conclusion therefore the Commissioner believes that the only aspect of policy formulation to which this information relates is the case of Binyam Mohamed.

Public interest test

61. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must again consider the public interest test.

Public interest arguments in favour of disclosing the information

62. The Commissioner believes that the public interest arguments in favour of disclosing this information effectively mirror those set out above in relation to his consideration of section 27(1)(a) and therefore he has not replicated them here.

Public interest arguments in favour of maintaining the exemption

63. The FCO submitted two broad arguments:

64. In the first the FCO argued that for effective formulation of government policy, the government requires a clear space aware from public view in which it can debate matters internally free from the pressures of public political debate. It is vital that Ministers and civil servants have the ability to properly consider and discuss policy options, to ensure that the best policy response is achieved. The candour of contributions to this process would be likely to be affected by officials' assessment of whether the content of such a discussion could be disclosed in the near future, thus having a negative affect on the quality of decision making which was clearly not in the public interest.
65. Secondly, the FCO argued that disclosure of the information could have a chilling effect on future decision making regarding challenging policy decisions. This was because civil servants would be potentially discouraged from taking difficult decisions or raising problematic options if they knew that that evidence of their contributions would be placed in the public domain.

Balance of the public interest arguments

66. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) which considered the application of section 35(1)(a).
67. In particular the Commissioner has considered two key principles outlined in the *DFES* decision. The first was the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

'Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the "...threat of lurid headlines depicting that which has been merely broached as agreed policy.'

68. The second being:

'The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.' (Para 75(i)).

69. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:
70. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop **live** policy. In this case the Commissioner accepts that the government's policy towards the case of Binyam Mohamed, at the time this request was submitted, could be correctly described as live: the request was submitted on 18 February 2009 and Mr Mohamed was not released from Guantanamo Bay until 23 February 2009. However, the Commissioner also recognises that the government continued to be involved in litigation in respect of disclosure of information concerning Mr Mohamed's treatment and detention throughout 2009. Therefore in the Commissioner's opinion it would be too simplistic to argue that the government's policy in respect of Mr Mohamed ceased to be live on the date of his release.
71. In line with the comments of the Tribunal quoted above at paragraph 44, the Commissioner believes that significant weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. It is clearly in the public interest that the FCO was able to candidly discuss the different policy options for in respect of the Binyam Mohamed case away from external scrutiny. In attributing such weight in this case, the Commissioner also notes that for some of the documents withheld in the basis of section 35(1)(a) the information in question is of a genuinely free and frank nature and includes a candid discussion of the pros and cons of a number of policy options. However, the Commissioner also believes that some of the documents that have been withheld on the basis of this exemption do not in fact contain discussions, candid or otherwise, about the various policy options. Rather such documents, which are those numbered 4, 12, and 21 simply contain discussions about logistical issues relating to the discussion of the policy in question. In the Commissioner's opinion it is difficult to see how disclosure of these documents would, to any great extent, impinge upon on the safe space the FCO has argued is so deserving of protection.
72. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect

the frankness and candour with which relevant parties will make future contributions to that policy;

- The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
 - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
73. Clearly, in this case as the policy formulation and development was ongoing at the time of the request, the third scenario is not relevant to this case. In the Commissioner's opinion the FCO's submissions relating to chilling effects are somewhat generic in nature – i.e. future decision making on challenging decisions. Based on this the Commissioner assumes that the chilling effect which the FCO envisages will be created will be the second type rather than the first.
74. In considering the weight that should be attributed to these two scenarios the Commissioner has taken into account the scepticism with which numerous Tribunal decisions have treated the chilling effect arguments when they have been advanced by other public authorities. The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* accurately summarises these views:
- ‘we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner EA/2007/0001*. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, 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.’ (para 26).
75. However, the Commissioner has also taken into account the comments of Mr Justice Mitting when hearing an appeal in the High Court against the Tribunal decision *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department (EA/2006/0073)*. Whilst supporting the view of numerous Tribunal

decisions that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] 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.'

76. In light of the case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments has to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.
77. Taking this into account the Commissioner does not believe that any particular weight should be given to the second, broader type of chilling effect. This is because the FCO has not identified any particular evidence which would demonstrate why there would be a chilling effect on different policy makers when making submissions in the future on different challenging policy issues, beyond making an assertion that this would be likely to occur.
78. In respect of the weight that should be attributed to the arguments in favour of disclosing the requested information the Commissioner reiterates his position that given the issues at the heart of this case, these arguments should be given notable weight. In respect of the actual content of the information that Commissioner is considering under section 35(1)(a), in contrast to a number of documents considered in respect of section 27(1)(a), he believes that they may be

less informative and thus not serve the public interest arguments in favour of disclosure to the same extent.

79. For this reason, allied to the very significant weight that should be given to the safe space arguments, the Commissioner has concluded that in respect of the document numbered 35 the public interest narrowly favours maintaining the exemption.
80. However his conclusion is different in respect of the documents numbered 4, 12 and 21. For the reasons set out above the Commissioner does not believe that the safe space arguments particularly apply to these documents. Therefore, the Commissioner believes that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information in these documents.

Section 42 – legal professional privilege

81. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
82. There are two categories of legal professional privilege: advice privilege and litigation privilege. The features of each are set out in decision notice related to this one (FS50262409), issued on the same date, to the same public authority, following a complaint from the same complainant as in this present case.
83. The FCO is relying on both types of privilege to withhold the documents numbered 29 and 36 in the annex. The Commissioner initially considered whether both documents attract advice privilege. In the Commissioner's opinion document 29 does attract advice privilege because it clearly evidences the substance of a communication (or communications) between the FCO and an external legal adviser; in other words it summarises legal advice provided to the FCO.
84. With regard to document 36 the Commissioner accepts that this can be accurately described as a communication between a lawyer and the FCO, the dominant purpose of which was the imparting of legal advice.
85. In light of these findings the Commissioner has not gone on to consider whether the two documents in question also attract litigation privilege.

Public interest test

86. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test set out at section 2(2) of the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

87. The FCO highlighted the fact that legal professional privilege exists in order to encourage clients to be frank and open with their legal adviser with the expectation that those communications will not be disclosed without their consent. It is important that the government is able to seek legal advice so that it can make decisions in the correct legal context. In order to do so the legal adviser must be possession of all material facts in order to provide sound advice. The government must therefore feel confident that it can disclose all relevant facts to its legal adviser without fear that such information will be disclosed to the public.

Public interest arguments in favour of disclosing the information

88. Once again the Commissioner believes that the public interest arguments in favour of disclosure mirror those identified above in relation to section 27(1)(a) and thus he has not repeated them here.

Balance of public interest arguments

89. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest built into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

‘The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than

those in favour of maintaining the exemption'. (Tribunal at para 41).

90. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
- how recent the advice is; and
 - whether it is still live.
91. As a general approach, in order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has used the following criteria:
- the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
92. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the justification for legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to still be used as part of a decision making process.
93. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
94. At the time of the complainant's request the two documents in question were less than 12 months old and thus the Commissioner accepts that the justification for legal professional privilege had not diminished to any great extent. Furthermore, the Commissioner is prepared to accept that the issues are ones that are still live.

95. In terms of attributing weight to the arguments in favour of disclosure in the context of section 42, the Commissioner acknowledges that it is the third criterion at paragraph 93 which is most relevant to this case. This is because the focus of the issues at the heart of this case do not involve levels of public spending or a financial relationship. Similarly, there are not a significant number of people directly affected by this case; albeit that the effects on Mr Mohamed are profound.
96. In respect of the transparency of the FCO's actions in this case, the Commissioner acknowledges that the Foreign Secretary's letter quoted in paragraph 3, and steps referred to in it, demonstrate a degree of transparency in respect of the central issue, i.e. the allegation which appeared in The Observer. However, in the Commissioner's opinion, for the public interest reasons discussed earlier in this notice, there are still very weighty reasons for disclosure of the requested information. In particular in the context section 42(1), the Commissioner is of the opinion that disclosure of these documents, in particular that numbered 29, would strongly contribute to government transparency in relation to the particular allegation.
97. However, taking into account the strong inbuilt weight in favour of protecting legal professional privilege, and in particular the fact that the legal advice was, at the time of the request, recent and live, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 23 – information supplied by, or relating to, bodies dealing with security matters

98. The FCO has argued that some of the information falling within the scope of this request is exempt from disclosure on the basis of section 23(1) of the Act. This section states that:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'
99. The full text of section 23, including the full list of the bodies listed at subsection 23(3) is available in the legal annex attached to this notice.
100. This exemption is class based exemption. Therefore there is no need for a public authority to identify any particular prejudice in order for exemption to be engaged. If the information falls within the description contained at section 23(1) it is exempt from disclosure. The exemption is also absolute and thus not subject to the public interest test.

101. As noted in the Chronology section of this notice, the FCO has not provided the Commissioner with the information that it has withheld on the basis of section 23(1). (Such information is therefore not listed in the schedule which is attached to this notice). Given the circumstances of this case, and based on the explanation given to the Commissioner's representatives regarding the information which the FCO has withheld on the basis of section 23(1), the Commissioner has concluded that section 23(1) has been correctly relied upon, as indicated in the letter of 1 July 2010 referred to at paragraph 14 above. (In this letter the Head of Information Rights at the FCO confirmed that he had reviewed the information in question and that it clearly fell within the scope of the exemption contained at section 23(1).)
102. Furthermore in two of the documents which the Commissioner has ordered disclosure of - namely those numbered 12 and 24 - he has identified contact details which are exempt from disclosure on the basis of the section 23(1). This is because these contact details relate to the bodies listed in section 23(3).

Procedural Requirements

Section 16 – advice and assistance

Section 17 – refusal notice

103. The complainant noted when asking the FCO to complete an internal review he also asked it provide him with advice and assistance by clarifying the format of the requested information. The FCO refused to provide such clarification because it would not be practicable to do so nor would it be of any real assistance to the complainant. The complainant argued that the FCO's failure to provide him with this assistance constituted a breach of section 16 of the Act. The complainant also argued that the FCO was unable to properly explain the extent to which each of the exemptions was being relied upon. In the complainant's opinion such a failure was a breach of both the FCO's obligations under section 16 of the Act regarding advice and assistance and also a failure to comply with the requirements of section 17.
104. Section 16(1) of the Act requires that:
- ‘It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it’.
105. And section 16(2) confirms that:

'Any public authority which in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection(1) in relation to that case'

106. Generally the code issued under section 45 relates to good practice which public authorities should consider adopting rather than obligations which arise under the Act. However, because Part II relates specifically to the duty to provide advice and assistance under section 16, failure to comply with this part of the code can indicate a breach of section 16(1).
107. In his submissions to the Commissioner the complainant argued that the FCO failed to comply with paragraphs 8 and 10 of the code, both of which fall within Part II, and thus are relevant to the duty under section 16(1). In respect of paragraph 10 the complainant noted that it specifically stated that 'appropriate assistance...might include: providing an outline of the different kinds of information which might meet the terms of the request' and in respect of paragraph 8 the complainant noted that it stated that 'authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested'.
108. However, the Commissioner believes that it is vital to note that paragraphs 8 to 11 of the code of practice fall under the sub-heading 'Clarifying the request' and therefore are only relevant when there is some ambiguity as to the nature of the request, i.e. where the public authority is unclear as what recorded information is being sought. The purpose of this section of the code is not to place an obligation on public authorities to 'clarify' the nature of the information that has been withheld in order to allow an applicant to more fully understand why particular exemptions have been cited.
109. In the Commissioner's opinion the FCO was clear about the nature of the information being requested and therefore it had no need to consider providing the advice and assistance recommended by paragraphs 8 to 11 of the code of practice in order to be in a position to respond to the request. Although the Commissioner recognises that if he had a greater understanding of the format in which the withheld information was held the complainant may have been able to have a better understanding as to why the exemptions had been cited, this is not what the code of practice obliges public authorities to do.
110. In light of his conclusion that the provisions of part II of the code of practice referred to by the complainant were not relevant, the Commissioner must find that no duty under section a 16(1) arose in

relation to this request. It follows that the FCO did not breach this section of the Act.

111. Section 17(1) requires that when a public authority refuses a request by relying on any of the exemptions contained in Part II of the Act it must provide the applicant with a refusal notice which contains a number of pieces of information, including the specific exemption in question – as required by section 17(1)(b) – and if not otherwise apparent, an explanation as to why the exemption applies – as required by section 17(1)(c).
112. In his submissions to the Commissioner the complainant noted that the Commissioner's 'Good Practice Guidance No 1: Refusal Notices' emphasised 'the importance of clear and fully explained refusal notices' in order to ensure that it is apparent that the request had been dealt with seriously. The complainant specifically argued that without knowing the format in which the information is held, and which exemptions apply to which pieces of information, it was impossible for him to fully assess the FCO's reliance on the different exemptions.
113. Although the Commissioner can understand why a more detailed refusal would have been useful to him, the refusal notice provided to the FCO adequately met the requirements of sections 17(1)(b) and 17(1)(c). This is because it was clear which exemptions were being relied upon and why the FCO considered them to apply. The Commissioner's view is that when a request seeks access to all the information held on a single issue, section 17 does not require a public authority to identify each piece of information held and then explain how and why the exemptions apply to each one.

Sections 10 and 17 - Time for compliance

114. The right of access information provided by section 1(1) of the Act is in two parts: section 1(1)(a) – the right to know whether information of the nature requested is held; and section 1(1)(b) – if held, the right to have that information provided.
115. Section 10(1) states that a public authority must comply with the requirements of section 1(1) no later than the twentieth working day following the date of receipt of the request.
116. If a public authority relies on exemptions to refuse to disclose any requested information, then a refusal notice must be issued in line with the time for compliance set out a section 17(1).

117. In this case the complainant submitted his request on 18 February 2009 and the FCO did not issue its refusal notice until 24 April 2009 and thus breached section 17(1) of the Act.
118. Furthermore by failing to provide the complainant with the documents that the Commissioner considered should be disclosed, the FCO also breached sections 1(1)(b) and 10(1).

The Decision

119. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- (i) The FCO was not required to provide the complainant with any advice and assistance and thus did not fail to meet its duty under section 16(1) of the Act.
 - (ii) The refusal notice issued by the FCO was sufficiently detailed to meet the requirements of section 17(1).
 - (iii) The following documents are exempt from disclosure on the basis of section 27(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information: 1 to 3; 5; 6; 8 to 11; 13 to 17; 19; 20; 22; 23; 25 to 28; and 30 to 33.
 - (iv) The following document is exempt from disclosure on the basis of section 35(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information: 35.
 - (v) The following documents are exempt from disclosure on the basis of section 42(1) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information: 29 and 36.
 - (vi) Further documents are exempt from disclosure on the basis of section 23(1) of the Act.
120. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

(i) Although the following documents fall within the scope of the exemption contained at section 35(1)(a), the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information: 4, 12 and 21.

(ii) Document 24 does fall within the scope of the request.

(iii) The FCO breached section 17(1) by failing to issue a refusal notice within the time for compliance set out at section 10(1).

(iv) The FCO breached sections 1(1)(b) and 10(1) by failing to provide the complainant with the documents which the Commissioner has concluded are not exempt from disclosure.

Steps Required

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

- Provide the complainant with a copy of the documents numbered 4, 12, 21 and 24.

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

Failure to comply

123. 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

124. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

125. The Commissioner has issued guidance on the time limits on carrying out internal reviews under the Act.⁵ This guidance explains that in the Commissioner's opinion 20 working days constitutes a reasonable amount of time to conduct an internal review. In exceptional circumstances it may be reasonable to take longer but in no circumstances should the total time taken exceed 40 working days. In this case, the FCO received correspondence from the complainant on 17 June 2009 asking it to conduct an internal review of its handling of his request. The FCO did not inform the complainant of the outcome of this review until 11 September 2009, outside of the 40 working day guideline.
126. In the future when the FCO conducts internal reviews the Commissioner expects it to adhere to the timelines set out in his guidance paper.

⁵ [Freedom of Information Good Practice Guidance No. 5](#)

Right of Appeal

127. 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 24th day of January 2011

Signed

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

Schedule of documents provided to the Commissioner by the ICO

Document number	Exemptions cited by FCO	Commissioner's findings
1	Part withheld on basis of S27(1)(a); remainder already disclosed to the complainant.	In relation to the withheld information, s27(1)(a) engaged: public interest favours maintaining the exemption.
2	S35(1)(a) and s27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
3	Part 1 – copy of document 2; Part 2 – s27(1)(a)	Part 1 – as per document 2. Part 2 - s27(1)(a) engaged: public interest favours maintaining the exemption.
4	S35(1)(a)	S35(1)(a) engaged; public interest favours disclosing the information.
5	All s27(1)(a); para 2 s35(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
6	s27(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
7	Copy of part 2 of document 3	As per part 2 of document 3.
8	S27(1)(a) and s35(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
9	S27(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
10	Email – s27(1)(a), s27(2), s35(1)(a) and s42. Letter – s27(1)(a) and s35(1)(a).	Both email and letter - s27(1)(a) engaged: public interest favours maintaining the

		exemption.
11	Same as letter at document 10.	The content differs slightly from document 10 but s27(1)(a) is still engaged and the public interest favours maintaining the exemption.
12	S35(1)(a)	S35(1)(a) engaged; public interest favours disclosing the information subject to the redactions on the basis of s23(1) as explained at 102.
13	s27(1)(a), s27(2), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
14	S27(1)(a), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
15	S27(1)(a), s27(2), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
16	S27(1)(a), s27(2), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
17	S27(1)(a), s27(2), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
18	Copy of document 13	As per document 13.
19	S27(1)(a), s27(2) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
20	S27(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
21	S35(1)(a)	S35(1)(a) engaged; public interest favours

		disclosing the information.
22	S27(1)(a), s27(2), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
23	S27(1)(a), s27(2), s35(1)(a) and s42	s27(1)(a) engaged: public interest favours maintaining the exemption.
24	Included in bundle in error – not relevant to request.	Information is in scope of request and should be disclosed subject to the redactions on the basis of s23(1) as explained at 102.
25	S27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
26	S35(1)(a) and s27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
27	S35(1)(a) and s27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
28	S27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
29	S42	S42(1) engaged; public interest favours maintaining the exemption.
30	s27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
31	s27(1)(a)	s27(1)(a) engaged: public interest favours maintaining the exemption.
32	s27(1)(a) and s27(2)	s27(1)(a) engaged: public interest favours

		maintaining the exemption.
33	s27(1)(a) and s27(2)	s27(1)(a) engaged; public interest favours maintaining the exemption.
34	Copy of document 9	As per document 9.
35	s35(1)(a)	S35(1)(a) engaged; public interest favours maintaining the exemption.
36	S42	S42(1) engaged; public interest favours maintaining the exemption.

Legal Annex

Freedom of Information Act 2000

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."

Effect of Exemptions

Section 2(2)

In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

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."

Duty to provide Advice and Assistance

Section 16(1) provides that -

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it".

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."

Information supplied by, or relating to, bodies dealing with security matters

Section 23(1) provides that –

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

Section 23(2) provides that –

"A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact."

Section 23(3) provides that –

"The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,
- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service."

International Relations

Section 27(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad."

Section 27(2) provides that –

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

Section 27(3) provides that –

"For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held."

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.

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 45 Code of Practice

Clarifying the request:

8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.
9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.
10. Appropriate assistance in this instance might include:
 - o providing an outline of the different kinds of information which might meet the terms of the request;

- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
- providing a general response to the request setting out options for further information which could be provided on request.

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.