

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 January 2011

Public Authority: Drivers Standards Agency (the DSA)
(an Executive Agency of the Department of Transport)

Address: The Axis Building
112 Upper Parliament Street
Nottingham
NG1 6LP

Summary

The complainant requested statistical data about the annual pass/fail figures for set tests at specified test centres. The public authority provided the data in anonymised form. The complainant was unhappy how the data was anonymised and requested an internal review. The public authority responded that it believed section 40(2) applied in respect to the data provided in the form suggested by the complainant. The complainant referred this case to the Commissioner. During the course of the investigation, the public authority also applied section 36(2)(c) to the withheld information. The Commissioner has considered the application of this exemption and finds that it is engaged. He also finds that the public interest in maintaining the exemption outweighs that in disclosure. He therefore finds that section 36(2)(c) was appropriately applied in this case. He finds that the public authority breached the procedural sections 17(1)(b), 17(1)(c) and 17(3), but finds that no remedial steps need to be taken.

The Commissioner's Role

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

The Request

2. The Commissioner notes that under the Act the DSA is not a public authority itself, but is actually an executive agency of the Department for Transport which is responsible for the DSA and therefore, the public authority in this case is actually the Department for Transport not the DSA. However, for the sake of clarity, this Decision Notice refers to the DSA as if it were the public authority.
3. On 6 August 2009 the complainant requested the following information in accordance with section 1(1) of the Act:

'[1] Information under Freedom of Information legislation in relation to Sevenoaks Driving Test Centre for the past three years:

- *The number of car driving tests taken*
- *The number of car driving tests passed*
- *The pass/fail rates categorised by examiner*

- *The number of ADI Part 3 examinations taken.*
- *The number of ADI Part 3 examinations passed.*
- *The pass/fail rates categorised by examiner.*

[2] Information under Freedom of Information legislation in relation to Reigate Driving Test Centre for the past three years:

- *The number of car driving tests taken*
- *The number of car driving tests passed*
- *The pass/fail rates categorised by examiner*

- *The number of ADI Part 3 examinations taken.*
- *The number of ADI Part 3 examinations passed.*
- *The pass/fail rates categorised by examiner.*

Please note that only the statistic in relation to individual examiners is requested in sections [1] & [2] and not examiner identity.'

4. The public authority telephoned the complainant to ask him to clarify how he wanted the data to be provided. The result was that the complainant wrote to the public authority on 12 August 2009:

'I would like to confirm the details of my most recent request under FOI legislation in relation to the number of practical car

driving tests and ADI part 3 tests taken and passed for Sevenoaks and Reigate test centres.

Additionally I would like to know by examiner, the pass/fail rates for practical car driving tests and ADI part 3 tests for both Sevenoaks and Reigate test centres.

Finally I would also like to know the pass/fail rate for ADI part 3 parts by PDI gender for both Sevenoaks and Reigate test centres.

The above statistics by financial year will suffice and I look forward to receiving the requested information at your earliest convenience.'

5. On 9 September 2009 the public authority issued its response. It provided the appropriate statistical data about the number of driving tests and the pass rates in the two centres. It provided the data by examiner in respect to both the ADI part 3 tests and practical driving tests. It provided the data by financial year as requested. It did not use a consistent examiner identifier across the three years data in order to prevent individuals from being identifiable in line with the wording of the request dated 6 August 2009.
6. There followed further correspondence about the nature of the complainant's concerns. This included a request for a particular driving instructor's results that was not provided.
7. On 1 December 2009 the complainant explained that he wanted to understand whether the references to the individual examiners were consistent through the document. If they were not, he asked the information to be reformatted so that it was so.
8. On 31 December 2009 the public authority explained that the data in Annex A was not consistent and that it would not reformat this information in this way. It explained that in its view the data would enable individual examiners to be identifiable and that it would not be fair to the individual and would contravene their data protection rights. It explained that it could apply section 40(2) appropriately to the data in this format.
9. Later the same day, the complainant requested an internal review of the case. He explained:

'Please will you arrange for an internal review of the case.

Under the circumstances where a particular examiner has been temporarily suspended from certain activities pending further training, it is only reasonable for the DSA to be accountable to victims of over zealous examiner behaviour and maladministration.

As the requested information is to support a challenge in the Magistrates Court, your attempts to confuse and suppress the trust by deliberately mixing examiner references is clearly an attempt to pervert the course of justice.'

10. On 29 January 2010 the public authority communicated the results of its internal review. It explained that it believed that the version that provided no consistent examiner reference was necessary in order to prevent the identification of an individual. It explained that it handled the request in this way to ensure that an individual could not be identified as should they be so, then it would mean that it was disclosing their personal data, which would have contravened the first data protection principle and engaged section 40(2). It explained that there was no appropriate condition satisfied in Schedule 2 of the Data Protection Act (the DPA) and this meant that processing would not accord with the DPA.

The Investigation

Scope of the case

11. On 6 February 2010 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 the following points:
 - The data was required to support his challenge in the Magistrates Court against the outcome of a driving test; and
 - He explained the background and that he believed that the way the data was scrambled so that there was not a consistent key for each examiner meant the data he had received was almost meaningless.
12. On 25 March 2010 the complainant confirmed that he was content with the Commissioner's suggestion of the scope of the case being:

'To determine whether the consistent information can be disclosed to the public [in respect to all three spreadsheets] (so that each individual examiner's record [without their names] can be looked at over the three years) or whether section 40(2) [or any other exemption] has been applied correctly in this instance.'

13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The Commissioner is not a body who can consider the vitality or otherwise of the driving test. He also cannot consider whether information should be made available privately to embark on court challenges. All he can decide is whether the information can be provided to the public in accordance with the legislation.

Chronology

14. 18 February 2010: The Commissioner wrote to the public authority to confirm that he had received an eligible complaint. He asked to be provided with a copy of the withheld information and relevant arguments about why the information was being withheld.
15. 23 February 2010: The public authority contacted the Commissioner to ask whether he required all the withheld information or whether a sample would be adequate. The Commissioner confirmed he was prepared to accept a representative sample in this case.
16. 22 March 2010: The public authority contacted the Commissioner to explain that there was a delay in providing him with a copy of the withheld information.
17. 25 March 2010: The Commissioner telephoned the complainant to explain that the case was allocated and to discuss what was outstanding. The complainant expressed his dissatisfaction about both the driving instructor exams and how the public authority handled information requests. He explained that he wanted to see if consistent data could be provided. The Commissioner agreed to confirm what was said in writing.
18. Later that day, the Commissioner emailed the complainant to confirm the scope of the case. He also wrote a second email to ensure that a final point was clarified at this point.
19. The Commissioner also called the public authority to remind it that he required a copy of the withheld information. He was informed that the public authority wanted to apply section 36(2)(c) to this information and that they were gathering appropriate submissions as well.

20. The Commissioner received a copy of some of the withheld information. The complainant also wrote to the Commissioner to confirm the scope of the investigation.
21. The Commissioner then submitted detailed enquiries to the public authority. He asked for it to carefully detail its position and provide its arguments to support its position.
22. 26 March 2010: The Commissioner wrote to the complainant to explain how the investigation would proceed and to provide an update about where it was up to. He received a response from the complainant which stated that the information should be provided to allow personal accountability for driving instructors' performance.
23. 1 April 2010: The Commissioner received an email asking for an extension. The Commissioner accepted the request.
24. 7 April 2010: The Commissioner received a partial response to his enquiries. The public authority explained that it could only provide a full response after the General Election. This was because the Qualified Person's opinion was required. It also explained that its view the provision of the information in the form required would fall outside the scope of the request dated 6 August 2009 as it would be personal data.
25. 19 April 2010: The Commissioner wrote to the public authority. He asked further questions and asked that the other information he had previously asked for to be provided after the election.
26. 25 May 2010: The complainant emailed the Commissioner for an update. The Commissioner responded explaining where the case was up to. The Commissioner also telephoned the public authority to chase an appropriate response.
27. 26 May 2010: The public authority provided the Commissioner with a complete response.
28. 27 May 2010: The Commissioner asked the public authority for a document it referred to in its response and was provided with it the next day.
29. 2 August 2010: The Commissioner submitted further enquiries to the public authority. He received a response on 30 August 2010.

Findings of fact

30. It is important to understand both the format in which information was provided and the format in which the complainant now wants the information in order to understand the remainder of this Notice.
31. The public authority provided the information about individual instructor's data in the following way:

It is arranged (by financial years)

2006/7	2007/8	2008/9
Individual A	Individual A	Individual A
No of tests (by gender)
Pass		
Fail		
% passed		

[Where the As can relate to different individuals]

32. The complainant wants the information about individual instructor's data in the following way:

By financial year:

2006/7	2007/8	2008/9
Individual A	Individual A	Individual A
No of tests (by gender)
Pass		
Fail		
% passed		

[Where the A would be consistent throughout – so one can see the three year data for each examiner]

Analysis

Substantive Procedural Matters

How to read the request for information?

33. This case has been complicated by the way the request has been worded. In particular the words:

Please note that only the statistic in relation to individual examiners is requested in sections [1] & [2] and not examiner identity.'

34. The Commissioner believes that this sentence is ambiguous. It could be read that any information that was personal data was outside the scope of the case and this is the reading that the public authority gave it. The Commissioner agrees that this would be one reasonable objective reading of the request. He believes that the public authority has complied with this objective reading in full.
35. However, the Commissioner also believes there is a second objective reading, especially in light of the clarification provided on 12 August 2009. The complainant contends that the consistent data (without names) for the three years would not establish examiner identity and is what he has asked for. The Commissioner agrees on the circumstances that this is a second objective reading of the request. The Commissioner has also moved to consider the public authority's compliance with this reading of the request and the remainder of the Decision Notice will relate to this. The Commissioner has adopted this approach in light of the ambiguity of the sentence in paragraph 33 above. He has looked at this case on the basis that the complainant's interpretation was correct as this allows him to consider whether the information that is subject to the complaint has been withheld correctly.

Exemption

36. The public authority originally applied section 40(2) to this information. It then moved to apply section 36(2)(c) at the commencement of the Commissioner's investigation.
37. The Commissioner will consider the operation of section 36(2)(c) first.

Section 36(2)(c) – prejudice to the effective conduct of public affairs

38. Section 36(2)(c) provides that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to prejudice the effective conduct of public affairs.
39. The public authority has now confirmed that it is applying section 36(2)(c) to the withheld information.

Can the public authority apply the exemption late?

40. Where, as in this case, a public authority claims an exemption for the first time in the course of his investigation, the Information Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* [EA/2008/0087] confirmed that the Commissioner has discretion as to whether or not to consider the exemption.
41. The Commissioner has noted that the public authority has expressed consistent concerns that the disclosure of the information would have prejudiced the effect conduct of public affairs as it could adversely affect the integrity of its driving tests.
42. He also notes that the public authority as soon as it realised that the Commissioner was considering the second objective reading of the request ensured that it made the Commissioner aware that it was minded to rely on the exemption and provided the appropriate material as quickly as it could, given that Parliament had been dissolved. In the circumstances of this case, the Commissioner has determined that he is prepared to consider the public authority's arguments related to the application of section 36(2)(c) to the withheld information.
43. However the Commissioner wishes to stress the general importance of the principle that the qualified person's opinion is obtained before the exemption is relied upon. The Commissioner also notes that claiming section 36 late, during his investigation, may increase the likelihood of him concluding that the opinion is not a reasonable opinion. This is because it increases the scope for errors in the Qualified Person's opinion, such as taking into account factors that did not exist at the time of the request, or not giving sufficient weight to the circumstances that did exist at the time because events have since moved on.
44. Section 36(2)(c) is a qualified exemption. This means that should the exemption be engaged, then the Commissioner must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in its disclosure on the facts of this case.

Is the exemption engaged?

45. In section 36(2)(c) cases, the Commissioner is required to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there were two possible limbs on which the reasonable opinion could have been sought: where disclosure "would be likely to prejudice" and where disclosure "would prejudice".

46. The first limb places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* [EA/2005/0005]. The tribunal stated that:
- "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".*
47. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
48. The public authority has argued that the disclosure of this information 'would prejudice' the effective conduct of public affairs and the reasonable opinion was provided on that basis. The Commissioner is only able to consider the higher threshold as this was the threshold that was the basis on which the opinion was given.
49. When establishing whether disclosure 'would prejudice', it is important to note that information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would lead to the prejudice to the effective conduct of public affairs. In order to establish that the exemption has been engaged the Commissioner must:
- Ascertain who the qualified person is;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was objectively reasonable and reasonable arrived at.
50. The Commissioner will consider each in turn. Firstly, the Commissioner must first ascertain who the qualified person is. The qualified person in this case was Chris Mole MP, who was the Parliamentary Undersecretary of State at that time.
51. The Commissioner is satisfied that the appropriate opinion was given. He has received detailed records of what was provided to the decision maker. The decision maker was asked to consider an explanation of what the withheld information was in its context, arguments about why it may affect public affairs and the Commissioner's letter explaining the

application of section 36. The Commissioner is satisfied that the opinion was given 21 April 2010 (after being submitted to the Minister on 15 April 2010). The timing of this opinion, as noted above, raises further questions about reasonableness of the opinion.

52. The last criterion requires detailed analysis. In the case of *Guardian & Brooke v Information Commissioner & the BBC [EA/2006/0011 and 0013]*, the Information Tribunal stated that “in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at.” (paragraph 64). In relation to the issue of reasonable in substance, the Tribunal indicated that “the opinion must be objectively reasonable” (paragraph 60). In determining whether an opinion had been reasonably arrived at, it suggested 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.
53. In relation to whether the qualified person’s opinion was reasonably arrived at, the public authority provided the Commissioner with a copy of the qualified person’s opinion and the evidence he considered prior to giving his opinion. This evidence consisted of a memorandum setting out in detail the issues related to the request. It provided the request, explained exactly what the information that was requested was, provided details of communications between the ICO and the public authority and also explained the information that was already provided. From these documents, the Commissioner is satisfied that the qualified person appears to have taken into account relevant considerations and does not appear to have been influenced by irrelevant ones. The Commissioner finds that although the exemption was claimed late there is nothing to indicate that the process as to how the opinion was arrived at was flawed. He is satisfied that the qualified person was able to focus on factors that existed at the timing of the request.
54. The public authority has detailed the reasons why it believes that the disclosure of the withheld information would be likely to cause prejudice to the effective conduct of public affairs. The ones that the Commissioner feels are relevant are:
 - (i) *They view the consistent link between the years as sufficient data to enable instructors to be identified by the public. This is particularly the case where professionals who deal with the test centres in their work know when certain examiners were sitting over specified periods of time;*

- (ii) *The results could lead to potential candidates picking and choosing centres when people with whom they perceive they have a better chance of success are on duty and/or targeting where a particular examiner works. This would distort the waiting times experienced at specified centres;*
- (iii) *The results could also lead individual examiners to influence their statistics to show themselves in a better light. This may lead to an unintentional quota system and would distort the objective basis of the test. The public authority has a specific set of standards that it employs and has the statutory power to investigate when there are distortions in results;*
- (iv) *It is important for the integrity of the test that there is no quota system as it is crucial that the system is based purely on performance; and*
- (v) *The release of the information has the potential to provide different incentives leading to the driving examiner assessing a candidate's driving ability incorrectly and ultimately this could compromise road safety.*

55. The Commissioner is satisfied that the disputed information alongside information already known by sections of the public (such as driving instructors) would enable examiners to be identified in respect to their performance. This is because people know when the examiners were at the centres and this information could be used to identify each individual across the three years. As this is the case, the Commissioner is satisfied that the provision of the data would have an adverse effect on the operation of the driving test and the Commissioner is also satisfied that it was objectively reasonable for the qualified person to conclude that the disclosure of the disputed information would prejudice the future effective conduct of public affairs. The Commissioner has concluded that the opinion of the qualified person appears to be both reasonable in substance and reasonably arrived at, and therefore accepts that section 36(2)(c) is engaged.

The Public Interest Test

56. Section 36(2)(c) is a qualified exemption. That is, once the exemption is engaged, the release of the information is subject to the public interest test. The test involves balancing factors for and against disclosure to decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

57. The Commissioner will commence his analysis by considering those factors that favour disclosure. He will then consider those that favour the maintenance of the exemption, before concluding where he believes the balance lies.

Public interest arguments in favour of disclosing the requested information

58. The public authority carefully considered those public interest factors that favour disclosure. It explained that it understood that the disclosure of the data in respect to individual examiners would be likely to improve the public's confidence in the test's fairness.
59. It also explained that there is a public interest in transparency in decision making by a public authority. The Commissioner agrees that this is so.
60. The public authority also noted that this type of information had been disclosed historically by its sister department, the Driving Vehicle Agency in Northern Ireland. However, it has not done so since 2006. The Commissioner made further enquiries about this matter and the public authority contacted its sister agency. It explained that it could evidence the threat to individual examiners that resulted from this information being in the public domain. It noted two incidents that involved police involvement about action taken against individual examiners and showed that there was a credible threat.
61. The complainant has also provided his arguments about why he believes that the information should be disclosed to the public.
62. He has explained that there are particular concerns about the integrity of the particular centres that he has chosen and that this must increase the public interest in full transparency. He has also explained that it is important to have full transparency to prevent the potential abuse of authority at the public's expense.
63. The Commissioner has also carefully considered the transparency of the current process. He notes that applicants do receive feedback when they pass and fail driving tests. It explains the flaws that were spotted and how one can improve. However, this information provides a very limited level of transparency and is incapable on its own of revealing whether or not individual test centres or examiners are more prone to pass candidates than others.

64. He notes that the criteria that are used by driving examiners are in the public domain and he notes that the public authority has already disclosed a scrambled version of the data in this case. The Commissioner has considered what further insight the disputed information would provide in addition to this information already in the public domain.
65. The Commissioner supports the Information Tribunal's view in *Cabinet Office v Lamb* and the Information Commissioner [EA/2008/0024 & 0029] that 'disclosure under FOIA should be regarded as a means of promoting accountability in its own right and a way of supporting the other mechanisms of scrutiny, for example, providing a flow of information which a free press could use'.
66. The public authority has explained that it monitored the examiners itself. Where there are records of examiners with pass rates that are much higher or lower than the national average then it would investigate these individuals. It does this by through examiner supervisors checking performance. This leads to standards being clear and apparent with the driving test maintaining its integrity too. As above, the Commissioner does not accept that additional layers of scrutiny mitigate the need to disclose information entirely; however, the weight of public interest in disclosure must be measured in its context.
67. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in disclosing the information:
- It would enable applicants to be more fully informed about the performance of individual instructors;
 - It would increase the transparency of the public authority and provide additional scrutiny about how it uses its powers;
 - Similar information had been disclosed previously by Northern Ireland's Driving Vehicle Agency;
 - It would provide accountability of the instructors performance to the public; and
 - It would provide transparency in respect to the particular concerns expressed by the complainant.

Public interest arguments in favour of maintaining the exemption

68. The public authority has provided detailed submissions about why it believes that the public interest favours the maintenance of the exemption. It is important to note that only factors that relate to the

prejudice of the effective conduct of public affairs can be considered in this analysis.

69. When making a judgment about the weight of the public authority's public interest arguments, the Commissioner believes that he is correct to take the severity, extent and frequency of prejudice or inhibition to effective conduct of public affairs into account.
70. The first factor the public authority asked the Commissioner to consider was that the disclosure of the information would be likely to substantially prejudice the effectiveness of the driving test itself.
71. It would do this because the data in the form that has now been asked for would enable specific individuals to be identified. It explained that this could be done because a subsection of the public, driving instructors, have regular contact with specific centres and can use their knowledge to link the numbers to people through their presence or absence over particular years. It explained that this provided an additional lever that would enable the information to be decrypted and make individuals identifiable. The Commissioner has carefully considered the information in both forms. He believes that the provision of the information would be likely to lead to individuals being identifiable.
72. The difficulty that this would lead to is that once the information is connected to individual examiners then it leads to the public believing rightly or wrongly that it is possible to select examiners on the basis that it would be easier to pass with them. This impression may not reflect reality and could have a corrosive effect on the reputation of the driving test. In particular it may give the wrong impression that there is an acceptable quota of passing instead of the testing being reflective of the ability and roadworthiness of the individual. It could also lead to individual examiners being targeted as occurred in Northern Ireland when a similar disclosure was made.
73. The second adverse effect could result from individual examiners being aware that their results were being published. This could lead to a marked change in incentives in respect to manipulating their behaviour to amend their statistics to the average. It could inadvertently lead to a quota system and may result in candidates being marked more leniently or strictly as connected to this quota rather than being assessed solely on their driving ability. Where a candidate for the driving test was more leniently marked, they would be a worse driver and road safety would be compromised. Where a candidate for the driving instructor's exam was more leniently marked, it would also have such an effect on road safety and would also but the vulnerable

- learner driver in a potentially precarious position. The public authority argued that the potential distortion of the individual examiner's results could cause considerable detriment to the conduct of public affairs. The Commissioner has been satisfied that the prejudice identified would be potentially severe and if it occurred it would be both substantial and frequent.
74. The public authority's service level agreement indicates that one of its primary objectives is to reduce the number of individuals killed or seriously injured on Britain's roads. To do this it is required to carefully control the administration of its driving tests to ensure that it is meritocratic and road safety is maintained. From the arguments above about the potential impact of the disclosure on examiner performance, the Commissioner accepts that the disclosure of the information could impact severely on the ability of the DSA to meet its wider objective of public safety and this point must carry considerable weight.
75. The public authority also argued that as an extension to this point, it may have been the case that for future requests in respect to individual pass/fail rates in respect to age, gender or ethnicity may be requested. The potential distortion in incentives may be more pronounced for these sorts of requests as the breakdown is for smaller numbers. The Commissioner does not believe that the nature of other potential requests is a relevant consideration in respect to this particular case and has placed no weight on it.
76. The third concern expressed by the public authority was that the addition of this potentially misrepresentative set of statistics would damage the integrity of the practical driving test. This is because it would introduce an unwarranted and harmful layer of result scrutiny that would directly cause detriment to its conduct of public affairs. The Commissioner believes that this factor is tied to the second concern but does not develop the public safety point any further.
77. The Commissioner also has noted that the public authority already has a duty to monitor the examiners itself. It does this in a proportionate manner that finds the appropriate balance between ensuring the efficacy of the test and acting within its resources. The disclosure of the information could lead to inappropriate pressure on the public authority which would distort resources from where they need to be or alternatively could affect the ability of the public authority to deliver value for money to the public, which is another objective of it, particularly in times where its resources are limited. The Commissioner accepts that this prejudice is real and could be frequent too.

78. In summary the Commissioner has considered the combined weight of the following factors he regards as relevant in relation to the public interest in withholding the information:

- the likelihood and severity of harm arising by disclosure to the effectiveness of the practical driving test;
- the credible threat to staff members;
- the potential harm to the public safety;
- the potential harm to public confidence; and
- the potential consequences of that harm to the public authority.

Balance of the public interest arguments

79. When considering the balance of the public interest arguments, the Commissioner is mindful that the public interest test as set out in the Act relates to what is in the best interests of the public as a whole, as opposed to interested individuals or groups.

80. In this case the Commissioner believes that there is weight to the public interest arguments on both sides. The Commissioner appreciates that the arguments in favour of additional accountability and transparency have some weight in this case. He believes that it is important for a public authority to be as transparent as possible where it does not have a significant adverse effect. However, in the circumstances of this case he finds that the weight of public interest factors maintaining the exemption are greater than those that favour disclosure. He finds this because he has been satisfied that the disclosure of the information could lead to the detriment of public safety and the earlier disclosure of the scrambled information has already provides considerable accountability in this case.

81. In light of the above, the Commissioner finds that the public interest lies in maintaining the exemption, and therefore withholding the disputed information, outweighs the public interest in disclosure. Therefore the Commissioner is satisfied that the disputed information was correctly withheld by the public authority and upholds the application of section 36(2)(c).

82. As the Commissioner has found that section 36(2)(c) has been appropriately applied, he has not gone on to consider the application of section 40(2).

Procedural Requirements

83. There have been a number of procedural deficiencies in this case. The Commissioner will conclude this notice by noting each in turn:

Section 17(1) (b) and (c)

84. Section 17(1)(b) requires that where a public authority specifies that information it holds is exempt it specifies the exemption in its refusal notice. The public authority failed to rely on section 36(2)(c) until the case was referred to the Commissioner and therefore breached section 17(1)(b) in this case.
85. Section 17(1)(c) requires that where a public authority specifies that information it holds is exempt, it specifies why it was relying on the exemption where it was not obvious. The public authority failed to do so and breached section 17(1)(c) in this case.

Section 17(3)

86. Section 17(3) requires that where a public authority applies a qualified exemption that it specifies its public interest test and why it believes that the public interest in maintaining the exemption outweighs that of disclosure. The public authority failed to detail its public interest test by the time of its internal review and breached section 17(3).

The Decision

87. 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:
- *It correctly withheld the disputed information because section 36(2)(c) was applied appropriately in this case. He has found that the exemption was correctly engaged and the public interest in maintaining the exemption outweighs that of disclosure.*
88. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- *It breached sections 17(1)(b), 17(1)(c) and 17(3) due to deficiencies in its refusal notice and internal review procedure.*

Steps Required

89. The Commissioner requires no steps to be taken.

Right of Appeal

90. 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 4th day of January 2011

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex

The Freedom of Information Act 2000

Section 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.

...

Section 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.

Section 36 - Prejudice to the effective conduct of public affairs

(1) This section applies to-

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and

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

(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 executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.