

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 July 2011

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information from the UK Borders Agency about how it handles correspondence it receives from the offices of Members of the Scottish Parliament about individual asylum applications. The request was refused on the basis of sections 35(1)(a), 36(2)(b)(i) and 36(2)(b)(ii) of the Act. The Commissioner is satisfied that all of the requested information falls within the scope of section 35(1)(a) and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest disclosing the information.

The Commissioner's Role

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

Background

2. In 2006 the Department for Constitutional Affairs (now the Ministry of Justice) issued guidance to government departments on how to handle correspondence under Devolution, including how to handle correspondence from Members of the devolved legislatures (MDLs).¹
3. The guidance suggests that the general expectation is that constituency correspondence on non-devolved matters should be

¹ The guidance can be viewed here: <http://www.justice.gov.uk/guidance/docs/dgn02.pdf>

routed through a Westminster MP, and constituency correspondence on devolved matters through an MDL. Therefore when a MDL takes up with UK Ministers a constituent's case involving a non-devolved matter, government departments should issue a substantive response but the reply should make it clear to the MDL that it is the role of Westminster MPs to represent their constituents on non-devolved matters. The reply should therefore urge the MDL, in future, to advise his or her constituents to refer such matters to their Westminster MP.

The Request

4. The Commissioner notes that under the Act The UK Borders Agency (UKBA) is not a public authority itself, but is actually an executive agency of the Home Office which is responsible for the UKBA. Therefore, the public authority in this case is actually the Home Office not the UKBA. However, for the sake of clarity, this decision notice refers to the UKBA as if it were the public authority.
5. On 13 May 2010 the complainant submitted the following request to the UKBA:

'I would be grateful if you could provide me with the information for the following:

 1. Copies of all documentation including letters, emails, memos and notes stating that UK Border Agency staff must not provide asylum case details to the offices of Members of the Scottish Parliament.
 2. Copies of all documentation including letters, emails, memos and notes stating that in the event of a General Election, UK Border Agency staff may provide asylum case details to the offices of Members of the European Parliament.
 3. Any other documentation including letters, emails, memos, and notes that relate to this matter.'
6. The UKBA responded on 10 June 2010 and explained that it believed that the requested information was exempt from disclosure under section 35(1)(a) of the Act but it needed further time to consider the public interest test. It explained that it aimed to have completed its considerations by 8 July 2010.
7. On 8 July 2010 the UKBA contacted the complainant again and explained that it needed further time to complete its public interest test

- considerations. It anticipated having completed its considerations by 5 August 2010.
8. The UKBA contacted the complainant once again on 5 August 2010 and explained that it still needed further time to complete its assessment of the public interest test. It explained that it hoped to have completed its considerations by 2 September 2010.
 9. On 2 September 2010 the UKBA contacted the complainant once again and explained that it still needed further time to provide a substantive response to his request. It now anticipated being in a position to provide such a response by 30 September 2010.
 10. The UKBA provided the complainant with a substantive response on 30 September 2010. This response explained that the UKBA considered the requested information to be exempt from disclosure on the basis of the exemptions contained at sections 35(1)(a), 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the Act. For each of these sections UKBA had concluded that the public interest favoured maintaining the exemption.
 11. On 12 October 2010 the complainant contacted the UKBA in order to ask for an internal review. The complainant argued that the requested information related to an administrative decision, not a policy one, and thus did not fall within the scope of the exemption contained at section 35(1)(a). The complainant also explained that he was dissatisfied with the UKBA's delays in providing him with a substantive response to his request.
 12. The UKBA informed the complainant of the outcome of the internal review on 10 December 2010. The review confirmed that the UKBA remained of the view that the requested information was exempt from disclosure on the basis of sections 35(1)(a), 36(2)(b)(i) and 36(2)(b)(ii) and that the public interest favoured maintaining each exemption. The review also confirmed that the UKBA handled correspondence from MDLs in line with the guidance referenced in the Background section above.

The Investigation

Scope of the case

13. On 11 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant's grounds of complaint mirrored those set out in his request for an internal review.

Chronology

14. The Commissioner contacted the UKBA on 23 March 2011 and asked it to provide him with a copy of the requested information along with submissions to support the application of the exemptions cited in the internal review. In particular the Commissioner asked the UKBA to clarify which exemptions had been applied to which parts of the requested information especially in light of the fact that sections 35 and 36 were mutually exclusive and cannot be applied to the same information.
15. The UKBA provided the Commissioner with a copy of the requested information on 19 April 2011. (This consisted of correspondence between Ministers in the Home Office, the territorial offices and the devolved administrations; submissions to Ministers from civil servants; and discussions between civil servants regarding the topic in question). In this response the UKBA confirmed its position now was that all of the requested information was exempt from disclosure on the basis of section 35(1)(a). However, should the Commissioner conclude that this exemption did not apply, then the UKBA's alternative position was that the requested information was in fact exempt from disclosure on the basis of sections 36(2)(b)(i) and 36(2)(b)(ii). The UKBA also explained that the original response to the requestor should have cited section 40(2) in relation to the names and other personal information relating to Home Office officials below Senior Civil Service level.

Analysis

Exemptions

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

16. Section 35(1)(a) 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'

17. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
18. The UKBA has explained to the Commissioner that the policy in question is whether, and how, the UKBA should respond to enquires from elected representatives on asylum cases and other matters; and more specifically how UKBA should respond to enquiries from MDLs, including the Scottish Parliament.
19. The Commissioner recognises that the term 'policy' is not a precise one 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.
20. 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.
21. 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.

22. In its submissions to the Commissioner the UKBA argued that this particular policy fell within this broad definition of policy described above and thus it did not agree with the complainant's opinion that the information simply related to administrative matters. The UKBA reasoning was as follows: the point at issue in the deliberations was the extent to which it should respond in detail to enquiries from MDLs. Practical considerations are involved in the deliberations given the resources involved in answering every enquiry about specific cases from MDLs, in the same way that as they would treat an enquiry from MPs. However, there was an important point of principle in that the UKBA's position rested on the fact that immigration and asylum are not devolved issues but are reserved to the UK Parliament. The issues therefore go wider than the practical and administrative in that they relate to the relationship between the UK Parliament and the devolved legislatures. That is why the information within the scope of the request involves discussions not only within the UKBA and the Home Office but also with the territorial offices, i.e. the Scotland Office, the Wales Office and the Northern Ireland Office. Final decisions on these issues would not be taken by UKBA officials on purely administrative grounds but by Ministers on wider policy grounds.
23. Furthermore, the UKBA explained that the issues at the heart of this policy had been relevant ever since the devolved legislatures came into being. However the issue of how the UKBA should respond to enquires from MDLs became more of a live issue in 2009 as a consequence of renewed pressure on the UKBA's stance from MDLs, with the matter being particularly pertinent in April 2010 because of the forthcoming general election. At the time of the request, 13 May 2010, the UKBA's existing approach to dealing with such correspondence (including how its position compared with how MEPs correspondence was handled) was under review by Ministers of the new administration and no decision had been taken.
24. The Commissioner has considered the facts of this case carefully and is prepared to accept that all of the requested information falls within the scope of the exemption contained at section 35(1)(a). Although, as the

UKBA itself concedes, there is an administrative angle to this issue, in the Commissioner's opinion two factors mean that the treatment of correspondence from MDLs is ultimately a 'policy' decision, rather than an administrative one. The first is that the primary considerations in the deliberations clearly concern the relations between the UK Parliament and devolved legislatures and thus there is an implicit political (and sensitive) issue at the heart of the discussion which arguably touches upon wider constitutional issues. The second is the fact that any decision in relation to how to handle MDLs correspondence involves the input of Ministers and not just those within the Home Office, but also in other government departments. Thus the Commissioner accepts that the decision relates not just to the departmental policy of the UKBA but the policy across government of how to deal with correspondence across government. Furthermore, the Commissioner is satisfied that the requested information clearly focuses on the development of this policy rather than simply its implementation. This is because whilst the policy regarding enquiries from MDLs had been adopted by UKBA based upon the Department of Constitutional Affairs' guidance of 2006 and thus had been in operation for sometime, the requested information clearly relates to the process of reviewing this policy which began in 2009 and remained ongoing at the time of the request in May 2010.

25. That is not to say that withheld information simply includes discussions of how the policy may be changed. Rather the withheld information inevitably includes information which explains the existing policy, i.e. the one which predated the review which began in 2009. However, as the phrase 'relates to' in the context of this exemption should be read widely the Commissioner believes that information concerning all aspects of how MDL correspondence should be handled falls within the scope of the exemption, not just information which focuses on the potential options for revising the policy.
26. Furthermore, the Commissioner is conscious that the complainant's request sought information not simply about the handling of correspondence from MDL's but also correspondence received from MEPs. Having reviewed the withheld information the Commissioner notes that the discussions surrounding the handling of MDL correspondence includes discussions surrounding the handling of MEP correspondence. In effect review of the position regarding MDL correspondence would appear to have been directly linked to the position in respect of MEP correspondence. The Commissioner has highlighted this point to make it clear that is satisfied that the UKBA identified all of the material relevant to the complainant's request.

Public interest test

27. Section 35(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

28. The UKBA noted that there was a general public interest in public authorities being more open about the policy making process because this could lead to better quality policy formulation and development, greater accountability, increased trust and an improved standard of public debate. A greater openness about the process may lead to a climate in which policy is not seen as a narrow preserve of Ministers, officials and external advisers, but one in which there greater engagement by the public.

Public interest arguments in favour of maintaining the exemption

29. The UKBA argued that there was a need for 'safe space' for those involved in policy making to freely debate policy issues and reach a decision without being hindered by external comments. The UKBA noted that its policy in relation to correspondence from MDLs had attracted media and political attention.
30. Furthermore, UKBA argued that Ministers needed to be able to consider and discuss all options, to expose their merits and demerits and their possible implications. Their candour in doing so would be affected by their assessment of whether the content of their discussions would be disclosed in the near future, when it may undermine or constrain the government view on either a policy decided in the past or one that is currently under discussion. (In essence, disclosure would have a chilling effect on future discussions).

Balance of the public interest arguments

31. 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).
32. 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.'

33. 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)).

34. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:

35. 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. As explained above, the UKBA has confirmed that the review of the policy in question remained ongoing at the time of the complainant's request in May 2010.

36. In light of this explanation and on the basis of the content of the information itself, the Commissioner is satisfied that at the time of the request the policy in question was clearly actively under review with options being considered for amending the existing policy. The issue was therefore one that at the time of the request could be correctly described as 'live', albeit that the policy was in the Commissioner's opinion under development rather than being formulated.

37. In line with the comments of the Tribunal quoted above at paragraph 62, 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 UKBA, and indeed other government departments such as the territorial offices, can candidly discuss the different policy options in respect of how enquiries from constituents should be handled. In attributing such weight to this argument the Commissioner notes that the information in question is, in places, of a genuinely free and frank nature and includes candid discussions of the pros and cons of a number of policy options. Moreover, the Commissioner recognises that the UKBA's

handling of MDLs correspondence had attracted media interest, not least because of attention drawn to it by some MDLs themselves.

38. Nevertheless the Commissioner is conscious of the comments of the Tribunal in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) in which it suggested that the weight which should be attributed to safe space arguments diminishes as the policy becomes more certain. In the circumstances of this case at the time of the request as the UKBA were not formulating new policy but only reviewing the existing policy and alternative options previously identified, the Commissioner believes that to a small degree this offsets the weight that should be given to the safe space arguments.
39. 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.
40. Clearly, in this case as the policy formulation was ongoing at the time of the request, the third scenario is not relevant to this case.
41. In considering the weight that should be attributed to the first 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. 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).

42. 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.'

43. In light of these various Tribunal and High Court judgments, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have 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.
44. 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 UKBA 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, including Ministers, beyond making an assertion that this would be likely to occur.

45. The Commissioner is prepared to accept that disclosure of the information withheld on the basis of section 35(1)(a) could have a limited impact on how officials make contributions to future policy discussions on the issue of providing responses to MDLs. However, in the Commissioner's opinion this weight is limited to some extent because as the Tribunal has argued it is reasonable to expect civil servants to continue to provide independent and robust advice: 'we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service' as they are 'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.'² Furthermore, the Commissioner does not accept that disclosure of the withheld information would affect the contributions of Ministers to the ongoing discussions on this particular issue given the Tribunal's findings in *The Scotland Office v the Information Commissioner* (EA/2007/0070) that:

'No evidence has been put before us to show that because of the potential for disclosure under FOIA, Ministers have changed the way in which they communicate, to have taken less robust positions in debate or have been less candid in expressing their views in writing. In other words, there is no evidence that the "chilling effect" feared has actually materialised. This is of course as it should be. In line with the views expressed by the Tribunal in DFES, we consider that we are entitled to expect of our Ministers, as elected politicians, a degree of robustness and for them not to shy away, in cabinet discussion, from taking positions and expressing those positions candidly, for fear that their views may, in certain circumstances, become public.' (para 89).

46. The Commissioner believes that the generic public interest arguments in favour of disclosing the information identified by the UKBA deserve to be given considerable weight given that fact that the arguments identified, namely improving accountability, increasing the public's trust in public authorities and improving the standard of public debate, are so inherent to the Act.
47. In terms of the specific circumstances of this case, the Commissioner recognises that the issue at the heart of this policy is effectively the question of whether constituents have the right to choose who should

² See EA/2006/0006 paragraph 75(vii).

represent their interests when seeking an elected representative to contact a government department on their behalf. The Commissioner considers such an issue to be an important one with the potential to impact on any individual across the UK and therefore in his opinion this arguably raises the public interest in disclosing the withheld information. Moreover, the Commissioner notes that the ongoing public debate surrounding the UKBA's position has highlighted the fact that the individuals who ask one of their elected representatives to contact the UKBA may well be asylum seekers who are unaware of the distinction between contacting, for example their MSP as opposed to their MP, in order to seek support for their asylum application. Disclosure of the requested information could inform this debate, and possibly lead to positive contributions to the policy review, in order that the interests of potentially vulnerable individuals such as asylum seekers are protected but the need for government departments to draw a distinction between devolved and reserved policy matters is maintained.

48. However, despite the weight that the Commissioner believes should be attributed to the arguments in favour of disclosure, given that the policy development was live at the time of this request and the significant weight that should be attributed to the safe space arguments, the Commissioner has concluded that the public interest favours maintaining the exemption.

Procedural Requirements

49. Under section 17(3) a public authority may extend the time for compliance where it is necessary to do so in order to properly consider the public interest although this section requires that any such consideration must still be completed 'within such time as is reasonable in the circumstances'.
50. The term reasonable is not defined in the Act but the Commissioner has issued guidance where he has made it clear that in no case should a public authority take more than 40 working days to deal with a request.³ In this case the UKBA took significantly longer than 40 working days to reach a decision in respect of the balance of the public interest test which, in the context of his guidance, the Commissioner's does not consider to be a reasonable time period. The UKBA therefore breached section 17(3) of the Act.

³ [Freedom of Information Good Practice Guidance No. 4](#)

51. Furthermore, the UKBA breached section 17(1) of the Act by failing to cite sections 36 and 40(2) in its refusal notice although it later sought to rely on these exemptions.

The Decision

52. 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:

- The requested information 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.

53. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The UKBA breached section 17(3) by not completing its consideration of the public interest test within a reasonable time period.
- It also breached section 17(1) by failing to cite in its refusal notice further exemptions which it later sought to rely on, namely sections 36 and 40(2).

Steps Required

54. The Commissioner requires no steps to be taken.

Right of Appeal

55. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

56. 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.
57. 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 26th day of July 2011

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Time for Compliance

Section 10(1) provides that –

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

Section 10(3) provides that –

“If, and to the extent that –

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

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

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

Refusal of Request

Section 17(1) provides that -

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

(a) states that fact,

(b) specifies the exemption in question, and

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

Section 17(3) provides that -

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

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

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."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

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

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

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