

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: The Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Summary

The complainant made a request to the Department for Education (DfE) for information relating to the United Learning Trust or its associated companies within the period 1 October 2009 to 25 December 2009, and for details of any finance provided to ULT or its associated companies in respect of academies planned for Oxford and Northampton. Information was provided to the complainant at the time of the original request, the internal review and during the Commissioner's investigation. However information was withheld under the exemptions contained at section 36(2)(b)(i) and (ii), section 36(2)(c), section 40(2), section 42 and section 43(2). The Commissioner considers that the exemptions located at section 36(2)(b)(i) and (ii), section 36(2)(c), section 40(2) and section 42 were correctly engaged. The Commissioner considers that the exemption located at section 43(2) was incorrectly engaged in this case. The Commissioner has ordered DfE to disclose this 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. The Department for Education (DfE) explained that the information in the scope of the request dates from the previous administration, and therefore the background which it provided (and which is detailed below), relates to the Academies programme under the Labour government. It explained that the focus of the Academies programme has since changed to reflect the priorities of the coalition government.
3. The DfE has explained that academies are all-ability state-funded schools established and managed by sponsors from a wide range of backgrounds, including high performing schools and colleges, universities, individual philanthropists, businesses, the voluntary sector and the faith communities.
4. It explained that academies were at that time, and remain, a key element of the drive to raise standards. Under the previous administration this focused on raising aspirations and creating opportunity in some of the most disadvantaged communities in the country. The overall aim of the programme was to provide more quality places where educational opportunity and attainment was inadequate and to raise aspirations and transform the life chances of children in those communities.
5. It said that under the previous government most academies replaced existing underperforming schools, others provided high quality places in areas that needed the extra places (either as entirely new schools or as successful independent schools wishing to better serve their local community and broaden their intake). A small number were high performing schools federating with weaker schools as a school improvement strategy.
6. It explained that the DfE supported the development of partnerships between sponsors and local authorities, which was the first stage in the process in establishing as academy. This enabled the local authorities, together with the DfE to assess their secondary education provision and decide if a new academy would be the right solution for their needs. The first step in this process was for sponsors, local authorities and other potential partners interested in the academies programme to contact the DfE for informal discussions.

7. It said that once established, the sponsor and local authority would work together to prepare a formal Expression of Interest (EoI). The feasibility stage began once the Secretary of State agrees support for an Academy project, following submissions of the EoI. It lasted for approximately 6-18 months, depending on the complexity of individual projects. During this stage, the project team prepared detailed plans, including an educational vision and model, and an outline building design, and formally consulted with the local community.
8. It explained that the projects which are the focus of this request (Weston Favell in Northamptonshire and the Oxford School Academy) were proposals in development, with the United Learning Trust (ULT) the major sponsor. ULT is a subsidiary charity of United Church Schools Trust (UCST). UCST operates 11 independent schools across the UK, and ULT operates in the state sector, currently sponsoring some 20 academies and a City Technology School.

Weston Favell Academy Project

9. The DfE explained that Weston Favell is a private finance initiative (PFI) school built in 2008. Ministers originally approved plans for a new academy in Northampton to replace the existing Weston Favell school, an under performing school in early 2009. However, issues arose following the public consultation which delayed the opening date.
10. It said that the DfE worked with the LA and ULT on the issues which arose following the public consultation however there had been significant local opposition to plans for the school to become an academy, particularly with ULT as the sponsor. It explained that in December 2009 ULT decided to withdraw as the sponsor in order to concentrate on their existing open academies.
11. It said that the school remains in special measures (which it went into in December 2009), however the DfE continues to work with the school and the LA to identify a new academy sponsor.

Oxford School Academy Project

12. In relation to this project, the DfE explained that Ministers gave approval for plans to be developed for an academy to open in September 2010 to replace the Oxford School, an underperforming school in Oxford. These plans were the subject

of local opposition, including a 'Save Oxford School' campaign. The academy was originally due to be sponsored by ULT.

13. It said that in December 2009, ULT decided to withdraw as the sponsor in order to concentrate on their existing open academies. It explained that CfBT Education Trust subsequently replaced ULT as a sponsor and the new Oxford Spires Academy opened in January 2011 to replace the Oxford School.

The Request

14. The complainant initially made a request to the DfE on 5 May 2010. However the DfE explained that it would exceed the cost limit under section 12 of the Act to comply with that request. Therefore on 25 May 2010 the complainant made a refined request to the Department. She requested the following information:
 - i. I would be grateful if you could provide all documents that relate to the United Learning Trust, or its associated companies, the United Church Schools Trust and United Church Schools Foundation, in the period October 1 2009 to December 25 2009. Could you provide all correspondence between ULT and officials and ministers and minutes of any meetings between the company and ministers or officials. Please could you provide all internal documents that relate to ULT or its associated companies.
 - ii. Could you also provide correspondence with Oxford and Northamptonshire councils that related to ULT over the same period.
 - iii. Could you also provide details of any finance provided to ULT or its associated companies in respect of academies planned for Oxford and Northampton.
15. On 13 August 2010 the Department responded to this request for information. It explained that it was able to provide the complainant with a large amount of information however a number of redactions would be made to names and contact

- details. It also provided the complainant with details relating to finance provided to ULT or its associated companies in respect of academies planned for Oxford and Northampton. It explained that there was further information which may be exempt from release which was still under consideration. It also explained that there was further information that was exempt from disclosure under section 42 (legal professional privilege) and section 43 (commercial interests).
16. On 20 August the Department wrote to the complainant again to explain that the information which it believed may be exempt but that had still been under consideration, was withheld under section 36(2)(b) and section 36(2)(c).
 17. As the complainant was dissatisfied with the response she had received, on 23 August 2010 she asked the Department to carry out an internal review.
 18. On 16 December 2010, the Department wrote to the complainant with the result of the internal review. It removed some of the redactions it had made, it did however uphold some of the redactions made under section 40(2) (third party personal data). It also explained that it was prepared to release some further information but still withheld some information under the exemptions originally applied.

The Investigation

Scope of the case

19. As the complainant was dissatisfied with the result of the internal review she contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DfE had dealt with her request in accordance with the Act.
20. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:

21. The complainant confirmed that she did not wish to obtain the names of parents or their contact details which had been redacted from the information provided to her under section 40(2).
22. The DfE provided the complainant with some of the information it had originally withheld in full under section 43(2). There were however some redactions made to the information provided under section 40(2) and section 43(2). The Commissioner will still therefore consider the redactions made. The DfE did however still withhold some information in full under section 43(2).

Chronology

23. On 12 January 2011 the Commissioner wrote to the DfE to ask it to provide him with copies of the withheld information.
24. On 2 February 2011 the Commissioner wrote to the DfE to ask it for further submissions in support of its application of section 36(2)(b)(i) and (ii), section 36(2)(c), section 40(2), section 42 and section 43(2).
25. By 13 April 2011 the DfE provided the Commissioner with all of the information he had requested in order to conduct the investigation.

Analysis

Exemptions

Section 36(2)(b)(i)

26. Sections 36(2)(b)(i) states that:

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

- (b) would, or would be likely to, inhibit –
- (i) the free and frank provision of advice, or

27. A full text of section 36 is available in the Legal Annex at the end of this Notice.

28. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank provision of advice. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that:

“On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable...” (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, “...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at...” (paragraph 64) “...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as ‘the reasonable opinion of a qualified person’ under section 36 merely because the conclusion happened to be objectively reasonable?”

29. In determining whether section 36(2)(b)(i) was correctly engaged by the DfE the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was objectively reasonable and reasonably arrived at.
30. The DfE has explained that in this case some of the information withheld under section 36(2)(b)(i) relates to papers of a previous administration and therefore the Attorney General (AG) was used as the qualified person and the AG’s opinion was obtained on 20 August 2010. The DfE has provided the Commissioner with a copy of the qualified person’s opinion as well as the submissions which were put to the qualified person to enable the AG to reach the opinion.

31. The following submissions were put to the qualified person:
- It is important for the process of effective government that officials are allowed freedom to develop their views and give free and frank advice when necessary. The information requested includes ministerial submissions, briefings and other communications which if published would be likely to result in more restricted advice being offered and a more circumscribed exchange of views. This would adversely affect the quality of decisions that are designed to improve standards in schools.
 - An example of an email which contained advice as to how a sensitive issue should be dealt with was highlighted to the qualified person. The DfE explained that it is likely that if such advice were to be routinely released, officials would not couch their advice in such frank terms because of the damage that this could do to relationships with the parties being discussed.
 - In addition, it stated that Ministers need to be able to think through all the implications of particular advice. In particular, they need to be able to undertake rigorous and candid assessment and disclosure of this advice may result in better options not being put forward in the future in case of adverse public reaction.
32. Upon viewing the qualified person's opinion, it does not specifically mention section 36(2)(b)(i). However the DfE has explained that the AG's office has confirmed that this was an administrative error and that the qualified person's opinion is that section 36(2)(b)(i) and (ii) and section 36(2)(c) are all applicable in this case. It stated that the submissions make clear that the DfE was seeking the AG's view on all three limbs of section 36, the response generally concludes that the AG agrees the exemptions are engaged and if the AG had either disagreed with the recommendations in the submission in respect of section 36(2)(b)(i) or felt unable to make a decision about this specific limb without seeking further evidence or arguments, then the response to the DfE would have clearly reflected the AG's concerns. The Commissioner is satisfied that the qualified person's opinion relates to section 36(2)(b)(i) as well as section 36(2)(b)(ii) and section 36(2)(c).

33. The qualified person's opinion is that the prejudice in this case would be likely to occur. The threshold to prove would be likely to prejudice is lower than if the DfE had claimed that the prejudice would occur. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
34. The Commissioner considers that at the time of the request both projects were incomplete and therefore the advice contained within the withheld information was still being relied upon and it was likely that further advice would need to be provided by officials involved in these particular projects as well as other existing projects and any future projects. The Commissioner considers that the timing of the request increases the likelihood of the prejudice occurring.
35. The Commissioner considers that the withheld information does contain very candid advice to assist in decision making relating to the two academy projects in question. The Commissioner accepts it is a reasonable opinion that if this advice were disclosed it would be likely to cause officials involved to be less candid in the advice they provide in the future in relation to these projects as well as other projects which have already begun and any future projects which have not yet started. Whilst the Commissioner does not accept that officials will be put off providing advice in full it is not unreasonable to conclude that the depth and rigour of advice provided would be likely to be affected which would have a damaging impact upon future decision making relating to the academies programme.
36. The Commissioner accepts that it was reasonable to conclude that disclosure would or would be likely to inhibit the free and frank provision of advice in the future. He considers that the information does contain very free and frank advice and that if it were disclosed officials would be likely to be more restrictive in relation to the frankness of advice provided in the future.

37. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(i) was correctly engaged.
38. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)*.
39. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public arguments in favour of disclosing the requested information

40. The DfE has recognised that disclosure could further the understanding of and increase public debate around academies policy in general and the two projects in particular. It further explained that releasing the information could increase public confidence that decisions are taken on the basis of the best available information, and releasing the information could enable individuals and organisations to better understand the reasons behind decisions affecting their lives.

Public interest arguments in favour of maintaining the exemption

41. If the free and frank nature of advice were inhibited, this would adversely affect the quality of future decisions made that in this case are designed to improve standards in schools. It would not be in the public interest to diminish the quality of decisions made in relation to the improvement of schools.

Balance of the public interest arguments

42. The Commissioner considers that there is a public interest in furthering understanding of this topic which would increase the quality of public debate on the issue of academy policy in general as well as the two specific projects the request relates to.
43. The Commissioner also considers that disclosure increases public confidence in the decision making processes in this area. The Commissioner considers that this is also in the public interest, particularly as the academy projects are a significant change to education provision in England.
44. The Commissioner does however consider that there is a strong public interest in the DfE being able to obtain free and frank advice when making decisions in relation to the improvement of schools. He considers that it is in the public interest that the DfE has full and relevant advice and information necessary to maintain quality and produce well thought out decisions. He considers that in this case, at the time of the request, the advice sought was still being relied upon as the two projects in question were at that stage still incomplete. He considers that this gives further weight to this public interest argument.
45. The Commissioner considers that the public interest in favour of disclosure of the redacted information is outweighed by the public interest in maintaining the exemption contained at section 36(2)(b)(i) of the Act.

Section 36(2)(b)(ii)

46. Sections 36(2)(b)(ii) states that:

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

(b) would, or would be likely to, inhibit –
(ii) the free and frank exchange of views for the purposes of deliberation”

47. A full text of section 36 is available in the Legal Annex at the end of this Notice.
48. Information may be withheld under section 36(2)(b)(ii) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. In determining whether this exemption was correctly applied in this case the Commissioner has taken the same approach as set out in paragraphs 32-34 above.
49. The following submissions were put to the qualified person:
 - In the course of the development and implementation of proposals to replace two underperforming schools (Weston Favell, Northamptonshire and Oxford, Oxfordshire) with Academies, officials and ministers have engaged in free and frank discussions with those involved in the process. This includes Northamptonshire and Oxfordshire County Councils and the original proposed Academy sponsor, the United Learning Trust (ULT). Disclosure of these discussions would be likely to prejudice the conduct of future discussions with those involved in the Academies programme, if their views, given in confidence, were to be disclosed at a later date. It is likely that officials would be more guarded when seeking to resolve issues in order to avoid creating misunderstandings of the scale of an issue or alarm amongst the wider public, and amongst pupils, teachers and parents in particular. However, this more guarded approach to communications between officials might mean that any problems were not candidly described or addressed, and that Ministers and officials would not have a full understanding of the real situation when seeking to resolve such issues.
 - The qualified person was directed to some examples within

the withheld information of particularly candid discussions.

50. The DfE has explained that in the course of the development and implementation of proposals to replace two underperforming schools (Weston Favell Northamptonshire and Oxford, Oxfordshire) with academies, officials and ministers have engaged in free and frank discussions with those involved in the process. This includes Northamptonshire and Oxfordshire County Councils and the proposed academy sponsor, ULT. It has explained that disclosure of these discussions would be likely to prejudice the conduct of future discussions with those involved in the academies programme, if their candid views which were given without any expectation of disclosure, were to be disclosed at a later date. It has explained that this is particularly pertinent as ULT is the sponsor of a number of other Academy schools.
51. The qualified person's opinion is that the prejudice in this case would be likely to occur. The threshold to prove would be likely to prejudice is lower than if the DfE had claimed that the prejudice would occur. In dealing with the issue of the likelihood of prejudice, the Commissioner is again minded of the again John Connor Press Associates case set out at paragraph 33 above.
52. The Commissioner considers that at the time of the request both projects were incomplete and therefore the discussions and deliberations related to issues which were still ongoing. The Commissioner considers that the timing of the request increases the likelihood of the prejudice occurring.
53. Upon considering the withheld information to which section 36(2)(b)(ii) has been applied to, the submissions put to the qualified person and the qualified person's opinion, the Commissioner accepts that it was reasonable to conclude that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. He considers that the information does contain very candid discussions relating to the two academy projects and the parties involved in the projects and that if it were disclosed officials may be more restrictive in relation to the frankness of discussions on similar issues in the future. The Commissioner has taken into account that this is particularly pertinent as ULT is the sponsor of a number of other Academy schools and therefore disclosure would be likely to have an impact in relation to the frankness and candour of

- discussions between ULT and any other bodies it works with in relation to the already established Academies which it sponsors.
54. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) was correctly engaged.
55. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the Brooke case set out at paragraphs 38 and 39 above.

Public arguments in favour of disclosing the requested information interest

56. The DfE has recognised that disclosure could further the understanding of and increase public debate around academies policy in general and the two projects in particular. It further explained that releasing the information could increase public confidence that decisions are taken on the basis of the best available information, and releasing the information could enable individuals and organisations to better understand the reasons behind decisions affecting their lives. As well as this general public interest in understanding the implementation of the academy programme the Commissioner also acknowledges the level of local interest in the particular academy projects covered.

Public interest arguments in favour of maintaining the exemption

57. If officials were less free and frank in their deliberations and discussions of issues surrounding the academy projects, problems may not be candidly described and therefore may not be properly addressed. Ministers, officials and other parties involved may not then have a true grasp of the situation when seeking to resolve issues. This is not in the public interest as this would have a negative impact upon the development of the particular projects in question as well as upon the running of open academies and the setting up of other future projects.

Balance of the public interest arguments

58. The Commissioner considers that there is a public interest in furthering understanding of this topic which would increase the quality of public debate on the issue of academy policy in general as well as the two specific projects the request relates to.
59. The Commissioner also considers that disclosure increases public confidence in the decision making processes in this area. The Commissioner considers that this is also in the public interest, particularly as the academy projects are relevant to many individuals across the country.
60. The Commissioner however considers that there is a strong public interest in the DfE being able to discuss issues surrounding the academy projects freely and frankly to ensure academies are developed and set up to the highest standards possible. As stated above at the time of the request the two projects were not complete and therefore discussions and deliberations were still being relied upon and were still ongoing which increases this public interest argument.
61. The Commissioner considers that the public interest in favour of disclosure of the redacted information is outweighed by the public interest in maintaining the exemption contained at section 36(2)(b)(ii) of the Act.

Section 36(2)(c)

62. Section 36(2)(c) states that:

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

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

63. A full text of section 36 is available in the Legal Annex at the end of this Notice.
64. Information may be withheld under section 36(2)(c) if its disclosure, in the reasonable opinion of a qualified person, would

otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. In determining whether this exemption was correctly applied in this case the Commissioner has again taken the same approach as set out in paragraphs 32-34 above.

65. The following submissions were put to the qualified person:
- Disclosing confidential communications with ULT and Northamptonshire and Oxfordshire County Councils could harm future relations between the DfE and other sponsors and local authorities, as well as those involved in this case. This could prejudice the effective conduct of public affairs by inhibiting efficient running of established academies as well as inhibiting the effectiveness of future academy projects by deterring sponsors from participating in the academy programme. This may have an adverse impact on the DfE's ability to bring in sponsors to help turnaround underperforming schools. This applies to new sponsors as well as existing sponsors wishing to undertake further projects in the future.
 - The DfE's ongoing relationship with sponsors needs to be strong, and one in which all partners feel able to engage in robust discussions, particularly where issues arise, such as in this case where ULT withdrew from two academy projects but remained committed to their existing academies and to getting involved in future projects.
 - In addition, if the disclosure the information requested were to undermine confidence in the academies programmes this could have a significant adverse impact on the children being educated at these schools.
66. The qualified person's opinion is that the prejudice in this case would be likely to occur. The threshold to prove would be likely to prejudice is lower than if the DfE had claimed that the prejudice would occur. In dealing with the issue of the likelihood of prejudice, the Commissioner is again minded of the again John Connor Press Associates case set out at paragraph 33 above.
67. The Commissioner considers that disclosure of the requested information would be likely to damage the relationship between

- the DfE and ULT and Northamptonshire and Oxfordshire County Councils as well as sponsors of other academy projects and other county councils. He considers that this would be likely to have a negative impact on the DfE's ability to attract new sponsors for new projects, to engage existing sponsors in relation to further projects as well as damage the effective running of established projects. The Commissioner considers that the DfE should be able to discuss issues arising openly with sponsors of academy projects and their relevant county councils as the effective establishment of academies as well as the ongoing running and development of them is dependant upon the DfE and relevant parties being able to do this.
68. The Commissioner again considers that at the time of the request both projects were incomplete and therefore the discussions and deliberations related to issues which were still ongoing. The Commissioner considers that the timing of the request increases the likelihood of the prejudice occurring.
69. Upon considering the withheld information to which section 36(2)(c) has been applied to, the submissions put to the qualified person and the qualified person's opinion, the Commissioner accepts that it was reasonable to conclude that disclosure would be likely otherwise to prejudice, the effective conduct of public affairs. He considers that the information does relate to sensitive issues about particular schools or academies and the parties involved with them and that disclosure would damage the relationship between the DfE, academy sponsors and the relevant local authorities which undermines the efficiency of the Academies programme.
70. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(c) was correctly engaged.
71. As the Commissioner has decided that the exemption is engaged, he has again gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the Brooke case set out at paragraphs 38 and 39 above.

Public arguments in favour of disclosing the requested information interest

72. The DfE has recognised that disclosure could further the understanding of and increase public debate around academies policy in general and the two projects in particular. It further explained that releasing the information could increase public confidence that decisions are taken on the basis of the best available information, and releasing the information could enable individuals and organisations to better understand the reasons behind decisions affecting their lives.

Public interest arguments in favour of maintaining the exemption

73. Disclosing confidential communications between ULT, Northamptonshire and Oxfordshire County Councils would be likely to undermine the relationship between the DfE and those parties. This would be likely to have a negative impact upon the development of the Northamptonshire Academy and the ongoing running of the Oxfordshire Academy (which has now been opened). The academies programme is an initiative to improve the quality of education available for children and their future life chances. It would not be in the public interest to damage the relationship between the parties responsible for the establishment and ongoing running of these two academies as it would affect a large number of pupils who attend these particular academy schools.
74. Disclosure would also be likely to damage the relationship between the DfE, ULT and Northamptonshire and Oxfordshire County Councils in relation to the running of other academy schools which have already been established and which these parties are involved in. As the successful running of further academies would be likely to be undermined by disclosure an even greater number of pupils may be adversely affected.
75. Finally as disclosure would be likely to deter existing sponsors from taking on further projects as well as potentially deterring new sponsors for future projects, this again would not be in the public interest as it would be likely to hamper an initiative to improve the quality of education available for children and their future life chances.

Balance of the public interest arguments

76. The Commissioner considers that there is a strong public interest in furthering understanding of this topic which would increase the quality of public debate on the issue of academy policy in general as well as the two specific projects the request relates to.
77. The Commissioner also considers that disclosure could increase public confidence in the academies programme. The Commissioner considers that this is also very much in the public interest, particularly as the academy projects are relevant to many individuals across the country.
78. The Commissioner however considers that there is a strong public interest in not damaging the relationship between the DfE, existing academy sponsors, potential/future academy sponsors and relevant local authorities which would be likely to undermine the academies programme in terms of the two projects relevant the request as well as other projects across the country. The Commissioner has given significant weight to this argument due to the vast number of individuals likely to be affected and disadvantaged if these working relationships were damaged. The Commissioner therefore considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 40(2)

79. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

“Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.”

80. Section 40(3)(a)(i) of the Act states that:

“The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or*
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"*

81. The full text of section 40 can be found in the legal annex attached to this decision notice.
82. The Commissioner will determine whether or not the DfE correctly applied section 40(2) in order to make the redactions to some of the information provided to the complainant.
83. In this case the DfE has explained that redactions were made to the names and contact details of parents making representations about specific schools, the names and contact details of junior departmental officials and the names and contact details of employees of local authorities and the company involved in the PFI project (mentioned at paragraph 11). It has said that this constitutes the personal data of the individuals set out above and is exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i). It said that this was because to release this information would breach the data protection principles.
84. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - a. from that data, or
 - b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
85. The Commissioner considers that the information redacted under section 40(2) and described at paragraph 89 above would constitute information from which the data subject would be identifiable.

86. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The DfE has argued that disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met.
87. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

Likely Expectation of the Data Subject

88. The DfE has argued that all of the names and contact details redacted from the information provided to the complainant related to junior DfE staff, junior local authority staff or junior members of staff from the PFI programme. It has confirmed that the names and contact details of more senior members of staff have not been redacted.
89. The Commissioner considers that junior members of staff from the three bodies set out above would not expect their names and contact details to be disclosed. This is because whilst more junior members of staff were acting in their professional roles it does not appear that they are public facing.

The Legitimate Public Interest

90. The Commissioner does not consider that disclosure of the names and contact details of the junior members of staff of the three bodies would provide any further insight into the decision making process surrounding academies. The Commissioner does not consider that there is a legitimate public interest in the disclosure of these names or contact details.
91. The Commissioner therefore considers that it would be unfair to disclose the information withheld under section 40(2) and therefore this exemption was correctly engaged in this case.

Section 42

92. Section 42(1) of the Act 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.
93. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
94. The DfE has confirmed that in this case the category of privilege it is relying upon is advice privilege. This privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity.
95. The communication in question must also have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact, which can usually be determined by inspecting the relevant information.
96. The DfE explained that the withheld information comprises of communications between the DfE and its legal advisers and were made for the purpose of obtaining legal advice. It confirmed that it is satisfied that privilege attached to the withheld information has not been waived.
97. After considering the requested information in this case which was withheld under the section 42(1), the Commissioner is satisfied that it falls within the scope of this exemption.
98. As section 42(1) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
99. The Commissioner is mindful of the Tribunal's decision in *Bellamy v ICO (EA/2005/0023)* in which it was stated:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that

inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".

"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."

100. The Commissioner has therefore considered these comments in the context of this case, and considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional.

Factors in favour of disclosing the information

101. The DfE has recognised that disclosure would increase transparency of the decision making process which would be in the public interest. It has suggested that this could include demonstrating that decisions have been made on the basis of high quality legal advice and enable individuals and organisations to better understand decisions made affecting their lives and work, and where appropriate may enable individuals to challenge those decisions.
102. The DfE also recognised that there is a legitimate public interest in increasing participation in public debate about matters such as the establishment of academies.
103. Finally it recognised that there is a public interest in accountability for decision making.

Factors favouring maintaining the exemption

104. The DfE has explained that it considers that there is a strong public interest in maintaining lawyer-client confidentiality. It said that it is vital that officials are able to consult lawyers in confidence to obtain effective legal advice in a safe forum, conducive to a candid exchange of views and consideration and assessment of potential risks without fear of disclosure.

105. It explained that government legal advisers need to be able to set out arguments without fear that advice might be disclosable and disclosure might evidence potential weaknesses in the government's position and thereby unnecessarily expose it to legal challenge. It stated that defending such legal challenges would require public resources. It stated that this would not be in the public interest.
106. The DfE argued that the disclosure of this legal advice has a high potential to prejudice the government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. It explained that this is not in the public interest as it is essential to protect the vitally important principle that officials must be able to consult lawyers in confidence to obtain effective legal advice in a forum which is conducive to a free exchange of views without fear of intrusion or disclosure.
107. The DfE highlighted that it has been recognised by the courts generally as well as the Information Tribunal, that there is a strong interest in protecting documents which are subject to legal professional privilege from disclosure. In particular it explained that the Information Tribunal has stated that it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case. The DfE confirmed that after considering the information withheld under section 42, it did not appear that there was anything in these documents, or the circumstances relating to them, which would justify setting aside the very strong presumption against disclosure of legal professional privilege material.
108. The DfE confirmed that at the time of the request the projects had not been completed and the issues which the legal advice related to had not been settled. It explained that at the time of the request it was highly likely that the legal advice would be relevant to future considerations.

Balance of the public interest

109. The Commissioner considers that there is a strong public interest in increasing transparency in the decision making processes

- relating to the establishment of academies, which adds to public debate on this issue and enables the public to better challenge decisions made where appropriate. The Commissioner considers this is particularly important where decisions made affect a wide number of individuals as in this case.
110. He also considers that there is a strong public interest in public authorities being accountable for decisions made and what information their decisions have been based upon. This may also increase public understanding as to how and why certain decisions have been taken. Again the Commissioner considers that this is particularly important where decisions made affect a significant number of individuals as in this case.
111. However the Commissioner has given significant weight to the fact that at the time of the request the academy projects to which the request related had not completed and the legal advice was still be relied upon. Furthermore at the time of the request, the DfE may potentially have required further legal advice relating to these issues.
112. The Commissioner also considers that there is a strong public interest in the DfE being able to obtain legal advice in relation to its legal position at any point in the academy projects process, and that it should be able to do so without disadvantaging its legal position. Furthermore the Commissioner considers that it is vital that the DfE is able to participate in full and frank exchanges with its legal advisers in order to ensure that it complies fully with all of its legal requirements and responsibilities. He considers that this is also very much in the public interest.
113. The Commissioner is also mindful of the Tribunal decision of *Foreign & Commonwealth Office v ICO* [EA/2007/0092] in which it was stated:

"...what sort of public interest is likely to undermine [this]... privilege? ...plainly it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained..."

The Tribunal went on to state that such arguments of misrepresentation should be supported by, "*cogent evidence*".

114. Upon viewing the information withheld under section 42, the Commissioner has not found evidence that the legal advice was misrepresented by the DfE.
115. The Commissioner considers that due to the substantial number of individuals to which the legal advice requested affects this strengthens the public interest considerations in favour of disclosure. However the Commissioner has weighed this against the fact that the legal advice was still being relied upon at the time of the request, that it does not appear that the DfE has purported to misrepresent the advice it received, and the strong public interest in protecting discussions and advice between a public authority and its legal adviser. The Commissioner considers that in this case the balance of the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Section 43(2)

116. Section 43(2) provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
117. In this case DfE has stated that disclosure of the requested information would be likely to prejudice the commercial interests of the DfE.
118. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the DfE's commercial interests.
119. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services. "

120. The Commissioner has also noted guidance issued by the Scottish Information Commissioner in relation to commercial interests and section 33(1)(b) of the FOI (Scotland) Act 2002. This guidance states that,

“...commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment.”

121. The Commissioner considers that developing agreements between the DfE, local authorities and academy sponsors, in terms of which body will fund and pay for different elements of an academy project and the planned costs of an academy project are not commercial activities relating to the DfE. The DfE do not have any competitors in relation to this and is acting as a facilitator between local authorities and academy sponsors. Whilst the DfE may provide some funding to academy projects this is to assist and facilitate the process rather than to purchase a particular product or service for the purpose of revenue generation.

122. The Commissioner therefore does not consider that section 43(2) was correctly engaged in this case.

Procedural Requirements

Section 1(1)

123. Section 1(1) of the Act provides that: -

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

- i. to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- ii. if that is the case, to have that information communicated to him.”

124. As the DfE did not provide a response under section 1(1)(a) within the statutory time for compliance it breached section 1(1)(a) in its handling of this request.
125. As the DfE incorrectly applied section 43(2) it breached section 1(1)(b) by not disclosing the information it withheld under this exemption within the statutory time for compliance.

Section 10

126. Section 10(1) of the Act 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.”

127. The Commissioner has considered whether or not the DfE complied with section 10(1) of the Act.
128. The DfE failed to comply with section 1(1)(a) and section 1(1)(b) within the statutory time for compliance, therefore it breached section 10(1) of the Act in its handling of the request.

Section 17

129. Section 17(1) of the Act 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.”

130. As the DfE did not provide the complainant with a refusal notice in relation to the exemptions it applied in this case within the statutory time for compliance, it breached section 17(1)(a), (b) and (c) in its handling of this request.

The Decision

131. 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:

- Application of section 36(2)(b)(i) and (ii) and section 36(2)(c)
- Section 40(2)
- Section 42

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

- Section 43(2)
- Section 1(1)(a) and (b)
- Section 10(1)
- Section 17(1)

Steps Required

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

- To disclose the information withheld and redacted under section 43(2).

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

Failure to comply

134. 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

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

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

136. 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

137. 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.

138. 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 29th day of June 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 –

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

(e) 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(2) provides that –

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

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.”

Section 10(4) provides that –

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

Section 10(5) provides that –

“Regulations under subsection (4) may –

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

(b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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(2) states –

“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.”

Section 17(3) provides that -

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

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

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

Section 17(4) provides that -

“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.

Section 17(5) provides that –

“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.”

Section 17(6) provides that –

“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.”

Section 17(7) provides that –

“A notice under section (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.”

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.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

Section 36(5) provides that –

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,

- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,

- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 40(5) provides that –

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any

of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –
In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act.

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 42(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."

Commercial interests.

Section 43(1) provides that –

"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”