

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2023

Public Authority: Department for Energy, Security and Net Zero
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information on the processing of a particular FOI request made by a third party. The public authority formerly known as the Department for Business, Energy and Industrial Strategy ("BEIS") relied on the exemptions at FOIA section 35(1)(d) – information relating to the operation of any Ministerial office, section 36(2)(b) & (c) – prejudice to the effective conduct of public affairs and section 40(2) – personal information.
2. The Commissioner's decision is that the public authority is entitled to engage section 35(1)(d) and section 36(2)(b) and (c) to the requested information, however the public interest favours disclosure. . He considers that section 40(2) has been appropriately applied to the redactions in the limited information disclosed to the complainant. He would expect the same redactions to be made when disclosing any further information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld in reliance of section 35(1)(d) and 36(2)(b)(i) & (ii) and (c).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 May 2021 the complainant wrote to BEIS¹ and requested information in the following terms:

“On 12 May some tweets were published by George Grylls which referred to this request and the Department's response - see

<https://twitter.com/georgegrylls/status/139249984920396596>

and <https://twitter.com/georgegrylls/status/1392596669238333440>

Please send me the following information:

- a) a copy of all the information held by the Information Rights and Records Unit relating to the processing of this FOI request, to include the material held in your FOI case management system;
 - b) a copy of all the information held by the Information Rights and Records Unit relating to the aforementioned tweets by George Grylls;
 - c) a copy of all the information held by the BEIS press office relating to this FOI request, including all 'lines to take' and 'responses against enquiries' prepared in connection with the aforementioned tweets by George Grylls;
 - d) a copy of all the information held within Mr Zahawi's ministerial private office relating to this FOI request;
 - e) a copy of all the information held within Mr Zahawi's ministerial private office relating to the aforementioned tweets by George Grylls.”
6. On 8 October 2021 BEIS responded to the request. With regard to point a) it provided some information redacted in reliance on FOIA section 40(2) – Personal information. It withheld further information entirely in reliance on sections 35(1)(d) – operation of any Ministerial office, 36(2)(b) & (c) – Prejudice to effective conduct of public affairs and section 40(2). In regard to point b) BEIS advised that no information is

¹ Although the complainant originally submitted their request to BEIS, on 17 May 2021, BEIS was dissolved on 7 February 2023 when four new departments were created. This decision notice is therefore served on the Department for Business and Trade.

held. Regarding point c) it provided limited information in the form of a 'line to take'. In regard to point d) it advised that no information is held. Regarding point e) BEIS confirmed that it holds information but is withholding the material in reliance on the same four exemptions set out above with respect to point a).

7. On 11 October 2021 the complainant requested an internal review challenging the application of all the exemptions and the balance of the public interest. They did not challenge that information was not held with regards to points b) and d).
8. Following an internal review BEIS wrote to the complainant on 16 March 2022 upholding its initial response.

Scope of the case

9. The complainant contacted the Commissioner on 14 March 2022 to complain about the way their request for information had been handled as they had not received a response to their request for internal review. This complaint was superseded, following the provision of the internal review, by a complaint concerning BEIS' reliance on the exemptions cited above.
10. The Commissioner considers that the scope of his investigation is the application of FOIA section 35(1)(d), 36(2)(b) & (c) and 40(2) to withhold the requested information.

Reasons for decision

Section 35 – Formulation of government policy, etc

11. FOIA section 35(1)(d) states:

"35.(1) Information held by a government department or by the Welsh Government is exempt information if it relates to-

(d) the operation of any Ministerial private office"

12. Section 35(5) of FOIA defines a 'Ministerial private office' as meaning:

"any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Government providing personal administrative support to the members of the Welsh Government."

13. The exemption covers information that 'relates to' the operation of the private office with the phrase being interpreted broadly. However, this does not mean that all information with any link to a Ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a Ministerial private office, which itself is defined as providing administrative support. In other words, it covers information relating to the administrative support provided to a Minister.
14. As a consequence, this exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about Ministerial priorities and similar issues.
15. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling Ministerial papers or prioritising issues, travel expenses, information about staffing, the Minister's diary, and any purely internal documents or discussions that have not been circulated outside the private office.
16. In this case BEIS argued that the exemption was engaged for information falling within the scope of points a) and e) of the request.
17. BEIS explained to the Commissioner which parts of the withheld information it considered to be exempt in reliance on this exemption. This information comprises the communications between the Secretary of State's office and the Information Rights team regarding the request referenced in the complainant's request along with exchanges between Private Office colleagues on the request handling.
18. The Commissioner considers that the purpose of section 35(1)(d) is to ensure that Ministerial business is managed effectively and efficiently. Having seen the withheld information he accepts that it comprises discussions that have not been circulated outside the private office and accepts that the exemption is engaged.
19. Section 35 is a qualified exemption and it is therefore necessary to consider whether the public interest would be better served by maintaining the exemption or by disclosing the withheld information.

Public interest test

20. The Commissioner's guidance² explains that public interest arguments under section 35(1)(d) should focus on harm to the private office's effectiveness.
21. There is no inherent or automatic public interest in withholding all information falling within this exemption. The relevance and weight of public interest arguments depends entirely on the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case. The key public interest argument for this exemption is likely to relate to preserving the private office's ability to focus on managing the Minister's work efficiently without external interference and distraction.
22. In requesting their internal review the complainant provided their view:

"I do not accept that answering this request would impede the timely and efficient operation of the ministerial private office; and processing FOI requests is a legal duty and a reasonable response to issues of transparency and accountability, it is not 'external interference and distraction'. Furthermore your public interest test makes no mention of the important need for accountability and transparency on the way FOI matters are conducted within BEIS, which is a legitimate topic for public scrutiny and concern."
23. BEIS advised the Commissioner that it recognises that there is a general public interest in the operation of ministerial private offices and disclosure of material which would promote transparency of how they operate.
24. However it went on to advise that it is in the public interest for private offices to be able to manage their time and operation efficiently without external interference and distraction. It explained its view that disclosure of advice and dialogue between private office officials would hinder the efficient operation of BEIS' private offices adding:

"There is a strong public interest in ensuring private office officials can have a safe space in which to share their views and deliberate freely and frankly, giving full consideration to the issues in hand and seeking advice where appropriate. If this information were made public, we believe the nature of such discussion would inhibit officials from expressing their views in a free and frank manner and it would be

<https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

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impossible to develop and take well considered decisions, affecting the efficient operation of BEIS' private offices."

25. The Commissioner has viewed the information withheld under this exemption and has considered the balance of the public interest. He considers there to be a significant weight in favour of transparency of government as a result of disclosure of this information, in terms of informing the public on the operation of private offices in response to an FOI request. He notes BEIS' concerns regarding the inhibition of officials from expressing their views and the potential impact on decision making and the efficient operation of private offices. He understands the protection of officials which BEIS is suggesting, however, as cited in his guidance:

"Some arguments may relate to the protection of civil servants. Such arguments must focus on how disclosure of information about civil servants harms good government. For example, that it would affect their perceived neutrality and undermine their future working relationships, or contribute to a chilling effect, or distract them from their primary task, or weaken the accountability of Ministers. However, these arguments do not generally carry much weight, as officials should not be easily deterred from doing their job."

26. The Commissioner is not persuaded that the information here is particularly sensitive such as to have an impact on the operation of the private offices or the officials doing their job. FOIA allows society to understand the operation of government departments which would otherwise remain unknown. In this case the Commissioner considers there to be a compelling weight in that understanding and therefore has determined that the public interest favours disclosure.

Section 36 – Prejudice to effective conduct of public affairs

27. Section 36(2) FOIA states:

"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

(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."

29. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
30. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
31. The qualified person in this instance was Minister Paul Scully. BEIS confirmed that the Minister was provided with the information and the Commissioner has seen the submission to him and a brief email response. The Commissioner is satisfied that, as a Minister, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
32. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
33. In seeking the advice of the qualified person, BEIS prepared submissions on 1 October 2021 which quoted the request, provided context to the requested information, explained the operation of the exemptions cited and gave an overall recommendation that supported the application of the exemptions. By agreeing to the application of the exemptions, the qualified person effectively supported the arguments included in the submissions, including the acceptance that the prejudice described in sections 36(2)(b)(i) & (ii) & (c) would occur through disclosure. The level of prejudice designated by 'would' prejudice means that it is more likely than not (ie a more than 50% chance) that prejudice would occur.
34. The Commissioner notes that these exemptions are about the processes which may be inhibited, rather than the specific content of the information. He considers that the issue is whether disclosure would or

would be likely to inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.

35. BEIS explained briefly that disclosure of the information would inhibit officials' ability to have free and frank exchanges, including when considering whether to seek advice on a particular FOI response, on similar topics in the future and would make it impossible to develop and take well considered decisions. Although not made clear in the submission, the Commissioner has concluded that BEIS' reliance on section 36(2)(c) is in regard to obtaining advice from the Clearing House and also advice on how to process the request.
36. In *McIntyre v Information Commissioner and the Ministry of Defence (EA/2007/0068, 4 February 2008)*³ The Information Tribunal took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used alongside another exemption, the prejudice envisaged must be different to that covered by the other exemption.
37. The Commissioner's guidance explains that if disclosing information would interfere with or distract decision makers in ways other than in the free and frank exchange of views or provision of advice, or would prejudice or undermine the decision itself rather than the frankness of the discussion specifically, then this argument only relates to section 36(2)(c). The Commissioner has concluded that this 'safe space' argument can be applied to the material withheld under section 36(2)(c). However, he notes that this need for a safe space will be strongest when the issue is still live. Once a decision is made, a safe space for deliberation will no longer be needed.
38. Having considered the parts of the information withheld under section 36(2)(b)(i) & (ii) and (c), and taking into account the qualified person's reasonable opinion, the Commissioner is satisfied that the limbs are engaged with reference to the relevant information.
39. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test set out in section 2(2)(b). The Commissioner has therefore considered the arguments in

³ [McIntyre v Information Commissioner and the Ministry of Defence \(EA/2007/0068, 4 February 2008\)](#)

favour of disclosing the information and those in favour of maintaining the exemption.

40. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed and prejudice or inhibition would, or would be likely to occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

Public interest test

41. BEIS again acknowledged that:

"disclosure of the requested information would provide greater transparency in understanding the dialogue officials have when processing FOI requests of this sensitive nature."

42. The complainant explained:

"BEIS have again given insufficient weight to the very important consideration of the need for proper accountability and transparency on the way FOI matters are conducted within the department. The internal review response also relies on generalised assertions about harm without providing any evidence or supporting argument. In my opinion the public interest strongly favours disclosure."

43. BEIS explained its view that there is a strong public interest in ensuring officials can have a safe space in which to share their views and deliberate freely and frankly, "giving full consideration to the issues in hand and seeking advice where appropriate." BEIS added that if the requested information was disclosed public discussion would inhibit officials from expressing their views in a free and frank manner resulting in difficulty developing and taking well considered decisions.

44. The Commissioner notes that arguments under s36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution.

45. As the Commissioner's guidance explains, there are two main reasons for such caution. Firstly, since FOIA was introduced in 2005, public officials now recognise that it is not possible to guarantee the confidentiality of their advice or deliberations. Secondly, civil servants and other public officials are expected to be impartial and robust when giving advice, and not be easily deterred from expressing their views by the possibility of future disclosure.
46. The Commissioner agrees with the complainant that the need for proper accountability and transparency on the way FOI matters are conducted within government carries significant weight in balancing the public interest. There has been a good deal of media coverage regarding the handling of FOI requests, in the broadest terms, within central government departments and the Commissioner considers that the information requested in this case is legitimately able to contribute to that debate.
47. Further to the points set out in paragraph 45 above the Commissioner has considered BEIS' rationale in favour of maintaining the section 36(2) exemptions. He is not persuaded that disclosure of the requested information would result in officials having less frank discussions or providing poorer advice. Those officials involved in the content of the withheld information are performing their duties as required, the Commissioner considers that the individuals concerned should be robust in their roles and fully aware of FOIA and the accountability it strives to provide. He does not consider the withheld information to be sufficiently sensitive so as to outweigh the public interest in disclosure.
48. Therefore in the specific circumstances of this case the Commissioner considers that the public interest favours disclosure of the information withheld under section 36(2)(a)(i) & (ii) & (c).

Section 40(2) personal information

49. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
50. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

⁴ As amended by Schedule 19 Paragraph 58(3) DPA

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

51. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
52. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

53. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
55. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
56. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
57. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information which comprises named individuals, comprises personal data. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
58. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
59. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

60. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

61. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
62. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
63. The Commissioner notes that the individuals concerned have not specifically consented to this data being disclosed to the world in response to the FOIA request. However, the requester, who is the subject of this request, made this data public in their tweets.

Lawful processing: Article 6(1)(f) of the GDPR

64. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁵ .

65. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

⁵ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

66. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

67. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

68. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

69. The complainant has argued:

"Given the important issues of concern that have been raised in relation to the processing of the initial FOI request, I believe it is both fair and necessary for the identity of all the officials involved to be disclosed. I therefore do not accept the use of section 40 in this regard.

Furthermore, since George Grylls has identified himself by tweeting publicly on the topic and is well known to be a journalist..., I also would not accept any use of section 40 in relation to him, if he was actually the requester himself. I note also that information has been redacted from what appears to be standard Times & Sunday Times email disclaimer (available to anyone who has received an email from an employee of those newspapers), and I do not accept that this is personal data at all."

70. The Commissioner notes the complainant's comments above but would clarify that BEIS did not rely on section 40(2) to withhold the names of senior officials. Those senior officials names appear in the information withheld under sections 35 and 36. The withheld names are those of junior officials.

71. The Commissioner understands the complainant's point that George Grylls already placed their name in the public domain by quoting the request. However, the Commissioner considers there to be limited

legitimate interest in the withheld information as disclosure would add little to the whole of the requested information.

Is disclosure necessary?

72. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
73. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

74. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
75. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
76. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
77. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

78. The Commissioner is satisfied that junior members of staff would not expect information relating to their work published to the world at large.
79. The Commissioner asked BEIS if it had consulted the requester as to whether they consented to their name being disclosed. BEIS did not contact the requester.
80. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
81. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Procedural matters

Section 17 – Refusal of a request

82. Under FOIA section 17(1) a public authority must issue a refusal notice in respect of any exempt information within 20 working days of the request.
83. The complainant made their request on 17 May 2021, BEIS responded after 103 working days, on 8 October 2021.
84. BEIS did not deal with the request for information in accordance with the FOIA. The Commissioner finds a breach of section 17(1) by BEIS failing to respond in accordance with this section within 20 working days.

Other matters

85. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
86. The complainant asked for an internal review of the outcome of their request on 11 October 2021. BEIS did not provide the results of its review until 16 March 2022, 103 working days later.

87. The Commissioner does not consider this to be acceptable practice.

Right of appeal

88. 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,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

89. 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.
90. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF