



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Tony Collins
Executive Editor
Computer Weekly
Quadrant House
Sutton
Surrey
SM2 5AS

10 June 2009

Dear Mr Collins,

Freedom of Information Act 2000: Section 50(1)
Name of Public Authority: Office of Government Commerce

Please find enclosed a Decision Notice issued under section 50(1) of the Freedom of Information Act 2000. This Decision Notice relates to your complaint to the Commissioner dated 23 May 2006. Your complaint has been carefully considered and in this case the Commissioner has found in favour the complainant. The attached Decision notice sets out the reason for this decision.

Your complaint has been carefully considered and in this case the Commissioner has found in favour the complainant. This letter sets out the reasons for that decision.

If you disagree with any aspect of the attached Decision Notice, you have the right to appeal to the Information Tribunal. Contact details for the Tribunal are included in the Decision Notice.

The Decision Notice includes details of both you and the public authority. This is to ensure that there is no doubt as to the request for information to which the Notice relates. The Commissioner will publish summaries of Decision Notices and provide complete copies on request. He will, however, remove all names and addresses of complainants from these versions.

Although public authorities may choose to reproduce the Decision Notices, the Commissioner would expect that they would take similar steps. The Commissioner considers that these may be necessary in order to comply with the requirements of the Data Protection Act.

You can/should write to us if the public authority fails to comply with any steps specified by the Commissioner in the Decision Notice. It is important to note



Information Commissioner's Office

that the Commissioner's power to commence legal proceedings in this situation is discretionary and although we will investigate the matter, formal action will not be appropriate in all cases.

I hope the above information is of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rachael Cragg', written in a cursive style.

RC Rachael Cragg
Senior Complaints Officer
Information Commissioner's Office

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 June 2009

Public Authority: Office of Government Commerce
Address: Trevelyan House
26-30 Great Peter Street
London
SW1P 2BY

Complainant: Mr Tony Collins
Address: Computer Weekly
Quadrant House
The Quadrant
Sutton
Surrey
SM2 5AS

Summary

The complainant requested the traffic light status (RAG), project titles and recommendations of gateway reviews carried out in the previous year by a number of government departments. The Office of Government Commerce (OGC) disclosed all but one of the project titles and gateway numbers of the current projects. The OGC refused to disclose the name of one project, its RAG status and recommendations under section 23(1), 33(1)(b) and 35(1)(a) of the Act. The OGC also refused to disclose the RAG status and recommendations of the other projects under section 33 and 35. The Commissioner has investigated and found that all the exemptions are engaged. However, he also finds that in relation to section 33 and 35 the public interest in maintaining the exemptions does not outweigh the public interest in disclosure. The OGC must disclose the information withheld under sections 33 and 35 within 35 calendar days of this notice. The Commissioner has also concluded that in failing to make available to the complainant information to which he is entitled the OGC has breached sections 1(1)(b) and 10(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part

1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant has advised that on 28 April 2006 he made the following request for information to the Office of Government Commerce (OGC):

"Please may I have the results of all gateway reviews on high-risk IT related projects carried out over the past year at the Home Office, Department for Health including Connecting for Health, and Department for Work and Pensions, including CSA."
3. The OGC wrote to the complainant on 12 May 2006 asking the him to clarify some aspects of his request: Whether 'Home Office' included the department's associated bodies; and as regard the request for 'results' of the Gateway Reviews if he was seeking the RAG status only or the full reports. The OGC explained that if it did not receive clarification within three months from the date of the email it would consider the request for information to be closed.
4. The complainant responded on 22 May 2006 explaining that his request only related to high – risk IT related projects within the Home Office. He also clarified that he was not seeking the whole report but only the results; the RAG status; the recommendations (edited) if necessary; and the name of the project.
5. The OGC replied in full to the information request on 6 June 2006 explaining that it held information as described in the request. In relation to that information it had decided to disclose the project / programme names, departments and Gate Numbers of high risk IT related reviews that took place within the specified period; except those which related to bodies covered by the exemption at section 23. The OGC also refused to disclose the RAG status and recommendations of the reviews under sections 23, 33(1) (b) and (2) and 35(1) (a).
6. Under section 33(1) (b) and (2) the OGC asserted that disclosure of the information would prejudice its functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions, in so far as the Gateway review process is such a function. The OGC also said that some of the information relates to the formulation or development of government policy and so section 35(1) (a) applies and that projects related to bodies covered by section 23(3) of the Act had been removed from the list.
7. The OGC carried out a public interest test in relation to sections 33 and 35 and concluded that the public interest in maintaining the exemptions outweighed the public interest in disclosure of the information.
8. On 6 June 2006 the complainant asked the OGC to carry out an internal review of its decision to withhold some of the requested information.

9. The OGC carried out an internal review and communicated its findings to the complainant on 30 June 2006. The internal review upheld the decision not to disclose the name of one project, and the RAG status and recommendations of the reviews under sections 23, 33 and 35.

The Investigation

Scope of the case

10. On 26 July 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider if the OGC was correct to refuse to supply the name of one of the projects and the RAG status and recommendations of the Gateway Reviews under the exemptions.

Chronology

11. The Commissioner began his investigation on 8 May 2008 by writing to the OGC asking for further explanation regarding the application of the exemptions and for a copy of the withheld information. The Commissioner also asked the OGC to consider if it wished to present the same arguments to support the application of sections 33 and 35 as advanced in two previous decisions and two appeals to the Information Tribunal. These previous cases related to Gateway Reviews and RAG status of the ID card programme.
12. The OGC responded on 6 June 2008 confirming that it wished to present the same arguments as advanced to the Commissioner in cases FS50070196 and FS50132936 and the resulting Information Tribunal Cases EA/2006/0068 and 0080. The OGC also explained that some of the information was additionally withheld under section 23 as it related to bodies dealing with security matters. The OGC provided a copy of the withheld information. The Commissioner notes that whilst requests for similar information are likely to raise the same issues and arguments, each case must be looked at on its own merits with reference to the actual information requested and the circumstances that exist at the time of that request.
13. The Commissioner responded on 6 June 2008 asking for further details regarding the information withheld under section 23. The OGC responded on 10 June 2006 providing details of the security bodies to which the information relates.

Findings of fact

14. The OGC has explained that the Gateway review process examines the progress of high to medium risk governmental projects at five critical stages of their life-cycle. Reviews are mandatory for projects which are classed as high or medium risk. Each gateway review is assigned a gate number which refers to the type of review being conducted, for example gate zero reviews comprise a strategic

assessment of a programme and are intended to support future reviews however, gateway reviews do not necessarily progress in chronological succession.

15. Gateway reviews are written for Senior Responsible Officers (SRO's) for specific projects who are held to account for delivery of their projects. The OGC have explained that at present there are two safeguards to ensure the independence and quality of the Gateway Review Process:
 - Governance: the supervisory board overseeing OGC policy and activities, including the Gateway review process, is chaired by the Chief Secretary to the Treasury and is made up of permanent secretaries, including the head of the National Audit Office. This board meets three times a year and discusses, among other issues, Gateway statistics, issues and progress.
 - Choice of Reviewers: the process to gain accreditation as a reviewer has stringent, detailed and objective criteria such as, for example, a need for a minimum of eight years' specialist experience to be able to work on a high risk review.
16. OGC Gateway reports include details of the findings of the review and a series of recommendations that are addressed to the SRO. They also include a colour-coded assessment in the form of the Red Amber Green (RAG) Traffic Light System or RAG status. Red status means the project team should take immediate action in order to achieve success. Amber status means the project should go forward, with action to be carried out or recommendations to be acted on before the next OGC Gateway review of the project. Green means the project is on target to succeed but may still benefit from the uptake of recommendations. These constituent elements are closely inter-related. It is the importance which the review team ascribes to the various recommendations that determines the overall RAG status. In turn the recommendations build upon the most significant findings of the review.
17. The information being withheld in this case is the name of one project, and the RAG status and recommendations of all the projects requested.
18. Action on this case was deferred pending the outcome of two cases in which similar public interest arguments had been advanced which were awaiting determination by the Information Tribunal. Those cases (Office of Government Commerce v Information Commissioner (Tribunal references: EA/2006/0068 and 0080) were decided, appealed to the High Court, remitted to the Information Tribunal (Tribunal No.2) and have now been re-determined in Tribunal No.2's decision of 19 February 2009. This Decision Notice takes account of Tribunal No.2's conclusions on this matter.

Analysis

Procedural matters

General right of access

19. Section 1(1) of the Act provides that any person making a request for information to a public authority is entitled to (a) be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.
20. For the reasons which follow, the Commissioner considers that the information the Department withheld from the complainant should be released to him. Therefore, the Department has breached section 1(1)(b) of the Act in failing to communicate this information to the complainant in response to his request.

Time for compliance

21. Under section 10(1), a public authority must inform a person making a request for information whether it holds the information requested, and communicate that information to the applicant, no later than the twentieth working day following the date of receipt.
22. By failing to provide the complainant with information to which he is entitled within twenty working days of the date of receipt of the complainant's request, the Department has breached section 10(1) of the Act.

Exemption: Section 33 – audit functions.

23. Section 33(1)(b) applies to any public authority which has functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their public functions. The OGC has explained that one of its functions is to examine and review government projects at critical stages of a project's life-cycle, to assess whether it can progress successfully and to make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied that the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that the OGC is a public authority to which section 33(1) (b) may apply.
24. Section 33(2) allows a public authority to refuse to disclose information if disclosure would, or would be likely to prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
25. The OGC has argued that releasing the RAG status of a particular project would remove the confidentiality of Gateway reports; if the reports were altered from confidential peer reviews to reports subject to public scrutiny then this would inhibit the frankness, candour and voluntary cooperation of the interviewees and discourage future cooperation. They consider that disclosure could also result in

gateway reviews being written with disclosure in mind and so result in the reviews being less robust, less prompt and narrower in coverage. They argue this would weaken the Gateway process and therefore prejudice OGC's ability to carry out necessary examinations of efficiency, effectiveness and economy.

26. In reaching a decision as to whether in this case, disclosure of the information would or would be likely to prejudice the exercise of the OGC in its audit functions, the Commissioner has considered the Tribunal No 2's decisions in relation to EA/2006/0068 and 0080 *'Office of Government Commerce v Information Commissioner'*. The Tribunal first considered the threshold to be considered when applying the prejudice test and concluded that 'would' indicates prejudice being more probable than not.
27. The Tribunal also found that the OGC was reasonable in concluding that there would be a weighty chance of prejudice existing, because the underlying way that Gateway Reviews are undertaken would need some change to current practice if it were to be demonstrated under the Act that there could be no guarantee that reviews would be kept from disclosure in the future. These changes, it concluded would put the currently practised process at some risk and therefore it was reasonable for the OGC to determine that disclosure of the disputed information would be likely to prejudice the undertaking of Gateway Reviews and therefore the OGC's function. The Tribunal No.2 decision of 19 February 2009 found that there were four main points which justify that such prejudice was real and weighty.
- First – the undoubted success story which attends the gateway review process as whole
 - Second – the gateway review process has now permeated all types of government programmes
 - Third – the success and growth of the process has been maintained by three motivating features
 - The exchanges of free, candid and confidential information between reviews and interviewees
 - The equally candid and robust content of the subsequent reports; and
 - The mutual trust and confidence expressed by the interviewees and the SRO in the Review Team and the process as a whole based on the preceding two factors.
 - Fourth – the genuinely held belief by all those involved in the process that 'untimely' disclosure would seriously damage the three factors articulated above, namely that:
 - There would be a more guarded response
 - There would be more likelihood of more bland and anodyne reports; and
 - There would be a resulting unwillingness on the part of SRO's to be willing to cooperate with then attendant delays in what was called the increased risk of negotiation in the wake of the submission reports.

28. The Commissioner has considered the OGC's arguments put forward in this case and the decisions of the Tribunal and has decided that the OGC has demonstrated that release of the requested information would be likely to prejudice the exercise of its audit functions under section 33(1)(b). The Commissioner's decision is therefore that the exemption is engaged

Public Interest Test.

29. Section 33 is a qualified exemption and is subject to the public interest test. The OGC assert that the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information and that therefore the information is exempt from disclosure.
30. In considering the arguments for maintaining the exemption the Commissioner considered the following arguments put forward by the OGC in this case and in the Tribunal No.2 decision of 19 February 2009:
- There is a public interest in successful delivery of the programme for two reasons: the potential impact in improving a significant proportion of people's lives and the effective use of public money. To ensure these are met it is important that the programme is subject to effective and prompt peer review based on candid interviews. Maintaining confidentiality in order to promote openness, honesty and candid exchange of information is fundamental to this process.
 - Disclosure of the information would make interviewees become more guarded and cautious in their communications.
 - The public interest is already met in the increasing amount of information about the programme already in the public domain combined with the parliamentary scrutiny being afforded the programme.
 - Disclosure of the RAG statuses would put pressure on reviewers to 'soften' the status from red to amber which would "enable" the RAG status a less useful tool.
 - Current stakeholders involved in the review process such as interviewees, reviewers, Senior Responsible Officer's and members of the private sector would become unwilling to be involved.
 - The process would become lengthened as more consideration would be given to the potential further disclosure of the information contained within the review. Additionally the content of the review would become bland and issues of sensitivity could be omitted.
31. The following arguments from the complainant, the original Tribunal and the Tribunal No.2 were considered in favour of disclosure:
- There is a public interest in understanding the programmes and ensuring their successful delivery and value for money.
 - There are general public interest arguments in transparency and scrutiny of the projects
 - The current means of public scrutiny available through the National Audit Office and Public Accounts Committee involve largely historical and

retrospective views and are not related to current projects. Gateway Reviews would provide a level of public scrutiny of current projects.

- There is a debate as to the merits of the schemes, the practicalities involved and the history as to the decision making which underlies the schemes and which continues today
- Disclosure would assist to the public's knowledge in respect of IT projects and ensure that schemes as complex as these are properly scrutinised and implemented.

32. In reaching a decision as to where the balance on the public interest lies the Commissioner has considered the Tribunal's conclusions. The Tribunal pointed out that the arguments put forward by the OGC were based on the fact that the review system could only be successful if disclosure is not a realistic possibility. The Tribunal also highlighted that since the publication of the Commissioner's notices those involved in Gateway reviews were still able to undertake them successfully, despite the known risk that they might be disclosed. The Tribunal No.2 of 19 February 2010 went further and stated:

"those involved in the Gateway review process feel that there has nonetheless been no alteration in their belief that, candour and participation still apply even today (18 months or so after the original Tribunal decision) in relation to the process as a whole. The fact that only two interviewers out of a constituency of over about 1500 reviewers have apparently withdrawn from their roles... does not persuade the Tribunal that the anticipated damage is likely to materialise the way suggested."

33. The Commissioner also considers that the main constraint on frankness from interviewees is not the prospect of publicity but that they may upset colleagues at a more senior level. Comments in the Gateway reviews are non-attributable to individuals and this will be completely unaffected by any prospect of disclosure. Whilst the Commissioner acknowledges that there is still a risk that it will be possible to ascertain who the source is of particular comments, this risk is not limited to disclosure under FOI, this is also a risk from insiders who see the report and will be most familiar with the position of interviewees. It would be unrealistic to imagine that people would not take part in the system because of the possibility of disclosure, not least because, in accordance with the Civil Service Code, civil servants must fulfil their duties and obligations responsibly.
34. The OGC has argued that disclosure could lengthen the process as consideration would need to be given to the potential disclosure under FOI of any review. However, the current ground rules regarding timescales for review are clear, and if the OGC make it clear that these ground rules will still be applied then these concerns will be dissipated.
35. The Commissioner has considered all the circumstances of the case and finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

Section 35 – formulation of government policy

36. The OGC also argued that the requested information was exempt from disclosure by virtue of section 35 of the Act. Section 35(1) (a) exempts information held by a government department from disclosure if it relates to the formulation or development of government policy.
37. The OGC has argued that the requested information includes DWP and Home Office programmes and projects that are in a state of ongoing policy development. It has argued that the Gateway review process is a key part of this policy development as it informs the departments of areas for future development and therefore helps ensure that development of policy is also on track. The OGC assert that disclosure of the RAG status and recommendations would prevent policy formulation or development from taking place in the self-contained space needed to ensure that it is done well. They also argue that disclosure would make policy development less effective by focusing departments' attention on obtaining a 'green' status rather than on effective formulation and development of policy.
38. It is arguable whether the exemption at 35(1)(a) is engaged in respect of the requested information. There is a strong argument that the information contained in the reports in fact relates to the implementation of the projects, rather than to the formulation or development of government policy around them. The Commissioner notes that all of the projects have been approved and are in the process of being implemented, hence the gateway reviews. It is also worth noting that the information requested is for the RAG status and the recommendations and not for all the information contained in the reports and it is open to question whether this information alone engages the exemption. However, in this case the Commissioner is willing to accept that the information does relate to the development of government policy. Disclosing the RAG status and recommendations alone could relate to the development of government policy as revealing that a project has a RED status could affect decisions ministers make about its future development, and he is therefore willing to accept that section 35 is engaged.

Public Interest Test

39. Section 35 is a qualified exemption and is subject to the public interest test. The OGC assert that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
40. The complaint has put forward what he considers to be strong public interest arguments in favour of the release of the requested information. These are:
 - There is a public interest that Minister's statements can be assessed for their completeness- and release of the red, amber or green status would affect that.
 - It is in the public interest that when Ministers state any of the projects have had a clear bill of health they confirm the project's status.
 - If the status of the projects is red, or has been red it is in the public interest that the information is disclosed.

- In any case where there are recommendations to be carried out either under an amber or green status it is in the public interest to distinguish this.

41. The OGC put forward the following public interest arguments for maintaining the exemption:

- The public interest in successful delivery of the programme must take account of two factors: the potential impact in improving a significant proportion of the public's lives and the effective use of a large amount of public money. To ensure these interests are met, it is important that the programme is subject to effective and prompt peer review, based on candid interviews.
- Disclosure would (or would be likely to) inhibit candour among future interviewees on this and other programmes. Any resulting lack of candour would cause Gateway reviews to be less useful.
- In particular, if there were an expectation that RAG status would become public, reviewers might feel pressure to change the status e.g. from red to amber, which would render the RAG status a less useful indicator and would not be in the public interest.

42. In order to decide whether the public authority has dealt with the complainants request for information in accordance with the requirements of Part 1 of the Act the Commissioner must assess whether in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In coming to his decision the Commissioner has taken the following factors into account.

43. The Commissioner is aware of the importance the Government attaches to the Gateway Review process. He recognises that there is a balance to be struck between the competing societal objectives of public accountability and transparency and the importance of maintaining public confidence in the robustness and effectiveness of the Gateway Review process. The Commissioner has taken these competing objectives into account in reaching his decision and has taken full account of the approach adopted by Tribunal No.2 in EA/2006/0068 and 0080 '*Office of Government Commerce v Information Commissioner*'. He has also had regard to the decision of the Information Tribunal in the *Secretary of State for Work and Pensions v the Information Commissioner (EA/2006/0040)*, in which the Tribunal highlighted the presumption in favour of disclosure, saying:

"there is an assumption built into [the Act], that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities".

44. The subject of these reports will have a significant impact on the lives of individuals and their relationship with the state. The Commissioner considers that this in itself presents a very strong argument in favour of disclosure. The public should therefore be kept informed as far as possible as to how the programmes are progressing and what impact any of the projects will have on them. Disclosure is likely to enhance public debate of issues such as various projects feasibility

and how they are being managed. It will also allow the identification of project risks and practical concerns. It could also go some way towards educating the public by allowing it to develop a better understanding of the issues surrounding the development of the various projects.

45. The Commissioner is mindful of the OGC's view that because the programmes are of public importance, there is strong public interest in the programmes being successful. The OGC argues that it is therefore essential that the integrity of the Gateway Process is maintained and not damaged in any way. The Commissioner has taken this into account but still considers that allowing the public a better understanding of the development of the programmes outweighs the public interest arguments put forward by the OGC. In any event, the Commissioner is not persuaded that disclosure of the information requested will damage the Gateway Process in the way the OGC has suggested it will.
46. The Commissioner is mindful of the OGC view that the release of the information showing the projects traffic light status would make future prospective interviewees less willing to participate in the Gateway Process, or that they may be less candid or frank with their comments. However, in this case he is not persuaded by this argument and expects those involved to maintain the high standards of professionalism that their positions demand. Further he takes note of the approach of the Tribunal No.2 as outlined in paragraph 28 in relation to this matter.
47. In the Commissioner's opinion the reports do not contain any information which would cause participants to be less willing to contribute openly and fully to future Gateway Reviews. Gateway reports do not attribute comments to any particular person, although the Commissioner recognises that in some cases the nature of the information is such that it may be possible to attribute the comment to a particular individual. However, even if it is possible to do this, the Commissioner is still not convinced that disclosure of the requested information would, or would be likely to, lead to contributors being less candid in future reports. Should there be evidence of this, the organisations involved must take the necessary measures to ensure their staff continue delivering the quality of advice that they are expected to do.
48. In any event in this case the complainant has only asked for the status of the Gateway Reviews and any recommendations. In the Commissioner's opinion, having viewed the withheld information, disclosing this information will not reveal details of the concerns but will summarise recommendations and actions to take with no reference to individual participants. He is therefore unable to accept that interviewees will be less frank with their comments if the information is disclosed.
49. The Commissioner's assessment is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

Section 23: 'Information supplied by, or relating to bodies dealing with security matters'

50. Section 23(1) provides that information is exempt if it was directly or indirectly supplied to the public authority, or relates to, any of the bodies specified in subsection (3).
51. The OGC explained that one of the programmes falling within the scope of the request was the responsibility of one of the bodies listed in subsection (3). Therefore the information requested: the name of the project, recommendations and RAG status has been received from and relates to the bodies. The OGC explained that the information contained within the recommendations directly relates to the security body and its project as well as the name and RAG status.
52. The Commissioner has been made aware of the project name and the body involved and therefore accepts that the information withheld under section 23 was supplied by or relates to one of the security bodies listed in subsection (3).

The Decision

53. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- i) The Application of section 23(1) to some of the withheld information
54. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i) The application of section 33(1)(b) and (2) as the public interest in maintaining the exemption does not outweigh the public interest in disclosure
 - ii) the application of section 35(1) (a) as the public interest in maintaining the exemption does not outweigh the public interest in disclosure
 - iii) section 1(1)(b) of the Act was breached by virtue of the incorrect application of section 33(1)(b) and (2), and section 35(1)(a)
 - iv) section 10(1) of the Act was breached by failing to provide the requested information within twenty working days of the date of receipt of the request.

Steps Required

55. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- i) Disclose the information withheld under sections 33(1) (b) and (2) and 35(1) (a)

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

Failure to comply

57. 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.

Right of Appeal

58. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 10th day of June 2009

Signed



Gerrard Tracey
Assistant Commissioner

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

Legal Annex

Audit functions

Section 33(1) provides that –

“This section applies to any public authority which has functions in relation to-

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

Section 33(2) provides that –

“Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”

Section 33(3) provides that –

“The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny 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).”

Section 35(4) provides that –

"In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking."

Section 35(5) provides that –

"In this section–

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications–

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means 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 National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."

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

Section 23(1) provides that –

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

Section 23(2) provides that –

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

Section 23(3) provides that –

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

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

Section 23(4) provides that –

“In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

Section 23(5) 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) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”