

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 March 2010

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

Summary

The complainant requested a copy of a draft consultation document on a review of the UK's drugs classification system. The Home Office claimed that the report was exempt from disclosure by virtue of sections 35(1)(a) and (b) (formulation of government policy and disclosure of Ministerial communications). During the course of the Commissioner's investigation the Home Office released some information that it considered fell within the scope of the request, cited section 21(1) in relation to information which it considered was accessible to the complainant by other means and confirmed that it was citing section 35(1)(a) in relation to the remaining withheld information. The Commissioner found that the exemption at section 21 is not engaged. He found that the exemption at section 35 is engaged, but that the public interest in maintaining the exemption does not outweigh that in disclosing it. Therefore, he orders disclosure of the draft consultation document.

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 Misuse of Drugs Act 1971 (amended through the Criminal Justice 2003 Act, which came into effect in 2004) divides controlled drugs into three classes depending on the degree of harm deemed attributable to each drug. These classes (A, B and C) carry different levels of penalty for possession and dealing.
3. The classification of individual drugs can change over time if new evidence shows that they pose a greater or lesser risk to society. The Home Secretary decides what harm rating individual drugs should be given, based on evidence provided by advisers who assess the drugs according to the problems they cause to society and users.
4. On 19 January 2006, Charles Clarke, the then Home Secretary, announced the future publication of '*a consultation paper with suggestions for a review of the drug classification system*'.
5. On 13 October 2006, John Reid, then Home Secretary, announced that the Government would not be proceeding with the review.

The Request

6. The complainant wrote to the Home Office on 26 March 2007 requesting:

'comprehensive information about the reasons and reasoning process that the SSHD [the Home Secretary] undertook in reaching his decision in Command Paper 6941, October 13 2006, at page 5, paragraph 12, in which it was said:

"Government has decided not to pursue a review of the classification system at this time".

Also, I seek disclosure of a document, specifically "the consultation document which is in draft form in the department"'. It was referred to by Vernon Coaker MP in his submission to the 2005 – 2006 House of Commons Science and Technology Committee on 14 June 2006 in answer to question 1205 and published in HC 1031 (2006)'.
7. The Home Office responded on 2 July 2007. In its response, the Home Office told the complainant about the factors the Government had taken into consideration in deciding not to proceed with the review. It also confirmed that it held the requested information but that it was

exempt from disclosure by virtue of sections 35(1)(a) and (b) (formulation of government policy and Ministerial communications).

8. The complainant requested an internal review on 4 February 2008. The Commissioner notes that the complainant explained to the Home Office the reason for the delay in making his request for an internal review.
9. The Home Office wrote to the complainant on 12 March 2008 with the outcome of its internal review. In its correspondence, it upheld its decision to cite section 35(1)(a). No reference was made to section 35(1)(b).

The Investigation

Scope of the case

10. On 8 April 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:
 - that ensuring that the drug classification system is fit for purpose is in the public interest.
11. In his correspondence, the complainant specifically requested the Commissioner to focus his investigation on the matter of whether or not the Home Office was correct to refuse to disclose the draft consultation document.
12. During the course of the Commissioner's investigation, the Home Office released some information that it considered fell within the scope of the request, cited section 21(1) in relation to information which it considered was accessible to the complainant by other means and confirmed that it was citing section 35(1)(a) in relation to the remaining withheld information.
13. The complainant contacted the Commissioner on 24 July 2009. In this correspondence he advised that his request was not satisfied by the Home Office's disclosure as it *'referred to information already in the public domain'*. He explained that the disclosure made no reference to the proposals contained within the requested document, nor the reasoning behind the consultation proposals.

14. The Commissioner has focussed his investigation on whether or not the Home Office correctly cited sections 21(1) and 35(1)(a) in relation to the withheld elements of the draft consultation document.

Chronology

15. The Commissioner wrote to the Home Office on 17 April 2009 asking it to confirm the exemptions it was claiming and to provide further information about its decision to cite the exemptions and how it conducted the public interest test.
16. The Home Office provided the Commissioner with a copy of the withheld information on 12 May 2009 and a response to his questions on 9 June 2009. In this correspondence, the Home Office advised the Commissioner that it was citing the exemptions in sections 21 (information accessible to applicant by other means) and 35(1)(a) (formulation of government policy) in relation to the draft consultation document.
17. Following the Commissioner's intervention, the Home Office disclosed some information to the complainant which it considered fell within the scope of his request and referred the complainant to information which it now considered was in the public domain.

Analysis

Exemptions

Section 21 Information accessible to applicant by other means

18. Section 21 states:

'(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information

available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme'.

19. During the course of the Commissioner's investigation, the Home Office told the Commissioner that:

'On reflection, we recognise that the document contains some factual information which is or was in effect already in the public domain and to which we therefore propose to apply the exemption in section 21 (information accessible to applicant by other means)'.

20. Although not specifically stated, the Commissioner understands the Home Office is citing section 21(1) of the Act.

21. In relation to the information withheld under section 21(1), the Home Office advised:

'We propose to provide [the complainant] with a copy of Annexes A, B and C to the document, plus the four-page section entitled 'International comparisons' (paragraphs 8.1 – 8.15). So far as the rest of the material not covered by section 35(1)(a) is concerned, we propose to explain to [the complainant] in general terms what information the draft document draws upon and provide links to sources on the internet where he can find it'.

22. The Commissioner acknowledges that the Home Office wrote to the complainant on 2 July 2009. In its correspondence the Home Office explained that, having reviewed its original decision, it now considered that some of the information originally withheld is accessible to him. It described the relevant parts of the document being withheld under section 21(1) as consisting of *'factual information about drugs and drug classification at the time the draft was written'*.

23. The Home Office provided the complainant with details of how to access the relevant source documents online and explained how, in its view, they related to the information contained within the draft consultation document. The Home Office also disclosed some information from the draft consultation document itself, together with a number of its annexes.

Is the information reasonably accessible?

24. The Commissioner considers that, where information is available elsewhere, it does not necessarily mean that it is 'reasonably accessible' to the applicant. In his view, information is reasonably accessible if the public authority:
 - knows that the applicant has already found the information; or
 - is able to direct the applicant precisely to the information.
25. In considering whether or not the Home Office is correct in claiming that the withheld information is readily accessible to the complainant, the Commissioner has first addressed the question of whether or not the complainant has the necessary computer facilities to enable him to access the links provided by the Home Office.
26. The Commissioner notes that he received a letter from the complainant, written after the complainant had received the Home Office's correspondence which provided him with the links to the information available online. The Commissioner notes that the complainant made no reference to the fact that he was unable to access the information online. The Commissioner is therefore satisfied that, in this case, there is no evidence that the complainant did not have access to the necessary computer facilities to enable him to access the links provided.
27. In accordance with the Information Tribunal's guidance in the case of *Ames v Cabinet Office* (EA/2007/0110) the Commissioner considers that it is reasonable to expect public authorities to point specifically to the information it considers relevant to the request rather than, for example, to say that there could be something of relevance on a website.
28. In his view, this means the public authority has to be reasonably specific to ensure the information is found without difficulty and not hidden within a mass of other information. He has therefore considered the extent to which the Home Office provided the complainant with a precise link or some other direct reference to exactly where the relevant information can be found.
29. In this respect, the Commissioner notes that when the Home Office provided the complainant with links to a number of documents it considered relevant to his request, it also provided an explanation as to how, in its view, the information related to the draft consultation paper.

30. The Commissioner notes the following level of explanation provided in relation to the documents:
- *'provides information about the historical background to the Misuse of Drugs Act 1971, the Act's classes and schedules of drugs and the UN Conventions';*
 - *'provides information on the ABC classification system, its evidence base and assessment of harm, the Misuse of Drugs Regulations, international comparisons and the role of the Advisory Council on the Misuse of Drugs';*
 - *'this provided further information on those author's views of assessment of harm which is relevant';* and
 - *'provides the Government's view on the above issues in 2006, including tobacco and alcohol, and contains a 'Table of knowledge inputs into classification system' which was quoted in the draft consultation document'.*
31. The Commissioner accepts that the Home Office provided the complainant with links to a substantial amount of information which it considered relevant to his request. However, having considered the Home Office's explanations as to how it considers the information to be relevant to the request and taking account of the length of some of the documents involved, the Commissioner is not satisfied that the Home Office provided the complainant with sufficiently precise directions to enable him to establish where the requested information can actually be found.
32. In the Commissioner's view, as there is scope for the way in which source material is, for example, used, presented or interpreted, it may not accurately reflect the requested information and cannot therefore be deemed to be the requested information itself.
33. Where links provide access to information that is directly quoted, he accepts there is a stronger case for saying that it is the requested information but he considers that, without knowing the context in which quotes or statistics are used, they may not in themselves accurately convey the message contained in the requested information.
34. Consequently, the Commissioner does not accept that the information is reasonably accessible and therefore does not find the exemption engaged. Accordingly, he requires the Home Office to disclose to the complainant the information withheld under this section of the Act.

Section 35 – Formulation of government policy

35. Section 35(1) of the Act provides that:

'Information held by a government department or by the Welsh Assembly Government 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 for the provision of such advice, or*
- (d) the operation of any Ministerial private office.'*

36. Although it originally applied section 35(1)(a) to the whole document, the Home Office confirmed during the course of the Commissioner's investigation that it is only relying on section 35(1)(a) in relation to specific paragraphs within the report.
37. Section 35 is a class based exemption, requiring no evidence of prejudice. In order for the exemption to be engaged in this case, as the Home Office is citing section 35(1)(a), the withheld information must, as a matter of fact, relate to the formulation or development of government policy. The Commissioner has therefore considered whether or not the withheld information relates to the formulation or development of government policy.

Does the information relate to the formulation or development of government policy?

38. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action. It is unlikely to be about purely operational or administrative matters, or to a policy which has already been agreed or implemented.
39. The Commissioner is mindful of the fact that the term '*government policy*' is not defined in the Act. In this respect, the Home Office has argued that, when applying section 35 of the Act, '*it is therefore not necessary that the information on the formulation or development of Government policy relates to ultimately agreed policy. The exemption*

can apply to early ideas that are discarded as policy is developed or withdrawn'.

40. The Home Office has argued that although the decision not to proceed with a review of the drug classification system was taken before the request from the complainant was received, *'drug strategy is in effect always in development'*. Accordingly, it considers that the *'issues raised in the draft consultation document are to that extent still relevant to ongoing policy development in this area'*.
41. The Home Office has argued that, in applying the exemption, it has taken into account the Information Tribunal's conclusions in *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006). The Commissioner notes that this was a case in which the Tribunal was also considering information that had been withheld under section 35(1)(a).
42. The Tribunal's approach in this case demonstrates that where the majority of information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be regarded as relating to the section 35(1)(a) purpose.
43. In accordance with the Tribunal's decision, the Commissioner considers that the term 'relates to' in section 35(1) can safely be interpreted broadly. Although this has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to adopt a common sense approach, disclosing any information which causes no, or no significant, harm to the public interest.
44. Having reviewed the withheld information in this case, the Commissioner accepts that the contents of the consultation paper provide context and factual information about the subject of the UK's drug classification system. He also acknowledges that it contains what the then Home Secretary, in his statement to the House of Commons on 19 January 2006, described as *'suggestions for the review of the drug classification system'*.
45. The Commissioner is satisfied that, by virtue of the withheld information being a consultation paper whose purpose is the review of an existing policy, namely the drug classification policy, it relates to the formulation or development of government policy. He therefore finds the exemption engaged.
46. Having found the exemption to be engaged, the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

47. The Commissioner understands that, before changing a particular policy, a public authority may consult on the issue in question. In this respect, the Home Office website states:

'Before changing policy, the Home Office publishes consultation papers.

These set out government proposals on a particular issue and ask for responses from people and organisations with specialist knowledge in that area. We also value responses from the general public.

The responses received help to ensure that any proposed changes to the law will have a real, practical impact'.

48. The complainant has argued in favour of disclosure on the basis that the requested information is a "draft consultation document" which was to inform a public consultation on the need for a review of the drug classification system'.

49. The Home Office acknowledges that:

'There is a public interest in members of the public being able to assess the quality of information and advice given to Ministers in relation to the decisions taken, the manner in which they were made and their proposed implementation or withdrawal. We also acknowledge that, with increased public knowledge of the way government works, the public contribution to the decision making process may in the future become more effective and the process more broadly based'.

50. The Home Office told the complainant that it agrees that 'disclosure would also increase the public's confidence in the system by which legislation is considered'. It also said it was 'mindful that the matter of drug classification is of great interest to the public.'

51. Further, the Home Office acknowledges that 'the drug classification system remains a sensitive and ongoing issue' and that in this respect, disclosure 'would allow a marginally more informed public debate'.

Public interest arguments in favour of maintaining the exemption

The safe space argument

52. The Home Office has advised the Commissioner that the draft consultation document 'represented a strand of thinking among some

officials at the time, but was abandoned at a fairly early stage of development'.

53. Consequently, in support of its decision to withhold the requested information, the Home Office has told the Commissioner that it considers release *'would reduce the quality of advice given to Ministers if a proposal at an early stage of development, which more importantly was subsequently abandoned, were to be made public'* and that *'there is a strong risk that the development of options and proposals will become inhibited and over-cautious'* as a result of disclosure.
54. More generally, the Home Office has argued that:
- 'Ministers and officials should be able to conduct rigorous and candid risk assessments of their policies and programmes, including considerations of the pros and cons, without fear of disclosure. The prospect of disclosure could inhibit consideration and debate of the full range of policy options'.*
55. In this respect, it has argued that:
- 'section 35 is statutory recognition of the public interest in allowing ministers and their officials to have a clear space to debate matters internally in the knowledge that these discussions will not be made public'.*
56. The Commissioner acknowledges the argument about the need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement.
57. In his view, this argument exists separately to, and regardless of, any potential effect on the frankness and candour of policy debate that might result from disclosure of information under the Act (the 'chilling effect'). Even if there was no suggestion that those involved in policy development and formulation might be less frank and candid in putting forward their views, in his view there would still be a need for a 'safe space' for them to debate policy and reach decisions without being hindered by external comment.
58. However, the Commissioner considers that an important determining factor in relation to the 'safe space' argument will be whether a request for such information is received whilst a 'safe space' in relation to that particular policy-making process is still required. In this respect, he notes that the Home Office has advised that the decision not to proceed with a review of the drug classification system had been taken by the time the complainant's request for information was received.

Accordingly he considers that the argument in relation to the importance of preserving safe space is substantially diminished.

The 'chilling effect' argument

59. Another possible public interest factor concerns the 'chilling effect' argument, that is, the possibility that disclosure of information will reduce the frankness and consequently the quality of debate and advice. Such arguments are described in *Scotland Office v the Information Commissioner* (EA/2007/0070) as arguments about 'the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause'.
60. The Commissioner accepts that in principle the possibility of disclosure of information may have a 'chilling effect' on discussions. However, he also notes that the Information Tribunal has generally not given significant weight to 'chilling effect' arguments. For example in the case of the *Foreign and Commonwealth Office v The Information Commissioner* (EA/2007/0047) the Tribunal indicated that:

'we adopt two points of general principle which were expressed in the decision in HM Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential.... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.'
61. In this case, the Home Office has argued that *'release would reduce the quality of advice given to Ministers if a proposal at an early stage of development, which more importantly was subsequently abandoned, were to be made public'*.
62. When considering the 'chilling effect', the Commissioner would expect public authorities to provide convincing arguments for each kind of impact being argued with reference to the particular disclosure being considered.
63. In this case, he considers the argument put forward by the Home Office to be general in nature and lacking in any specific evidence. Accordingly, he considers that the weight that can properly be given to the 'chilling effect' of disclosure is slight.

The accuracy argument

64. In support of its withholding of the requested information, the Home Office told the complainant that it *'did not consider it to be in the public interest to release a document that was an early piece of work relating to a review that did not take place. The document is no more than an early draft and may possibly contain factual inaccuracies'*.
65. The Commissioner notes that the Home Office variously describes the information which is the subject of this request as being *'a draft of a proposed public consultation paper on a review of the UK's drugs classification system'* and *'an unapproved draft consultation document'*. In view of this emphasis, the Commissioner is surprised that there does not appear to be anything on the document itself indicating its status as a draft version of the report.
66. During the course of the Commissioner's investigation, the Home Office clarified its argument that the information may not be accurate, explaining that, as the draft was abandoned at an early stage, it was not subject to final checking for factual accuracy.
67. It has also told the Commissioner that the draft consultation document *'did not represent Government policy at the time or subsequently'*.
68. In this respect, the Commissioner notes that the Act gives a right to information held, not to information which is accurate. In his view, a public authority is able, when responding to a request, to explain, for example, that its response may contain some factual inaccuracies. He therefore considers this argument irrelevant when considering the public interest.

Balance of the public interest arguments

69. Section 2(2)(b) of the Act states that where an exemption is qualified, information will only be exempt if the public interest in maintaining the exemption outweighs the public interest in disclosing it. This means that where a qualified exemption is engaged, the information must still be disclosed unless the public interest in maintaining the exemption is greater than the public interest in disclosing it. Where the public interest factors are equally balanced, the presumption is in favour of disclosure.
70. The Commissioner considers the withheld information in this case comprises context and background, options and questions, and administrative details.

71. In respect of the information which comprises context and background the Commissioner acknowledges that it may contain statements of fact and opinion. However, in this case, he considers that it is principally a 'technical' outline of the context and possibilities within which policy is to be decided, rather than a substantive debate over potential policy positions involving the exchange of views and advice. As such, the Commissioner does not consider that the factors favouring maintenance of the exemption are particularly strong in relation to such information.
72. In respect of the information which comprises administrative details, the Commissioner is not persuaded that the information is of such a nature that its disclosure will have the detrimental effect described by the Home Office.
73. The Commissioner accepts that there is other information which deals with the pros and cons of future options for the classification of illegal drugs as well as, understandably for a document of this nature, consultation questions on the issue of drug classification.
74. The Home Office has argued that the draft as a whole and these elements in particular '*show one way in which policy might have been developed but in the event was not*'.
75. When considering the opposing public interest factors in this case, the Commissioner considers the classification of illegal drugs is a matter of significant public concern. He notes that decisions regarding changes in classification, such as the reclassification of cannabis from class B to class C in 2004, have been the subject of intense media debate. The Commissioner also notes the level of media interest in the Science and Technology Committee Report, a report which addressed the classification of illegal drugs, published in the second half of 2006. He therefore considers the issue in this case likely to have been a matter of considerable public interest at the time of the request.
76. It is also the Commissioner's view that there is a strong public interest in understanding how government formulates policy and in ensuring that there is well-informed public debate on this and other important issues. Furthermore, he considers there is a public interest in promoting transparency and participation.
77. Having balanced the opposing public interest factors in this case, the Commissioner's conclusion is that the public interest in maintaining the exemption does not outweigh that in disclosing it and that the withheld information should therefore be disclosed.

Procedural Requirements

Section 1 – General right of access

78. Section 1(1) states:

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

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

79. As the Commissioner considers that the withheld information should have been disclosed, he finds the Home Office in breach of section 1(1)(b) of the Act in that it failed to provide disclosable information by the time of the completion of the internal review.

Section 10 - Time for compliance

80. 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.'

81. In this case, the complainant made his request for information on 26 March 2007 but the Home Office did not issue its refusal notice until 2 July 2007. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the Home Office in breach of section 10(1) of the Act. It also breached section 10(1) in failing to disclose information that was not exempt within this statutory time limit.

Section 17 – Refusal of request

82. 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'.*

83. The Commissioner notes that, in taking more than 60 working days to issue its refusal notice, the Home Office was clearly in breach of the statutory timescale, and therefore breached section 17(1) of the Act.
84. The Commissioner also considers the Home Office failed to specify in sufficient detail why each exemption it was citing applied. The Commissioner has therefore concluded that the Home Office breached section 17(1)(c) of the Act in failing to supply a Notice compliant with the requirements of that section within 20 working days.

The Decision

85. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- it breached section 1(1)(b) by not providing the complainant with the requested information wrongly withheld under sections 21 and 35 by the time of the completion of the internal review;
 - it breached section 10(1) by not confirming to the complainant within the statutory timescale that it held the requested information;
 - it also breached section 10(1) by failing to disclose wrongly withheld information within the statutory timescale;
 - it breached section 17(1) by not providing the complainant with a valid refusal notice within the statutory timescale; and
 - it breached section 17(1)(c) by failing to specify in sufficient detail why the exemptions cited applied.

Steps Required

86. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the information in the draft consultation document withheld under sections 21 & 35.
87. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

88. 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

89. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

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

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

Dated the 9th day of March 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

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."