

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 August 2013

**Public Authority:** Department for Communities and Local Government

**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to how the Department for Communities and Local Government ('DCLG') responded to an earlier request for information. The Commissioner's decision is that DCLG correctly engaged the exemptions at sections 36(2)(b)(i) and 36(2)(b)(ii) but in all the circumstances of the case, the public interest in disclosure outweighs the public interest in maintaining the exemption.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under sections 36(2)(b)(i) and 36(2)(b)(ii)
3. 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**

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4. On 5 September 2012, the complainant wrote to DCLG and requested information in the following terms:

"I request any letters or e-mails between DCLG staff, ministers and SpAds relating to a Freedom of Information request I made on July 25th 2012

In formulating your response, you may wish to note relevant case law such as Home Office and MOJ v ICO (2008); High Court CO/12241/2008 (2009).

The FOI request read:

"Please disclose all communications relating to Hatfield town team's successful bid for a Portas Pilot award.

In particular, could you provide any evidence confirming the claim of Rt Hon Grant Shapps MP that, "[he] asked the department to find another minister. [He] had to put a little distance there," as cited here: [http://www.whtimes.co.uk/news/hatfield\\_portas\\_pilot\\_win\\_completely\\_proper\\_says\\_mp\\_grant\\_shapps\\_1\\_1459014](http://www.whtimes.co.uk/news/hatfield_portas_pilot_win_completely_proper_says_mp_grant_shapps_1_1459014)

Please ensure the communications include documentation of final ministerial approval."

5. On 3 October 2012, DCLG wrote to the complainant confirming that it held information within the terms of the request and stating that it was considering the exemptions at section 36(2)(b)(i) and 36(2)(b)(ii) and required further time to consider the balance of the public interest test. It said it needed to extend the time by another 20 working days and would therefore respond by 31 October 2012.
6. DCLG wrote to the complainant again on 31 October 2012 stating that it needed another 20 working days to decide how best the public interest would be served in this case. It stated that it planned to issue a substantive response by 28 November 2012.
7. On 28 November 2012 issued its response. It provided some information within the scope of the request but refused to provide the remainder, citing the exemptions at sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA.
8. The complainant requested an internal review on 28 November 2012. DCLG provided an internal review response on 31 December 2012 in which it maintained its original position.

## **Scope of the case**

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9. The complainant initially contacted the Commissioner on 31 October 2012 to complain about the way his request for information had been handled. That case was not progressed as DCLG had not yet provided a

response. Following receipt of DCLG's internal review, the complainant wrote to the Commissioner on 7 January 2013 requesting that the case be expedited as it formed part of a continuing pattern of using delays, cost or section 36 exemptions in a blanket fashion to reject requests from the Office of the Shadow Secretary of State.

10. The Commissioner considered whether DCLG were correct to withhold the requested information under the exemptions at section 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA.
11. During the Commissioner's investigation, DCLG claimed the exemption for personal data at section 40(2) of the FOIA to the names and direct contact details of junior officials. The complainant has confirmed that he does not object to the application of this exemption to this information; therefore it has not been considered in this decision notice.

## **Reasons for decision**

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12. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
13. In this case DCLG is applying the exemptions at both section 36(2)(b)(i) and 36(2)(b)(ii).
14. Section 36(2)(b) provides an exemption where disclosure 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.

### **Are the exemptions engaged?**

15. In order to establish whether each of the exemptions has been applied correctly the Commissioner has:
  - Ascertained who is the qualified person or persons for the public authority in question;
  - Established that an opinion was given;
  - Ascertained when the opinion was given; and

- Considered whether the opinion given was reasonable.
16. With regard to the first two criteria, the Commissioner has established that for both exemptions the reasonable opinion was given by Mark Prisk MP, Minister of State for Housing. The Commissioner is satisfied that Mark Prisk is a qualified person as section 36(5)(a) of the FOIA provides that the qualified person for a government department is any Minister of the Crown.
  17. In relation to the third criterion, DCLG has provided dates when the opinion was sought and given. The Commissioner is satisfied that the opinion was provided after the receipt of the request and before the response of 28 November 2012. The Commissioner notes that, by virtue of section 17 of the FOIA, the opinion should have been provided prior to the 20<sup>th</sup> working day after receipt of the request when DCLG were entitled, under section 10(3), to extend the time limit in order to consider the balance of the public interest. However, despite this technical breach, the Commissioner's view is that section 36 is still engaged in this case as the qualified person gave their reasonable opinion within the extended period for consideration of the public interest test.
  18. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.
  19. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>1</sup>, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save

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<sup>1</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

that it will not be so trivial, minor or occasional as to be insignificant (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

20. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*<sup>2</sup> confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*<sup>3</sup> commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
21. In its initial response to the complainant, the internal review response and in its submission to the Commissioner, the council stated that disclosure of the information *would be likely to* inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation. Therefore, the Commissioner considers that it is appropriate to apply the lesser evidential test.
22. At the Commissioner's request, DCLG provided a copy of the qualified person's opinion. The Commissioner notes that the qualified person was: provided with all the information within the scope of the request; informed which specific limbs of the exemptions his opinion was being sought on; made aware which sections of the information his opinion was being sought upon; and provided with reasons for the exemptions being engaged.
23. The Commissioner notes that the following arguments were put to the qualified person as to why the inhibition would be likely to occur:

"The information falling within the terms of the request related to and described internal considerations about the handling of a previous request for information, and was contained in various communications between policy officials in the Portas Pilots team, an FOI adviser in the

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<sup>2</sup> Appeal number EA/2005/0005

<sup>3</sup> Appeal number EA/2005/0026 & 0030

Department's Knowledge and Information Access Branch, and some input from a special adviser and a ministerial private office.

At the time of the meta-request, the issues raised during the consideration of the previous FOI request, as well as the policy background, were both recent and live.

A need existed for an appropriate degree of 'safe space' within which considerations about these issues could continue to take place. Disclosure would have been likely to have inhibited the process of both advice and exchanges of views to come to decisions.

Separate from the need for such 'safe space', the disclosure of the information requested, given the potential need for ongoing consideration of the previous request, as well as routine, regular liaison between policy officials, special advisers, private offices and FOI advisers in KIA on the handling of likely future FOI requests, made it reasonable to consider that this would have been likely to have inhibited the frankness and candour within which those parties would have made future contributions to comment, advice and debate about such requests."

24. He also notes that no particular counter argument supporting any position that the exemptions were not engaged was provided in this case. The following was put forward to the qualified person:

"It was simply the case that, should the grounds for the cited exemptions being engaged not prove to be sufficiently strong then the information would automatically become due for disclosure to meet the requirement of section 1(1)(b) of the FOI Act.

The advice provided and the views exchanged and reflected in the information in this case were not especially frank. There was not an especially strong case for considering that disclosure of the actual information itself would have been harmful. It was rather the inhibiting effect on the process of providing advice and exchanging views for the purposes of coming to a decision itself which would likely be inhibited."

25. Other factors taken into account by the qualified person were as follows:

"The fact that there was a high likelihood of future requests from the same applicant.

The Department's approach to considering FOI requests is applicant and purpose blind and each request is treated on its own merits. However, officials, special advisers and private offices, in considering requests for information, must be able to communicate on a manner

that is able to be free and frank. If officials and special advisers felt unable to communicate in that way, owing to the fact that information requested about such communications would routinely be released, then this would be very likely to, in the specific circumstances of further requests from the same applicant and/or where there was a likelihood of political or media exposure, inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation.”

26. Whilst the Commissioner does not accept that officials and special advisers would be put off providing advice and views in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the deliberation process of responding to requests under the FOIA. He therefore finds that the opinion of the qualified person is a reasonable one in this instance and that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged.

### **Public interest test under section 36**

27. Sections 36(2)(b)(i) and 36(2)(b)(ii) are qualified exemptions and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>4</sup> indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

28. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency*

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<sup>4</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, the Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

### **Public interest arguments in favour of disclosing the requested information**

29. DCLG acknowledged the general public interests of transparency and accountability that would be served by the disclosure of requested information and how disclosure in this case would serve the public interest by providing information about the way a government department handles and responds to FOI requests. It stated that there is a public interest in such deliberations being transparent, where this would allow the public to be more informed and better able to judge how deliberations are carried out and decisions implemented. In addition, it stated that disclosure would serve to further public trust and confidence in the processes officials use in handling and advising on requests for information.
30. In his internal review request, the complainant said;  
  
"As someone working for a member of Her Majesty's Loyal Opposition, your Department may have been tempted to treat my request differently to that of a member of the public. That would, of course, be contrary to the applicant-blind nature of the Act...The public interest in the positive effect of increasing my and the public's confidence in the robustness of your Department's internal procedures for handling RFIs has been insufficiently considered and has, in case law, been shown to outweigh the kinds of arguments you have advanced."
31. DCLG referred to the above statement in its response to the Commissioner. It acknowledged that there is public interest in providing information that demonstrates the integrity of public servants, including when handling requests for information, and that where there is a reasonable basis to think that wrongdoing or failings in administration may have occurred, there is a public interest in discovering whether that is the case. However, it said that there is no basis to suppose any wrongdoing in this case, or more widely, or that the need to provide reassurance was anything other than a generally applicable consideration.
32. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value

because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process. In this particular case, disclosure would result in better informed public opinion as to how DCLG deals with requests under the FOIA. It would aid transparency as to how the legislation designed to promote accountability and transparency has been applied by a government department.

### **Public interest arguments in favour of maintaining the exemptions**

33. DCLG said that there is a very strong public interest in Ministers and their officials being able to avail themselves of sufficient private space in which to have discussions about the considerations which inform official Departmental responses to requests for information. In its internal review response it stated the following:

"Given that your request did not refer to an area in which policy was being developed, but to, *"any letters or e-mails between DCLG staff, ministers and SpAds relating to a Freedom of Information request I made on July 25th 2012,"* it cannot have referred to policy formulation, unless it was to the specific policy of how to respond. I conclude, therefore, that the Department's contention was that the correspondence that your request sought was correspondence referring to a live issue being debated, and that the issue in question was how to respond to your request regarding a subject which had *"a reasonably significant media profile"*.

34. In its response to the Commissioner's enquiries, DCLG further explained how the issue was still live at the time of the request. It said it issued the response to the complainant's earlier request one day before this request was made and therefore at the time of considering the latter request there was a very real potential prospect of the complainant seeking an internal review of the response to his earlier request and, if not satisfied with that, subsequently appealing any review decision to the Commissioner. It acknowledged that by the time this request was responded to, on 28 November 2012, it could be concluded, in line with DCLG's own practice and the Commissioner's guidelines - that any reasonable period within which to request an internal review would have elapsed but considered that this in no way alters the fact that, for most of the period within which DCLG was considering the request, an internal review could have been sought.
35. DCLG also said that even if the live nature and currency of internal information relating to the handling of the earlier request were not taken into consideration, it is apparent that the matters to which both the earlier and current request related were very much live matters at the time the request was submitted, during consideration of the

request and beyond. It referenced the Commissioner's guidance that "consideration of press coverage may be a factor in considering whether an issue remains 'live' in the context of a particular case"<sup>5</sup>, and referred to the fact that the complainant had included a web link to a local Hatfield media article in the request of 25 July 2012, published that day, and that during the consideration of this request an article appeared in The Guardian<sup>6</sup> newspaper in order to demonstrate that the issue was still very much live.

36. It said that no time at all had elapsed for the passage of time to be any sort of significant consideration which might have lessened the likelihood and degree of inhibiting effect on the process of free and frank provision of advice or exchange of views arising from disclosure of the information at the time it was requested and at the time of the 28 November 2012 response.
37. In its response to the Commissioner, DCLG acknowledged that the concepts of 'safe space' and 'chilling effect' are different and said that although in its original response and review it expressed the concept as that of 'safe space', it believes both are relevant. The Commissioner notes that although DCLG didn't originally specify the term 'chilling effect', it did refer to such a concept as detailed in paragraph 23.
38. DCLG accepted that the Commissioner and Tribunal have shown that they will pay little regard to generic, widely-drawn arguments about chilling-effect but said that case law decisions have been seen to accept the likelihood of chilling-effect where matters and information are recent or live and the likelihood of a "chilling effect" is tangible. It referred to the Tribunal case of Home Office & MOJ v IC<sup>7</sup> and pointed out that the Tribunal acknowledged that the chilling effect argument could apply in particular cases;

"Although there could be a chilling effect in particular cases this argument could not be maintained at a general level as in this case where much of the evidence was on the basis of dealing with meta-requests generally." (para. 46)

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<sup>5</sup> The Commissioner notes that this statement has been taken from guidance which has since been updated. This statement no longer appears in ICO guidance.

<sup>6</sup> <http://www.guardian.co.uk/politics/2012/nov/14/grant-shapps-hatfield>

<sup>7</sup> Appeal number EA/2008/0062

39. DCLG said that in the later High Court appeal of Home Office and Anor v IC<sup>8</sup>, the Commissioner discussed the above Tribunal case and noted how in his view that case differed from the one before him in that there was an internal review ongoing at the time and the matter was still therefore a live issue and decided that in the circumstances of that case the public interest was best served by not disclosing the information. It said that accordingly, it is reasonable to conclude that disclosure of the information in this case would have been very likely to make all concerned in DCLG more cautious, and less free and frank, when considering requests for information, either from those individuals affiliated with the Opposition or where there was a likelihood of reasonably significant political and/or media scrutiny. Having revisited the original decision notice<sup>9</sup>, the Tribunal decision<sup>10</sup> and the High Court judgement<sup>11</sup> that DCLG referred to, the Commissioner could not find the reference to an internal review, and therefore a live issue, and consequently does not accept this argument from DCLG. However, he notes that in paragraph 40 of the High Court judgment it is stated that the Commissioner accepts that the public interest in favour of not disclosing the information relating to the requests not responded to by the time the complaint was submitted to the Commissioner outweighs the public interest in disclosing. The Commissioner considers that this is different to the case in hand where the request had been responded to and a reasonable period for requesting a review had expired.
40. DCLG considered that of additional relevance here is the fact that the request in this instance formed part of an ongoing series of requests for information, including requests relating to the Portas Pilot policy. It acknowledged that the intention of the FOIA is to be both applicant and purpose blind in most respects and said it is committed to treating each request on its own merits. It also said that it is to be expected that someone who is affiliated to Her Majesty's Opposition may reasonably be expected to make an above average number of requests for information as part of the legitimate activities of holding the

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<sup>8</sup> 2009 EWHC 1611. Case number CO/12241/2008.

<sup>9</sup> [http://www.ico.org.uk/~media/documents/decisionnotices/2008/FS\\_50174491.PDF](http://www.ico.org.uk/~media/documents/decisionnotices/2008/FS_50174491.PDF)

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i273/Home%20Office%20%26%20MoJ%20v%20IC%20\(EA-2008-0062\)%20Decision%2020-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i273/Home%20Office%20%26%20MoJ%20v%20IC%20(EA-2008-0062)%20Decision%2020-11-08.pdf)

<sup>11</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1611.html>

Government of the day to account. However, it said that Ministers, special advisers and officials, in considering such requests for information, must be able to communicate in a manner that is able to be free and frank and it is reasonable to conclude that if Ministers, officials and special advisers felt unable to communicate in that way, due to the fact that information requested about such communications would routinely be released, then this would very likely, especially in the circumstances of further requests from the same applicant, and on similar subjects, inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. DCLG said that this is particularly a consideration where, notwithstanding applicant blind presumptions, the prospect of political and media exposure, as was evident in this case, may be expected to be more likely.

### **Balance of the public interest arguments**

41. Where, as with this case, a qualified exemption is engaged, the information requested must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
42. Having seen the withheld information, the Commissioner has considered where the balance of the public interest lies, taking into account the severity, frequency and extent of the claimed prejudice.
43. DCLG said that it had balanced the arguments in favour of disclosing the information against those for maintaining the exemptions and considered that there was nothing of sufficient public interest in the information or its disclosure which would serve to equal the very strong public interest in maintaining the need for safe space.
44. The Commissioner's guidance on section 36<sup>12</sup> states that;  
  
"The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice... This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor.”

45. In this case, DCLG have argued that the matters to which the earlier request relates, and by extension the request under consideration, were live matters at the time and provided examples of media coverage to demonstrate this. Whilst the Commissioner acknowledges that there has been media speculation in relation to Hatfield being chosen as one of the winners of the Portas Pilot Scheme, he also recognises that the decision as to which towns would be successful had already been made at the time of both requests and therefore he considers that there is no public interest in protecting a safe space for deliberation on that particular policy. It is possible that there may be some public interest in protecting a safe space in order to properly promote, explain and defend the decision but DCLG has not explained why a safe space would be required in relation to the actual information withheld and therefore the Commissioner has not given this argument any weight in this case.
46. DCLG also argued that it required a safe space in relation to its consideration of the complainant's earlier request, as the request in this case was made the day following its response to that earlier request. As stated in paragraph 34, it acknowledged that any reasonable period in which to request an internal review would have elapsed by the time it responded to the request but contended that for most of the period it was considering the request an internal review could have been sought. The Commissioner understands that the response to the earlier request provided the requested information and therefore does not agree that it was a realistic possibility that the complainant would request an internal review. The Commissioner is also aware that an internal review was not in fact requested. He therefore does not agree that the public interest requires the maintenance of a safe space in relation to consideration of the earlier request.
47. The Commissioner also considers that as the safe space required would not be for the formulation of policy, but rather for exchange of views or advice on how to meet its statutory obligations under the FOIA, the inhibition claimed would not be particularly severe or widespread given that there are statutory parameters within which a request has to be dealt with. He does not consider that there is significant public interest in protecting a safe space in relation to statutory obligations designed to promote openness and transparency in government and DCLG has not provided reasons as to why such a safe space is needed in relation to the specific withheld information.

48. DCLG also cited 'chilling effect' arguments and inferred that the public interest lies in preventing inhibition to free and frank discussions in the future.

49. The Commissioner's guidance on section 36 states

"...civil servants and other public officials are expected to be impartial and robust when giving advice and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Nonetheless, chilling effect arguments cannot be dismissed out of hand.

Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."

50. Therefore, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the Tribunal case *Department for Education and Skills v the Information Commissioner*<sup>13</sup> and endorsed as a statement of principle in the *Export Credits Guarantee Department* High Court case<sup>14</sup>;

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

51. The Commissioner has considered the validity of DCLG's arguments in paragraphs 45 and 46 that the matter is live and reaches the conclusion that the timing of the request in this case does not particularly add to the possibility of a chilling effect resulting from disclosure of the requested information.

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<sup>13</sup> Appeal number EA/2006/0006

<sup>14</sup> 2008 EWHC 638

52. In this case, DCLG said that the withheld information is not especially frank or sensitive. It has not explained to either the complainant or the Commissioner why disclosure of this particular information would result in a chilling effect. The Commissioner has viewed the withheld information and notes that although it isn't entirely anodyne, there isn't significant content that is so candid that it would obviously result in the claimed chilling effect. The Commissioner considers that it should not be assumed that all disclosures will have the same consequences and has not placed significant weight on the chilling effect argument in this case. The Commissioner has taken into consideration the Home Office Tribunal case referred to above and in particular paragraph 46 where the Tribunal recalled the evidence in the reasonable opinion of a qualified person that "much of the information created by a public authority in dealing with a request for information is not actually sensitive".
53. Although DCLG has not made reference to the actual content of the withheld information, it has considered the circumstances of the individual case in that it considers it is relevant that the request is from someone who is affiliated to Her Majesty's opposition and therefore, in the circumstances of further requests from the same applicant, and on similar subjects, the inhibition to the free and frank provision of advice or exchange of views would be particularly pronounced.
54. There is no specific reference in the FOIA to the principle that the identity of the requester should be ignored, but it is the absence of references in the legislation to the identity of the applicant from which the general principle is drawn. It is an approach endorsed by the Tribunal who, in *S v Information Commissioner and the General Register Office*<sup>15</sup>, stated;
- "FOIA is, however, applicant and motive blind. It is about disclosure to the public, and public interests. It is not about specified individuals or private interests."
55. Therefore, the Commissioner has not taken in to account DCLG's reference to the identity of the requester and how, in their view only, that adds to the public interest in maintaining the exemptions. The public interest issues that come into play when a qualified exemption is engaged are about the effect of making the information public, not the effect of it being disclosed to a particular requester.

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<sup>15</sup> Appeal number EA/2006/0030

56. The complainant has asserted that DCLG may be treating requests from him in a different manner to requests from others. The Commissioner considers that it is a consequence of the legislation that each request will be considered on its own merits and therefore no two requests will be subject to the same conditions of processing. The Commissioner also questions the amount of comparative data that would be required in order to confirm the complainant's view in this case. However, it remains the case that the focus should always be on the information requested, not the identity of the requester. The identity of the requester would only become relevant if the public authority were to resist the duty to comply with a request on the grounds that it was a vexatious or repeated request.
57. The Commissioner considers that there is an important public interest in this case in providing information which shows whether a public authority is applying transparency legislation appropriately. The need for openness and transparency about how DCLG seeks to comply with its information access obligations adds particular weight to the public interest in disclosure. He notes that DCLG has not explained its public interest arguments with specific reference to the withheld information in this case.
58. Having viewed the withheld information, the Commissioner notes that although some of the information isn't entirely anodyne, the content is not so candid that the public interest in its disclosure is outweighed by any adverse effect which might follow.

### **Conclusion on the public interest test**

59. The Commissioner has considered all the public interest arguments presented in this case. He has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice or exchange of views. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information in relation to both the exemption at section 36(2)(b)(i) and that at section 36(2)(b)(ii).

## Right of appeal

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60. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

61. 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.
62. 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 .....**

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