

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 31 March 2009**

**Public Authority:** Department for Children, Schools and Families  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

### Summary

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The complainant requested access to information relating to the Secretary of State for Education's intervention into the Leeds Local Education Authority in 2000, the formation of Education Leeds and the involvement of Capita in the above exercise. The public authority provided access to some of the information requested but withheld other information, citing sections 35(1) (a), 36(2) (b), 43(2) and 42 of the Freedom of Information Act 2000.

After a careful evaluation of the requested information, the submissions of the public authority and the relevant provisions of the Act, the Commissioner's decision is that the public authority has validly applied section 42 of the Act. With regard to sections 35 and 36, the Commissioner found that the public authority had validly applied the exemption to parts of the information, however, it was in the public interest to partially disclose other parts of the requested information. The Commissioner has therefore ordered the Department for Children, Schools and Families to disclose a redacted version of the relevant information to the complainant. The Commissioner did not uphold the application of section 43. Additionally, the Commissioner noted a number of procedural failings concerning sections 1, 10 and 17 of the Act.

### The Commissioner's Role

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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.

This request for information was originally made to the Department for Education and Skills (DFES) in March 2005. DFES has now ceased to exist and its functions have been transferred to the Department for Children, Schools and Families (DCSF), on whom this notice has been served.

## The Request

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2. On 2 March 2005 the complainant made a request for “*all recorded information on the decision taken to abolish the Leeds Education Authority and to form the company Education Leeds*”. The complainant also sought access to all information “*relating to the involvement of Capita in that particular exercise including details of procurement*”. In its response of 4 March 2005 DFES disclosed some of the requested information but informed the complainant that it had decided to withhold the remainder under sections 35(1) (a) and 43 (2) of the Act. DFES said that, after consideration of the public interest test, it was satisfied that the public interest in maintaining those exemptions outweighed the public interest in disclosing the withheld information.
3. On 11 April 2005 the complainant requested an internal review of the public authority’s decision. On 11 May 2005 DFES confirmed the outcome of the internal review, which upheld the original decision to withhold parts of the requested information. The complainant was also told that the internal review panel had identified that, in a number of instances, Section 42 (legal professional privilege) also applied to the withheld information.

## The Investigation

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### Scope of the case

4. The complainant was dissatisfied with the result of the internal review and, on 8 July 2005, he made a complaint to the Commissioner under section 50 of the Act.

### Chronology

5. On 10 February 2006, the Commissioner contacted DFES to request copies of the withheld information, and invited it to provide further comments on its handling of the complainant’s request. In its response, dated 24 March 2006, DFES provided such comments. The Commissioner subsequently raised further questions about DFES’s reliance on the exemptions it had applied to the complainant’s request. In response to those questions DFES informed the Commissioner, on 21 December 2006, that it had decided to:
  - (i) disclose all the material originally withheld under section 43<sup>1</sup>,
  - (ii) apply section 43 to some of the material previously withheld under section 35,
  - (iii) disclose some of the material withheld under section 35,

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<sup>1</sup> The department has provided this information to the complainant.

- (iv) apply section 36(2)(b) to parts of the withheld information.
6. DFES provided the Commissioner with a new folder consisting of 36 documents numbered 10 to 45. DFES said that it was now content to release fifteen of these documents in full without redaction (documents numbered 29 and 32-45 inclusive). DFES was also content to release in part information contained in document 17. In respect of documents 10 – 28, 30 and 31 DFES identified the specific information in each document applicable to the exemptions it was relying upon and further comments were provided in support of its decision to continue to withhold the information requested by the complainant.

### **Findings of fact**

7. The School Standards and Framework Act 1998 (SSF 1998) extended the general default powers conferred on the Secretary of State (SoS) by section 497(A) of the Education Act 1996. Under SSF 1998, the SoS can intervene in the functions of any local education authority (LEA) if he is satisfied that the LEA is failing in any respect to perform its primary functions to an adequate standard. The stated aim of any LEA intervention is to challenge poor performance, low expectations, and to secure continuous improvement in local authorities' services to children. The SoS's intervention powers have been further extended by the Education Act 2002 and the Children's Act 2004.

### **Background**

8. In November 1999 the Office for Standards in Education (OfSTED) carried out an inspection of the Leeds Local Education Authority (Leeds LEA). The OFSTED inspection report was submitted to Leeds City Council on 2 February 2000.<sup>2</sup> The report found that the Leeds LEA had exercised a number of its functions unsatisfactorily or poorly, and made 33 recommendations for action.
9. Following the report, the SoS applied his intervention powers to direct Leeds City Council to outsource many of its schools related services to a new company owned by the Council – Education Leeds. This company effectively replaced the Leeds City Council's Department of Education. Five companies originally submitted bids to provide Education Leeds with consultancy and management support. Following a tendering exercise, Capita was selected to manage the new company.

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<sup>2</sup> <http://www.ofsted.gov.uk/reports/pdf/?inspectionNumber=588>

## Analysis

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### Procedural matters

10. The Commissioner has initially considered whether DFES has complied with its obligations under section 17(1) of the Act. In its refusal notice of 4 March 2005 DFES did not apply the exemption at section 36 of the Act: this was only applied during the course of the investigation. In failing to apply this exemption by completion of the internal review the Commissioner finds that DFES breached section 17(1)(b) and (c) of the Act. A full text of the statutory provisions referred to is contained in the legal annex.
11. In addition, by failing to provide the complainant with the requested information the DFES breached section 1(1)(b) of the Act. Furthermore, by failing to provide the information to the complainant within 20 working days of receiving the request the DFES also breached section 10(1) of the Act.

### Exemptions

12. DFES has applied sections 35, 36, 42 and 43 of the Act to withhold the information requested by the complainant. The requested information consists of:
  - (i) Communications with, and advice given by, the DFES internal and external lawyers. DFES asserts that this information should be withheld as it is covered by legal professional privilege under section 42(1) of the Act. (Documents 11, 17 (in part), 24, 25, 26, 27 and 28 refer)
  - (ii) Information which DFES asserts is exempt under section 35 (1) (a) of the Act because it deals with the formulation and development of the intervention policy. (Documents 10 -15 inclusive refer)
  - (iii) Information which DFES asserts is exempt under section 36(2)(b)(i) and (ii) of the Act because, in the reasonable opinion of the qualified person, disclosure of this information would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. (Documents 16 – 23 inclusive refer)
  - (iv) Information which DFES asserts is exempt under section 43(2) of the Act because its disclosure would, or would be likely to, prejudice the commercial interests of DFES, Capita and Serco (both companies are jointly referred to as “the bidders” in this Decision Notice). (Documents 30 and 31 refer)

A full text of the relevant sections of the Act referred to above is contained in the legal annex.

## Section 42 – Legal Professional Privilege

13. The Commissioner has considered whether section 42 was correctly applied to the information referred to in paragraph 12(i) above. This exemption is “*class based*” so it is not therefore necessary to identify any harm or prejudice that may arise as a result of disclosure.
14. DFES has contended that information relating to communication with, and advice from, its internal and external lawyers relating to the Leeds intervention, the formation of Education Leeds and the engagement of Capita is exempt because it is covered by legal professional privilege. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers. As well as exchanges which contain or refer to legal advice which might be imparted to the client, the exemption will also cover exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation.
15. There are two types of privilege – legal advice privilege and litigation privilege. In both cases, the communications must be confidential, made between a client and a professional legal adviser acting in a professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in such a context will attract privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
16. After a careful review of the documents, the Commissioner is satisfied that the relevant information is subject to legal professional privilege and therefore engaged by section 42 because:
  - (i) it is confidential correspondence between DFES and its lawyers acting in their professional capacity and made for the dominant purpose of obtaining legal advice
  - (ii) it contains the legal advice provided by the departmental lawyers
  - (ii) it includes correspondence which contains or refers to the legal advice provided by the departmental lawyers
  - (iii) there is no evidence to suggest that privilege has been waived.

## The public interest test

17. Information which is subject to legal professional privilege is exempt from disclosure if the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest in disclosure lies in promoting probity

and creating accountability and transparency in actions and decisions that affect the public.

The Commissioner also recognises, in this particular case, that disclosure of this information might further the public's understanding of, and participation in, issues relating to the Leeds intervention and the issues surrounding outsourcing the delivery of education services to private companies.

18. However, balanced against the arguments for disclosure, is the general public interest in maintaining the exemption for information subject to legal professional privilege. The concept of legal professional privilege is based on the need to ensure that clients can receive confidential and candid advice from their legal advisors after having had full and frank discussions with them. This is a fundamental principle in the legal system and there is a strong public interest in maintaining it.
19. The Commissioner has taken account of the fact that the Information Tribunal, in its decision in *Bellamy v Information Commissioner (EA/2005/0023)*, stated that *"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest...It may well be that...where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight...Nonetheless, it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case"*.<sup>3</sup> The Commissioner has also taken into account the decisions of the Information Tribunal in the cases of *Pugh v Information Commissioner (EA/2007/0055)* and *MOD and Mersey Tunnel Users Association v Information Commissioner (EA/2007/0052)* that it is not necessary to demonstrate the existence of exceptional circumstances in order to permit disclosure under this exemption: all that is necessary is to show that the factors favouring disclosure are more weighty than those that support maintaining the exemption.
20. In the Commissioner's view the serious issues arising in this case from the Leeds intervention made it imperative for the DFES officials to be able to receive confidential and candid advice and engage in full and frank discussions with their lawyers. Nor, bearing in mind the background context of this complaint, does the Commissioner consider the advice provided in this case to be by any means stale: this is comparatively recent advice which could well be relied upon in order to deal with similar interventions in the future. The Commissioner has considered this case in the light of the less severe tests set out by the Information Tribunal in the *Pugh* and *Mersey Tunnel* cases but he is nevertheless satisfied that, in the particular circumstances of this case, the public interest in maintaining the exemption and therefore withholding the advice outweighs the public interest in disclosure. Consequently, he finds that section 42 was correctly applied to the information sought.

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<sup>3</sup> Appeal no. EA/2005/0023, FS0066313 at paragraph 35

## Section 35

21. Section 35 is a class based exemption which potentially exempts information relating to the formulation and development of government policy. The only requirement for engaging this exemption is that the withheld information should fall within the class covered by the exemption. Therefore it is not necessary to demonstrate that prejudice would occur if the information were to be disclosed. However, this exemption is qualified: this means that to successfully rely on its application, DFES must demonstrate that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. (NB: in respect of document 11, although DFES has applied section 35 to the information contained in this document, the Commissioner is giving the matter no further consideration as he has already accepted the arguments for withholding the information in this document in full under section 42).
22. In considering matters relating to this exemption the Commissioner has taken into account the decision of the Information Tribunal in the case of Department for Education and Skills v Information Commissioner and Evening Standard, (“DfES appeal”)<sup>4</sup> where the Tribunal concluded that the terms “relates to” and “formulation and development of policy” can be given a reasonably broad interpretation. On that basis, it is arguable whether the exemption at section 35 is engaged in respect to parts of the withheld information in documents 10,12,13,14 and 15 because these items appear to be related to the operational implementation of the Leeds intervention (and other proposals relating to this intervention) rather than to the formulation and development of the intervention policy itself.
23. DFES has stated that, *“information need not itself contain the formulation or development of government policy, for it to engage section 35 (subject to the public interest test) – but it must relate to such formulation or development”*. Quoting an earlier decision by the Commissioner<sup>5</sup>, the public authority has argued that *“micro policy formulation and development can continue, as civil servants and ministers determine how to implement policy decisions at a macro level.”* And, in response to a particular query on Document 10 from the Commissioner, DFES supported their argument by stating that the queried item, *“whilst appearing to be operational, in that the thoughts were expressed specifically around Leeds – have been reflected in subsequent intervention arrangements. Those thoughts were therefore not just steers for Leeds operational arrangements, but also represented more general policy steers, account of which has been taken by officials when developing further arrangements...this document relates to ongoing policy formulation”*.
24. In the DfES appeal, the Tribunal acknowledged that the *“distinction between formulation/development on the one hand and implementation on the other will prove to be a very fine one in some cases since implementation itself usually spawns policies”*. Accordingly, the Commissioner accepts that section 35 is

<sup>4</sup> Appeal number:EA/2006/0006.

<sup>5</sup> Decision Notice FS50083103 of 5 June 2006.

engaged with regard to these documents because he recognises that, in order to be effective, the intervention policy has to be in a state of dynamic formulation and development in order to meet the educational needs of children in the United Kingdom. For example, he is aware of the evolution of the SoS intervention powers which has occurred through the various amendments to section 497(A) of the Education Act 1996 (see paragraph 7).

### Public interest test

25. Having taken the view that the exemption is engaged, the Commissioner must next consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in the DfES appeal, where the Tribunal laid down a set of principles that should guide the weighing of the public interest in relation to cases where the section 35 exemption applies; these principles have been considered and, where relevant to this complaint, have been adopted.
26. In making its judgement on where the public interest lay in this case, DFES recognised that disclosure of this information would:
  - (i) inform democratic and open debate,
  - (ii) promote increased knowledge about *"how problems such as those identified in Leeds can be turned around"*, and
  - (iii) increase public awareness of the issues relating to outsourcing<sup>6</sup> and the selection process for determining the private companies that would play the key role in the delivery and management of the state education system.
27. In its consideration of the public interest for withholding the information DFES stated that, as specific interventions are often controversial, the public interest was also served by *"the keeping of clear written records of what is decided by whom, for what reasons. Full consideration of options and the keeping of appropriate written records would be likely to be considerably inhibited if it were the practice for records of past policy advice and consideration to be disclosed. This would not support good quality decision making and would be against the public interest."*
28. The Commissioner acknowledges the DFES argument that disclosing the information would not be in the public interest because of the unlikelihood that the full and frank comments contained within the withheld documents would have been made if it had been thought that there was any likelihood that they would subsequently be disclosed. DFES considered that disclosure would result in a lack of clarity and in the absence of a clear audit trail around the decision making

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<sup>6</sup> This is where private companies, from an approved government provider list, are brought in under a contract to deliver services in LEAs which have received poor OFSTED reports.



process in the future. However, the Commissioner also notes the public interest arguments submitted by DFES that favour disclosure, especially on the promotion of public understanding and debate on the issues relating to LEA interventions and the outsourcing of LEA functions to the private sector.

29. After a careful evaluation of these arguments, the Commissioner has concluded that, with the exception of one short passage, the public interest operates in favour of the disclosure of this information. In reaching this conclusion the Commissioner understands that frank and honest debate among civil servants is necessary for high quality policy formulation and that there is a public interest, in certain circumstances, in maintaining a private space for discussion away from public scrutiny in order to formulate that policy effectively. He is satisfied that the Act should therefore protect the formulation and development of policy by maintaining privacy when it proves necessary to do so.
30. However, the Commissioner also recognises (as indeed does DFES) the importance of the public being able to understand how government responds to situations such as that which occurred in Leeds. It needs to be recognised that, by the time the request for information was made in this case, the matters covered by these documents were already several years old: events have moved on. The Commissioner fully recognises that there are candid remarks in some of these documents. However, he is not persuaded that releasing material of this kind some years after the event will lead, as has been suggested, to less candid and frank advice in future or, indeed, that it will muddy the audit trail. Officials are required to provide clear advice to Ministers and other officials: that often necessitates the recording of uncompromising opinion and comment and that will surely continue: otherwise officials will not be doing what is required of them. They are also required to create an audit trail so that the process by which that decision was reached can be followed through. It should be noted that the Commissioner is not of the view that the passing of time means that this kind of information should automatically be released: each case will need to be judged on its individual merits.
31. The Commissioner therefore is of the view that, in all the circumstances of the case, the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. The exception to this view relates to the third sentence of the email dated 19 January 2001 at the top of document 12: in this small instance, the Commissioner remains of the view that the public interest continues to operate in favour of withholding the information.
32. Finally, and in accordance with the view of the Tribunal in the Evening Standard case to which reference was made earlier, it is the Commissioner's view that, where individuals are mentioned by name, there is no reason why the identities of those individuals in this particular case, given their seniority, should not be released into the public domain.

### **Section 36**

33. DFES has said that disclosing the requested information would prejudice the effective conduct of public affairs and should therefore be exempt under section

36. Section 36 requires the production of a reasonable opinion by the relevant qualified person that disclosure of this information would, or would be likely, to prejudice the effective conduct of public affairs. The DFES has confirmed that, in this case, the relevant qualified person concerned was Lord Adonis, at the relevant time a Minister in the DFES.
34. The Commissioner has taken into account the summary by DFES of the key issues which were considered by the qualified person in relation to section 36(2). These primarily concerned the likely prejudicial effect of disclosure on the frankness and candour of internal discussion and the production of written records of confidential discussions. The Commissioner is therefore satisfied that the opinion of the qualified person is reasonable in respect of this information and that it has been reasonably arrived at. He therefore finds that section 36 has been correctly engaged.

### Public interest test

35. Having decided that the exemption is engaged, the Commissioner must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information under consideration. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke Appeal)*,<sup>7</sup> where the Tribunal considered the law relating to the balance of the public interest in cases where the section 36 exemption applied.<sup>8</sup> The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2) (b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives full weight to the qualified person's reasonable opinion that there would, or would be likely to be, some prejudice to the effective conduct of public affairs if this information were to be disclosed.
36. In its submission to the Commissioner DFES accepted the public interest argument for releasing the information that disclosure might provide a greater degree of understanding about how decisions are made and allow for a more informed debate about intervention when children's educational services are judged to be inadequate.

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<sup>7</sup> Appeals Numbers: EA/2006/0011 and EA 2006/0013

<sup>8</sup> at paragraphs 81 – 92.

37. However, DFES's position that the public interest lies in withholding the information is based essentially on those prejudicial effects of disclosure which were considered by the qualified person. With regard to particular information that had been withheld, DFES submitted that the public interest rested in withholding the information because *"disclosure of this paragraph would likely result in questions being raised... This would be likely to constrain officials from informing Ministers of all actions being taken to address matters that are impeding the implementation of agreed policy..."*
38. The Commissioner recognises that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they take in order to promote accountability. He also accepts that there is a strong public interest in disclosing information where to do so would help determine whether public authorities are acting, or have acted, appropriately. Disclosure would also provide parents with information on the provision of education services for their children, and enhance public confidence in the effectiveness of the education system.
39. Notwithstanding the above, the Commissioner is also aware that frank and honest internal deliberation among the DFES officials was and is essential when dealing with identified inadequacies in the provision of children's education. Therefore there is a public interest, in such circumstances, in maintaining a private space for discussion and consideration away from public scrutiny in order to ensure effective implementation of the intervention policy.
40. The Commissioner has considered these competing public interest arguments in favour of maintaining the exemption and in favour of disclosure. He has concluded that the public interest lies in:
- (i) not disclosing the information withheld in documents 18 to 23; and
  - (ii) disclosing the small amount of information withheld on page 2 of document 16 and the information withheld in paragraph 8 of Document 17.

With regard to the information referred to in (i) above, the Commissioner believes that the potential harm that would be caused by its release means that the public interest in maintaining the exemption outweighs the public interest in disclosure.

41. The Commissioner is in no doubt that it is in the public interest that LEAs and other educational institutions tasked with delivering educational services possess a high standard of performance in the discharge of their functions. The information withheld contains candid and frank communications relating to the Leeds intervention and the formation of Education Leeds, as well as to considerations about how the recommendations of the OFSTED report should be implemented. The Commissioner therefore recognises that, in the course of dealing with these issues, DFES officials needed to consider matters candidly and robustly, particularly those matters which were likely to prove complex and contentious, on the understanding that their thinking would not be exposed in a manner likely to inhibit the full and frank expression of opinion. Such consideration involved, from time to time, a frank assessment of individuals and organisations. The Commissioner believes that there will be a detrimental impact

on the UK government's ability to tackle poor performance within the state education sector if officials cannot be provided with a protected private space in which to pursue such deliberations. He also accepts that officials would be less likely to enter into the free and frank exchange of views about particular courses of action and options open to them (and Ministers) if they thought those views were likely to be subject to public scrutiny.

42. In the particular circumstances of this case the Commissioner considers that the desirability for openness and transparency through disclosing the withheld information is not sufficient in itself to outweigh the harm that disclosure would cause, even allowing for the passage of time since that information was created. Consequently, the Commissioner is satisfied that the public interest in maintaining the section 36 exemption outweighs the public interest in the DFES disclosing the withheld information.
43. With regard to the information referred to in paragraph 40(ii), the Commissioner believes that the potential harm that would be caused by its disclosure does not outweigh the public interest in disclosure. The Commissioner has considered the arguments advanced by DFES but does not believe that withholding either the very small amount of information in document 16 or the information in paragraph 8 of Document 17 can be justified. Accordingly, the Commissioner is satisfied that the public interest in maintaining the section 36 exemption does not outweigh the public interest in DFES releasing these two items of information.

### Section 43

44. Section 43(2) of the Act exempts information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including those of the public authority holding it.) DFES has argued that disclosure of this information would, or would be likely to, damage both its own commercial interests and those of the bidders.
45. In dealing with the issue of commercial prejudice to the DFES and the providers, the Commissioner has applied the test of 'likely to prejudice' as enunciated by Mr Justice Mundy in the case of *R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073*, and subsequently followed by the Information Tribunal in the case of *John Connor Press Associates Limited and The Information Commissioner*<sup>9</sup> where the Information Tribunal interpreted the expression 'likely to prejudice' within the context of the section 43 exemption as meaning that the chance of prejudice being suffered should be more than a hypothetical or a remote possibility, there must be a real and significant risk. The Tribunal in that case indicated that the degree of risk must be such as that there 'may very well' be prejudice<sup>10</sup>.

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<sup>9</sup> EA /2005/0005),

<sup>10</sup> This test of "likely to prejudice" has also recently been confirmed by the Information Tribunal in *OGC v The Information Commissioner EA/2006/0068 & 0080 paragraphs DFES 42 – 48*).

46. In *Hogan and Oxford City Council v The Information Commissioner*<sup>11</sup>, the Information Tribunal considered Mr Justice Mundy's test in respect of section 31(1) of the Act but emphasised the fact that the consideration of prejudice also encompassed the more evidentially demanding test of 'would prejudice' as well as 'likely to prejudice'. In the above appeals, the Information Tribunal stated that *"...there are two possible limbs on which a prejudice based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not...The s31(1) prejudice is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge."* In the above appeal, the Information Tribunal also stated that, "an evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice."
47. With regard to its own commercial interests, DFES has argued that disclosure of the withheld information would significantly impair its relationship with service providers due to the commercially sensitive information that would be released. In its view, service providers would become concerned that commercially sensitive information could be routinely released to the public and that they might, as a result, withhold such information in the future. If that were to occur it would be detrimental to the department's ability to assess bids appropriately, select the best provider for each service and negotiate effectively to secure best value for money.
48. Having applied the prejudice tests in paragraphs 45 and 46 (above), the Commissioner is not satisfied that the DFES has demonstrated that disclosure of this information would, or would be likely to, prejudice its future commercial interest and reputation. In taking this view, the Commissioner is mindful of the fact that the information request was made four years after the Leeds intervention and the formation of Education Leeds. The Commissioner considers that, with the implementation of the Act, persons or companies contracting with public authorities should now expect their commercial dealings to be subject to a higher level of public scrutiny: greater public scrutiny should be the expected price for dealing with the public sector. Accordingly, the Commissioner is not willing to accept that disclosure of the withheld information would, or would be likely, to prejudice the commercial interests of DFES.
49. DFES has also presented commercial prejudice arguments on behalf of the bidders. Generally, the Commissioner would only consider third party arguments put forward by the bidders themselves. The Commissioner notes that, in the case of *Derry City Council v Information Commissioner*<sup>12</sup>, the Information Tribunal was also unwilling to speculate on the damage that might be caused to the commercial interests of the third party (in this case Ryanair) based on the representations only of Derry City Council.

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<sup>11</sup> EA/2005/0026, EA/2005/0030

<sup>12</sup> EA/2006/0014

50. Therefore, in the particular circumstances of this case, the Commissioner is not willing to speculate about the commercial prejudice arguments presented by DFES on behalf of the bidders in relation to the withheld information in Document 30. He considers that it would have been reasonable to expect the bidders to assess and provide their own views on the potential effects of releasing this information.
51. However, the Commissioner is prepared to consider the arguments presented by DFES on behalf of the bidders in relation to the withheld information in Document 31 (Doc 31) because this information contains frank assessments of the bids submitted by Serco and Capita. He believes that it is not practical to expect the bidders to be given the opportunity to comment on the disclosure of withheld information of this kind.
52. DFES has argued that disclosure of Doc 31 would, or would be likely to, prejudice the commercial interest of the bidders because:
- (i) resurrection of some of the issues around the Leeds procurement exercise which took place over five years ago would resonate with - and exacerbate- various recent or current debates and concerns which would be highly likely to damage the commercial interests of both companies.
  - (ii) the withheld information contains frank assessments and comparisons of the companies' bids.
53. After having applied the prejudice tests in paragraphs 45 and 46 (above), the Commissioner is not satisfied that the DFES has demonstrated that disclosure of this information would, or would be likely to, prejudice the commercial interest of the bidders. In reaching this position, the Commissioner has taken account of the fact that the tendering process took place between November 2000 and January 2001, i.e. over eight years ago, and four years before the complainant made his information request in March 2005. It is the Commissioner's considered opinion that the sensitivity and confidentiality of the comments and other information recorded would have diminished to a level sufficient to allow disclosure at the time the complainant made his request. For example, the Commissioner has noted that the five year appointment of Capita to which the withheld information relates, was substantially completed by the time the request was submitted. In addition he has noted that Serco (the unsuccessful bidder) was subsequently awarded a ten year contract with Bradford Metropolitan District Council. Therefore the Commissioner believes that the withheld information in Document 31 has lost the commercial potency it would have had at the time it was created and, in consequence, that it would now be of little commercial value if it were to be disclosed.
54. Accordingly, the Commissioner is not persuaded that disclosure would, or would be likely to, prejudice the commercial interest of DFES and or the bidders. Therefore he finds that the exemption in section 43(2) is not engaged with regard to this information.

## The Decision

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55. The Commissioner's decision is that the public authority dealt with the following element of the complainant's request for information in accordance with the Act:

The Commissioner has concluded that the public authority has correctly applied the exemption provided at section 42 of the Act to documents 11, 17 (in part) and 24 – 28 inclusive.

With regard to the information to which section 35 was applied, the Commissioner's decision is that the public authority validly applied the exemption in section 35(1)(a) of the Act in respect of the third sentence of the email at the top of document 12.

With regard to the information to which section 36 was applied, the Commissioner's decision is that the public authority validly applied the exemption in section 36(2) (b) (i) and (ii) of the Act to documents 18 to 23 inclusive.

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

The public authority breached section 1(1)(b) of the Act by failing to provide the complainant with the requested information by the time of completion of the internal review.

The public authority breached section 10(1) of the Act by not providing the complainant with the requested information within 20 working days of the request.

The public authority breached section 17(1)(b) and (c) of the Act by not stating by completion of its internal review that it was relying on section 36(2)(b) nor explaining why it applied.

With regard to information to which section 35 was applied, the Commissioner's decision is that the public authority did not correctly apply the exemption provided at section 35(1)(a) of the Act to documents 10, 12 (except for that referred to in paragraph 55), 13, 14 and 15.

With regard to the small passage on page 2 of Document 16 and paragraph 8 of Document 17, the Commissioner's decision is that the public authority did not correctly apply the exemption provided at section 36(2) (b) (i) and (ii) of the Act.

The public authority has not correctly applied section 43(2) of the Act to documents 30 and 31.

## Steps Required

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

All previously withheld information other than that specified in paragraph 55 above should be released to the complainant within 35 days of the date of this notice.

## Failure to comply

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58. 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

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59. 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](mailto:informationtribunal@tribunals.gsi.gov.uk)

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 31<sup>st</sup> day of March 2009**

Signed .....

Gerrard Tracey  
Assistant Commissioner

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

## LEGAL ANNEX

### General Right of Access

**Section 1(1)** provides that -

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

(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.”

### Time for Compliance

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### Refusal of Request

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

**Section 17(3)** provides that -

“A public authority which ... is to any extent relying:

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

must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

**Section 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.

### **Prejudice to effective conduct of public affairs.**

**Section 36(2)** provides that –

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

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

### **Legal Professional Privilege**

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

### **Commercial prejudice**

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

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