

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 August 2009

Public Authority: Learning and Skills Council
Address: Cheylesmore House
Quinton Road
Coventry
CV1 2WT

Summary

In September 2005, the complainant made 11 requests in a single item of correspondence. The public authority disclosed some information and withheld the rest. During the course of the Commissioner's investigation, further information was disclosed to the complainant. The Commissioner has decided that some of the requested information has been correctly withheld under section 40(2) but that other elements should be disclosed. The Commissioner requires that this information be disclosed to the complainant. The Commissioner has concluded that, on the balance of probabilities, the public authority does not hold some of the requested information. The Commissioner decided that the public authority has made a reasonable offer of access to other elements of the requested information, which would not otherwise be made available through disclosure because of section 12. However, the Commissioner has identified a number of procedural shortcomings in the way the public authority handled the complainant's requests.

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 complainant is the local branch executive committee of a national trade union whose members include some of the public authority's employees.

The Request

3. The complainant submitted 11 requests in one item of correspondence dated 15 September 2005. The full text of the requests is set out in an Appendix to this Notice. At the end of the text, the complainant commented "*Please treat each of these requests separately, and reply as the information for that request becomes available*".
4. On 26 September 2005, the public authority responded indicating that the requests were extensive, but that it would not seek to rely on section 12 (Cost of Compliance Exceeds Appropriate Limit) of the Act, although it reserved its right to do so. It did request an extension of time for responding to the requests and indicated it required until 27 October 2005. The complainant agreed to this extension recognising the volume of work that would be involved.
5. On 27 October 2005, the public authority provided its initial responses to all of the requests for information except 'FOI Request 1', 'FOI Request 6', 'FOI Request 7' and 'FOI Request 8'. It disclosed some elements of the requested information, withheld other elements of the requested information under section 40(2) (Unfair Disclosure of Personal Data) and Section 43(2) (Prejudice to Commercial Interests) and asserted that the remainder was not held. It did not set out detail as to why it believed it could rely on the exemptions it had cited.
6. On 17 November 2005, the complainant requested a review of the redactions that were made to the requested information prior to disclosure. It also asked the public authority to provide a response to 'FOI Requests 1, 6, 7 and 8.
7. On 28 November 2005 the public authority informed the complainant that it would conduct an internal review.
8. There was further negotiation between the parties in writing and in person where further explanations were provided to the complainant as to the public authority's reasoning where it had applied exemptions and further arguments were put forward by the complainant as to why that reasoning was flawed. These will be considered later in this Notice.
9. The scope of the internal review was formally agreed in correspondence between the parties on 6 December 2005. It was set out as follows:
 - i. "*The [public authority has] unreasonably applied exemptions for prejudice to commercial interest on information requested under the Freedom of Information Act 2000 – particularly in the light of the Information Commissioners [sic] decision in the case of the National Maritime Museum FS50063478. We believe prices, rates and total values in contracts should be disclosed.*

- ii. *The decision by the [public authority] to redact addresses from contracts is unreasonable and [the complainant believes] this should cease.*
 - iii. *The decision by the public authority to redact names of individuals from coda, spreadsheets and elsewhere (removing the column description from Coda) is unreasonable. We do not believe that the name of a person, and possibly a date or period, and the name of a project perhaps, is personal data.*
 - iv. *The [public authority] has not responded within any reasonable time, either to apply an exemption or disclose the information for Freedom of [sic] questions 1,6,7 and 8, and is thus preventing any resolution of the situation. It is now long past the statutory period for response. If an exemption is being applied, we wish to appeal."*
10. On 9 January 2006, the public authority disclosed some information in relation to FOI Request 1 and 6. This disclosure included redactions of agency worker names because the public authority had concluded that this information fell outside the scope of FOI Request 1.
 11. The following day the complainant contacted the public authority asking for an explanation as to delay and to challenge the redactions. It also asserted that agency worker names also fell within the scope of FOI Request 6.
 12. On the same day (10 January 2006) the public authority provided the outcome of its internal review, the scope of which had been agreed by the parties on 6 December 2005. The review upheld its original position and set out further arguments as to why it believed it was correct. It also changed its position regarding FOI Request 10 and now cited section 12 as the basis for its refusal, arguing that the cost of redacting personal data would exceed the appropriate limit set by regulation.
 13. On 11 January 2006, the public authority released information in response to FOI Request 8 although it had redacted certain information under section 43. It also argued that some of the information caught by the scope of that request was not held.
 14. On 16 January 2006, the public authority explained why delays had arisen in relation to its responses, asserting that the work done had now exceeded the costs limit. It set out steps taken by both parties to prioritise the requests (which included the suspension of activity on certain of the requests pending clarification as to the application of exemptions) and also referred to a further 23 requests that the complainant had submitted in November 2005. It commented that it had taken the complainant's comments as to the relevance of agency worker names in relation to FOI Request 6 into consideration and had included them for consideration for disclosure. It asked whether the complainant wished it to resume work which had previously been

suspended. It also reminded the complainant that it reserved the right to apply section 12 or to charge a fee where appropriate.

15. There was further correspondence between the parties but matters reached an impasse by 1 March 2006.

The Investigation

Scope of the case

16. On 8 March 2006 the complainant contacted the Commissioner to complain about the way its requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - “daily rates of pay in contracts with consultants”*
 - “the names of temporary employees”*
 - “information contained in the [public authority’s] accounting system, Coda”.*
17. The case was formally allocated to a caseworker on 14 June 2007 although some preliminary work was undertaken on the case in the preceding weeks. The Commissioner sought to clarify the exact nature of the complaint so that he could determine the scope of his investigation. This was made more difficult by the fact that the chief representatives for each side worked near each other in the course of their everyday duties which impeded confidential telephone contact with the Commissioner. Both the public authority and the complainant also missed a series of deadlines set by the Commissioner in order to obtain clarification in writing as to which matters were still the subject of a dispute between the parties.
18. Both the public authority and the complainant sought to argue that the other side had not been willing to participate in further informal negotiations although each presented evidence which demonstrated to the Commissioner its own willingness to participate in further informal negotiations. Subsequent negotiations appeared to have taken place between the parties and further disclosures were made, particularly in relation to contractual information.
19. The complainant sought to introduce new elements to its complaint, specifically in relation to the public authority’s compliance with its obligations to provide advice and assistance and its assertions that certain parts of the requested information were not held. The parties also appeared to be at cross purposes on a number of occasions regarding which of the complainant’s access requests included agency worker names within its scope, and what matters had been put forward for internal review. The complainant drew the Commissioner’s attention to the terms of the review agreed by both parties on 6 December 2005

and sought to argue that these terms were very broad. It cited in support of this view the wording set out in item iii in paragraph 9 above. However, the public authority sought to assert that the terms of the review were quite narrow, referring to the reviewer's own reference to specific requests by number in the actual review which appears not to have been challenged by the complainant.

20. In addition, there were a series of delays in the Commissioner's investigation.
21. However, by 23 October 2008, the following were identified as being the outstanding points within the scope of the overall complaint.
 - The public authority's disclosure in response to FOI Requests 3 and 6 failed to include relevant information which must be held by the public authority and which was not exempt. Its searches were therefore not sufficiently thorough.
 - The public authority's offer of access to information caught by the scope of FOI Request 7 was unreasonable and it should, instead, provide a copy of the information in question. Where the public authority argues that it would exceed the appropriate limit for the cost of compliance to provide this information it was incorrect.
 - The public authority had incorrectly cited section 12 as a basis for refusing to provide the information which remained withheld in relation to Request 10.
 - Where it had sought to rely on section 40(2) in relation to the information caught by the scope of Request 10, the public authority was incorrect.
 - The public authority had incorrectly applied section 40(2) in relation to agency worker names.
 - The public authority had failed to provide adequate advice and assistance
 - The public authority had introduced reliance on certain exemptions too late for those exemptions to be considered by the Commissioner.
 - The public authority had failed to provide adequate explanations as to why it sought to rely on certain exemptions.
22. When the above matters were put to the public authority, it sought to argue that many of the above items were matters which it had not had an opportunity to review internally. In an email dated 7 January 2009, the Commissioner explained that he had evidence that the parties had continued to discuss matters between themselves since the complaint under section 50 was first made although each party would appear to characterise these discussions in a different way. He explained that given the passage of time and the failure by both parties to communicate with him in a timely manner, he had concluded that the most sensible and pragmatic approach would be to issue a

determination on the matters outstanding as set out by the complainant. The public authority did not continue to dispute this view.

23. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

24. As set out above, the complaint was allocated to a caseworker in June 2007. The Commissioner entered into email correspondence with the complainant to clarify a number of points and to seek further information. During this correspondence the complainant advised that it was negotiating further with the public authority. The Commissioner undertook to await the outcome of these negotiations and set a deadline of 20 July 2007 for an update. The complainant eventually emailed the Commissioner on 10 August 2007 setting out the areas which at that point remained in dispute.
25. On 13 August 2007, the Commissioner wrote to the public authority asking for clarification of a number of points including its basis for relying on exemptions it had cited. He also asked for unredacted copies of information that remained withheld. He set a deadline for response of 20 working days.
26. There were a series of delays due, in part, to staff availability at the public authority. However, the Commissioner had occasion to remind the public authority of his formal information gathering powers under section 51 of the Act. On 6 December 2007, the public authority sent a response enclosing an encrypted electronic copy of some of the withheld information.
27. On 1 July 2008, the Commissioner contacted the public authority to seek access to other withheld information which had not been forwarded to him and to obtain further arguments regarding its reliance on section 12. The public authority had sought to argue that it could take the cost of physically redacting exempt material into account when calculating the cost of compliance. The Commissioner explained that this had been dismissed in recent Tribunal decisions namely *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072) ("DBERR") and *Jenkins v Information Commissioner and The Department for Environment, Food and Rural Affairs* (EA/2006/0067) ("Jenkins").
28. A response was not forthcoming from the public authority until 13 August 2008 during which time the Commissioner again reminded the public authority of his formal information gathering powers. The public authority advised that it had made a further disclosure to the complainant in relation to FOI Request 3. It also set out its position in relation to other requests including its willingness to provide

unredacted copies of the information it had originally provided in redacted form in relation to FOI Request 8. It stood by its position regarding section 12 arguing that the Tribunal's decision in Jenkins was equivocal as to whether redaction could be included in the calculation of the cost of compliance.

29. The Commissioner then wrote to the complainant on 1 September 2008 to confirm what matters remained in dispute in the light of further disclosures that had been made and to clarify the difference between FOI Requests 2 and 10. The complainant provided a provisional response by return setting out a range of continuing concerns and undertook to respond by the end of the month.
30. There appeared to be further attempts at negotiation between the parties at the end of September 2008 which, unfortunately, did not appear to yield positive results. The complainant then appeared to shift the focus of its concerns to matters which fall outside Part 1 of the Act. The Commissioner made several attempts by email and by telephone to encourage the complainant to re-focus its efforts on providing a full response to his letter of 1 September 2008. It finally did so in a letter of 22 October 2008. It also acknowledged that the information requested in FOI Request 2 was a subset of the information requested in FOI Request 10.
31. On 12 November 2008, the Commissioner wrote to the public authority setting out what he considered to be the matters which were still in dispute. He asked a series of questions regarding the thoroughness of searches undertaken and the application of exemptions. Once again the Commissioner had occasion to remind the public authority of his information gathering powers under section 51 of the Act. The public authority eventually provided a response on 11 December 2008.
32. This response queried whether various elements of the complaints were valid because they had not been subject to a formal internal review (see paragraph 19). It also provided details as to the thoroughness of its searches. It also commented that certain information was exempt under section 40(2) but provided no further detail as to why it believed this to be the case or which particular information it was referring to.
33. The Commissioner replied and explained why he was taking forward the complaints set out by the complainant in its most recent letter despite the public authority's arguments that they had not been subject to a formal internal review. He emphasised the following as being significant factors in his decision.
 - The parties had been at cross purposes as to the scope and breadth of the internal review and there had been communication failings by both parties in this regard.
 - There clearly had been dialogue between the parties to resolve outstanding issues which had run concurrently with the

Commissioner's investigation. The extent of that dialogue was difficult to assess due, in part, to the conflicting ways in which each party characterised both the discussions themselves and the approach of the other party.

- Both parties had failed to provide the Commissioner with timely responses which delayed the progress of his investigation.
- There had been other delays in the Commissioner's investigation.

34. The Commissioner asked for further detail as to the public authority's arguments in relation to section 40(2). He set a deadline for response of 10 working days and advised that he would issue an Information Notice if a full and timely response was not received.
35. A response was received within the deadline and more detail was provided as to the application of section 40(2). No further objection to the scope of the Commissioner's investigation was raised.

Analysis

Substantive Procedural Matters

Is certain information held?

36. Section 1(1) of the Act states 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.”

37. The complainant challenged the extent of the public authority's disclosures in relation to FOI Request 3 and FOI Request 6. The Commissioner has therefore considered whether the public authority has complied with section 1(1)(a) and (b) of the Act in relation to these 2 requests.
38. In its letter of 22 October 2008, the complainant had also complained about the extent of the public authority's disclosure in relation to FOI Request 4. The focus of the complainant's remaining concern in relation to this request was a spreadsheet apparently circulated by an employee of the public authority which was to be completed by colleagues with information about temporary staff and consultants. The complainant insisted that this information was held by the public authority and should have been disclosed to it in response to FOI Request 4. Having examined the correspondence and having queried

the matter with the complainant and the public authority, the Commissioner learned that this was, in fact, the spreadsheet expressly referred to in FOI Request 6. The Commissioner therefore excluded FOI Request 4 from his further deliberations as to whether certain information is held because the issue was to be addressed in relation to FOI Request 6.

39. In relation to FOI Request 3, the public authority had eventually provided the complainant with an unredacted copy of a contract it made with an employment agency plus a variation to that contract (it had previously provided a redacted version). The complainant argued that there was a second contract made prior to the variation and based its assertion on a conversation one of its members recalled having with a legal representative of the public authority. It also asserted that a temporary worker had been asked to sign a new contract in January 2005 as a result of the second contract which it believed had been made.
40. The Commissioner asked the public authority whether it had made another contract with the employment agency prior to the date that the variation was agreed. The public authority explained that at the time of the original request it undertook a thorough search which included making reference to those of its employees who were responsible for the contract with the employment agency. It stated that "*no other information that was requested was identified as being held*".
41. With regard to FOI Request 6, the complainant raised concerns about the non-disclosure of the spreadsheet specifically referred to in the request and about the extent of the public authority's search in relation to this request. It queried whether the individuals named in the request had actually been approached by the public authority. The Commissioner put this to the public authority.
42. The public authority stated that all of the individuals named in the request were asked to search for information which they might hold within the scope of the request. It explained that it had not been able to identify the spreadsheet that was referred to in this request but admitted that it had not actually told the complainant that this was the case.
43. When considering a dispute as to whether certain information is held by a public authority, the Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that:

"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records".

It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of

probabilities. This is therefore the test the Commissioner will apply in this case.

44. In discussing the application of the balance of probabilities test, the Tribunal stated that:

“We think that its application requires us to consider a number of factors including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.

45. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office* (EA/2007/0110). In this case Mr Ames had requested information relating to a dossier, “Iraq’s Weapons of Mass Destruction”, of September 2002. The Tribunal stated that the Iraq dossier was “...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...”. However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not “...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...” Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held, this does not demonstrate that information is held.
46. In reaching a conclusion upon this point the Commissioner has considered what information he would expect the public authority to hold and whether there is any evidence that the information was ever held. In doing so the Commissioner has taken into account the responses provided by the public authority to the questions posed by him during the course of his investigation. The Commissioner is also mindful of the Tribunal decisions highlighted above.
47. In relation to FOI Request 3, the Commissioner considers that on the balance of probabilities there was no additional contract with the employment agency in the period (as alleged by the complainant) and that therefore the public authority does not hold any further information within the scope of this particular request. The complainant provided anecdotal evidence as to a discussion about another contract but this

does not provide a sufficiently persuasive indication that there was another contract.

48. In relation to FOI Request 6, the Commissioner has no evidence to disprove the public authority's assertion that it approached all those named in the request with the specifics of the request. The complainant is clearly convinced of the existence of a spreadsheet entitled "<<File: Consultants and Temps.xls>>" but the public authority has asserted that it cannot identify this spreadsheet. It is regrettable that the public authority did not specifically deny holding a spreadsheet by this name when responding to the complainant. Had it done so, further dialogue between the parties may have yielded more constructive progress on this particular point.
49. While the complainant is clearly convinced as to the specific name of the spreadsheet, the Commissioner would observe that it has not explained how it came to know of a spreadsheet of this name. It has not, for example, provided other information which refers to a spreadsheet of this name. While the Commissioner recognises that the complainant does not have unlimited access to all the information held on the public authority's servers it has more access to the public authority's servers and internal correspondence than an ordinary member of the public. In light of the above, the Commissioner has concluded that on the balance of probabilities, the public authority did not, at the time of the request, hold a spreadsheet of this specific name. However, the public authority's failure to deny within 20 working days that it held information that was specified in FOI Request 6 is a contravention of section 1(1)(a) and section 10(1) of the Act. These provisions are set out in Legal Annex to this Notice.
50. The complainant has also complained about the thoroughness of the public authority's search in relation to FOI Request 7. The Commissioner has seen evidence of further negotiations between the parties around this point although they do not appear to have been particularly productive. Central to the remaining dispute between the parties here appears to be the public authority's initial willingness to exceed the appropriate limit in conducting a physical search of its stores and its electronic records for information caught by the scope of this request. It apparently reached a point where it was no longer willing to do so but made an offer of access to the complainant in terms which will be discussed shortly. However, the complainant believed that the public authority has waived its right to change its mind because of its earlier display of willingness to supply information (albeit redacted). It also argued that the public authority had erroneously included the cost of redactions when calculating the cost of compliance, and therefore queried the legitimacy of its arguments as to the cost of compliance. It also argues that the public authority's offer of physical access to the information is not reasonable.

Has the public authority offered reasonable access for the complainant to information caught by FOI Request 7?

51. In an attempt to resolve any issues arising out of the disputed cost of compliance with the request, the public authority has offered the complainant access to its facilities to inspect all or any of the contracts that were identified by the public authority in the search it conducted in response to FOI Request 7. The contracts would be made available without redaction and reasonable photocopying requirements would be satisfied free of charge. The public authority also undertook to search for other contracts within its physical stores which the complainant had identified as being within the scope of its original request. The public authority has confirmed in writing to the Commissioner that this offer was made in terms that would be made to any other member of the public.
52. As noted above, the complainant disputes the public authority's view that its offer of access to the information caught by the scope of this request is reasonable. The complainant has argued that this offer is not as generous as first appears because it would only be allowed to take advantage of it during "facility time". Facility time is the time an employee is allowed to discharge their responsibilities as a local trade union representative. The complainant has argued that its local agreement for facility time is extremely limited (5-10% for branch officials).
53. Section 11 of the Act addresses the means by which requested information should be communicated. This section is set out in full in a Legal Annex to this notice. It sets out three options for communicating requested information, namely copies, inspection, or the provision of a digest or summary. The communication preferences of the complainant should be complied with where it is reasonably practicable to do so. A public authority is allowed to comply with a request by any means which are reasonable in the circumstances and, by virtue of section 11(2), a public authority can consider the cost of communication when doing so. Clearly, negotiations around this subject will take into account the particular circumstances of the complainant and the public authority.
54. In this case, the complainant's preference is for copies and the public authority has, instead, offered inspection and the opportunity to take copies free of charge of that information which is of most interest. The Commissioner has seen correspondence between the parties on this subject (specifically a letter to the complainant dated 30 September 2008) and notes that the public authority did state that inspection and copying could not be carried out by employees on its time but could be carried out by employees on facility time. In the same letter it offered to discuss its existing agreement as to facility time.
55. The Commissioner notes that facility time in this case is somewhat limited although an offer was made to revisit this. The Commissioner would presume that branch officials of the union would have matters other than access to this information to attend to during facility time. The Commissioner entirely understands why it would wish to make

judicious use of facility time and would have a number of competing demands on that time.

56. However, the Act is not a mechanism specifically designed for facilitating industrial relations and the Commissioner has no remit to arbitrate in industrial disputes between public authorities and their employees. The public authority is understandably concerned about employees using time normally spent carrying out duties in accordance with their contract of employment to progress a matter which falls outside those duties. The complainant, for its part, believes this is an unreasonable position for the public authority to adopt.
57. The Commissioner notes that the offer set out would, according to the public authority, be made available in similar terms to any other person who asked for it. Any other person would face similar issues about using their own time to access the public authority's premises during its office hours. Presumably, there is no reason why the complainant could not find a volunteer among its members or officials who would be prepared to access the information on their own time in a similar way. While the public authority's position may or may not be reasonable in terms of fostering good industrial relations, the Commissioner's remit does not extend to including that as a factor for consideration.
58. The Commissioner has therefore concluded that the public authority's offer is reasonable.

Exemptions

Section 12 - Cost of compliance exceeds appropriate limit – Request 7

59. Where the parties cannot agree on physical access to the information as discussed above, the public authority believes it is entitled to rely on section 12 as a basis for refusing to provide the information caught by the scope of FOI Request 7. Although, the Commissioner believes the public authority's offer of access is reasonable, he will also address the complainant's argument that the public authority had waived its right to claim reliance on the exemption at section 12 in relation to FOI Request 7 because it had initially chosen not to do so. The complainant has also asserted that even if the public authority is entitled to claim reliance on it at this late stage, its arguments as to the applicability of section 12 are not valid.
60. The Commissioner would note that the public authority, on a number of occasions (for example, a letter to the complainant of 16 January 2006) stated that it reserved the right to either "[make] use of section 12 or, [charge] a fee". The late application of exemptions has been considered at the Information Tribunal on a number of occasions. The issue was clarified in the DBERR case referred to above. The Tribunal questioned "*whether a new exemption can be claimed for the first time before the Commissioner*" and concluded that the Tribunal (and presumably the Commissioner) "*may decide on a case by case basis*

whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case” (paragraph 42).

61. In the same case, the Tribunal took into consideration the fact that the refusal notice in that case was issued “*at an early stage of the implementation of the Act when there was limited experience of the application of exemptions*”. The Commissioner would note that this request was also handled in the early stages of implementation of the Act. In the Commissioner’s view and in the circumstances of this case, the public authority is entitled to claim reliance on section 12 even though it chose not to do so when it first handled the requests.
62. Having concluded that the public authority is entitled to claim reliance on section 12, the Commissioner will now consider the application of this exemption.
63. Section 12 is set out in full in a Legal Annex to this notice. Section 12 removes the obligation on public authorities to comply with section 1 of the Act where the estimated cost of compliance with either part of that section would exceed what is known as “the appropriate limit”. This limit is set by Statutory Instrument No. 3244 “The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004” (“the Fees Regulations”). For non-central government public authorities such as the one in this case the appropriate limit is £450 (which can be calculated as 18 hours of work where an hour is charged at a standard rate of £25).
64. Section 12(4) allows for the aggregation of requests for the purpose of calculating costs in circumstances which are set out in Regulation 5 of the Fees Regulations. This Regulation provides that multiple requests can be aggregated where two or more requests relate, to any extent, to the same or similar information. The Commissioner notes that the public authority chose not to aggregate any of the 11 requests that were set out in the complainant’s letter to the public authority of 15 September 2005. In passing, the Commissioner would observe that it could have done so in relation to FOI Requests 4, 5, 6, 7, 8 and 9 because they follow an overarching theme as to the cost and use of consultants by the public authority. This accords with the Tribunal’s approach at paragraph 43 of *Fitzsimmons v ICO & Department for Culture Media and Sport* (EA/2007/0124). Arguably, it could perform further aggregation because its other requests focus on a particular type of consultancy, namely that which provides temporary workers. However, the Commissioner notes that it has not chosen to do so in relation to the 11 requests of 15 September 2005 or the 23 requests of November 2005 (none of which are the subject of the complaint in this case).
65. Although it has not sought to rely on section 12(4), the public authority has now chosen to rely on the provisions of section 12(1) in relation to

FOI Request 7. It has also done so in relation to FOI Request 10 but this will be considered later in this Notice.

66. Section 12(1) provides an exemption from the duty to provide requested information under section 1(1)(b) where the cost of compliance with that duty would exceed the aforementioned appropriate limit. When calculating the appropriate limit, a public authority can take into account the costs incurred when identifying, locating, retrieving and extracting the requested information. Contrary to the public authority's assertions, the Commissioner believes that a public authority cannot take the cost of redacting exempt information into account as part of its calculation. The Tribunal agreed with this at paragraph 37 of its ruling in the DBERR case referred to above.
67. The public authority has explained (in a letter to the Commissioner of 11 December 2008) that it was able to identify contracts within the appropriate limit but that it was then required to make a search of its physical contract store. It explained that the contracts were stored in a variety of places within that store at the time of the request and that the "entire" exercise took in excess of 5 working days. At the time of the request the public authority was of the view that redaction time could be included in the cost of compliance and, at least at the time of the request, it was proposing to make redactions to the information in question. It is far from clear, therefore, whether it included the time taken to make redactions as part of the "entire" exercise. However, even if redaction time is removed from the calculation as to the cost of compliance, the Commissioner is satisfied that the cost of identifying, locating, retrieving and extracting the information requested in FOI Request 7 from its physical stores in order to provide it under section 1(1)(b) would exceed 18 hours.
68. The Commissioner has concluded therefore that the public authority is exempt from its obligation to provide the information caught by the scope of FOI Request 7 by virtue of section 12(2). The Commissioner notes that it has, nevertheless, invited the complainant to inspect and, where it has a particular interest, to copy free of charge any of the information that it originally identified as being caught by the scope of FOI Request 7. For the reasons outlined above, the Commissioner believes this to be a reasonable offer in the circumstances.
69. However, in failing to confirm that it was seeking to rely on any of the provisions of section 12 within 20 working days of the request (or to rectify this failure at internal review), the public authority contravened the requirements of section 10(1) and section 17(5).

Section 12 - Cost of compliance exceeds appropriate limit – Request 10

70. The information caught by Request 10 is a database named CODA. At the time of the request it contained four years' worth of data. The public authority provided a considerable amount of the information from the database within the scope of the request but withheld one column

which is titled “descr” (short for ‘description’). It is this column which is the subject of this complaint. Originally, the public authority argued that it would exceed the cost of compliance to provide the information in this column because it was entitled to take into account the cost of redacting information within the column which it believed to be exempt under section 40(2) (Unfair disclosure of personal data). It explained that the column “descr” contained a considerable amount of personal data and the most expedient approach would, in its view, be to withhold the entire column rather than go through it and pick out the personal data which it believed was exempt.

71. For reasons outlined above, the public authority is in error where it argues that it can take the cost of redaction into account when calculating the cost of compliance. The Commissioner has concluded that the public authority cannot, therefore, rely on section 12(2) as a basis for withholding the information contained in the column entitled “descr”.

Section 40(2) – Disclosure would breach one of the data protection principles

72. The public authority has argued that disclosure of the personal data with “descr” would contravene one of the data protection principles of the Data Protection Act 1998 (“DPA”). As such it would be exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i). Section 40 is set out in full in a Legal Annex to this notice.
73. The public authority’s main arguments centred on the application of the first data protection principle. It believes that disclosure of the personal data in question would be unfair and would not satisfy one of the conditions for processing listed in Schedule 2 of DPA. In the case of information which was sensitive personal data, it would also not be able to satisfy one of the conditions listed in Schedule 3 of DPA. These arguments are considered in more detail below.
74. The Commissioner asked it to identify the personal data in question and to provide further detailed arguments. From a sample of 16,532 items of data within one year’s worth of records in the database, the public authority identified 2,300 items of personal data which were, in each case, the name of an individual. If reinstated into the rest of the database this name would appear in conjunction with other information which would tell the reader more about that individual and why their name was on the database. It identified four different categories of personal data within the column “descr” as follows:
- *“The individual is described by name in the data where the payment refers to an award of money in relation to their employment in education (teachers receiving a payment award).*
 - *The individual is described by name in the data where the payment relates to their retirement from employment (former [public authority] employees).*

- *The individual is described by name in the data where the payment relates to a net pay advance, salary advance or similar in relation to their employment ([current or former] employees [of the public authority]).*
- *The individual is described by name in the data where the payment relates to the individual's education or training as a result of their learning disability and/or learning difficulty."*

It suggested that given the volume of the information there may be instances of personal data which would fall within other categories.

75. The public authority explained that it would not have been able to respond to the complainant's FOI Request 10 within 20 working days as required by the Act while, at the same time, meeting its obligations under DPA to ensure that it was not disclosing personal data in breach of one of the principles of that other Act. It argued that the complainant had not been co-operative in reaching an informal resolution of this point and had not accepted its suggestion that a whole column be redacted for the sake of expediency.
76. The complainant, for its part, argued that the public authority did not seek to filter out the personal data in a competent manner. It also commented that it was not convinced that the mention of individuals' names in "descr" made that information personal data. It argued in an email of 22 October 2008 that the database focussed on expenditure and the information in question was biographical "*so far as we know, only in a very peripheral sense*".
77. In analysing the application of section 40(2), the Commissioner therefore considered a) whether the information in question was personal data and b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

Is the information personal data?

78. Personal data is defined in section 1 of DPA as data

"which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual".
79. Data is also defined in section 1 of DPA. The first category of data within that definition is information "*which is being processed by means of equipment operating automatically in response to instructions given for that purpose.*" The Commissioner is satisfied that the information in

this case is processed in such a manner because it is processed on an electronic database.

80. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "Determining what is personal data" which can be accessed at: http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
81. The Commissioner is not persuaded by the complainant's arguments that the information in question is not biographically significant and that it only relates to individuals in a very peripheral sense. In the Commissioner's view, the name, of itself, is personal data because it relates to an identifiable living individual and, in this context, the name tells the reader that this individual has received a payment from the public authority. Each name would not otherwise be on the list. The Commissioner disagrees with the complainant where it argues that this is not biographically significant.
82. Where the column "descr" is reinstated into the database requested by the complainant (as would be the case where the Commissioner ordered disclosure here), each name would be linked to a payment and further details as to the reasons for that payment. In some cases, where the payments relate to an individual's learning disability or otherwise to a person's health or condition, the information would be sensitive personal data as defined in section 2 of DPA. Section 2 of DPA is set out in the Legal Annex to this Notice.
83. In the light of the above, the Commissioner is therefore satisfied that the names of individuals which are listed in the column "descr" constitute those individuals' personal data. Where the information relates to an individual's health or condition, the Commissioner is satisfied that this information is that person's sensitive personal data. The Commissioner then considered whether disclosure would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

84. The first data protection principle has two main components and, in cases involving sensitive personal data, there is an additional component. These are as follows:
- requirement to process all personal data fairly and lawfully;
 - requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
 - additional requirement to satisfy at least one DPA Schedule 3 condition for processing sensitive personal data (if applicable).

85. Both (or, where applicable, all three) requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair and lawful?

86. It is important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it.

The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed that, "Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions" (paragraph 52):
http://www.informationtribunal.gov.uk/Documents/decisions/guardianne_ws_HBrooke_v_infocomm.pdf.

87. In considering fairness, the following are significant factors.
- What are the reasonable expectations of the individual in relation to the handling of their personal data?
 - What was that person told about what would happen to their personal data?
 - Is any duty of confidentiality owed to that person?

Fairness and sensitive personal data

88. Disclosure of sensitive personal data in this case would make public, through the publication of a name, information about an identifiable living individual's health or condition. This would arise because their name as set out in the column "descr" would be linked to a payment made as a consequence of that individual's health or condition. In the Commissioner's view, a public disclosure of this information would be wholly outside these individuals' reasonable expectations. The Commissioner believes the public authority owes a clear duty of confidentiality to the individuals in question. Where the payment relates to support for those with learning disabilities, the Commissioner believes this is particularly the case. The nature of the relationship between the individual and the public authority is one where the public authority provides support to improve that individual's skills for competing and performing in the workplace. While it involves expenditure of public funds, it is, essentially, a private matter and it would be wholly unfair to make public details of specific funding arrangements between the individual and the public authority. The Commissioner is satisfied that disclosure of sensitive personal data in this case would be unfair and in contravention of the first data protection principle. The names of individuals listed in the column

“descr” who receive payments related to their health or condition are therefore exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i).

Fairness and non-sensitive personal data

89. The Commissioner notes that the remaining non-sensitive personal data are the names of teachers or employees and ex-employees of the public authority who are mentioned within the data in the column “descr”. The Commissioner agrees that these individuals would not reasonably expect to have their names publicly linked to details of payments they each received as well as to the circumstances in which those payments were made. Where the information relates to employees or ex-employees of the public authority, this information would, in the Commissioner’s view fall within a class of information normally held by an organisation’s Personnel or Human Resources department. In the Commissioner’s view, information of this kind carries a particular expectation of confidentiality. It relates to specific payments made to specific and identifiable individuals. The Commissioner is therefore satisfied that disclosure of all other individuals’ names found in column “descr” would be unfair and would contravene the first data protection principle. This information is therefore exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i).

Remainder of the information within “descr”

90. As noted above, not all the information within “descr” is personal data. The public authority did not seek to argue that the remainder of the information within “descr” is also exempt (other than submitting arguments that it could include the cost of redaction when calculating the cost of compliance). However, it did set out the difficulties that it would have in redacting exempt information from “descr”. It explained that this field within the CODA spreadsheet is used optionally by its employees and is a “free text” field. It argued that at the time of the request, it would not have been able to redact all the personal data within “descr” within the 20 working day timescale set out in section 10(1) of the Act. As noted elsewhere in this notice, it originally believed it could have included redaction time when calculating the cost of compliance, although this view has subsequently been shown to be incorrect. In any event, it argued that it would take considerable time and effort in order to complete this task in a way which ensured that it did not inadvertently disclose personal data unfairly and in contravention of the first data protection principle. It had explained its dilemma to the complainant and had suggested that the column “descr” be redacted for the sake of expediency. The complainant, for its part, was not persuaded by the public authority’s arguments as to the difficulties that would arise and was not prepared to compromise on this point. It set out what it believed would be efficient and effective alternative search parameters.

91. Having examined a sample of the database, the Commissioner noted that by reference to other columns and codes (not necessarily those suggested by the complainant), it was possible *in most cases* to predict accurately the location of personal data within “descr”. For example, there was a particular code for “Inland Revenue” and “Season ticket loans” and, by using these as a key to a search of the database, the Commissioner usually located an information cell in “descr” containing the name of the individual to whom the payment related. However, he noted that a search of this kind occasionally resulted in finding an information cell which did not contain personal data. The Commissioner assumes that this arose because of the use of “free text” to populate information cells in “descr”.
92. The Commissioner shares the public authority’s concern as to the risk of inadvertent and unfair disclosure of personal data found in “descr”. The Commissioner believes that any task of redaction would need to be undertaken with meticulous care. If not undertaken in this fashion, an exercise of redaction may result in either the inadvertent but unfair disclosure of personal data or the inadvertent redaction of information which was not otherwise exempt. He is disappointed that the complainant did not agree to the compromise proposal put forward by the public authority.
93. The Commissioner made it clear to the public authority that it was not entitled to include redaction time when calculating the cost of compliance. The public authority did not advance any other argument as to why it was not obliged to disclose the remainder of the information in “descr” even though it had ample opportunity to do so during the course of the investigation. Had it advanced other arguments, the Commissioner would have given them due consideration and set out his view as to their merits in this Notice.
94. In light of the above, the Commissioner has decided that the public authority is obliged to disclose all the remaining information within “descr” that is not personal data.

Names of agency workers

95. From the outset of the investigation, the complainant raised concerns about the public authority’s refusal to provide the names of agency workers. These are temporary employees who are contracted to work for the public authority via an employment agency. The complainant was extremely concerned about the employment rights available to these workers. Specifically, it was concerned that, at the time of the requests, their contracts of temporary employment were terminated shortly before substantive employment rights would be available to them.

96. There has been considerable dispute and confusion as to which request would include the names of agency workers within its scope. The complainant was of the view that the names of agency workers would be included within the scope of FOI Request 1 and argued that any redaction of those names by reason of section 40 was invalid. The public authority believed that the names themselves fell outside the scope of FOI Request 1 and this was why it had redacted them from the disclosure it made in response to that request.
97. When the Commissioner re-examined the correspondence between the parties prior to the date of the original complaint he noted that the parties agreed in February 2006 that the names of agency workers would fall within the scope of FOI Request 6. However, the complainant did not refer to FOI Request 6 when complaining about the redaction of agency worker names.
98. In any event, the Commissioner gave the complainant at the outset of his investigation his preliminary view that disclosure of these names under the Act would constitute unfair processing of personal data. He did so in an effort to informally resolve this point. He invited further arguments from the complainant as to why agency worker names would not be exempt under section 40(2).
99. The complainant initially sought to argue that the information was not personal data. As such, the provisions of section 40 could not apply to it. The Commissioner disagrees with this because, in his view, disclosure under the Act of an individual's name in a list of agency workers involves the processing of that individual's personal data. Individuals can be identified in this case by their names. A disclosure in this case would make public the fact that each named individual has been employed on a temporary contract at the public authority.
100. The Commissioner also explained to the complainant that it would not be fair to process personal data of this kind (and in this way) about individuals who were likely to be junior staff. The complainant responded at length as to why disclosure would be fair. Its arguments can be summarised as follows.
- An individual's right to privacy under Article 8 of the Human Rights Act is balanced against other rights under that Act. The rights against which it is balanced in this case would be Article 14 (Right not to be discriminated against), Article 6 (Right to a fair trial) and Article 11 (Right to free association, i.e., to be a member of a trade union).
 - Individuals should be allowed to enjoy the protection that membership of a trade union brings and therefore their names should be made available in response to this request.
 - Temporary agency workers are threatened with termination of their employment and are otherwise fearful of proactively seeking the protection of trade union membership.

- Disclosure would promote the economic well-being of the country because it would promote the public interest in fair employment.
 - Agency workers do not work for the public authority on temporary contract by choice. Their preference would be for permanent employment with all the rights that would be available to them on that basis but the public authority's employment strategy ensures that they are only employed on a temporary basis.
101. The complainant also sought to argue that the information was already in the public domain by virtue of the fact that the agency workers wear name badges in public which uniquely identify them as being temporary employees.
102. The Commissioner acknowledges that the complainant is passionately committed to ensuring that all employees of the public authority (temporary or permanent) receive the necessary legal protection. The complainant has devoted considerable time and effort to setting out its arguments as to why disclosure would not be unfair. However, the Commissioner believes the complainant has neglected to give proper consideration to the fact that disclosure in this case would be disclosure to the general public rather than disclosure to colleagues who are representatives of the local branch of a national trade union. The Commissioner endeavoured to make this point on a number of occasions to the complainant in order to resolve this point informally.
103. The Commissioner is not persuaded by any of the complainant's arguments as to why disclosure would be fair. Wearing a name badge at work which identifies you as an employee on a temporary contract does not constitute a disclosure of one's personal data into the public domain. Employees may wear name badges for a number of reasons, such as to ensure they are identifiable to colleagues (and any security staff) as being on the employer's premises legitimately. The Commissioner acknowledges that an employee might neglect to conceal their name badge when leaving the premises and, as a consequence, their name and badge may be visible to passers-by. However, this would generally be an oversight on their part rather than a positive step to make their name and place of employment publicly available.
104. The Commissioner recognises that the complainant's concerns as to employment protection for temporary workers are genuine and heartfelt. However, the Commissioner believes there are other less intrusive ways in which a temporary worker can be alerted to the fact that there is a recognised trade union at the public authority and that they may be entitled to join that union. For example, notices could be placed in common areas. The Commissioner has no role to play in arbitrating in industrial disputes and cannot order disclosure of personal data to the public simply because it might thereby become available to a trade union and so arguably enhance employee rights or improve industrial relations at one particular location.

105. The Commissioner is therefore satisfied that disclosure of agency worker names would be unfair and in contravention of the first data protection principle of the DPA. As such the Commissioner has decided that agency worker names are exempt from disclosure under section 40(2).

Failure to provide advice and assistance

106. Under section 16 of the Act, a public authority is obliged to provide such advice and assistance as is reasonable to those making requests under the Act. Section 16 is set out in full in a Legal Annex to this notice. Recommendations as to reasonable advice and assistance are found in a code of practice issued by the Secretary of State under section 45 of the Act. This is widely referred to as the "section 45 code of practice".
107. In the Commissioner's view, it is difficult to determine with any certainty the extent to which the public authority complied with its obligations to provide advice and assistance to the complainant. As has been outlined above both parties have made representations to the Commissioner indicating their own willingness to negotiate and co-operate and these representations have included assertions as to the unwillingness of the other party to negotiate and co-operate. The Commissioner has no doubt that there were continued negotiations between the parties to seek resolution. However, these negotiations appear to have been conducted against the background of strained industrial relations.
108. The Commissioner has already commented that the public authority could have considered aggregating the requests for the purpose of calculating costs. Certain of the requests are similar or follow a particular overarching theme. Unfortunately, when preparing its initial response, the public authority did not have the benefit of guidance published by the Commissioner on this subject. This guidance was recently updated in June 2009:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fees_regulations_guidance_v2.pdf
109. In the Commissioner's view, the public authority may have been able to engage in a more constructive dialogue with the complainant if each side had been more mindful of the extent (and the limits) of the public authority's obligations under the Act where requesters submit multiple requests within one piece of correspondence.
110. In light of the above, the Commissioner does not uphold the complainant's complaint that the public authority contravened its obligations under section 16 of the Act.

Procedural Requirements

Section 17 – Failure to provide a proper refusal notice

111. Section 17 imposes certain obligations upon a public authority regarding the information it must provide in any refusal notice that it might issue in response to a request. Section 17 is set out in full in a Legal Annex to this Notice.
112. In its initial response to FOI Request 4 dated 18 January 2006, the public authority explained that it had redacted some information under section 43 because it believed that disclosure would, or would be likely to, prejudice the commercial interest of either of the contracted parties to whom the information related. It asserted that the public interest in maintaining this exemption outweighed the public interest in disclosure.
113. In failing to specify which exemption within section 43 it sought to rely on, in failing to explain in sufficient detail why it believed the exemption applied and in failing to explain in sufficient detail why the public interest in maintaining that exemption outweighed the public interest in disclosure, the public authority contravened the requirements of section 17(1)(c) and section 17(3)(b).
114. The complainant asserted that the public authority should have cited relevant case law in support of its arguments as to the application of exemptions and that in failing to do so, it contravened its obligations under section 17. The Commissioner does not consider that citation of relevant case law is obligatory in order to comply with section 17 of the Act, although it can be helpful if set out in a clearly understandable context. He would draw both parties' attention to his published guidance on issuing refusal notices http://www.ico.gov.uk/Home/what_we_cover/freedom_of_information/guidance.aspx#proguidance.

Section 10 – Failure to provide a timely response

115. As noted in paragraph 5, the public authority did not provide refusal notices in relation to any of the requests within 20 working days. The complainant initially accepted these delays recognising that the requests covered a significant amount of information. It was initially content with a staggered timetable for the provision of responses. The complainant's initial complaint to the Commissioner dated 8 March 2006 stated: "*Because of the voluminous amount of work involved the [complainant] does not wish to make a complaint about lateness – we recognise that there has been negotiation and goodwill on both sides in relation to the amount of work involved and do not wish to press any points about lateness.*" Unfortunately, relations between the parties deteriorated at some point after this comment.

116. The Commissioner notes that the public authority's failure to provide a response within 20 working days constitutes a breach of a number of its procedural obligations under the Act. In failing to confirm or deny what information it held within the scope of any of the requests within 20 working days it contravened the requirements of sections 1(1)(a) and section 10(1) of the Act. In failing to provide a refusal notice in relation to any of the requests within 20 working days, the public authority also contravened its obligations under 17(1) of the Act.

The Decision

117. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It is entitled to rely on section 40(2) (by virtue of section 40(3)(a)(i)) as a basis for withholding the personal data found in column "descr" on its CODA database and any of the names of agency workers found within any of the information caught by the scope of its various requests.
 - It is entitled to rely on section 12(1) in relation to FOI Request 7.

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

- It failed to provide within 20 working days a written confirmation or denial as to whether any of the requested information was held. In doing so it contravened sections 1(1)(a), 10(1) of the Act
- As well as failing to provide confirmation or denial in relation to any of the requests within 20 working days, it also failed to provide any refusal notices where it believed it was entitled to do so. In failing to provide such refusal notices within 20 working days, it also contravened the requirements of section 17(1) of the Act.
- It failed to deny that it held the spreadsheet referred to in FOI Request 6 within 20 working days and failed to rectify this at internal review. As such it contravened the requirements of section 1(1)(a) and section 10(1) of the Act.
- It failed to provide non-exempt data in column "descr" within 20 working days and failed to rectify this at internal review. In doing so, it contravened section 1(1)(b) and section 10(1) of the Act.
- It failed to confirm that it was seeking to rely on any of the provisions of section 12 within 20 working days of the request (or to rectify this failure at internal review). In doing so it contravened the requirements of section 10(1) and section 17(5).

Steps Required

118. The Commissioner requires the public authority to disclose the information within “descr” that is not exempt under section 40(2) by virtue of section 40(3)(a)(i).

Other matters

119. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

Engagement with the Commissioner

120. During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority’s reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the public authority’s reasons for invoking particular exemptions.
121. Accordingly the Commissioner does not consider the public authority’s approach to this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the public authority’s future engagement with his office and would expect to see improvements in this regard.

Right of Appeal

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

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

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

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

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

Dated the 11th day of August 2009

Signed

**David Smith
Deputy Commissioner**

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

Appendix

'FOI Request 1

'Any correspondence, minutes, emails, minutes or other records concerning:

(1) Employment rights of agency workers

We expect that the following may have emails, letters and documents related to this, but do not wish to confine the search to these individuals: [4 individuals named - names redacted].

FOI request 2

'All entries in coda, from 1 Jan 2002, showing all the columns (using a generic selector and presenter), relating to the subnominal 4801000. We would like this an electronic file – preferably an excel spreadsheet'

FOI request 3

'Copies of all national contracts with Employment agencies, including [Company redacted] (both the initial contract and the revised contract), and any discussions, emails, notes, minutes, letters leading to the revision of the contract.'

FOI request 4

'Any correspondence, minutes, emails or other records monitoring the use of consultants at National Office from 2002 – [7 individuals named – names redacted] may have these but the search should not be confined to them.'

FOI request 5

'All lines from coda from 2002 onwards, using a generic selector, which relate to Consultancy. As the information is not consistently recorded, the search will have to be conducted using various criteria. The following criteria may be helpful:

- Often these are under nominals 520. 5180 but may also be recorded under other codes.
- The search may also be conducted by suppliers. Prominent consultancy suppliers include KPMG, Price Waterhouse Coopers, Tribal, Xansa, Experian, DTZ, Progressive, LSDA, WWT, RCU, Business Solutions, Crystal; Further names of consultants may be found on the call off lists of approved suppliers which is held by [individual's name – name redacted]

'We would like these supplied as an electronic record – preferably an excel spreadsheet.'

FOI Request 6

'Any correspondence, minutes, emails, notes, spreadsheets or other records regarding the cost of consultants, at any time during 2002 – present, at National Office. [4 individuals' names – names redacted] may have spreadsheets or other documents monitoring consultants and temporary workers in their arenas, but the search should not be confined to them.

In particular, but not limited to, [individual's name – name redacted] will have a completed document entitled <<File: Consultants and Temps.xls >> which was circulated in April 05.'

FOI Request 7

'Copies of all contracts with consultants dealing with National Office. Beginning Jan 2004'

FOI Request 8

'Any correspondence, minutes, emails or records regarding the single tendering process for consultants at National Office, in particular how many and which consultants have had their contracts renewed without competitive tendering, including copies of single tender contracts for consultancy since April 2004 – procurement, [individual's name – name redacted], and [individual's name – name redacted] may have records of this, but the search should not be confined to them.'

FOI Request 9

'A detailed breakdown per directorate at National Office of the cost of consultants from 1st April 2004. This is to include consultancy expenditure on both admin and programmes to be detailed separately.

Also how much programme money has been spent on consultants doing admin-related work and [sic].'

FOI Request 10

'We wish to have an electronic copies of Coda, across all subnominals, - using a generic selector and presenter – for the National Office from 1 April 2002 to the present (initially National Office was under the code AA000, but was later broken up into separate codes of the type AA *00 e.g. AA400).

'If the electronic version of Coda for National Office is too large, we would like access to the Coda System to view, export, and retain selected contents.'

Reference: FS50108668

FOI Request 11

'Records of comments and approvals from the online recruitment system from 1 January 2005 onwards'

Legal Annex

Freedom of Information Act 2000

Section 1 General right of access to information held by public authorities

(1) 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.

Section 10 Time for compliance with request

(1) 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.

Section 11 Means by which communication to be made

(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,

(b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

(c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

Section 12 Exemption where cost of compliance exceeds appropriate limit

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

Section 16 Duty to provide advice and assistance

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case

Section 17 Refusal of request

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) 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 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.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Section 40 Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) 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), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject’s right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

Section 43 Commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Data Protection Act 1998

Section 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- “personal data” means data which relate to a living individual who can be identified—
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
 - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or
 - (b) that it should form part of a relevant filing system,
- it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.
- (4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

2 Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.