Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2011

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

Summary

The complainant requested information relating to the correspondence between the then Home Secretary and Professor Nutt, Chairman of the Advisory Council on the Misuse of Drugs, regarding the Professor's resignation. The Home Office advised the complainant where some of the requested information could be found in the public domain. With respect to the remainder, it confirmed it held the requested information, but refused to provide it on the basis that it was exempt from disclosure by virtue of sections 36 (prejudice to effective conduct of public affairs) and 42 (legal professional privilege).

After investigating the case the Commissioner decided that the information had been correctly withheld. However, he identified a series of procedural shortcomings on the part of the public authority.

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 Advisory Council on the Misuse of Drugs (ACMD) is a statutory and non-executive non-departmental British public body, which was established under the UK's Misuse of Drugs Act 1971.

3. The ACMD is required to have at least 20 members, among them representatives of the practices of medicine, dentistry, veterinary medicine and pharmacy, the pharmaceutical industry, and chemistry (other than pharmaceutical chemistry), and members who have a wide and relevant experience of social problems connected with the misuse of drugs.

4. One of the key functions of the ACMD is to recommend classification of new or existing drugs, which may be misused.

5. Professor David Nutt of the University of Bristol was Chairman of the ACMD until being relieved of his post on 30 October 2009. Professor Nutt was sacked by the then Home Secretary Alan Johnson, Johnson saying:

"*It is important that the government's messages on drugs are clear and as an advisor you do nothing to undermine public understanding of them. I cannot have public confusion between scientific advice and policy and have therefore lost confidence in your ability to advise me as Chair of the ACMD"*.

The Request

6. The complainant wrote to the Home Office on 30 October 2009 with the following request:

"I would like to request access to the following records:

1. *A recent letter by the Home Secretary to Professor David Nutt which I believe to contain the sentence "I cannot have public confusion between scientific advice and policy and have therefore lost confidence in your ability to advise me as Chair of the ACMD [Advisory Council on the Misuse of Drugs]". I would like to request a copy of the full letter.*
2. *The response letter by Professor Nutt to the letter mentioned above.*
3. *All internal drafts of this letter and all memoranda, notes, emails*

and other documents which were produced in connection with the preparation of this letter.

4. *Any internal advice which suggested that the Home Secretary should ask Prof Nutt to resign".*

7. The Home Office wrote to the complainant on 30 November 2009. It provided him with a link to the information requested in points 1 and 2 of his request as it was already in the public domain. In respect of points 3 and 4, it advised him that, in order to consider the public interest test fully, it was extending the time for responding. It told him:

"We have determined that the information you have requested falls to be considered under the exemption contained within section 36(2)(b) and (c) (prejudice to effective conduct of public affairs)".

8. Having told the complainant that it aimed to respond fully by 18 December 2009, the Commissioner understands that a further letter was sent to the complainant on 16 December 2009 giving a deadline for responding of 20 January 2010.

9. The Home Office ultimately provided its response on 27 January 2010. In this correspondence, the Home Office confirmed it held some information relating to points 3 and 4 of the request. However, it refused to disclose it, citing the exemptions in sections 36(2)(b)(i) and (ii) (prejudice to effective conduct of public affairs) and 42 (legal professional privilege) of the Act. There was no reference to section 36(2)(c) of the Act.

10. On 28 January 2010, the complainant requested an internal review in respect of the Home Office response to points 3 and 4 of his request.

11. The Home Office wrote to the complainant on 6 April 2010 upholding its decision not to disclose the requested information at points 3 and 4 of the request. In this correspondence, as well as referring to the exemption in section 42, the Home Office also variously referred to the exemption in section 36(2)(a) and (c) and 36(2)(b) and (c) as being relied on. The Commissioner will return to this point later.

The Investigation

Scope of the case

12. The complainant contacted the Commissioner on 6 April 2010 to complain about the way his request for information had been handled.

13. In subsequent correspondence, the complainant confirmed that he accepted that the Commissioner's investigation would focus on the Home Office's response to points 3 and 4 of his request. The Commissioner has therefore focused his investigation on the Home Office's citing of the exemptions in sections 36 and 42, including its assessment of the public interest test. The Commissioner has also considered the timeliness of the Home Office's response.

14. The Home Office told the complainant that the information that falls within the scope of points 3 and 4 of his request relates to internal drafts of the letter from the Home Secretary to Professor Nutt as well as submissions to Ministers and email exchanges between officials. The Commissioner understands the letter concerned is the letter dated 30 October 2009 in which the then Home Secretary, Alan Johnson, asked Professor Nutt to step down, with immediate effect, from the Advisory Council on the Misuse of Drugs.

Chronology

15. The Commissioner wrote to the Home Office on 14 July 2010 asking it for further explanation of its reasons for citing sections 36 and 42 in relation to points 3 and 4 of the request, including its reasons for concluding that the public interest in maintaining the exemptions outweighed the public interest in disclosure of the information requested. As the correspondence between the public authority and the complainant is inconsistent on this issue, he specifically asked the Home Office to clarify which limb(s) of the exemption in section 36 it was relying on.

16. The Home Office responded on 13 August 2010. In this correspondence, the Home Office clarified that, in relation to the information it is withholding by virtue of the exemption in section 36, it is relying on section 36(2)(b)(i) and (ii). It told the Commissioner that reference to section 36(2)(c) at the internal review stage was an error.

17. At this stage, the Home Office also told the Commissioner that, in its view, section 40 (personal information) applied to any personal information contained within the withheld information.

18. In response to questions raised during the Commissioner's investigation, the Home Office provided clarification of the actual withheld information on 27 October 2010.

Analysis

Exemptions

Section 36 Prejudice to effective conduct of public affairs

19. Section 36(2) states 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 Cabinet of the Welsh Assembly Government,
(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".

20. The Home Office told the complainant that it holds some information that falls within the scope of his request:

"primarily in the form of advice to Ministers in submissions and discussions via emails. However, these documents mainly record the outcome of discussion between officials and legal advisers etc not the detail of the discussions".

21. During the course of the Commissioner's investigation, the Home Office clarified that, in relation to the information it is withholding by virtue of the exemption in section 36, it is relying on section 36(2)(b)(i) and (ii). It also clarified the withheld information to which it considered this exemption applies.

22. The Commissioner considers it acceptable to claim both section 36(2)(b)(i) and (ii) in relation to the same information as long as arguments can be made in support of the claim for each individual subsection. These subsections are not mutually exclusive.

23. In relation to the likelihood of prejudice in this case, the Home Office confirmed to the Commissioner that it is relying on the higher threshold of "would prejudice". In the context of section 36(2)(b) the Commissioner notes that the issue is whether disclosure would, or would be likely to, **inhibit**, rather than to **prejudice**.

24. In other words, effectively what the Home Office is claiming is that, in the reasonable opinion of a qualified person, disclosure in this case would inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

25. The term 'inhibit' is not defined in the Act. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.

The opinion of the qualified person

26. The first condition for the application of the exemption at section 36 is the qualified person's reasonable opinion. When assessing the qualified person's opinion the Commissioner will consider the following:

    a. whether an opinion was given;

    b. whether the person who gave that opinion is the qualified person for the public authority in question;

    c. when the opinion was given; and

    d. whether the opinion is reasonable.

27. In this case, the Home Office has advised that a submission, dated 25 January 2010, was sent to Alan Campbell, then Parliamentary Under-Secretary of State for Crime Reduction. (The Commissioner notes that this was significantly after the date on which the Home Office told the complainant that it was extending the time for responding in order to consider the public interest test). A response was received on 27 January 2010.

28. Section 36(5)(a) provides that the qualified person for a government department will be any Minister of the Crown. It has been established, therefore, that an opinion was given, that this opinion was given by a

qualified person for the Home Office and that this opinion was given on 27 January 2010.

29. With respect to the internal review, the Home Office advised the Commissioner that the opinion of the qualified person was also sought at the internal review stage. On that occasion, a submission, dated 31 March 2010, was sent to Alan Campbell. A response was received on 6 April 2010.

Is the opinion reasonable?

30. The next step is to consider whether the opinion is reasonable. In determining whether or not the opinion is reasonable, the Commissioner will consider the extent to which the opinion is both reasonable in substance and reasonably arrived at. The Commissioner will generally take into account two main factors here: what the qualified person took into account when forming his opinion and the content of the withheld information itself.

31. In deciding whether the opinion is 'reasonable' the Commissioner has been assisted by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013]. In that case, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur, and thus:

"*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".*

32. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion he is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

33. During the course of his investigation, the Commissioner asked the Home Office to confirm whether the qualified person was provided with any submissions supporting a recommendation that the exemption was engaged. Equally, he asked whether the qualified person was provided with any contrary arguments supporting the position that the exemption was not engaged.

34. The Home Office provided the Commissioner with copies of the two submissions in this case. The Home Office also confirmed that the

qualified person was provided with a summary describing the requested information at the time of the initial response and that he also had access to the actual information at the time of the internal review.

35. In answer to the Commissioner's questions as to whether the qualified person was provided with contrary arguments, the Home Office confirmed that the two submissions set out the case for using the exemption "*because that was our firm recommendation".*

Is the exemption engaged?

36. Section 36 is the only exemption in the Act that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in paragraph 2 would follow from disclosing the information.

37. In considering whether the exemption in engaged in this case, the Commissioner has referred to the Ministry of Justice (MoJ) guidance on section 36. This states that, in order to form an opinion, the qualified person will need to be provided with "*any background information they might need in order to reach such a decision*".

38. The MoJ guidance also says:

"It will be extremely important to document thoroughly the reasons why information falls within section 36(2). The provision is wide-ranging and any decision to withhold information under it should be narrowed down as precisely as possible by clear reference to the risk of harm that could be caused by disclosure of the information in question. It is because the scope of the provision is so potentially wide that the requirement for a qualified person to take the decision on the application of section 36 in each case was included in the legislation".[1]

39. In this case, the Home Office told the Commissioner that the submission provided to the qualified person on each occasion "*included arguments for and against disclosure"*. It explained that the submissions provided counterarguments in that they considered the public interest test in relation to the exemptions, including considerations favouring disclosure.

[1] http://www.justice.gov.uk/guidance/docs/foi-exemption-s36.pdf

40. The Commissioner accepts that the qualified person was provided with a submission at the time the initial response to the complainant's request was being prepared and at the time of the internal review.

41. However, the Commissioner is concerned to see that the submission documentation provided to the qualified person at the internal review stage presents a confused picture. The qualified person is variously asked to agree to the continued withholding of the requested information by virtue of the exemptions previously cited, and to agree to the citing of a different limb of section 36, namely 36(2)(c).

42. In essence, the second submission intersperses references to both section 36(2)(b) (subsections (i) and (ii)) and 36(2)(c) as being the most appropriate single limb of the exemption to rely on in this case. In this respect, the Commissioner considers the submission documentation is very confused, with inconsistent references to the subsections of the exemption being relied on.

43. However, although it is not clear why reference to section 36(c) was introduced at the internal review stage, the Commissioner is satisfied that the intention behind the second submission was to invite the qualified person to endorse his original opinion. In this case, the original opinion was that section 36(2)(b)(i) and (ii) applied.

44. Putting to one side the weaknesses in the Home Office's submission at the internal review stage, the Commissioner has considered the documentation relevant to the process of obtaining the qualified person's opinion in this case.

45. In doing so, the Commissioner has also considered the level of prejudice. Section 36 provides for two levels with regard to the likelihood of prejudice, 'would prejudice', and 'would be likely to prejudice'. The level in this case was detailed in the letter to the complainant dated 27 January 2010. In this correspondence, the Home Office told the complainant:

"release could lead to reluctance on the part of officials, Ministers and other advisers to provide (and seek) frank advice in future".

46. The Commissioner does not consider that this gives a clear indication of whether the risk of any prejudice occurring was considered to be one that 'would be likely to' occur, or whether the risk met the higher test of 'would occur'. However, the Home Office has confirmed that it considers the higher test applies.

47. Having had sight of the submissions in this case, in the Commissioner's view they fall short of the way he would expect to see demonstrated the likelihood of inhibition or harm occurring as a result of disclosure. This is with respect both to the free and frank provision of advice and to the free and frank exchange of views for the purposes of deliberation. Furthermore, in his view, the arguments in the submissions refer to the public interest test, an issue which properly falls to be considered when, or after, the decision has been taken that the exemption is engaged.

48. The Commissioner acknowledges that the response to the complainant, a copy of which was provided to the qualified person, states simply on the question of likelihood that "*disclosure of preliminary thinking may end up closing off better options because of adverse public reaction*".

49. Notwithstanding his concerns about the quality of the submissions to the qualified person, particularly that presented at the internal review stage, the Commissioner is satisfied that the overall conclusion of the process was correct. He has considered the content and sensitivity of the information and timing of the request, which was very close to the announcement made related to Professor Nutt. The Home Office and the Secretary of State were still actively handling the matter when the request was made. The Commissioner has followed the approach set out by the Information Tribunal in *McIntyre v Information Commissioner EA/2007/068; "…where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion…."*. In the case this notice is focused on the Commissioner considered that the qualified person's opinion was overridingly reasonable in substance.

50. However, having duly considered the arguments put forward by the Home Office, he takes the view that only the lower level of harm has been demonstrated

51. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 36(2)(b)(i) and (ii) and he has carried this lower level of likelihood through to the public interest test.

The public interest test

52. The Commissioner notes that the Home Office provided the complainant with general public interest arguments as well as those specific to his case. In some instances, the arguments provided appear to relate to both exemptions claimed by the Home Office in this case. In considering the public interest with respect to the exemption in

section 36, the Commissioner has only taken into account those arguments relevant to that section.

Public interest arguments in favour of disclosing the requested information

53. The Home Office acknowledges that the requested information concerns a high-profile subject and therefore that there is a strong public interest in disclosing it "*to provide greater transparency*".

54. It also recognised the public interest in the way Ministers take decisions, particularly those that have a significant impact on the lives of citizens.

Public interest arguments in favour of maintaining the exemption

55. Arguing in favour of maintaining the exemption, the Home Office told the complainant:

"*It is in the public interest that decision making is based on the best advice available with full consideration of all the options and the impartiality of the civil service being protected – it might be undermined if advice was routinely made public….leading to poorer decision making".*

56. It further argued the importance of Ministers being able to exchange views "*without undue concern*" that such information will be routinely released.

57. Similarly, in the Home Office's view:

"*It would not be in the public interest to disclose information that could prejudice the ability of Ministers and officials to be able to conduct rigorous and candid discussions relating to the Government's scientific advisors".*

Balance of the public interest arguments – the free and frank provision of advice

58. As the Home Office is citing multiple limbs of the exemption, the Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in disclosing the information under consideration equals or outweighs the public interest in maintaining the exemption. In doing so, he notes that, in this case, the

public interest arguments put forward by the Home Office in relation to section 36(2)(b)(i) are broadly similar to those cited in relation to section 36(2)(b)(ii).

59. The Commissioner has considered firstly the public interest arguments in respect of the free and frank provision of advice.

60. The Commissioner accepts that there are merits in the argument that disclosure would provide greater transparency in the way in which decisions are reached. However, in this respect, the Commissioner notes that the Government published the correspondence between the then Home Secretary and Professor Nutt and that it was accessible on a news website. This fact was confirmed by the Home Office in correspondence to the complainant dated 30 November 2009.

61. The Commissioner has carefully considered the content of the withheld information in reaching his decision in this case. In his view, the fact that the outcome of the views and advice is already in the public domain goes some way to satisfying the public interest. Indeed, the Commissioner takes the view that release of the internal discussions leading to the decision would not significantly further the public understanding of events. This is view the Commissioner has reached considering the content of the information.

62. In weighing the public interest factors, the Commissioner must take into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which, in the midst of a debate, opinions or options are expressed. The Commissioner notes that the issue was still "live" and the subject of considerable political and media debate.

63. The Commissioner gives weight to the Home Office's argument that there is a strong public interest in officials and advisers retaining the ability to communicate between themselves freely, frankly and in confidence. Similarly, he gives weight to the argument that it is in the public interest that decisions are made based on the best advice available and with full consideration given to all the options available.

64. Having considered the opposing public interest factors in this case, the Commissioner has concluded that, with respect to revealing the internal thinking processes about a developing situation, the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption.

65. The Home Office is citing section 36(2)(b)(ii) in relation to the same information for which it is citing section 36(2)(b)(ii). As he has found the section 36(2)(b)(i) arguments in favour of maintaining the

exemption persuasive, the Commissioner has not gone on to consider the public interest arguments in relation to section 36(2)(b)(ii).

Section 42 Legal professional privilege

66. The Home Office is citing section 42 (legal professional privilege) in relation to the remainder of the withheld information. This exemption applies to information that would be subject to legal professional privilege (LPP). In other words, section 42 sets out an exemption from the right to know for information protected by LPP.

67. LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice or documents created by or for lawyers for the dominant purpose of litigation. This exemption ensures that the confidential relationship between lawyer and client is protected.

68. In this case, although not specifying which subsection it is relying on, as the Home Office has confirmed that it holds information within the scope of the request, the Commissioner understands that the Home Office is citing section 42(1) which 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."

Is the information privileged?

69. Legal professional privilege (LPP) is a common law concept shaped by the courts over time. It is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counterarguments.

70. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.

71. There are two categories of LPP – litigation privilege and legal advice privilege. In this case, the Home Office is claiming advice privilege.

72. Legal advice privilege may apply whether or not there is any litigation in prospect. In the Commissioner's view, this form of LPP covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice. The advice itself must concern legal

rights, liabilities, obligations or remedies or otherwise have a relevant legal context.

73. In this case, the Home Office is citing section 42(1) in relation to a number of communications which were produced in connection with the Home Secretary's letter to Professor Nutt. On the basis of the above, and having had sight of the withheld information, the Commissioner is satisfied that it constitutes legal advice privilege and he has consequently concluded that the exemption is engaged in respect of this information. He has therefore gone on to consider the public interest.

The public interest test

74. As section 42 is a qualified exemption the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the report.

75. As described above, the Home Office provided the complainant with general public interest arguments as well as those specific to his case. In considering the public interest the Commissioner has only taken into account those arguments relevant to section 42.

Public interest arguments in favour of disclosing the requested information

76. The Home Office acknowledges that the requested information concerns a high-profile subject and therefore that there is a strong public interest in disclosing it "*to provide greater transparency*". It accepted that disclosure would be likely to aid an informed public debate on this subject as it would raise public awareness of the decision making processes involved.

Public interest arguments in favour of maintaining the exemption

77. The Home Office told the complainant that there is a very strong public interest in officials and advisers being able to advise Ministers objectively and frankly "*no matter how emotive or sensitive the issue*".

78. In addition, it argued there was an inbuilt public interest in maintaining professional privilege to ensure public authorities take decisions in a fully informed legal context with advice given by lawyers who are fully apprised of the factual background. In this respect, it told the complainant:

"legal advisers must be able to present the full picture which will include arguments in support of the final conclusions and those against".

Balance of the public interest arguments

79. The Commissioner understands that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Information Tribunal recognised this in *Bellamy v Information Commissioner* (EA/2005/0023).

80. However, the exemption is not absolute and the Act therefore requires consideration of whether the public interest in disclosure in a particular case is strong enough to equal or exceed the public interest in maintaining legal professional privilege (LPP).

81. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

82. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has used the following criteria:

- the transparency of the public authority's actions.

83. In this case, the Commissioner is mindful of the fact that, at the time of the request, the advice was recent and still being relied on.

84. In balancing the opposing factors in this case, the Commissioner has taken into account the strong inbuilt weight in favour of protecting legal professional privilege, the fact that this information is recent and live, and the fact that, in his view, disclosure of the withheld information would have a limited effect with regard to aiding the understanding of, and participation in, the public debate of issues of the day. In conclusion, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural Requirements

Section 17 Refusal of request

85. Section 17(1)(b) places an obligation upon the public authority that its refusal notice *'specifies the exemption in question'*. In failing to adequately specify the subsections of section 36(2) the Home Office breached section 17(1)(b).

86. In this case, the Home Office extended the time limit to address the public interest. As the Commissioner has explained in his *'Good Practice Guidance 4'*, public authorities should aim to conduct the public interest test within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken should in no case exceed 40 working days. In this case, the complainant made his request on 30 October 2009, but the Home Office did not communicate its final decision until 27 January 2010, nearly three months later. The Commissioner does not consider that there were exceptional reasons to justify this. He therefore concludes that this was an unreasonable timescale, which constitutes a breach of section 17(3) of the Act.

The Decision

87. 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 applied section 42(1) correctly;
- it applied section 36(2)(i) correctly.

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

- it breached section 17(1)(b) by failing to adequately specify the subsections of the exemptions claimed;
- it breached section 17(3) in unreasonably extending the time taken to conduct the public interest test.

Steps Required

89. The Commissioner requires no steps to be taken.

Other matters

90. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Act defines the qualified person for a number of specific public authorities listed in sections 36(5). All authorised qualified persons will be senior individuals in the public authority. The Commissioner expects that, as the qualified person is a senior person, the responsibility under this section will be treated as a significant one and that the opinion will not be expressed lightly. He is therefore disappointed to note that the second opinion was not dealt with as scrupulously as the first.

91. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 44 working days for an internal review to be conducted, despite the publication of his guidance on the matter.

92. The Commissioner also considers that the response that went to the complainant at the internal review stage lacks clarity. While it concludes that "*the original response was correct*" it variously refers to subsections (a), (b) and (c) of section 36(2). In the Commissioner's view, the standard of the internal review response that went to the complainant is unacceptable: the complainant may well have been left in doubt as to the grounds on which the requested information was withheld.

Right of Appeal

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

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

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

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

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

Dated the 31st day of March 2011

Signed ……

Steve Wood
Head of Policy Delivery

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

Legal Annex

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and

(a) information which is held by any other public authority.

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

(i) the work of the Executive Committee of the Northern Ireland Assembly, or

(ii) 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."