

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 12 April 2011

**Public Authority:** Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

### Summary

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The complainant requested copies of communications between the Catholic Education Service and the Department for Children, Schools and Families (now the Department for Education) on the subject of sex education and Personal, Social and Health Education in schools. The request focused on information from 2009. The public authority withheld this information under section 35(1)(a). After investigating the case the Commissioner decided that that section 35(1)(a) applied to the information and the public interest test favoured withholding the information. The Commissioner requires no steps to be taken.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### Background

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2. In December 2007 the public authority published a policy document announcing a number of changes and reforms to the education system,

titled 'The Children's Plan.'<sup>1</sup> Amongst other things this announced a review of the teaching of Sex and Relationships Education ("SRE") in schools. In October 2008 the then Schools Minister announced a review of the teaching of Personal, Social and Health Education ("PSHE"), which would include the teaching of SRE, and an independent review was commissioned. This was completed in March 2009, and recommended (amongst other things) that PSHE (including the teaching of SRE) should become part of the National Curriculum at both primary and secondary levels.<sup>2</sup>

3. The then Secretary of State, Ed Balls, accepted this recommendation in a written ministerial statement on 27 April 2009. Consequently, on 5 November 2009 he announced his decision to proceed with legislation to make PSHE (including the teaching of SRE) part of the statutory National Curriculum in both primary and secondary. This legislation would also include provisions to limit the parental right to withdraw their children from SRE to the point at which the child reached age 15.<sup>3</sup> Subsequently the Children, Schools and Families Bill (the "Bill") had its first reading in the House of Commons on 19 November 2009. Amongst other things, the Bill proposed changes to the way in which SRE and PSHE were taught in schools, and specifically making these subjects part of the National Curriculum.<sup>4</sup> The Bill was eventually granted Royal Assent on 8 April 2010.
4. On 25 January 2010 the public authority announced that it would be issuing new guidance on the teaching of SRE – which would be taught within lessons on PSHE. It stated that this guidance had been drafted, *"...by an expert group representing teachers, health charities, faith groups and young people..."* Amongst the stakeholders listed as having contributed to developing the draft guidance were the Catholic Education Service (the "CES"). The draft guidance was to be put out for public consultation. The public authority stated that the final version of the guidance would be circulated to schools in September 2010.<sup>5</sup>

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<sup>1</sup> [http://www.dcsf.gov.uk/childrensplan/downloads/The\\_Childrens\\_Plan.pdf](http://www.dcsf.gov.uk/childrensplan/downloads/The_Childrens_Plan.pdf)

<sup>2</sup>

<http://www.education.gov.uk/publications//eOrderingDownload/FINAL%20Macdonald%20PSHE%20Review.pdf>

<sup>3</sup> [http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn\\_id=2009\\_0208](http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2009_0208);

<http://www.parliament.uk/documents/commons/lib/research/rp2009/rp09-095.pdf>

<sup>4</sup> <http://education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-01098-2009>

<sup>5</sup> [http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn\\_id=2010\\_0022](http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2010_0022)

## The Request

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5. The complainant wrote to the public authority on 1 December 2009 and requested the following information:

*"Copies of minutes and any notes, including handwritten notes, taken at any meetings or gatherings where the Catholic Education Service, or any of its agents, including Ms Oona Stannard and Bishop McMahon, met with any civil servant or government minister in the calendar year 2009 on the subject of sex education or PSHE in schools. I should also please like any letters, emails or other communications sent by the same parties on the same subject in the calendar year 2009."*

The CES negotiates, on behalf of all Catholic bishops, with government and other national bodies on legal, administrative, and religious education matters. Ms Stannard is Chief Executive and Director of the CES. Bishop McMahon is Chair of the CES.<sup>6</sup>

6. The complainant wrote to the public authority again on 19 January 2010 and asked why he had not received a response to his request.
7. The public authority responded in a letter dated 15 February 2010 and stated that it had no record of having received his original request. It confirmed that it held information relevant to the request, but considered that section 35(1)(a) applied to this information. It stated that it was currently considering the public interest test in relation to the application of this exemption, and needed an additional 10 days in order to make this decision. Therefore, it anticipated that it would be able to respond by 8 March 2010.
8. The complainant wrote to the public authority on 6 April 2010 and noted that he had not yet received a response to his request.
9. The public authority wrote to the complainant on 7 April 2010 and informed the complainant that it had sent a substantive response on 5 March 2010. This response had been sent to an email address which it believed was the email address for the complainant. It attached a copy of its response. In this response the public authority had confirmed that it held information that fell under the scope of his request, but stated that it was exempt from disclosure under section 35(1)(a) of the Act.
10. The complainant wrote to the public authority on 13 May 2010 and requested an internal review of this decision.

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<sup>6</sup> <http://www.cesew.org.uk/index.asp?id=1>

11. The public authority wrote to the complainant on 10 June 2010. It informed him it now believed that some relevant information could be disclosed to him, although it also believed that some information should continue to be withheld. However, in relation to the information being withheld it informed him that it needed further time in order to consider the public interest test. It estimated that it needed an additional 10 days in order to consider this, and therefore anticipated that he would receive a response by 29 June 2010.
12. The public authority wrote to the complainant again on 28 June 2010. It disclosed a limited amount of information, consisting of an excerpt from an email and a document attached to that email. However, in relation to the remaining information that it held it stated that it believed that this information was exempt under section 36(2)(b) of the Act, as disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

## **The Investigation**

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### **Scope of the case**

13. On 19 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner wrote to the complainant on 4 January 2011 and confirmed that the scope of the case would be to determine whether the public authority was correct to withhold the requested information.
14. During the course of the investigation the Commissioner informed the complainant that after obtaining a copy of the withheld information he had noted that the information disclosed on 28 June 2010 actually post-dated the request, and had therefore not been held by the public authority when the request had been made. Therefore the information that had been redacted from the disclosed information would not fall under the scope of this case.
15. In addition to this, during the investigation the public authority confirmed that it was relying upon section 35(1)(a) to withhold the information in question (see paragraph 19 below).
16. Therefore the scope of this case has been to consider the public authority's use of section 35(1)(a) in order to withhold the information in question.

## Chronology

17. The Commissioner wrote to the public authority on 4 January 2011 and asked for a copy of the withheld information. He noted that in the refusal notice it had cited section 35(1)(a). However, in the internal review it had cited section 36(2)(b). He pointed out that sections 35 and 36 are mutually exclusive, and that if the withheld information related to the formulation and development of government policy it would fall under section 35(1)(a) rather than section 36(2)(b). He stated that after considering the wording of the request it was his initial view that the withheld information would relate to the formulation and development of government policy, and therefore section 35(1)(a) would be engaged. He asked the public authority to consider this, and provide relevant submissions.
18. On 12 January 2011 the public authority provided the Commissioner with a copy of the withheld information.
19. On 8 February 2011 the public authority provided a substantive response. It confirmed that the withheld information did relate to the formulation and development of government policy, and as such it was relying upon section 35(1)(a) to withhold this information.
20. The Commissioner wrote to the public authority again on 23 February 2011, and asked it to confirm whether it held any further relevant information that would fall under the scope of the request. He also asked some specific questions in relation to its use of section 35(1)(a).
21. The public authority responded on 11 March 2011. It confirmed that it held no further information that would fall within the scope of the request. It also responded to the additional questions asked by the Commissioner.

## Analysis

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### Exemptions

#### Section 35(1)(a)

22. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption, and therefore if the information relates to the formulation or development of government policy, the exemption is engaged.

23. The full text of section 35 can be found in the legal annex at the end of the notice.
24. The Commissioner has first considered whether the withheld information relates to the formulation and development of government policy.
25. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.
26. In this instance the withheld information relates to comments made by the CES in response to draft guidance on SRE that was circulated to certain stakeholders for comment in the spring of 2009. This was part of a wider move towards reforming the way in which SRE was taught in schools and was closely linked with the formulation of the Bill. Therefore, the Commissioner considers that the government policy in this case was the planned reforms to the way that SRE and PSHE were taught in schools, and in particular making the teaching of SRE part of the National Curriculum. This was reflected by the Bill that, at the time of the request, was progressing through Parliament, and the draft guidance on the teaching of SRE that was published for public consultation on 25 January 2010.
27. Bearing in mind the reasons why the CES provided this information to the public authority, at a time when the guidance on the teaching of SRE was still under development, and prior to the publication of the linked Bill, the Commissioner is satisfied that the withheld information relates to the formulation and development of that policy. Therefore the Commissioner finds that this exemption is engaged.
28. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider where the balance of public interest lies and decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

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

29. The Commissioner recognises that there is a public interest in openness and accountability, and in increasing public understanding of the way that government works. In this particular case he notes that the suggested changes to the way in which SRE would be taught – which at the time of the request were contained in a Bill progressing through Parliament – were sensitive and potentially controversial, and were the focus of public debate. The disclosure of the withheld information would have helped to inform that debate, in so far as it would have given an

insight into the views of one of the stakeholders already consulted by the public authority whilst the Bill, and the associated guidance, were being drafted.

30. In addition to this, the Commissioner also considers that there is a strong public interest in increasing the public understanding of the roles that stakeholders representing specific interest groups – such as the CES – influence the shaping of educational policy.

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

31. At the time of the request the Bill was progressing through Parliament, the relevant policy was still in the process of formulation. The public authority has argued that it is in the public interest that the formulation of government policy, and the associated decision making, proceeds in the self-contained space needed to ensure that it is done well. It has pointed out that if the thinking space and the ability for Ministers and senior officials to receive free and frank advice is not protected, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making will become poorer and will be recorded inadequately.
32. The Commissioner has interpreted this as a 'safe space' argument. Safe space arguments are about the need for a safe space to formulate policy, debate live issues, and reach decisions without being hindered by external comment and/or media involvement. The Commissioner accepts that there is a public interest in maintaining a safe space for the formulation and development of government policy, although the weight given to this argument will depend on the age of the information, and whether the formulation and development of that policy was still underway at the time of the request. The Commissioner has gone on to consider this argument further below.
33. In addition to this, the public authority has also added that the disclosure of this information may have a chilling effect on the future provision of advice from stakeholders, such as the CES. It has stated,

*"The information requested contains suggestions from a specific faith group on national guidance on SRE across that statutory school age range. The subject area...is highly controversial, with strongly held views across the spectrum. For this reason, it is important that Ministers have opportunities to reflect on the open and candid views of key stakeholders in deciding how to develop the subject in the future.*

*In developing national guidance that would facilitate the teaching of SRE in a wide range of schools across England and Wales, officials consulted a range of stakeholders to ensure that the guidance*



*would be appropriate to the needs of schools with differing religious and secular approaches. By releasing the contribution of this or any other individual consulted as part of this process, it would expose the views of stakeholders provided in confidence, would damage those relationships and could lead to those stakeholders being unwilling to provide advice in the future.”*

The Commissioner has interpreted this as a 'chilling effect' argument.

34. A chilling effect argument is directly concerned with the potential loss of frankness and candour in debate or the provision of advice which, as a result, would lead to poorer quality advice and less well formulated policy and decisions. This, it is argued, would not be in the public interest. The Commissioner has gone on to consider this argument further below.

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

35. In reaching a view on the balance of the public interest test the Commissioner has had to consider the circumstances at the time the request was made. Therefore, despite the fact that by the time the public authority had completed the internal review the Bill had been granted Royal Assent, the Commissioner cannot take this into consideration. Instead he has had to consider the public interest factors at the time the request was made – shortly after the Bill had had its first reading in the House of Commons.
36. The Commissioner recognises that there is a public interest in openness and accountability, and in increasing public understanding in the way that government works. In the particular circumstances of the case, the withheld information relates to the formulation of a piece of government policy, which was suggesting fundamental changes to the way in which SRE was taught in schools. This policy was controversial with a number of interest groups.
37. The information in this case shows the opinions of a significant stakeholder representing a large number of schools, on the formulation of a controversial piece of government educational policy. The Commissioner considers that there is a strong public interest in increasing transparency of the influence that lobby groups (including relevant stakeholders) have in shaping government policy. In particular, he considers that there is a significant public interest in increasing public understanding of how stakeholders representing faith groups influence, or attempt to influence, government educational policy. Therefore, the Commissioner finds this public interest particularly weighty. However, he feels that this argument is tempered, somewhat, in the circumstances of this case by the fact that the public authority did not just seek the views



of stakeholders representing faith groups during the formulation of this policy, and instead consulted with a wide range of stakeholders – for example the Sex Education Forum, OFSTED, and the National Governors Association.<sup>7</sup> The Commissioner has not seen any arguments that indicate he should give weight to the factor of exposing an imbalanced process or that faith groups (or other groups) had undue influence in the process.

38. The Commissioner has to balance these public interest arguments in favour of disclosure against those in favour of maintaining the exemption. As noted above, the Commissioner has identified the arguments in favour of maintaining the exemption as a safe space argument and a chilling effect argument.

39. In considering the weight to give to safe space arguments the Commissioner has been mindful of the views of the Tribunal in *Department for Education and Skills v the ICO & The Evening Standard* [EA/2006/0006]. In that case the Tribunal recognised the importance of the safe space argument, stating that,

*“The timing of a request is of paramount importance to the decision [...] disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.”<sup>8</sup>*

40. Therefore, in reaching a view on the weight to give to a safe space argument, the Commissioner considers that it is important to take into account the age of the information, and whether the formulation and development of the policy in question was still underway at the time of the request. In reaching this view he is mindful of the views of the Tribunal in *Department for Business, Enterprise and Regulatory Reform v the ICO & Friends of the Earth* [EA/2007/0072] where it commented in relation to the need for a private 'thinking' space that,

*“This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will*

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<sup>7</sup> [http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn\\_id=2010\\_0022](http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2010_0022)

<sup>8</sup> EA/2006/0006, para 75

*diminish over time as policy becomes more certain and a decision as to policy is made public.”<sup>9</sup>*

41. Therefore, with regard to the safe space arguments, the Commissioner considers that these are strongest if, at the time of the request, the policy formulation and development was ongoing. In such circumstances these arguments focus on the need for a private space in which to develop live policy.
42. In this case the request was made on 1 December 2009, shortly after the Bill had had its first reading in the House of Commons on 19 November 2009. In addition to this, the draft guidance for the teaching of SRE in schools was not published for public consultation until 25 January 2010. Therefore, the Commissioner is satisfied that at the time of the request the formulation of this government policy was live and ongoing. He also believes that the withheld information related to the formulation of this policy.
43. In line with the comments of the Tribunal quoted at paragraph 39, the Commissioner considers that significant and notable weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. As the Tribunal noted, in such scenarios the public interest is very unlikely to favour disclosure unless for example it would expose some level of wrongdoing. The Commissioner notes that this has not been suggested by the complainant, and nor is there any suggestion of this in the withheld information. Furthermore in the Commissioner's opinion, it is clearly in the public interest that the government should be able to seek the views of relevant stakeholders in circumstances such as this and to be able to consider those views in a safe space, at the time when it is still formulating the policy in question.
44. In considering the weight to give to the chilling effect arguments the Commissioner has been mindful of the views of the Tribunal in *Department for Education and Skills v ICO & The Evening Standard* [EA/2006/0006] which stated that,

*“The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.”<sup>10</sup>*

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<sup>9</sup> EA/2007/0072, para 114

<sup>10</sup> EA/2006/0006, para 75(i)

45. Therefore in considering arguments of this kind the Commissioner will consider the contents of the withheld information.
46. In this case the Commissioner notes that the withheld information shows the contribution made by the CES on a topic that was of great sensitivity to it. Having considered the withheld information he is satisfied that it shows the free and frank provision of views by the CES in regard to the proposals on the teaching of SRE and the initial draft of the guidance that would be put out for public consultation.
47. The Commissioner considers that proposals for SRE and PSHE contained in the Bill (and the associated guidance) at the time of the request would have been potentially controversial to the CES (or indeed to other educational stakeholders representing faith groups), or to parts of the community that the CES represents. Given this, he accepts that if the CES was unable, in the future, to provide comments on similar controversial comments on a confidential basis, this may have an inhibitory effect on its participation in future consultations. In particular, it might struggle to freely and fully engage with the public authority, whilst representing all the views of the community which it represents. Therefore the Commissioner accepts that – to a certain extent – this may lead to an inhibitory effect (i.e. a chilling effect) on advice it provides in the future.
48. However, the Commissioner also considers that stakeholders or lobbyists who seek to shape or influence government policy should reasonably expect their contribution to that process to be (at least to a certain extent) transparent. In addition to this, as the CES represents the Catholic education sector for the whole of England and Wales, the Commissioner believes that it would reasonably expect that some of the issues it chooses to contribute on would potentially be controversial to parts of the community that it represents – as that community will, itself, hold a wide range of views and opinions on topics such as this. Therefore, whilst the Commissioner accepts that this topic would be a controversial one for the CES to contribute its opinions about, this would be tempered by a reasonable expectation that comments that it made that fed into the formulation of educational policy may be open to public scrutiny. Therefore, whilst the Commissioner accepts that the disclosure of this information may have some chilling effect on the future provision of advice from the CES and other similar stakeholders, this would be limited by an expectation that:
  - some of its contributions may be open to public scrutiny, and
  - given the wide range of views and opinions on subjects such as this that are held by the community it represents, it is likely that whatever contribution it made in such a

consultation would be likely to be controversial to some members of that community.

Therefore the Commissioner has not given much weight to this argument.

49. After considering all of the above points, the Commissioner considers that in this case there are weighty public interest factors both in favour of disclosure and in favour of maintaining the exemption. However, due to the timing of the request, the Commissioner finds that the public interest in protecting the safe space necessary for the formulation of this policy particularly compelling.
50. Taking this into account, the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(a) in relation to the withheld information outweighs the public interest in disclosure. Therefore the information in question should be withheld.

## **The Decision**

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51. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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52. The Commissioner requires no steps to be taken.

## **Failure to comply**

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53. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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54. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

55. 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.
56. 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 12<sup>th</sup> day of April 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### Section 35

- (1)** Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-
- (a) the formulation or development of government policy,
  - (b) Ministerial communications,
  - (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
  - (d) the operation of any Ministerial private office.
- (2)** Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-
- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
  - (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
- (3)** The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
- (4)** In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.
- (5)** In this section-
- "government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."