

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 February 2008

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant asked MOD for details of the advice given to its Minister about the Minister's powers to stop-up existing rights of way and to create replacements. MOD refused to provide the information, citing the exemptions in sections 35(1)(a) and 42(1) of the Act. At review stage MOD withdrew its reliance on section 35 and substituted section 36(2)(b)(i), although it later reverted to section 35. The Commissioner has decided that the exemption in section 42(1) is engaged in relation to some of the information in the submissions to the Minister and that, in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing that information. As regards the remaining information, the Commissioner decided that MOD had misapplied section 35(1)(a) but that the exemption in section 36(2)(b) was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing that information at the time the request was made.

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. The full text of the statutory provisions referred to in this Decision Notice is contained in the Legal Annex to the Notice.

The Request

2. On 27 June 2005 the complainant asked the Ministry of Defence (MOD) for information relating to the Minister's stopping up and diverting part of Eriswell

Footpath in Suffolk in 2004. After further exchanges of correspondence, on 20 July 2005 MOD accepted the complainant's request as being for:

- (a) the exact and complete wording of the explanation given to the Minister concerning the Minister's powers to stop-up existing rights of way and to create replacements; and
- (b) details of who created the replacement routes .

3. In its response of 3 August 2005 MOD said that, in relation to the first part of the request, it held the information in question in submissions to the Minister made on 20 October 2003 and 13 November 2003. However, MOD refused to provide the complainant with the information, citing the exemptions in section 35(1)(a) (formulation of government policy) and section 42(1) (legal professional privilege). As regards section 42(1), MOD said that the exemption applied to information in both of the submissions. It said that "legal advice privilege arises out of a relationship of confidence between lawyer and client, and that the confidential character of the information is an essential requirement that privilege and (subject to a public interest test) is absolute". MOD said that the underlying rationale for having a strong rule against disclosure is that it encourages full and frank exchanges between a client and the client's legal advisers, which is judicially recognised as being something strongly in the public interest. It said that it is also strongly in the public interest that governmental action should respect the rule of law, which makes it essential that clear, fully informed and fully reasoned and balanced advice should be available to the policy maker. MOD said that if either the instructions given to a lawyer or the legal advice given by a lawyer were to be put into the public domain they could become tailored to take account of the impact, which would undermine the principle on which such privilege is based. MOD contended that the release of such information could discourage full and frank exchanges between government and its legal advisers and might discourage legal advice being sought, so risking decisions being taken which were not in accordance with the rule of law. As regards section 35(1)(a), MOD said that the information in the submissions also related to the formulation or development of government policy in connection with the Minister's exercise of powers under the Defence Act 1842 in relation to Eriswell Footpath, and thus that the exemption applied to the information. As to the second part of the information request, MOD said that the Secretary of State created the footpaths as public rights of way under section 17 of the Defence Act 1842; that no Order or document was signed, but the Minister did produce notices, which were published locally, to serve as evidence of his decision.
4. On 24 August 2005 the complainant sought a review of the refusal to provide him with the information in the submissions. He said that MOD had provided no explanation as to how the information that he sought could be said to relate to the formulation or development of government policy. He did not dispute MOD's application of section 42(1) to the legal advice in the submissions, but said that the Ramblers Association believed that there was a strong public interest in government departments being accountable for the quality of their decision-making: ensuring that decisions had been made on the basis of good quality legal advice formed part of that accountability. He said that transparency in decision-making and

access to information upon which decisions had been made could enhance accountability. He contended that MOD had offered no explanation as to how the public interest would be poorly served, or the interests of the Government compromised, by disclosure of the information sought. On 1 September 2005 MOD acknowledged the review request, saying that it aimed to complete the review within 40 working days but that it was possible that it might be sooner. On 26 October 2005 MOD apologised for the amount of time being taken to complete the review, saying that it aimed to complete it by 11 November 2005.

5. MOD eventually replied on 13 January 2006, maintaining its decision that section 42(1) applied to much of the information contained in the documents, for the reasons already given to the complainant. MOD added that disclosure of legal advice had a significant potential to prejudice the Government's ability to defend its legal interests by unfairly exposing its legal position to challenge; this was not in the public interest as it could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. MOD said that it agreed with the Ramblers Association that there was a strong public interest in government departments being accountable for the quality of their decision-making. MOD considered that ensuring that decisions had been made on the basis of good quality legal advice was part of that accountability and that, to fulfil that public interest, such advice needed to be given in context and with a full appreciation of the facts. The legal adviser needed to be able to present the full picture to the departmental client, which included arguments in support of the final conclusions and relevant counter-arguments. MOD said that legal advice often set out the possible arguments both for and against a particular view, and that without such comprehensive advice the quality of decision-making would be much reduced since it would not be fully informed: this would be contrary to the public interest.
6. MOD also said that it was no longer relying on section 35(1)(a), but now considered that all of the information was exempt from disclosure under section 36 (prejudice to effective conduct of public affairs). Under section 36(2)(b)(i), information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice. MOD said that the documents in question would reveal internal thinking processes and it believed that disclosure would make it likely that future exchanges including those with Ministers would be more guarded, which would be detrimental to the ultimate quality of decision-making. Record-keeping was likely to be more limited. MOD said that this impact, which in itself was contrary to the public interest, had to be balanced against any benefit to the public interest that might arise from the release of the documents. MOD recognised the public interest in the transparency of decision-making and the advisory processes of central government, but said that transparency also had the potential to undermine the public interest in ensuring that space existed within which Ministers and officials were able to discuss matters freely and frankly because that process made for better quality decisions. In particular, there was a need for candid assessments of the risks in taking certain decisions without the threat of disclosure, which might close off discussion and the development of better options. MOD confirmed that a Minister had formed the opinion that an adverse effect would, or would be likely to, follow disclosure; the public interest in maintaining the exemption, and thus withholding the information, therefore outweighed the public interest in disclosure.

The Investigation

Scope of the case

7. On 26 February 2006 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. He said that the issue related to the way in which MOD made use of its powers under sections 16 and 17 of the Defence Act 1842, under which the Secretary of State is empowered to stop up public rights of way without the need for consultation. As regards MOD's reliance on section 42(1), the complainant said that he found it impossible to understand how any significant loss or waste of resources, or damage to the national welfare, could result from disclosure to members of the public of information about how the Government understood the law by which it was able to take away some of their rights. He strongly disputed that the public interest was best served by preventing the public from knowing the nature of the full and frank exchanges concerning a process by which the public could be deprived of its rights but which had no genuine impact on either national security or the life of the populace. As to section 36(2)(b)(i), he said that MOD had given no hint as to what adverse effect on the public interest could arise from disclosure, which thus made it impossible to challenge; it was unacceptable that an unsubstantiated assertion should play such a decisive role in MOD's decision that the public interest in maintaining the exemption, and thus withholding the information, outweighed the public interest in disclosure.

Chronology

8. On 3 July 2007 the Commissioner asked MOD for copies of the withheld information. He also asked, in relation to MOD's reliance on section 36(2), for details of the terms in which the opinion of the qualified person was sought and given, which Minister had given the opinion, and the relevant dates.
9. On 31 July 2007 MOD provided the Commissioner with the information sought. On 1 August 2007, in the light of decisions of the Information Tribunal in the cases of *Rt Hon Lord Baker of Dorking CH and the Information Commissioner v Department for Communities and Local Government (DCLG)* (Tribunal ref: EA/2006/0043) and the *Department for Education and Skills v the Information Commissioner and the Evening Standard* (EA/2006/0006), the Commissioner asked MOD whether it was prepared to release to the complainant any of the information from the submissions.
10. On 29 August 2007 MOD responded. It agreed to release to the complainant the factual elements of the submission of 20 October 2003 (and subsequently agreed to release the Annexes to that submission). The Commissioner welcomes that development. However, MOD refused to release any of the legal advice given to the Minister in either the submission of 20 October 2003 or that of 13 November 2003. It maintained that the exemption in section 42 applied to all of the legal advice provided to Ministers in both submissions. MOD also said that, in the light of decisions of the Information Tribunal published since MOD completed its internal review, it was reverting to its original position that section 35 (1) also applied to all

of the withheld information, on the basis that it was the provision of advice to a government Minister on a matter of policy formulation and development. MOD said that, in the alternative, section 36(2)(b)(i) continued to apply.

Analysis

Exemptions

Section 42(1) – Legal Professional Privilege

11. MOD has sought to withhold the legal advice in the submissions to the Minister of 20 October 2003 and 13 November 2003 under section 42(1), which is intended to protect the confidentiality of communications between lawyer and client. Legal professional privilege has been described by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the Department for Trade and Industry* (Tribunal ref: EA/2005/0023; para 9) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers...”. There are two types of privilege – legal advice privilege and litigation privilege. Advice privilege will apply where no litigation is in progress or being contemplated. The communications in question must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
12. Having examined the withheld information the Commissioner is satisfied that all of the information in the submission of 13 November 2003, and some of the information in the submission dated 20 October 2003, constitutes legal opinion prepared by MOD’s legal advisers on a privileged and confidential basis. The Commissioner therefore considers that that information is protected by legal advice privilege and that the exemption in section 42 (1) is engaged. The complainant has said that he fails to understand how the public interest would be poorly served, or the interests of the Government could be compromised, by disclosure of the information sought. However, the exemption in section 42 is class-based, which means that no prejudice or harm need be demonstrated for the exemption to apply. Nevertheless, it is a qualified exemption and is, thus, subject to the public interest test.

Public interest test

13. The Commissioner accepts that there is a public interest in individuals having access to information that helps them understand the reasons why decisions that affect them were taken by a public authority, and that the release of such information can contribute to the accountability and transparency necessary for establishing whether a public authority is acting appropriately. However, the Commissioner also recognises the strong inherent public interest in protecting confidential communications between client and legal adviser. It is certainly in the public interest that authorities have the ability to consult openly with their legal

representatives and that forthright views can be expressed without fear of that advice subsequently being made public.

14. In making his assessment of where the balance of the public interest lies the Commissioner is mindful of the Tribunal's decision in the *Bellamy* case (see paragraph 11 above), in paragraph 8 of which the Tribunal observed, in relation to legal professional privilege, that *"there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned."*
15. In summing up, the Tribunal stated that *"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest"*. It concluded, at paragraph 35, that *"it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."*.
16. In *Dr John Pugh MP v the Information Commissioner and the Ministry of Defence (ref: EA/2007/0055)* the Tribunal discussed the conclusion reached in the *Bellamy* case, and in other Tribunal cases in which information that was covered by legal professional privilege had been considered. The Tribunal said (paragraph 55) that, *"Unlike other exemptions, because of the body of judicial opinion from higher courts in relation to the importance of maintaining legal profession privilege, we accept that there is a strong element of public interest inbuilt into the exemption itself, but that this does not, in effect, convert the exemption into an absolute exemption. It makes no difference that legal professional privilege is a class exemption. For the Commissioner or the Tribunal to find that the public interest favours disclosure there will need to be equally weighty public interest factors in favour of disclosure in the circumstances of the particular case. This does not necessarily mean that it needs to be an exceptional case."*
17. Notwithstanding the arguments of the complainant and the factors in favour of release referred to above, the Commissioner is of the view that those factors are not sufficiently strong in this case to override the public interest served by protecting confidential communications between client and legal adviser. The Commissioner is mindful of MOD's comments that, to be effective, legal advice rehearses possible arguments both for and against a particular view, and he considers that anything that might compromise the degree of frankness necessary to provide such advice would be contrary to the public interest.
18. While it will sometimes be appropriate to overturn legal professional privilege where weighty public interest factors favour disclosure it is the Commissioner's judgement that, in all of the circumstances of this case, the public interest in maintaining the exemption in section 42(1) outweighs the public interest in disclosure, and that MOD is therefore entitled to withhold the legal advice contained in the submissions of 20 October 2003 and 13 November 2003.
19. Since the Commissioner considers that MOD is entitled to rely on the exemption in section 42(1) to withhold the legally privileged information in the reports, no useful

purpose would be served by him determining whether the other exemptions cited by MOD in relation to that information are likewise relevant.

Section 35(1)(a) – Formulation of government policy

20. As to the information in the submission of 20 October 2003 which is not covered by legal professional privilege, which comprises some advice from officials and some factual information, MOD has reverted to the exemption that it first identified as being relevant to that information, namely section 35(1)(a). That exemption protects information held by a government department relating to the formulation or development of government policy. Notwithstanding its reliance on section 35(1)(a) MOD now accepts, following correspondence with the Commissioner's staff, that the factual elements of the withheld information, contained in paragraphs 1 and 3 and 6 to 8 of (and Annexes A and B to) the submission, should be released on the basis that much of that information is already in the public domain (the Commissioner has interpreted MOD's agreement as also covering the factual information in the second sentence of paragraph 4). MOD maintains, however, that the recommendations and opinions of officials contained in paragraphs 1, 2, 6 and 11 of the submission should remain withheld under the exemption in section 35(1)(a).
21. In its comments to the Commissioner on the complaint MOD said that its reason for reverting to its original judgement was the decision of the Information Tribunal in the *Evening Standard* case (Ref: EA/2006/06 – see paragraph 9 above) in which the Tribunal discussed the scope of section 35(1). However, the Commissioner is not persuaded that that decision of the Tribunal, which concerned a case in which part of a minute of a meeting did not relate to policy development when the rest did, and in which the Tribunal gave detailed consideration as to how the term 'relates to' should be interpreted in the context of the regulation, is relevant to the withheld information in the present case. From the information provided to the Commissioner by MOD it is clear that this is not the first time that a Minister has exercised his statutory powers under sections 16 and 17 of the Defence Act 1842. In the Commissioner's view, the submission to the Minister was offering recommendations and seeking his decision on a matter on which policy was already set, and was thus requesting his opinion on how to implement an existing policy. The Commissioner therefore considers that the withheld information in the present case is not information that relates to the formulation or development of government policy, and the exemption in section 35(1)(a) is not engaged.

Section 36 – Prejudice to the effective conduct of public affairs

22. MOD has argued that, in the event that section 35(1) (a) is not considered to be appropriate, section 36(2)(b)(i) should apply in the alternative. As stated in paragraph 6 above, this section of the Act provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, inhibit, the free and frank provision of advice. The 'qualified person' in the case of government departments is a Minister of the Crown. MOD has confirmed that the qualified person in this case was Mr Adam Ingram MP, the (then) Minister of State for the Armed Forces. His opinion was sought, and given, on 11 January 2006. He was advised about the public interest case for and against

the release of the documents, with his attention being drawn to the fact that, although the information requested was dated 2003, the issue was still current as all the local closure steps had not then been completed (MOD has since advised the Commissioner that it now regards such closure as having been completed in May 2007).

23. In the case of *Guardian and Brooke v the Information Commissioner and the BBC (EA/2006/0011 and 13)*, the Information Tribunal decided that *'the opinion must be both reasonable in substance and reasonably arrived at'*. In the present case, the Minister agreed that releasing the information in question would be likely to result in the kind of prejudice to the effective conduct of MOD's affairs envisaged by section 36; he therefore concluded that the information should be withheld. As the opinion of the qualified person appears to be both reasonable in substance and reasonably arrived at, the Commissioner accepts that the exemption in section 36 is engaged. That is not, however, the end of the matter: section 36 is a qualified exemption, which means that it is subject to the public interest test.

Public interest test

24. MOD contends, for the reasons given in paragraph 6 above, that the public interest in withholding the advice contained in the submissions outweighs the public interest in releasing it. In particular, while recognising the public interest in the transparency of decision-making and the advisory processes of central government, MOD considers that transparency also has the potential to undermine the public interest in ensuring that there is space within which Ministers and officials are able to discuss, freely and frankly, options and delivery, all of which lead to better quality decisions.
25. The Commissioner accepts that Ministers and officials are entitled to private thinking space in reaching decisions. The Commissioner also accepts that there would be significant prejudice to the giving of impartial advice if the advice given by officials were to be made available to a wider audience as a matter of course. The arguments put forward by MOD explain why it considers that, in general, the advice of officials to Ministers should not be released. However, each case must be considered on its merits.
26. In reaching a decision as to where the balance of the public interest lies in this case, the Commissioner has had regard to the decision of the Information Tribunal in the *Evening Standard* case (*EA/2006/0006*). The Tribunal stated that *'The timing of a request is of paramount importance'*. It also decided that, while policy was in the process of formulation it was highly unlikely that the public interest would favour disclosure. The Commissioner considers that, while the Tribunal was considering the exemption in section 35, the general conclusion as to the importance of the timing of an information request also applies here. He recognises that, at the time of the complainant's information and review request when the issue was still current, the public interest in maintaining the exemption outweighed the public interest in disclosing the advice elements in the submission of 20 October 2003. The Commissioner therefore concludes that MOD's decision to withhold the information at that stage was correct.

The Decision

27. The Commissioner's decision is that MOD:

- was entitled to rely on the exemption in section 42 of the Act to withhold the legal advice in the submissions of 20 October 2003 and 13 November 2003;
- misapplied section 35 in relation to all of the information in the submissions;
- correctly applied the exemption in section 36 to the advice and recommendations of officials in the submission of 20 October 2003;
- correctly applied the public interest test in relation to that exemption at the time of the information request.

Steps Required

28. There are no steps that the Commissioner requires MOD to take, but he would welcome the early release to the complainant of the factual information in the submission of 20 October 2003 referred to in paragraph 20 above.

Other matters

Time limits for carrying out an internal review

29. The Commissioner's published guidance on the time limits for carrying out internal reviews (Freedom of Information Good Practice Guidance No.5) says that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and that in no case should the total time taken exceed 40 working days. If the time taken should exceed 40 working days the Commissioner would expect a public authority to be able to demonstrate that it had commenced the review procedure promptly following receipt of the request for review and had actively worked on the review throughout that period. In the present case the complainant sought a review of MOD's decision on 24 August 2005, but MOD did not reply substantively until 13 January 2006, more than 20 weeks later. Although MOD provided the complainant with a progress report on 26 October 2005 in which it said that everything was being done to complete the review as quickly as possible, it also said that he would have a response by 11 November 2005: this did not materialise. There is nothing in the papers provided by MOD to suggest that it was actively pursuing the matter in the interim, and its lengthy delay in making its final response is a matter of some concern to the Commissioner. He would draw MOD's attention to the guidance mentioned above, and trusts that MOD will follow it in the future.

Current public interest in the release of information

30. Although not part forming of the Commissioner's decision, if the complainant were to make the same information request now it is the Commissioner's view that the balance of the public interest would favour disclosure of the advice elements in paragraphs 1, 2, 6 and 11 of the submission of 20 October 2003. For the reasons which follow, the Commissioner therefore strongly recommends that MOD now releases that information.
31. Since the referral of the complaint to the Commissioner all local closure steps have been taken in relation to the Eriswell footpath and thus the fate of that particular footpath is no longer a live issue (although the Commissioner accepts that the wider issue of footpath/road closures remains live). As the complainant has identified, MOD has not explained why the release now of the specific advice of officials in the submission of 20 October 2003 would not be in the public interest. The officials involved in the preparation of the submission were exercising their professional expertise to make recommendations based on the potential security threat that certain public footpaths in the vicinity of certain air force bases were perceived to pose.
32. In the Commissioner's view, the information in question does not reveal any detail that it would not be possible to infer from what is already in the public domain. The Commissioner does not believe that, as claimed by MOD (paragraph 6 above), the release now of the advice to Ministers in this particular case would have the impact described. The Commissioner also believes that release of the advice and recommendations in this instance would further public understanding of how the Minister's powers under sections 16 and 17 of the Defence Act come to be exercised. This conclusion is consistent with the view of the Information Tribunal who, in its decision in *Lord Baker v the Information Commissioner and DCLG* (Tribunal reference: EA/2006/0043), said, in paragraph 28, that:

“ the strength of the argument in favour of disclosure and against maintaining the exemption is that disclosure will enable the public to form a view on what exactly happened and not on what it can otherwise only guess at”.

The Tribunal concluded (paragraph 29) that, on the facts of the case that it was then considering:

“ the disclosure, after the date when the Minister's decision had been promulgated, of the advice and opinions of civil servants in question would not undermine to any significant extent the proper and effective performance by civil servants of their duties in the future”.

33. If MOD were to accept the Commissioner's recommendation, he would welcome the release to the complainant of the advice of officials to the Minister contained in paragraphs 1, 2, 6 and 11 of the submission of 20 October 2003.

Right of Appeal

34. 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

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 25th day of February 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(4) provides that –

“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.”

Section 35(5) provides that –

“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."

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

Section 36(5) provides that –

"In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

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."

Section 42(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."