Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 8 December 2009

Public Authority: The Home Office
Address: 4th Floor, Seacole Building
2 Marsham Street
London
SW1P 4AS

Summary

In February 2005, the complainant requested a copy of "*the report on which the Government recently based their view not to change to the law to permit intercept evidence*". The public authority refused to provide it citing the exemptions at Section 23 (Information from or relating to Security Bodies), Section 24 (National Security), Section 31 (Prejudice to Law Enforcement) and Section 36 (Prejudice to Effective Conduct of Public Affairs). It upheld this position on review and cited the exemptions at Section 35 (Formulation of Government Policy) and Section 42 (Legal Professional Privilege) as further reasons for refusing to disclose the requested information. Having investigated the matter, the Commissioner is satisfied that most of the information is exempt by virtue of Section 23(1). He is also satisfied that the remainder of the information is exempt under section 35(1)(a) and that the public interest in maintaining this exemption outweighs the public interest in disclosure. However, he found that the public authority contravened some of the provisions of section 17 when it failed to explain in a timely manner why it sought to rely on section 35(1)(a) as a basis for withholding the report.

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 Request

2. On 28 February 2005, the complainant requested a copy of "*the report on which the Government recently based their view not to change to the law to permit intercept evidence*".

3. The public authority refused to provide this information citing Section 23 (Information from Security Bodies), 24 (National Security), 31 (Prejudice to Law Enforcement) and 36 (Prejudice to Effective Conduct of Public Affairs) as its basis for doing so in a letter dated 21 March 2005. In relation to Sections 24, 31 and 36 it set out its arguments as to why the public interest in maintaining these exemptions outweighed the public interest in disclosure.

4. It provided the complainant with a copy of a statement made on 26 January 2005 by the then Home Secretary, Rt Hon Charles Clarke MP, regarding this review. It explained that this statement disclosed that information which, in the view of the Home Secretary, could safely be put into the public domain. It referred to the Home Secretary's comment that the full report would be given to the Intelligence and Security Committee. The public authority explained that remit of this Parliamentary Committee includes oversight of the intercepting agencies.

5. The complainant requested a review of this refusal on 30 March 2005.

6. Following an internal review, the public authority upheld its initial refusal and outlined the outcome of its internal review in a letter dated 17 May 2005. It argued that the report was also exempt from disclosure by virtue of Section 35 (Formulation of Government Policy) and Section 42 (Legal Professional Privilege). It did not set out any arguments as to why the public interest in maintaining these exemptions outweighed the public interest in disclosure.

7. On 4 July 2005, the complainant wrote again to the public authority to draw its attention to a lecture he attended on 28 June 2005. This lecture was given by a representative of the Crown Prosecution Service (CPS) and it took place during a conference organised by the legal pressure group, JUSTICE. The complainant explained that the conference was an open session accessible to any interested parties who were in a position to pay the participation fee. The complainant explained that the CPS representative was involved in the review. The complainant presumed that the CPS representative's comments about the review and the further detail he provided had been cleared by the public authority. He submitted in evidence a copy of the CPS representative's distributed paper and asked the public authority to reconsider its position to withhold the requested information taking into account this further disclosure about the review.

8. The public authority responded in a letter dated 6 September 2005. It explained that it was aware that the CPS representative would be giving the lecture but that this person did not speak for the public authority, the public authority had no management control over his actions and the text of his lecture was not formally authorised or supported by the public authority. It confirmed that the public authority did have sight of the text before the lecture but that, due to an oversight, it had not objected to specific parts of the text which "*overstepped what was previously in the public domain*". It added that the parts of the text which did go further than what had previously been released related to the conclusions of the part of the review which considered overseas comparisons. In the light of this, the public authority decided to disclose that part of the review which covered this point. However it reiterated its previously stated position in relation to the rest of the report.

The Investigation

Scope of the case

9. On 3 January 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- Disclosure would inform the policy debate about the matters covered in the Home Office review, namely the handling of terrorism, organised crime and drug trafficking. There was an "extraordinarily high public interest" in those matters which should outweigh any exemptions.
- The relevant exemptions related to crime investigations rather than security. The key issue was the use in court of intercept evidence. The public authority had unilaterally labelled the issue as one of national security in order to gain greater immunity from disclosure
- Information about court processes and ways of handling intercept evidence have no bearing on the techniques by which that evidence is gathered
- The information gathered from foreign systems "can hardly be sensitive since those systems do allow the use of evidence in open court"

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

Chronology

11. The Commissioner made initial contact with the Home Office to discuss the question of access to withheld information to which Sections 23 and 24 had been applied. The Home Office indicated that it would agree to allow an officer of the Commissioner with security clearance at Security Check ("SC") level to have sight of the withheld information. Due to the volume of complex casework at the Commissioner's office, an SC cleared officer was not available to commence work on the case until August 2007.

12. The Commissioner contacted the Home Office by telephone on 15 August 2007 to discuss practicalities of investigation given that Sections 23 and 24 had been cited. This accords with Annex 2 of the Memorandum of Understanding made between the Department for Constitutional Affairs (now the Ministry of Justice) on behalf of government Departments and the Information Commissioner's Office (the "MoU"). The MoU is available to the public via the Ministry of Justice's website. http://www.foi.gov.uk/memorandum.pdf.

13. At this point, the Home Office raised no objection to allowing an officer of the Commissioner with SC clearance to have sight of the withheld information although it was recognised by both parties that the matter would be kept under review. The Commissioner then wrote to the Home Office on 22 August 2007 to make further logistical arrangements and to ask for further detailed arguments in relation to the exemptions cited. The Commissioner also asked whether the

public authority sought to rely on a Ministerial Certificate in relation to either Section 23 or Section 24. A deadline for response was set at 19 September 2007.

14. There then followed a series of rescheduled and subsequently missed deadlines as the public authority indicated concerns about providing the Commissioner or any of his officers with access to the withheld information regardless of their security clearance status.

15. The Commissioner repeatedly drew the public authority's attention to his information gathering powers under Section 51 of the Act. The Commissioner can issue a formal notice requiring a public authority to provide him with information he needs to carry out an investigation under Section 50 of the Act. The public authority responded by referring to Annex 2 of the aforementioned MoU which, in its view, meant that the Commissioner did not need to view withheld information to which Section 23 or Section 24 applied.

16. The public authority responded to the Commissioner's 22 August 2007 letter on 24 October 2007. The Commissioner was not satisfied with the extent of this response and expressed particular concern at the public authority's application of Section 23 of the Act. The public authority argued that this exemption now applied to all the withheld information. Full details of Section 23 of the Act are set out in a Legal Annex to this Notice. However, in brief, the exemption applies where the information in question is supplied directly or indirectly to one of the security bodies ("the Section 23 bodies") listed in that section or where it relates to one of those bodies.

17. The Commissioner accepted that a significant proportion of the information was likely to have been provided directly or indirectly by one of the Section 23 bodies given the subject of the requested report. However, he was not satisfied, based on the limited explanation provided at this point, that all the remainder of the withheld information "related to" one of the security bodies to the extent that Section 23 would apply. The Commissioner stressed that he did not rule out the possibility that other exemptions might apply but he was not prepared to determine whether Section 23 applied to all the withheld information without either access to the withheld information or a further and more detailed explanation regarding that exemption or any of the other exemptions that the public authority had argued in the alternative.

18. A meeting between the Commissioner and the public authority was arranged for 4 December 2007. However, on 30 November 2007, the public authority wrote to advise that it could not provide assurances that information to which Section 23 had been applied would be made available. It cited Annex 2 as the basis for its position on this point. The Commissioner was not satisfied with this and the meeting was postponed. There followed further discussion between the Commissioner and the public authority to determine progress on the investigation of this case.

19. On 8 January 2008, one of the Commissioner's officers met with representatives of the public authority. During the meeting, the Commissioner's case officer was given sight of a heavily redacted version of the requested report. The case officer was given to understand that the public authority had blacked out all the

information which was supplied directly or indirectly by any of the bodies listed at section 23(3) (the "listed bodies"). It had also blacked out all the information which, in its view, clearly related to any of the listed bodies. It provided the case officer with sight of information to which other exemptions, in its view, also applied. It also provided general descriptions of some of the blacked-out information to assist the case officer.

20. Shortly before the Commissioner's detailed investigation began, the then Prime Minister, Rt. Hon. Tony Blair MP, announced that he had established a Privy Council Review to "*advise on whether a regime to allow the use of intercepted material in court can be devised that facilitates bringing cases to trial while meeting the overriding imperative to safeguard national security.*" The findings of this review were published in part in February 2008. The public version of the report (widely referred to as the "Chilcot Report" after the surname of one of its authors, Rt. Hon. Sir John Chilcot GCB) is available from The Stationery Office's website http://www.official-documents.gov.uk/document/cm73/7324/7324.asp.

21. In order to seek informal resolution of the case, the Commissioner contacted the complainant to ask whether the publication of the Chilcot report satisfied his request for information about this subject. The Commissioner stressed that any decision he made about the case would relate to whether or not the public authority was correct at the time of the request to refuse to provide the requested information and subsequent events could not be taken into consideration.

22. The complainant replied that it did not and contrasted the size of the published version of the Chilcot Report (67 pages) with the two page written statement of the then Home Secretary Rt Hon Charles Clarke MP, referred to above regarding the requested report. The complainant argued that this, of itself, added weight to the argument in favour of more extensive disclosure. He commented that the limits placed on disclosure of the earlier report in the interests of national security or otherwise were disproportionate. He also noted that the conclusions of Chilcot Report differed from those of the requested report and argued that disclosure now might reveal what different arguments carried weight at the time of the earlier report. Alternatively it might reveal that the arguments put forward in the earlier report were not different but that the public authority was neglectful in giving sufficient attention to the issue.

23. The Commissioner contacted the public authority to ask whether, in the light of the Chilcot Report, it was prepared to make a further disclosure to the complainant of the earlier report. The public authority indicated that it was not. It argued in response that the review which lead to the Chilcot Report "*was undertaken at the request of Government by a small group of Privy Counsellors who, because of the sensitivity of the topic, undertook a review of intercept as evidence ("IaE") under "Privy Counsellor" terms. Part of their work was to review past reports and this included the requested report. In both the Chilcot Report and the statement made by the Prime Minister when publishing it, it was made clear that the intention was to make as much of the Report public as possible but some information could not be disclosed as this would damage national security*".

24. It added "[that] *both reports, to a varying degree, contain information that could be exempted under the FOIA should not be misconstrued as grounds that exemptions should not continue to be applied to unpublished information*".

25. The Commissioner endeavoured to undertake his investigation and the preparation of this notice with due regard to the confidential marking that was applied to the requested information. This necessitated the use of a laptop with enhanced encryption to which access was heavily restricted. Unfortunately, one was not available to the caseworker until the end of 2008.

26. On 10 March 2009, the Commissioner wrote to the public authority to set out his provisional conclusions as to the application of the exemptions. He explained that he was not persuaded by the public authority's arguments that section 23(1) applied to the entire report. He commented that his investigation had been somewhat hampered by the fact that he had only been provided with limited access to the report. He invited the public authority to submit further arguments as to the application of section 31(1)(a), section 35(1)(a) and section 36 in relation to the information to which he had been given access.

27. The Commissioner acknowledged that the public authority did not make full arguments as to the application of other exemptions in late 2007/early 2008 because it had hoped that its arguments as to section 23(1) would be persuasive. He explained that if the public authority did not now wish to provide such further arguments he would proceed to a decision based on the limited arguments that had been provided. He set out a series of questions and comments regarding the application of each exemption to assist the public authority in formulating its further and final submissions.

28. There followed a series of emails between the Commissioner and the public authority and they discussed the case in detail during a telephone conversation of 30 March 2009. The Commissioner reiterated the need for a full response by 8 April 2009. Unfortunately, the public authority failed to meet this deadline and a series of further deadlines. During this period, the Commissioner reminded the public authority of his information gathering powers under section 51.

29. On 12 May 2009, the Commissioner issued an Information Notice which required a full response to his email of 10 March 2009. In most cases, where the Commissioner invites a public authority to provide its full and final arguments as to the application of exemptions, he will advise the public authority that he may decide to make a decision based on the arguments and evidence available to him. He would not normally seek to obtain full and final arguments via an information notice where a public authority shows a repeated reluctance to provide such arguments in a timely manner. Given the nature of the information involved, the Commissioner considered it was appropriate to seek the public authority's further arguments rather than rely solely on the limited arguments it had provided as to the application of exemptions other than section 23(1).

30. The public authority responded in a letter dated 11 June 2009 which was within the timescale specified in the Information Notice.

Findings of fact

31. The requested report is entitled "Review of Intercept as Evidence Multi-Agency Steering Report". It was commissioned in July 2003 by the then Prime Minister, Rt Hon Tony Blair MP, to examine the risks and benefits of using intercept as evidence. On 26 January 2005, the then Home Secretary, Rt Hon Charles Clarke MP, announced a summary of government's conclusions on the review. In that statement, the Home Secretary explained that the report itself was a classified document which could not be published in the ordinary way but that it would be made available to the Intelligence and Security Committee of the House of Commons. He also advised that he would give further evidence to that Committee if required to do so.

32. The Intelligence and Security Committee provided its comments on the report in its annual report for 2004/5.

    http://www.cabinetoffice.gov.uk/media/cabinetoffice/corp/assets/publications/reports/intelligence/iscannualreport.pdf

33. The term "intercept" is used throughout this document. It refers to the interception of communications which has been authorised by a Secretary of State under the Regulation of Investigatory Powers Act 2000 (RIPA).

Analysis

Exemptions

34. The public authority argued that it was exempt from its duty under section 1(1)(b) of the Act to provide any of the information described in the complainant's request. Section 1 is set out in full in a legal annex to this Notice.

35. The exemptions it principally seeks to rely on are section 23(1) and section 35(1)(a). The Commissioner's analysis as to the application of these exemptions is set out below.

36. For the purposes of his analysis as to the application of exemptions, the Commissioner has divided the report into two parts:

    - The information which he was not permitted to view during his meeting with the public authority of 8 January 2008 ("Part A information")

    - The information which he was permitted to view during his meeting with the public authority of 8 January 2008 ("Part B information").

Section 23 – Information provided by or related to certain listed security bodies

37. The public authority sought to argue that all the withheld information was exempt by virtue of section 23(1). Full details of section 23 are provided in a Legal Annex to this Notice.

38. In summary, this exemption applies where the information in question is supplied directly or indirectly by any of the security bodies listed at Section 23(3) (the "listed bodies") or where it related to those bodies. This is a class-based absolute exemption. In other words, where information falls within the class described in the exemption it is absolutely exempt from disclosure under the Act. This exemption is not qualified by a public interest test.

39. The public authority argued that the remit of the review was to examine the benefits and risks of using intercept evidence to secure more convictions of organised criminals and terrorists. It explained that a multi-agency group prepared the report of the review and identified security bodies listed at Section 23(3) ("the listed bodies") that had contributed to the report. It explained further that information which was not supplied directly or indirectly by those bodies related to those bodies because the subject of the review was the activity of interception. It argued that any information concerning interception activity and what it referred to as "the UK interception community" should properly be regarded as relating to the listed bodies even if the information concerns a body that is not listed at Section 23(3), e.g., a police force.

40. The Commissioner notes that the phrase "relates to" is not qualified by the adverbs "directly or indirectly". The extent to which information relates to a particular class described in an exemption has been considered in *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006)*, Scotland Office v The Information Commissioner* (EA/2007/0070) and *O'Brien v the Information Commissioner* (EA/2008/00011). In each of these cases, the exemption under consideration was section 35(1). The Tribunal concluded in each case that the term 'relates to' in section 35(1) should be given "a reasonably broad interpretation". It accepted that although this has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which caused no significant harm to the public interest.

41. By contrast, section 23 is not qualified by a public interest test. Nevertheless, there are no obvious grounds for giving the phrase "relates to" anything other than its ordinary meaning, which, as the Tribunal has indicated, does allow for a reasonably broad interpretation.

42. The Commissioner's own published guidance on the Data Protection Act 1998 (DPA98) also considers the phrase "relates to". This is because the phrase "relate to" (when referring to "data") appears in the interpretive provisions in section 1(1) of DPA98. This is the provision which sets out the definition of "personal data". The Commissioner therefore had regard for his own observations on the phrase "relate to" which are set out in his published Technical Guidance Note "Determining what personal data is" http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf .

43. He also noted an Oxford English Dictionary definition of "relate" which is as follows: "**3** establish a causal connection between: *many drowning accidents are related to alcohol use.* **4** (**relate to**) have reference to; concern".

44. When analysing those elements of the withheld information to which access was provided and in respect of which the public authority claimed it related to a section 23 body, he therefore considered:

a) whether and to what extent the information told the reader something about the activities of any of the listed bodies; and

b) whether and to what extent actions taken or decisions made by any of the listed bodies could be determined from the withheld information.

Part A information

45. The Commissioner has accepted the assurances given by the public authority during the meeting of 8 January 2008 that the Part A information was supplied directly or indirectly by one or more of the listed bodies or it clearly relates to one or more of them. These assurances were reinforced by outline descriptions of the information in question that the public authority also gave during that same meeting. The Commissioner is therefore satisfied that the Part A information is exempt from disclosure by virtue of section 23(1) of the Act.

Part B information

46. Having considered the Part B information and having taken into account the public authority's written and verbal arguments, the Commissioner is also satisfied that certain elements of this information were supplied directly or indirectly by the listed bodies or relate to those bodies. When determining whether the information related to the listed bodies the Commissioner adopted the approach set out above. His reasoning in this regard is set out in further detail in the Confidential Annex to this Notice.

47. However, he also concluded that certain elements of the Part B information in the report are not exempt under section 23(1). His reasoning in this regard is also set out in further detail in the Confidential Annex to this Notice.

48. Having concluded that certain elements of the Part B information are not exempt under section 23(1), the Commissioner has gone on to consider the application of other exemptions which the public authority sought to rely on in relation to that information.

Section 35 (1)(a) – Formulation of Government Policy

49. In a letter dated 11 June 2009, the public authority argued that it also believed that the entire report to be exempt under section 35(1)(a).

50. Section 35(1)(a) is a class-based exemption which applies where the information described in a request matches the description set out in that exemption. Section 35(1)(a) of the Act 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…'.

Section 35 is set out in full in a Legal Annex to this Notice.

Does the requested information fall within section 35(1)(a)?

51. The Commissioner takes the view that the 'formulation' and 'development' of government policy encompasses the policy process from the earliest stages, where options are generated and sorted, through to piloting, monitoring, and reviewing existing policy. Policy is 'government' policy when it involves the development of options and priorities for Ministers to select from, and is likely to be a political process which requires Cabinet input, or applies across government, or represents the collective view of ministers. Accordingly, the formulation or development of government policy is unlikely to include purely operational or administrative matters, or policies which have already been agreed or implemented.

52. The Commissioner considers that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action.

53. The public authority failed to cite section 35 at all in its initial refusal notice although it rectified this at internal review. In its internal review it explained that the report was "*the latest in a series of reviews carried out by the government to evaluate various options for changing the current position on the evidential use. In this respect the report relates to the development of the government's policy on the use of intercept as evidence*."

54. It restated this argument in its submission to the Commissioner dated 7 December 2007. In its meeting with the Commissioner dated 8 January 2008 it identified areas which, in its view, were particularly relevant when considering the application of this exemption. In its submission to the Commissioner dated 11 June 2009, it also restated this view and directed the Commissioner's attention to the then Home Secretary, Rt Hon Charles Clarke MP's, statement to Parliament on 26 January 2005 for a description of the purpose of the review and its findings in support of its position.

55. Having examined the information and having considered all the arguments set out by the public authority and the statement of the then Home Secretary as to the remit of the review, the Commissioner finds the public authority's comments persuasive. He is satisfied that the report relates to both the formulation and the development of government policy on the evidential use of intercept material in

criminal proceedings. As such, he is satisfied that the report falls within the class of information described in section 35(1)(a) and that the entire report is therefore exempt under section 35(1)(a).

56. Before reaching this conclusion, the Commissioner queried one element of the report with the public authority and sought its further arguments as to whether this information fell within the class of information described in section 35(1)(a). The public authority's comments and the Commissioner's analysis of those comments is set out in the Confidential Annex to this Notice. The Commissioner concluded that the information in question was also exempt from disclosure under section 35(1)(a).

57. For reasons outlined above and for the reasons outlined in the Confidential Annex to this Notice, the Commissioner is satisfied that a significant portion of the report is also exempt under section 23(1). The Commissioner's further analysis as to the application of section 35(1)(a) will therefore only relate to that information which is not otherwise exempt under section 23(1). The information in question is set out in a list in the Confidential Annex to this Notice. This notice will now address whether the public interest in maintaining section 35(1)(a) in relation to this information outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

58. Due to the late application of section 35(1)(a) the complainant was not given an opportunity to make full and detailed arguments to the public authority as to the application of this exemption. However, he made a series of arguments as to the public interest in disclosure which can be summarised as follows:

- There is a compelling public interest in contributing to a well-informed public debate about the use of intercept as evidence which would be served by extensive disclosure
- There is widespread concern about the use of control orders under the Prevention of Terrorism Act where prosecution, supported by the use of intercept evidence, would be the preferred approach for tackling terrorism
- There is a public interest in seeing the effective administration of policy development
- There is a public interest in understanding how the United Kingdom tackles organised crime and drug trafficking as well as terrorism

59. The public authority did not specify any arguments as to the balance of public interest in relation to section 35(1) in any of its correspondence with the complainant. However, it did set out its arguments in its letter of 11 June 2009. These arguments do not make specific reference to the withheld information and therefore the Commissioner believes it is appropriate to set them out in the main body of this notice.

60. It acknowledged a public interest in the disclosure of this information. It noted a public interest in understanding the rationale behind the government's position on the use of intercept evidence.

"*It is in the public interest that the best possible case is made in prosecuting those on trial for offences, and especially the most serious offences. It is clearly in the public interest that those guilty of such crimes are convicted. In this context understanding the issues and considerations around the value of the use of intercept evidence in such cases would serve the public interest.*"

Public interest arguments in favour of maintaining the exemption

61. The public authority also set out its arguments in favour of maintaining the exemption. These arguments also do not make specific reference to the information in question and therefore the Commissioner believes they can be set out in the published version of this Notice. The public authority explained that policy formulation is more effective where options can be considered and advice can be provided in a free and candid way. Noting that the matter remained under review even after the report had been completed, it argued that disclosure at the time of the request would cause prejudice to the candour with which the issues in question would be discussed. Stressing the sensitivity of the subject matter, it commented that "*damage caused to the effectiveness of the policy formulation process in this area would be particularly harmful to the public interest.*"

62. The public authority also argued that disclosure would damage the "*effectiveness of the working relationships between those involved* [in the review]*, which to a large extent relies on the ability to identify and discuss issues frankly and openly within a protected and secure space*".

Balance of public interest arguments

63. The public authority set out its view as to the balance of public interest. It acknowledged that the arguments in favour of disclosure did carry some weight, it believed that greater weight must be given to the argument in favour of maintaining the exemption. It commented that "*inevitably the subject matter of the report limits its ability to be widely circulated. The public interest in the report's contents has been addressed as far as possible by the Home Secretary in his statement of January 2005. The content of the report has been further reviewed by the Intelligence and Security Committee*". It provided a hyperlink to that Committee's report for 2004/5 which has been reproduced in Findings of Fact above.

64. The Commissioner would characterise the public authority's principle arguments as being

- the likelihood of a "chilling effect" on future contributions by relevant parties where this matter is reviewed again.

- the likelihood of damage to a "safe space" in which contributions can be made openly and frankly.

65. The Commissioner notes that the public authority has given particular weight to the fact that the subject matter continued to be kept under review after the report was concluded as evidenced by the Home Secretary's comments in his statement to Parliament on 26 January 2005.

66. The Commissioner draws a distinction between arguments relating to the need for a 'safe space' (i.e., the public interest in civil servants and Ministers being able to formulate policy and debate live issues without being hindered by external scrutiny) and those regarding the potential 'chilling effect' on the frankness and candour of debate that might flow from disclosure of information. The Commissioner's view is that the 'chilling effect' of potential disclosure involves the risk of a loss of frankness and candour in advice or debate. On the other hand, the need for a 'safe space' exists regardless of any impact of disclosure on the candour of debate.

Safe space

67. The notion of maintaining a 'safe space' for policy formulation was summarised in the Information Tribunal's ruling in Scotland Office v the Information Commissioner (EA/ 2007/0070) as "*the importance of preserving confidentiality of policy discussion in the interest of good government*". In the Commissioner's view, this addresses the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement. In The Department for Education and Skills v the Information Commissioner and The Evening Standard (EA/2006/0006), the Tribunal recognised the importance of this argument stating:

"*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*" (para 75, point iv).

68. This need for a 'safe space' while formulating policy therefore exists separately to the 'chilling effect', that is, to any potential effect on the frankness and candour of policy debate that might result from disclosure of information. Even if there was no suggestion that those involved in policy formulation might be less frank and candid in putting forward their views, there would still be a need for a 'safe space' for them to debate policy and reach decisions without being hindered by external comment.

69. However, the 'safe space' argument is not definitive. In the case of Scotland Office v the Information Commissioner (EA/2007/0128) the Tribunal warned that:

"*information created during this process cannot be regarded* per se *as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption*".

70. The Commissioner agrees with this view and comments that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration. Therefore, an important determining factor in relation to the 'safe

space' argument is whether a request for such information is received while a 'safe space' in relation to that particular policy-making process is still required.

71. In the High Court case Office of Government Commerce v the Information Commissioner (High Court, [2008] EWHC 638 (Admin)) the information in question related to the Government's Gateway Zero review into the introduction of an identity cards Bill. The High Court accepted that:

'the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished'.

72. And in DBERR v the Information Commissioner and Friends of the Earth (EA/2007/0072) the Information Tribunal commented on the need for a private thinking space:

"*This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public*".

The Commissioner has therefore assessed:

- to which policy the requested information relates;
- whether the formulation and development of that policy was still ongoing at the time of the request; and
- whether the weight of the public interest has diminished due to the policy becoming 'more certain'.

73. The policy to which the requested information relates is the evidential use of intercept material when prosecuting individuals for serious offences such as terrorism or organised crime. The review in question was complete at the time of the request and the government had decided not to make legislative changes in order to allow the evidential use of intercept material. However, it is clear from the Home Secretary's statement of 26 January 2005 that the government expected to revisit the matter in the short to medium term. At the time of the request it was not known how soon a further review would be conducted. It later transpired that a further review was commissioned just over two years later. Its conclusions were published in redacted form in the Chilcot Report.

74. In the Commissioner's view (and with particular regard to the Home Secretary's comments) it is reasonable to conclude that the government's position on this policy was not fixed at the time of the request although it is clear that the requested report constitutes a landmark in the development of that policy. As such, he considers that considerable weight can be given to the argument that the government needed to preserve a 'safe space' in which different agencies (including listed bodies) could be brought together to consider the matter further.

Chilling effect

75. The Commissioner has considered the nature and content of the information contained in the report to which access was provided. The Commissioner recognises that the information in this document is expressed candidly and that the ability to do this is essential in order to explore all policy options and for the policy development process. He accepts there is a need in certain circumstances for this process to be able to be carried out in private so that a wide range of views and opinions can be expressed. He is therefore willing to accept that in this case and with particular regard to the subject matter that these views and opinions may be expressed less candidly if it was thought that they would be accessible in the public domain. He believes the likelihood at the time of the request of a further review of the subject in the short to medium term adds particular weight to this point.

76. The Commissioner acknowledges that at the time of the request (and subsequently) there was a considerable public interest in understanding why intercept material is not permitted for use as evidence in court against those who are alleged to have committed offences related to acts of terrorism or to serious organised crime. However, he believes the public authority has correctly given particular weight to the countervailing argument that there was a realistic prospect of further review of this subject at the time of the request. The parties who contributed to this review would, in all likelihood, be called upon to contribute to any future review of this subject. As can be seen by the information published from the Chilcot Report, this turned out to be the case.

Balance of public interest - conclusion

77. The Commissioner has concluded that in the circumstances of this case the public interest favours maintaining the exemption at section 35(1)(a) in relation the information in this report which is not otherwise exempt under section 23(1).

78. He recognises that the government's legislative approach to tackling terrorism and organised crime (but particularly the former) remains controversial. At the time of the request there was considerable debate about the need to make changes to legislation which would allow the use of intercept material as evidence. It has been argued that this would lead to more successful prosecutions and lessen the need for measures which restrict the movement or liberty of certain individuals but fall short of formal prosecution of those individuals. Such measures, it has been argued, reduce the public's confidence in the government's anti-terrorism strategies. The Commissioner believes there is a compelling public interest in increasing the public's understanding of government policy formulation in this area and its development of that policy. He acknowledges that disclosure of the information in the report which was not otherwise exempt under section 23(1) would serve this public interest.

79. However, he believes the arguments as to the need to maintain a safe space for relevant parties to discuss this subject are more compelling. He has given particular weight to the fact that the use of intercept as evidence was likely to be the subject of further review at the time of the request.

The Chilcot Report

80. The Commissioner acknowledges the complainant's comment that far more of the Chilcot Report was put into the public domain than was the case with this report. However, in the Commissioner's view, the limits or extent of what was published in the Chilcot Report can have no bearing on his decision because it post-dates the request, the refusal of that request and the internal review of that refusal. The Commissioner's decision in this case can only relate to the validity or otherwise of the public authority's refusal in March 2005. The Commissioner's opinion in this regard is supported by the Tribunal's decision in DBERR v the Information Commissioner and Friends of the Earth (EA/2007/0072) (promulgated in April 2008). At paragraph 110 it commented:

"*the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA".* (para 110).

81. As set out earlier in this Notice, the Commissioner sought to achieve an informal resolution of this case by inviting the public authority to consider whether it was prepared to revise its position on disclosure in the light of the Chilcot Report. It explained that it was not.

Other exemptions

82. The public authority also sought to rely on provisions in section 24, section 31 and section 42. However, given that the Commissioner has accepted that the report is exempt from disclosure under section 23(1) and section 35(1)(a), he does not propose to consider further the application of the other exemptions that the public authority sought to rely on.

Procedural Requirements

83. The public authority failed to cite section 35(1)(a) in its initial refusal notice but rectified this at internal review. However, it failed to explain why the public interest in maintaining this exemption outweighed the public interest in disclosure. In failing to do so, it contravened the requirements of section 17(1) and section 17(3)(b) of the Act. The relevant provisions of Section 17 are set out in a Legal Annex to this Notice.

The Decision

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84. 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 was entitled to rely on section 23(1) and section 35(1)(a) as a basis for refusing to comply with its obligation s under section 1(1)(b) of the Act to provide the report described in the complainant's request.

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

- It contravened the requirements of section 17(3)(b) when it failed to explain why the public interest in maintaining section 35(1)(a) as a basis for withholding the report outweighed the public interest in disclosing it.

Steps Required

85. The Commissioner requires no steps to be taken.

Other matters

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

87. During the course of his investigation, the Commissioner has encountered considerable delay on account of the Home Office's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the Home Office's reasons for invoking particular exemptions. The delays and resistance were such that the Commissioner was forced to issue an Information Notice in order to obtain details relevant to his investigation.

88. Accordingly the Commissioner does not consider the Home Office's approach to this case to be particularly co-operative or within the spirit of the Act, and he would expect to see improvements in the Home Office's future engagement with his office. At time of issuing this Decision Notice, the Commissioner is pleased to report that there are signs of commitment to such improvements.

Right of Appeal

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

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

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

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

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

Dated the 8th day of December 2009

Signed ……..

Graham Smith
Deputy Commissioner

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

Legal Annex

S.1 General right of access

Section 1(1) provides that -

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

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

…

S.17 Refusal of Request

Section 17(1) provides that -

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

(a) states that fact,

(b) specifies the exemption in question, and

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

Section 17(2) states –

'Where–

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

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

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

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

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

Section 17(3) provides that -

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

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

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

…

S.23 Information supplied by, or relating to, bodies dealing with security matters

Section 23(1) provides that –

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

Section 23(2) provides that –

'A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.'

Section 23(3) provides that –

'The bodies referred to in subsections (1) and (2) are-

(a) the Security Service,

(b) the Secret Intelligence Service,

(c) the Government Communications Headquarters,

(d) the special forces,

(e) *the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,*

(f) *the Tribunal established under section 7 of the Interception of Communications Act 1985,*

(g) *the Tribunal established under section 5 of the Security Service Act 1989,*

(h) *the Tribunal established under section 9 of the Intelligence Services Act 1994,*

(i) *the Security Vetting Appeals Panel,*

(j) *the Security Commission,*

(k) *the National Criminal Intelligence Service, and*

(l) *the Service Authority for the National Criminal Intelligence Service.'*

…

S.35 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(2) provides that –

'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.'*