

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 March 2011

Public Authority: The Serious Fraud Office
Address: Elm House
10 – 16 Elm Street
London WC1X 0BJ

Summary

The complainant requested all written information the Serious Fraud Office (SFO) held about the collapse of Equitable Life which is not already in the public domain. The SFO refused the request, ultimately relying on the exemptions in sections 30 (investigations and proceedings), 40 (personal information and 42 (legal professional privilege). The Commissioner finds that some information was incorrectly withheld under section 30 and requires its disclosure. He also finds the public authority in breach of sections 1(1)(a) and (b), 10(1), 17(1)(c) and 17(3).

The Commissioner's Role

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

Background

2. The role of the Serious Fraud Office (SFO) is to investigate and prosecute cases of alleged fraud that are considered to be large or complex in nature. Typically, these cases are referred to the SFO by the police or other government bodies. In determining whether it should take on the case, the SFO makes a broad assessment of the

- suspected offence(s) during a preliminary investigation or vetting process.
3. The Equitable Life Assurance Society (Equitable Life) was established in 1762. It eventually became one of the biggest mutually owned life insurers in the world, with around 1.5 million policyholders.
 4. Following a July 2000 House of Lords ruling in relation to honouring its commitments to certain policyholders, and failure of attempts to find a buyer for the business, Equitable Life closed to new business in December 2000 and reduced payouts to existing members. Its closure was investigated, at the request of HM Treasury, by Lord Penrose. His report was published in March 2004.
 5. On 19 December 2005 the SFO announced that it had concluded that it would not commence an investigation under Section 1 of the Criminal Justice Act 1987 into Equitable Life.

The Request

6. The complainant wrote to the Serious Fraud Office (SFO) on 1 November 2009 requesting:

"all written information you have about the Equitable Life collapse, which is not already public, especially anything about the reinsurance treaty and written by the SFO".
7. The SFO responded on 30 November 2009. In this correspondence, it explained that it considered the requested information was exempt under sections 30 (investigations and proceedings) and 31 (law enforcement) of the Act.
8. The complainant requested an internal review on 4 January 2010.
9. The SFO upheld its decision not to disclose the information in its internal review response of 10 February 2010. At this stage it clarified, in relation to the latter part of the request, that it did not hold any *"documents ... which are written by the SFO and refer to the reinsurance treaty"*.
10. As well as confirming its citing of the exemptions in sections 30 and 31 of the Act, the SFO additionally cited the exemptions in sections 40 (personal information) and 42 (legal professional privilege).

The Investigation

Scope of the case

11. The complainant contacted the Commissioner on 17 February 2010 to complain about the way his request for information had been handled. He specifically referred to the withheld information but made no reference to the SFO's claim that it does not hold information about the reinsurance treaty. In relation to the SFO's claim that releasing the requested information would prejudice its ability to conduct effective investigations and, where appropriate, prosecutions, the complainant specifically asked the Commissioner to consider the following point:

"It is unreasonable for the SFO not to disclose information on the grounds that this would prejudice a future prosecution, when there have been no such prosecutions for ten years, and it has apparently no intention of ever prosecuting, and has not even started a 'full criminal investigation'".

12. During the course of the Commissioner's investigation, as outlined in the *Chronology* section below, the SFO clarified the exemptions it is relying on in this case. The complainant also clarified his expectations with respect to the disclosure of third party personal information. On this basis, the Commissioner has excluded information relating to private complaints from, or on behalf of, policyholders from the scope of his investigation. The complainant also confirmed that he did not wish to see information held by the SFO previously released into the public domain.
13. The Commissioner has focussed his investigation on the exemptions in sections 30, 40 and 42 of the Act.

Chronology

14. The Commissioner has set out the key correspondence between his office, the complainant and the SFO below.
15. On 17 May 2010, the SFO wrote to the Commissioner, providing him with a copy of the withheld information. It also provided an explanation of its citing of sections 30, 40, 41 and 42 of the Act. At this stage, as well as citing section 41 for the first time, for completeness it also cited section 21, explaining that it was citing this in relation to material previously released into the public domain. It said that it considered

this information was out of scope of the request as the complainant specifically requested information "*which is not already public*".

16. In this correspondence, the SFO confirmed the nature of the withheld material, some of which comprises statements by complainants/victims and correspondence to and from aggrieved policyholders. With respect to the statements provided by complainants/victims, it cited sections 30, 40 and 41, explaining that "*there is considerable overlap as far as the exemptions are concerned*".
17. It confirmed that it was relying on the exemption in section 40(2) and 41 of the Act in relation to the complainants/victims' statements and their correspondence to the SFO, and section 40(2) to SFO correspondence to these third parties. The Commissioner wrote to the complainant on 21 June 2010 advising him that it was unlikely that his investigation would determine that it would be fair to disclose this information.
18. The complainant responded on 29 June 2010, confirming that he was not interested in personal information where it related, for example, to family circumstances or the health of individuals.
19. On 24 September 2010, the SFO confirmed that it was no longer relying on the exemption in section 31.
20. Following further correspondence and telephone calls, on 14 December 2010 the Commissioner issued the SFO with an Information Notice in accordance with his powers under section 51 of the Act. By way of this Notice, the Commissioner required the SFO to furnish him with further information about this complaint. In particular, he required the SFO to respond regarding key pieces of information that fall within the scope of the request. The Commissioner was particularly concerned that key other documents referenced in withheld information previously supplied by the SFO had not been located. This included the Vetting Note.
21. The Chief Executive of the SFO responded on 13 January 2011. In response to questions in the Information Notice about key pieces of information, she provided the Commissioner with a copy of the Vetting Note and explained that the SFO had searched extensively and were unable to locate the other legal advice documents the ICO had asked about. The Commissioner notes that it was only as a result of his persistence and the exercising of his powers under section 51 of the Act that this important information came to light. The SFO confirmed it was applying the exemption in section 30(1)(a) to this information.

22. In her correspondence, the Chief Executive acknowledged that errors had existed in the organisation's record keeping and explained that steps have been, and are being, taken to address its records management systems and processes.

Analysis

Exemptions

Section 30 – Investigations and proceedings

23. In considering the information withheld by virtue of section 30, the Commissioner considers the investigation at issue to be the SFO's investigation into whether or not a full criminal investigation into the Equitable Life Assurance Society was justified.
24. To put this in context, the Commissioner considers it useful to refer to the explanation the SFO provided to the complainant when it said that:

"before we can decide whether a full criminal investigation is justified we need to carry out a preliminary investigation to determine this. Such an investigation was carried out in respect of Equitable Life".

25. In this case, the SFO is relying on the exemption in section 30(1)(a) with respect to all the information withheld under section 30. With respect to a small amount of the information withheld under this section the SFO told the Commissioner that this information "*may also fall within section 30(1)(b) and 30(2)(a) and (b)*".

26. The Commissioner has first considered the SFO's application of section 30(1)(a).

27. Section 30(1) provides that:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it".

28. The phrase "at any time" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to

- an investigation commencing, if it is subsequently used for this purpose.
29. Section 30 is a class-based exemption. Where a class-based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage it: where the information is found to be of the class described then the section is applicable.
 30. In the Commissioner's view, in order for the exemption in section 30(1) to be applicable the information must be held for a specific or particular investigation, not for investigations in general; and it continues to be applicable even after an investigation has been completed.
 31. The SFO advised the Commissioner that it has the authority to investigate cases of serious or complex fraud, as set out in section 1 of the Criminal Justice Act 1987. This sets out the SFO's dual powers of investigation and prosecution of offences of serious or complex fraud. The Commissioner is therefore satisfied that the SFO has a duty to conduct investigations.
 32. Equitable Life Assurance Society was referred to the SFO for them to determine whether to commence an investigation. The Commissioner accepts that, in this case, the SFO holds the requested information for the purpose of assisting it in investigating suspected criminal offences.
 33. As the Commissioner is satisfied that the SFO has a duty to conduct criminal investigations, and that it holds the requested information for this purpose, it follows that he finds that section 30(1)(a) is engaged.

The public interest test

34. Having established that the section 30 exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act. In other words, he must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
35. The SFO told the complainant that it had "*undertaken the required public interest assessment and concluded that the public interest favours application of the exemption*". However, the SFO does not appear to have provided the complainant with its reasons for reaching this conclusion.

Public interest arguments in favour of disclosing the requested information

36. The SFO told the complainant that it was withholding the requested information on the basis that it is held for the purposes of an investigation it has a duty to conduct. However, arguing in favour of disclosing the information, the complainant told the Commissioner:

"But Equitable Life closed to new business in December 2000. So the SFO has had ample time, that is ten years, to conduct such an investigation and has not done so".

37. The complainant argued that, in his view, it was unreasonable for the SFO not to disclose information on the grounds that this would prejudice a future prosecution:

"where there have been no such prosecutions for ten years, and it has apparently no intention of ever prosecuting, and has not even started a 'full criminal investigation'. Such prevarication is surely not in the public interest".

38. The Commissioner acknowledges the general public interest arguments that access to the information in this case would:

- further the understanding of, and participation in the debate of issues of the day; and
- facilitate the accountability and transparency of the SFO for decisions taken by them.

39. He also considers that other, specific, public interest factors, for example the amount of money involved, the number of people affected and whether there is a lack of transparency in a public authority's actions, can add weight to the general assumption in favour of disclosure.

40. In this case the Commissioner does not consider that a fundamental lack of transparency is apparent: the SFO announced, and explained in general terms, its decision not to take any action against Equitable Life in December 2005.

41. With respect to another of the public interest factors, the number of people affected, the Commissioner has taken into account the Information Tribunal decision in *Pugh v Information Commissioner and Ministry of Defence* (EA/2007/0055). In that case, the Tribunal said that there may be an argument in favour of disclosure where the

subject matter of the requested information would affect "*a significant group of people*".

42. Although that case related to the section 42 exemption, the Commissioner considers the number of people potentially affected to be of relevance in this case. It is widely reported that more than a million policyholders were left with reduced retirement savings as a result of the collapse of Equitable Life. The Commissioner therefore considers it is reasonable to argue that a significant group of people could have been affected by the decision detailed in the information withheld under section 30(1)(a) in this case.

43. The Commissioner has also taken into account the absolute loss to Equitable Life policyholders which, he understands, is put at between £2.3bn and £3bn.

44. On its website, the SFO states:

"Our aim is to protect society from extensive, deliberate criminal deception which could threaten public confidence in the financial system. We investigate fraud and corruption that requires our investigative expertise and special powers to obtain and assess evidence to successfully prosecute fraudsters, freeze assets and compensate victims".

45. The Commissioner asked the SFO to clarify its powers, as described on its website, with respect to prosecuting fraudsters, freezing assets and compensating victims. He also asked it to explain how an investigation of the type the SFO has the power to conduct would have assisted members of the public affected by the collapse of Equitable Life had the decision to conduct such an investigation been taken.

46. In reply, the SFO told him:

"We can only reply hypothetically. Had we decided to investigate the case, it may have lead to a prosecution which, in turn, may have resulted in a conviction, depending on the court's decision. The issue of compensation is a matter for the criminal courts. Prosecutors may invite the judge to make an order. However, we are unable to determine, on the information available, whether an order could have been applied for/made by the court and any possible amount."

47. In the circumstances, and given the magnitude of loss to policyholders, the Commissioner considers it is justifiable to include this factor when considering the public interest in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

48. When considering factors in favour of maintenance of the exemption, the Commissioner has addressed the issue of harm to the investigatory processes of the SFO. In the case of *The Department of Trade and Industry v Information Commissioner* (EA/2006/0007), the Information Tribunal stated that the Act acknowledges:

"that there is a public interest in recognising the importance of the proper conduct of investigative processes and procedures carried out by public authorities, particularly those which might lead to criminal proceedings, and moreover that in relation to such procedures and possible proceedings, the maintaining of confidential sources must be respected."

49. The Commissioner recognises the importance of a public authority such as the SFO being able to secure cooperation with its investigations and accepts that there is at least some likelihood of it becoming more difficult to secure such cooperation if the parties from whom cooperation is sought are concerned that information recording the investigation may be disclosed into the public domain. The Commissioner considers that this is a factor of significant weight in favour of maintenance of the exemption in this case.

Balance of the public interest arguments

50. The Commissioner recognises that, at the time of the request, despite it being some years since the SFO confirmed that it would not be conducting an investigation into Equitable Life, the issues surrounding the collapse of Equitable Life remained a live issue for many interested parties. The Commissioner notes that many policy holders were still awaiting compensation payments at the time of the request.

51. In this case, he recognises that Equitable Life has been subject to scrutiny including being the subject of several inquiries and investigations into various aspects of its activities and the aftermath of its collapse. He is also of the view that whether, and to what extent, related information is already in the public domain is a relevant factor when considering disclosure. In this respect he notes the SFO's press statement of 19 December 2005 which said:

"Following careful consideration of the available evidence, including the Penrose Report and material held by the Society and following the result of the Society's case against its previous auditors and some of its former directors, the Serious Fraud Office confirms that nothing has

emerged which would justify a full criminal investigation in to the affairs of the Equitable Life Assurance Society”;

and,

“The events at the Society leading up to its closure to new business were investigated by Lord Penrose and his report was published in March 2004. The Penrose Inquiry team provided considerable assistance to the SFO and the Society has co-operated with the SFO during its work.”

52. Since this announcement, there has been at least one further report published about Equitable Life. In July 2008, the Parliamentary Ombudsman published a report on her investigation into the actions of the regulators of Equitable Life (including the Government Actuary's Department) during the 1990s. Her report was titled: *Equitable Life: a decade of Regulatory Failure*. The Commissioner understands that although the Ombudsman's report did not look into what role Equitable Life executives played in its near collapse, this role was examined in the 2004 Penrose report.
53. In the Commissioner's view, while disclosure of all the information withheld by virtue of section 30(1)(a) could assist policy holders and the wider public in understanding the decisions SFO took with respect to Equitable Life, there is general recognition that it is in the public interest to safeguard the investigatory process. The right of access should not undermine the investigation and prosecution of criminal matters nor dissuade individuals from coming forward to report wrongdoing. However, the Commissioner notes the process in question was a preliminary investigation and vetting process and not all the information in question would not reveal details of SFO's own investigations.
54. He is of the view that, with respect to the exemption in section 30 of the Act, the public interest test involves weighing the prejudice that may be caused to a particular investigation or prosecution, or more generally to the investigatory and prosecution processes that the public authority may conduct in future, against the public interest in disclosure.
55. The Commissioner considers the public interest in maintaining the exemption will be very strong while an investigation is being carried out or, having been suspended, may be re-opened. However, once an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the

investigation had been properly carried out, may outweigh the public interest in maintaining the exemption.

56. In this case, the Commissioner has first considered the balance of the public interest with respect to the majority of the withheld information, in other words the information supporting the SFO's decision not to investigate Equitable Life. Having given due consideration to protecting what is inherent in the actual exemption, namely the effective investigation and prosecution of crime, the Commissioner considers the public interest in maintaining the exemption with respect to the majority of the withheld information supporting the decision not to investigate the case, outweighs the public interest in disclosure.
57. However, the Commissioner considers that the public interest arguments for disclosure are particularly strong with respect to the actual explanation and record of the decision, the Vetting Note itself. The Note would provide policy holders and the wider public an important insight into this significant decision. Having considered the nature of this particular information the Commissioner has also concluded the relevant prejudice arising from disclosure would be less, noting what the information reveals and the sources relied on. The Commissioner also finds that the passage of time between the decision and the request would have reduced some of the prejudice that could have occurred from disclosure of this information.
58. Although he accepts that it is not possible to say for certain whether or not compensation would have resulted had the SFO decided to commence an investigation into Equitable Life, the Commissioner considers there is a clear public interest in disclosure of the SFO's decision not to investigate Equitable Life, given the number of people affected by its collapse and the magnitude of the amount of money involved.
59. In the circumstances, the Commissioner considers the public interest arguments carry considerable weight when balancing the opposing factors in this case. Having considered the matter, he takes the view that, with respect to the Vetting Note, the public interest in maintaining the exemption does not outweigh that in disclosing it, and this information should therefore be disclosed.

Section 30(1)(b) and section 30(2)

60. Having reached his conclusion with respect to section 30(1)(a), the Commissioner has not found it necessary to go on to consider the SFO's application of sections 30(1)(b) and (30)(2) as he has already

found the information to which these exemptions were applied has been correctly withheld under the exemption in section 30(1)(a).

Section 42 – Legal professional privilege

61. The SFO told the complainant in its internal review correspondence, that some of the information it holds is exempt by virtue of section 42 (legal professional privilege).
62. This exemption applies to information that would be subject to legal professional privilege (LPP). In other words, section 42 sets out an exemption from the right to know for information protected by LPP. LPP covers communications between lawyers and their clients for the purpose of obtaining legal advice or documents created by or for lawyers for the dominant purpose of litigation.
63. LPP is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments.
64. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself.
65. There are two categories of LPP – litigation privilege and legal advice privilege. In this case, the SFO is claiming legal advice privilege.
66. Legal advice privilege may apply whether or not there is any litigation in prospect. In the Commissioner's view, this form of LPP covers a narrow range of information, namely confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice. The advice itself must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context.
67. On the basis of the above, and having viewed the withheld information, the Commissioner is satisfied that it constitutes legal advice privilege.

Has LPP been waived?

68. In this case the Commissioner is satisfied that there is no reason to believe that LPP has been waived in relation to the contents of the withheld information.

Is the exemption engaged?

69. As the Commissioner is satisfied that the information withheld under section 42(1) constitutes legal advice privilege and that LPP has not been waived, he has concluded that the exemption is engaged in respect of this information. He has therefore gone on to consider the public interest.

Public interest arguments in favour of disclosing the requested information

70. The SFO did not put forward any public interest arguments when it first cited section 42 in its internal review correspondence of 10 February 2010. During the course of his investigation, the Commissioner invited the SFO to confirm the public interest arguments it had considered. However, it did not respond on this matter.
71. The Commissioner has taken into account that there exists within the Act itself a general presumption in favour of disclosure. Some weight must therefore be attached to the general principles of achieving accountability and transparency.
72. In the context of this case, he has also taken into account the potentially large number of people affected by the matters about which the advice was sought and given and the amount of monies involved.

Public interest arguments in favour of maintaining the exemption

73. The Commissioner recognises that there is a strong public interest in protecting the doctrine of legal professional privilege. The doctrine has developed to ensure that clients are able to receive advice from their legal advisers in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality.
74. The Commissioner accepts the principle, indicated by a number of Information Tribunals, that the passage of time will often be a factor that favours disclosure. This stance takes into account the principle that if advice has recently been obtained, it is likely to be used in a variety of decision-making processes. Similarly, the older the advice, the more likely it is to have served its purpose and the less likely it is to be used as part of a decision-making process.
75. The Commissioner accepts that the circumstances of a particular case will dictate whether advice is considered 'recent'. In this case, the Commissioner notes that the SFO announced its decision in December

2005 that nothing had emerged which would justify a full criminal investigation into the affairs of Equitable Life. In the Commissioner's view, it is reasonable to conclude that, as a decision has been made, this indicates that the advice at issue in this case, whether or not it was followed, has served its immediate purpose. He considers this reduces the weight of arguments in favour of maintaining the exemption.

76. In the Commissioner's view, the public interest will be particularly strong if the advice, in relation to litigation, is recent or still live: in other words, if it is still being relied upon or relevant to litigation in prospect. In this respect, he considers that to disclose legal advice where litigation on the relevant issues is in prospect, or may be likely, would be unfair to a public authority. The legal advice would reveal the basis (and potentially the weaknesses) of the public authority's case, while a private opponent not subject to the Act would not have to reveal their position. In this case, while the prospect of litigation can never be ruled out, the Commissioner is not aware of any evidence that litigation is being considered.

Balance of the public interest arguments

77. In the Commissioner's view, there will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice.
78. However, the exemption is not absolute and the Act therefore requires consideration of whether the public interest in disclosure in a particular case is strong enough to equal or exceed the public interest in maintaining legal professional privilege (LPP).
79. Notwithstanding the arguments outlined above, the Commissioner considers that the well established and persuasive public interest arguments in protecting legal professional privilege must be accorded due weight and importance. Therefore, on balance, the Commissioner has concluded that in the circumstances of this case, the public interest arguments in favour of disclosure are insufficiently strong to override or equal the strong generic public interest arguments in favour of maintaining the section 42 exemption.

Section 40 Personal information

80. Section 40(2) of the Act provides an exemption for information that constitutes the personal information of third parties if its disclosure would contravene the Data Protection Act 1998.

81. The Commissioner has issued guidance on the question of when the names of staff, officials, elected representatives or third parties acting in a professional capacity should be released in response to an access request.

http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Practical_application/WHENSHOULDNAMESBEDISCLOSED.ashx

82. In his view, the main consideration is whether it would be fair in all the circumstances to identify an individual. When considering whether an individual would expect their role to be subject to public scrutiny, the Commissioner considers it appropriate to take account of the following factors:

- how senior they are;
- whether they have a public profile; and
- whether their role requires a significant level of personal judgement and individual responsibility.

83. In this case, having considered the personal information contained within the information he has ordered to be disclosed, the Commissioner has decided, in line with his guidance, that it would be fair for the identity of SFO officials and its advisers to be disclosed.

84. With respect to the personal information of other individuals identified in the Vetting Note, the Commissioner has also decided that it would be fair for this personal information to be disclosed.

85. In accordance with Schedule 2 Condition 6 of the Data Protection Act, the Commissioner must also be satisfied that the disclosure must be necessary for a legitimate interest of the public and that, even where necessary, disclosure must not cause unwarranted interference to the rights, freedoms and legitimate interests of the data subjects.

86. In this case, for the reasons described above, he is satisfied that there is a legitimate interest in the disclosure. He is also satisfied that disclosure will not result in detriment to the data subjects on the basis of their role and/or seniority and the reasonable expectation of scrutiny of their involvement in the matter under consideration.

Procedural Requirements

87. Section 1(1) of the Act 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."

88. During the course of the Commissioner's investigation, the SFO confirmed that it holds some further information within the scope of the request in relation to which it had not addressed the question of disclosure or exemption. In the Commissioner's view, given the broad nature of the complainant's request, this information clearly falls within the scope of the request. He therefore finds the SFO in breach of section 1(1)(a) of the Act in that it failed to advise the complainant that it held this part of the information relevant to his request.

89. During the course of his investigation, the Commissioner has concluded that some of the information withheld by the SFO has been incorrectly withheld. As he considers that this information should have been disclosed, he finds the SFO in breach of section 1(1)(b) of the Act in that it failed to provide this information to the complainant.

90. Section 10(1) of the Act provides that:

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

91. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale, the Commissioner finds the SFO in breach of section 10(1) of the Act.

92. In failing to provide the complainant with the information which it incorrectly withheld within the statutory timescale, the Commissioner finds the SFO in breach of section 10(1) of the Act.

93. Section 17(1)(b) places an obligation on the public authority that its refusal notice *"specifies the exemption in question"*. The Commissioner's view is that the public authority is thereby required to refer to the specific part(s) of the relevant exemption(s). In this case the SFO referred generally to sections 30, 31 and 40 without specifying

which sub-section/paragraph/sub-paragraph was being applied The Commissioner has therefore concluded that it breached section 17(1)(b) of the Act in failing to supply a notice compliant with the requirements of that section within 20 working days.

94. Section 17(3) of the Act provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information must state its reasons for the decision.
95. The Commissioner takes the view that the SFO failed, both in its refusal notice and at the internal review stage, to explain the public interest factors it had taken into account when reaching its decision that the public interest in maintaining the exemptions under sections 30, 31 and 42 outweighed the public interest in disclosing the requested information. The Commissioner has therefore concluded that the SFO acted in breach of section 17(3) of the Act.

The Decision

96. 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 properly withheld some information by reference to the section 42 exemption;
 - it properly withheld some of the information requested on the basis that it was exempt from disclosure by virtue of section 30(1) and the public interest favoured maintaining the exemption.

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

- it breached section 1(1)(a) by failing to notify the complainant in writing whether it held information of the description specified in the request;
- it breached section 1(1)(b) by not providing the complainant with some of the requested information by the time of the completion of the internal review;
- it breached section 10(1) by not providing the complainant with some of the requested information within 20 working days of the request;

- it breached section 17(1)(b) by failing to specify the subsections of the exemptions claimed; and
- it breached section 17(3)(b) of the Act in that it failed to demonstrate, in all the circumstances of the case, that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

Steps Required

97. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the Vetting Note to the complainant.
98. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

99. 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.

Other matters

100. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
101. The Commissioner has had some difficulty in confirming the scope of the withheld information. In this respect, he notes that some of the information provided to him by the SFO as being within the scope of the request does not appear to relate to Equitable Life matters.
102. He is also concerned to note that, during the course of the investigation, the public authority identified further information falling within the scope of the request. The authority's failure to identify this information when providing its initial response to the request or during its internal review suggests that, prior to the Commissioner's involvement, adequate searches may not have been made.

103. Where public authorities experience difficulty establishing whether information relevant to a request is held, this might also indicate records management problems. The code of practice issued under section 46 of the Act (the "section 46 code") set out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.
104. The Commissioner recognises the challenges that records management poses for organisations such as the SFO which hold a complex range of information. While, in this instance, the public authority has confirmed to the Commissioner that it has not displayed best practice in this regard, he notes that the SFO has already taken steps to improve its record keeping. The Commissioner welcomes this approach and expects that, in future, the authority's records management practice will conform to the recommendations of the section 46 code.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

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

Dated the 3rd day of March 2011

Signed

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

Legal Annex

Investigations and proceedings conducted by public authorities.

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Personal information.

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

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

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

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

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."