

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 23 March 2010**

**Public Authority:** The Treasury Solicitor's Department  
**Address:** One Kemble Street  
London  
WC2B 4TS

### Summary

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The complainant sought the identities, contact details, areas of work, branch of profession and date of qualification of all lawyers in the Treasury Solicitor's Department (TSol), together with details of whether or not those lawyers were practising professionals subject to post qualification educational requirements. TSol refused the request under section 21 of the Act as it stated that some of the information was accessible to the applicant by other means. TSol withheld the remaining information under section 36(2)(c) of the Act. During the course of the Commissioner's investigation TSol also claimed reliance on section 40(2). The Commissioner found that TSol had incorrectly applied section 21 of the Act as it did not provide a precise link or other direct reference to the information and so the information was not reasonably accessible to the complainant. The Commissioner found that section 36(2)(c) was engaged but decided that the public interest in maintaining the exemption did not outweigh the public interest in favour of disclosing of the information. The Commissioner considered section 40(2) and decided that the disclosure of the information would not be unfair or unlawful and would not therefore breach the data protection principles of the Data Protection Act 1998 (DPA). Therefore the Commissioner found that the withheld information should be disclosed.

### The Commissioner's Role

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

## The Request

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2. On 7 December 2006 the complainant made the following request to the Treasury Solicitor's Department (TSol):

*"...it is indicated that some of the lawyers in the other Departments are wholly employed by the Treasury Solicitor – as I understand it the DCMS, DFES and HM Treasury lawyers. If there are any others please can you identify any others for me?"*

*The recorded information that I am seeking in respect of all lawyers falling under the Treasury Solicitor's remit is as follows:*

- (a) *Please can you advise me as to the identity – specifying their names and contact details and current areas of work.*
- (b) *Please can you specify for me which are:*
- I. Practising professionals mandated to satisfy post qualification and continuing educational requirements of their branches of the profession; or*
  - II. Which, if any, are no longer have [sic] current professional legal qualifications and are not entitled to practice and/or are not required to satisfy the mandatory post qualification and continuous education requirements required of those who hold current professional legal qualifications?*
- (c) *In respect of each lawyer please specifying [sic] which branch they belong to and their date of qualification?*
- (d) *Your recorded procedures for dealing with conflicts of interest?"*
3. The complainant did not receive a response to his request, and he complained to the Commissioner on 11 January 2007. The Commissioner did not take any further action at this stage because TSol then responded to the complainant.
4. TSol responded to the complainant on 24 January 2007, apologising for the delay. In relation to the first part of the request TSol confirmed that TSol lawyers did not work in any other departments other than those named by the complainant.
5. In relation to part (a) of the request TSol advised that some of the relevant information was already published in the following locations:
- The Civil Service Year Book
  - Legal publishers' lists

- On TSol's website
- Via the Bar Council or the Law Society

TSol advised that this information was exempt from disclosure under section 21 of the Act, as it was already reasonably accessible to the complainant.

6. In relation to the information which did not fall under the section 21 exemption, TSol advised that this remaining information was exempt under section 36(2)(c) of the Act, as disclosure would prejudice the effective conduct of public affairs.
7. In relation to part (b)(i) of the request TSol advised that all barristers and solicitors employed by TSol were required to undertake continuing professional education. In respect of (b)(ii) TSol explained that the information could not be provided without revealing the identities of those lawyers. It said that where the identities of individual lawyers were published in any way, those individuals would have the necessary qualifications and would be fulfilling their professional requirements. TSol considered that these names would be exempt under section 21 of the Act for the reasons set out at paragraph 5 above. TSol advised that the remainder of the information was exempt under section 36(2)(c), for the same reasons as at paragraph 6 above.
8. In relation to part (c) of the request, TSol again applied the exemption at section 21 to information which it considered was already in the public domain, and the exemption at section 36(2)(c) to the remainder of the information.
9. Finally, in relation to part (d) of the request, TSol stated that the TSol Staff Handbook requires staff to report potential conflicts of interest to their managers and provided the complainant with various internal guidance notes including a copy of the Government Legal Services Guidance note for Government Lawyers. They also pointed out that the Civil Service Code on professional codes of conduct and ethical standards was a relevant guide also. The Civil Service Code is publicly available.
10. On 7 March 2007 the complainant requested that TSol review its response. At this stage the complainant did not offer any reasons for his dissatisfaction with TSol's response.
11. On 23 March 2007 TSol responded to the complainant. TSol advised that it had now completed an internal review, and had decided to uphold its original response.

## The Investigation

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### Scope of the case

12. On 16 May 2007 the complainant wrote to the Commissioner to request that he investigate the way his request was handled by TSol. The complainant did not raise any specific grounds for his complaint. The Commissioner is satisfied that TSol dealt with part (b)(i) of the request, as TSol provided confirmation that all barristers and solicitors employed by TSol are required to undertake continuing professional education. He is also satisfied that TSol dealt with part (d) of the request, as it provided the complainant with a copy of the GLS Guidance (Government Legal Service) and internal guidance notes to the complainant. The Commissioner has therefore only gone on to investigate parts:
- (a) Identities of TSol lawyers, names and contact details and current areas of work.
  - (b)(ii) TSol Lawyers who no longer have current professional legal qualifications and are not entitled to practice and/or are not required to satisfy the mandatory post qualification and continuous education
  - (c) The branch of each lawyer and date of qualification.

### Chronology

13. Unfortunately the Commissioner's investigation was delayed owing to the large volume of complaints received by his office. The Commissioner wrote to TSol on 16 April 2008 to request information in relation to its handling of the request.
14. TSol responded to the Commissioner on 8 May 2008. However, no further action was taken by the Commissioner at this stage. Following an internal re-organisation of complaints handling, the complaint was reallocated and the investigation restarted in February 2009.
15. The Commissioner wrote to TSol on 17 April 2009 with further queries in relation to the complaint.
16. TSol responded to the Commissioner on 19 May 2009. In addition to providing information in relation to its reliance on the exemptions already cited, TSol advised that it now wished to rely on the exemption at section 40(2) of the Act in relation to the information withheld under section 36(2)(c).

17. On 16 February 2010 the Commissioner wrote to TSol with further queries. TSol provided its response to these queries on 2 March 2010.
18. The Commissioner e-mailed TSol with a final query on 12 March 2010. TSol responded to this final query over the telephone on 18 March 2010.

## Analysis

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### Substantive procedural matters

#### Part (b)(ii) of the request

19. As detailed above TSol answered part (b)(i) of the complainants request by confirming that all its lawyers were practising professionals subject to post qualification and educational requirements. In answer to part (b)(ii) of the request it refused to provide information by relying upon section 21 and section 36(2)(c) of the Act, thereby suggesting that it held details of lawyers who were no longer practising professionals and who were therefore not subject to post qualification and educational requirements.
20. The Commissioner has carefully considered the wording of part (b)(i) and part (b)(ii) of the request. In his view the request envisages that lawyers will either be practising lawyers subject to post qualification and educational requirements, or lawyers who are not entitled to practice and therefore not subject to any post qualification requirements. He is supported in this view by the inclusion of the word "or" between parts (b)(i) and (b)(ii) of the request.
21. In light of the above the Commissioner would have expected that if the answer to (b)(i) was that **all** TSol's lawyers were practising professionals subject to post qualification requirements, then the only possible answer to (b)(ii) would have been that **none** of its lawyers were not entitled to practice and thus not subject to post qualification requirements. The Commissioner queried this apparent contradiction with TSol.
22. TSol explained that whilst all the staff it employed **as lawyers** were practising professionals subject to post qualification requirements, it could not rule out the possibility that it might employ some staff falling under the description given in part (b)(ii) of the request in some other capacity than as a lawyer. Hence its response to (b)(ii).

23. In the Commissioner's view, TSol has effectively applied a different interpretation of the word "lawyers" to part (b)(ii) of the request than it has applied to the rest of the request. In part (b)(ii) of the request it has interpreted "lawyers" to mean any staff, who have at any time been practising lawyers, regardless of the capacity in which they are employed by TSol. In the rest of the request TSol has interpreted "lawyers" to mean any staff employed by TSol as lawyers.
24. In the Commissioner's view the interpretation of "lawyers", applied by TSol to part (b)(ii) of the request (any staff, who have at any time been practising lawyers, regardless of the capacity in which they are employed by TSol) is not an objective reading of the request. However the interpretation of "lawyers" applied to the rest of the request (any staff employed by TSol as lawyers) is an objective reading. He therefore finds that TSol should have answered part (b)(ii) of the request by advising the complainant that it employed no lawyers who are not entitled to practice and are not subject to post qualification requirements. In failing to do this the Commissioner finds that TSol breached section 1(1)(a) of the Act in that it failed to deny that it held information for part (b)(ii) of the request.

## **Exemptions – part (a) and part (c) of the request**

### **Section 21: information which is accessible to the applicant by other means**

25. Section 21 of the Act provides an exemption for information which is reasonably accessible to the applicant by other means. Section 21 may be engaged even where payment is required. A full text of section 21 is available in the Legal Annex at the end of this Notice.
26. In respect of part (a) of the request TSol informed the complainant that some of the information was reasonably accessible through the Civil Service Year Book, in legal publishers' lists, on TSol's website or was available to the public from the Bar Council or Law Society. In respect of part (c) of the request TSol informed the complainant that the information was reasonably accessible to him, but did not specify the locations in which it could be found.
27. The Commissioner has considered whether the requested information was 'reasonably accessible' to the complainant and whether section 21 is therefore engaged. The Commissioner agrees that TSol holds all of the requested information but also notes that TSol acknowledges that only some of the information is available through other sources such as the Civil Service Year Book, the Law Society and the Bar Council. The Commissioner has therefore considered whether TSol provided clear

direction as to where the information could be accessed or found and how reasonably this could be accomplished.

28. TSol has stated that only some of the requested information is available through identified sources (i.e. the Civil Service Year Book and the TSol website). The Commissioner is of the view that TSol has not been detailed or specific enough about directing the complainant to this information, as it has only stated the general website or publication within which the information may exist. Taking into account the Information Tribunal's decision in *Ames v ICO & Cabinet Office* [EA/2007/0110] the Commissioner is of the view that it would not be reasonable to expect the complainant to trawl through large databases of complex information on a website containing multiple sources which also hold large volumes of other data. The Commissioner has also considered this issue in a similar case (see Decision Notice FS50164902). In light of the above the Commissioner finds that the information is not reasonably accessible to the complainant and that section 21 is **not** engaged.

### **Section 36(2)(c): prejudice to the effective conduct of public affairs**

29. Section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36(2)(c) to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice the effective conduct of public affairs. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown.
30. A full text of section 36 can be found in the Legal Annex at the end of this Notice.
31. In order to engage section 36(2)(c) – otherwise prejudice the effective conduct of public affairs – some prejudice other than that protected by another limb of section 36 must be shown. In the Commissioner's view the exemption at section 36(2)(c) is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another specific exemption.
32. In order to establish whether the section 36(2)(c) exemption has been applied correctly the Commissioner considers it necessary to:
1. Ascertain who was the qualified person or persons for the public authority in question;
  2. Establish that an opinion was given;

3. Ascertain when the opinion was given; and
  4. Consider whether the opinion given was reasonable.
33. In deciding whether the opinion was 'reasonable' the Commissioner has been assisted by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that 'in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).
34. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion in order to engage section 36(2)(c) the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition arising from disclosure.

### **Is the exemption engaged?**

35. TSol claimed reliance on section 36(2)(c) in its refusal notice dated 24 January 2007. As TSol is a non-ministerial government department, their qualified person is determined by section 36(5)(c) of the Act

36(5) In subsections (2) and (3) "qualified person" -  
(c) in relation to information held by any other government department, means the commissioners or other person in charge of that department

TSol confirmed to the Commissioner that the qualified person at that time was the Treasury Solicitor, Mr Paul Jenkins. The Commissioner is satisfied that the Treasury Solicitor was a qualified person at the time of the request for the purposes of section 36 of the Act.

36. The Treasury Solicitor's opinion was sought on 11 January 2007, and his opinion was given on 23 January 2007. The Commissioner has been provided with information relating to the opinion of the Treasury Solicitor and has seen a copy of the submission. TSol has confirmed

that the qualified person was presented with a submission, a note, background information, legal advice and a suggested response. In the opinion of the Commissioner the content of those documents contain relevant factors on which the qualified person could arrive at an opinion.

37. The Commissioner notes that none of the TSol submissions clearly identifies whether it considers the likelihood of prejudice occurring as one that 'would be likely to' occur, or whether the likelihood meets the higher test of 'would occur'. On this matter the Commissioner has again noted the comments of the Information Tribunal in the case of *McIntyre* in which the Tribunal explained that:

"...in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level." (para 45)

38. The Commissioner has therefore assumed that it is the TSol position that should the information be disclosed the likelihood of inhibition or prejudice occurring is one that is simply likely to occur, rather than one that would occur.

The Commissioner's Freedom of Information Act Awareness Guidance No 20 outlines the Commissioner's understanding of the term 'prejudice' within the Act. The Commissioner firstly considers it necessary to establish the nature of the prejudice (or other stated harm) that might result from the disclosure of the requested information. The Commissioner expects the public authority to provide evidence to show that there is a causal relationship between the potential disclosure and the prejudice<sup>1</sup>.

39. The Commissioner asked TSol to provide him with details of the prejudice it believed would arise should the requested information be disclosed. TSol wrote to the Commissioner on 22 April 2009 and declined to provide any additional information other than that contained within its refusal notice dated 24 January 2007 a draft of which had been presented to the qualified person along with the submission. In that letter TSol informed the complainant that disclosure of the information would prejudice, or would be likely to prejudice, the effective conduct of public affairs for the following reasons:

- *'Disclosure of a list of names of TSol lawyers will increase the chance that those lawyers will be subjected to indiscriminate approaches or unwarranted attention by members of the public.'*

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<sup>1</sup> Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 & EA/2005/0030; 17 October 2006)

*This could lead to disruption of their work and potentially cause distress to individual lawyers concerned.*

- *That the above argument applies with even greater force in relation to the request for contact details of the lawyers and the request for details of the subject areas of their work.*
  - *There is an additional concern in relation to the disclosure of subject areas of work to the extent that this may link individual lawyers with particular policy areas or types of cases (which could themselves be particularly sensitive)'*
40. The Commissioner has considered the evidence provided by TSol in conjunction with the withheld information. He accepts that the qualified person identified a causal link between disclosure of the information in question and the argued prejudice. He further accepts that the prejudice identified is relevant to section 36(2)(c) and is not trivial. He accepts that the qualified person's opinion that such a prejudice would be likely to occur is both reasonable in substance and reasonably arrived at. He therefore accepts that the exemption is engaged.

## **Public Interest**

41. Section 36(2)(c) is a qualified exemption and therefore the Commissioner must go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian and Brooke v Information Commissioner & BBC* [EA/2006/0011 & 0013] indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

*'88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.*

42. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it

will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the effective conduct of public affairs.

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

43. TSol told the complainant that the public interest in disclosing a list of names was limited and that this does not in itself promote greater transparency in the conduct of activities which involve public expenditure to any significant degree. They also said that they did not believe that it would facilitate the proper conduct of business between TSol and members of the public. They considered that disclosing names and contact details of lawyers may assist members of the public to contact them but that it would be most likely that they would already know who was dealing with their case and there is also an effective telephone reception system for transferring callers with a legitimate interest.
44. TSol told the complainant that disclosing subject areas of work of individual lawyers might increase transparency in the conduct of activities which involve public expenditure. They also said that it could also provide a better understanding of TSol which could add to public confidence in the conduct of litigation on behalf of the Crown. However they said that those dealing with TSol on particular matters are provided with relevant contact details and there are procedures in place for dealing with the conduct and behaviour of lawyers.
45. When asked by the Commissioner to provide any additional public interest arguments TSol declined to do so and referred the Commissioner to their letter to the complainant dated 24 January 2007.
46. The Commissioner considers that there is a public interest in disclosing the withheld information in order to promote openness, transparency, and accountability. He further considers that disclosing information about the work and professional qualifications of those employed as lawyers by TSol would inform the public about the professional competence of TSol's employees. He considers that there is a public interest in the public knowing that TSol lawyers are adequately qualified to perform their roles. Finally the Commissioner considers that there is some public interest in facilitating members of the public in contacting public authority staff.

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

47. In their letter to the complainant TSol said that disclosing the names, contact details and areas of work of TSol lawyers would increase the chance that those lawyers will be subjected to indiscriminate approaches or unwarranted attention by members of the public leading to disruption of their work and potentially causing distress to individual lawyers. Additionally TSol told the complainant that if subject areas of work of lawyers were disclosed then a link may be made between an individual lawyer and sensitive cases or policy areas.
48. When asked by the Commissioner to provide any additional public interest arguments to support their decision TSol initially declined to do so and referred the Commissioner to their letter to the complainant of 24 January 2007. However, in their letter to the Commissioner dated 19 May 2009 TSol made additional comments about the public interest. They said that seniority is a factor in considering the public interest and that generally names of senior members of staff are routinely published. They also stated that most government lawyers are relatively senior in comparison with civil servants and within a legal department the great majority of staff are usually in the two most junior legal grades in the civil service. TSol pointed out that Government lawyers act on the instructions of clients just like other lawyers and because of legal professional privilege are not at liberty to discuss their client's affairs with members of the public. They maintain that there is no basis on which those lawyers would be lobbied on matters relating to policy or services.

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

49. As described at paragraph 34 of this Notice the Commissioner considers that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and therefore does not necessarily imply any particular view as to the severity or extent of such inhibition or prejudice or how often it may occur, save that it will not be so trivial, minor or occasional as to be insignificant. Therefore, the Commissioner has given due weight to the opinion of the qualified person when assessing the public interest, and has also considered the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.
50. The Commissioner understands that TSol believes the public interest in maintaining the exemption outweighs the public interest in disclosing the identities of its legal officers. They have provided the Commissioner with their view that should the information be released their officials may be subject to calls and correspondence and possibly harassment

from members of the public causing a distraction to their work and therefore prejudicing the effective conduct of public affairs. They believe that this outweighs the arguments for transparency and confidence arguments put forward as public interest arguments to disclose the information.

51. The Commissioner accepts that the release of the information would be likely to cause the harm described, however the Commissioner is not convinced that the harm would be severe or frequent enough to outweigh the public interest in disclosure. He has considered whether TSol internal policies and procedures for handling such interest from the public should be robust enough to deal with unsolicited calls no matter what the seniority of the staff member. The Commissioner has taken the view that the existing policies for directing enquiries from members of the public are already in place and effective and could be extended if required. Accordingly the Commissioner does not believe that the harm or distraction would be so significant as to be unmanageable.

#### **Late reliance on an exemption not previously claimed**

52. The Commissioner notes the late reliance on section 40(2) by TSol. The Commissioner is under no positive duty to consider exemptions which have not been referred to by a public authority but may do so if it seems appropriate to him in any particular case.
53. The Commissioner has considered the nature of the information in question and has considered the potential risk associated with the impact of disclosure. In this case, the information relates to the identities of TSol officials, and the Commissioner is mindful of his dual role as the data privacy regulator. Therefore, the Commissioner has exercised his discretion and has considered it appropriate to consider TSol's arguments in relation to section 40(2).

#### **Section 40(2): personal information relating to third parties**

54. The exemption under section 40(2) of the Act applies to information which is the personal data of an individual other than the applicant, where disclosure of the information would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA). The DPA defines personal information as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

55. The Commissioner notes that the withheld information in this case comprises the names of TSol lawyers, contact details, current areas of work, branch of profession and date of qualification, which is obviously personal information relating to these individuals.
56. The Commissioner considers that the relevant data protection principle in this case is the first data protection principle as set out at Schedule 1 to the DPA. The first data protection principle states that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met.

#### *First data protection principle*

57. In considering whether disclosure of the withheld information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The individuals' reasonable expectations of what would happen to their personal data;
- Whether the individuals specifically refused to consent to the disclosure of the requested information; and
- Whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals.

The Commissioner has not seen any evidence that consent was sought in relation to the complainant's request.

58. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Page 8 of the guidance states that:

*'Whether the information relates to the individual's public life (ie their work as a public official or employee), or their private life (ie their home, family, social life or finances). Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position and whether they have a public facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would*

*put them at risk, or unless it also reveals details of the private lives of other people (ie the official's family)*

59. The Commissioner considers that it is good practice to have a policy on routine disclosure of names at certain levels, in certain roles or in certain circumstances, however this does not always mean that the names of more junior staff should always be withheld. Often it will not be unfair to release their names as the context will not be sensitive or controversial. The fact that a public authority has not specifically advised employees or officials about the implications of the Act is not a bar to disclosure, as they should anyway be aware of the Act's existence.
60. The Commissioner understands that TSol distinguishes between junior and senior lawyers within the department and on this basis it argues that the junior officials' names should not be released. TSol also points out that although most government lawyers are relatively senior compared with civil servants in general but that those positions below department head grade will be in the two most junior legal grades in the civil service. The Commissioner understands that both junior and senior legal advisers, are required to be legally qualified to work in the department (as either solicitors or barristers) and that they perform roles in the capacity of qualified legal advisers and are subject to legal professional privilege, responsible for providing advice to clients, claimants and dealing with opposing lawyers.
61. The Commissioner has inspected the personal data withheld under section 40(2), and has considered the information provided by TSol. The Commissioner is of the view that the individuals concerned were not the most junior within TSol. Indeed the Commissioner considers that these individuals have to exercise a significant level of judgement, give opinions with a high degree of legal knowledge, and correspond on a subject matter specific to that level of legal knowledge and experience. As such the Commissioner does not consider these individuals to be junior staff with little or no expectation of their names entering the public domain.
62. TSol told the Commissioner that disclosure of the names of junior officials may cause disruption of their work through indiscriminate approaches or unwarranted attention from members of the public and cause distress to individual lawyers. The Commissioner believes that the staff involved in this case are sufficiently senior to expect to be able to account for their opinions and work. Therefore the Commissioner does not consider that it would be unfair to any of the individuals to release their names.

## **Would it be unlawful to disclose the information?**

63. Having decided that disclosure of officials' names would not be unfair, the Commissioner has gone on to consider whether the processing would be lawful. In this case, the Commissioner is not aware of any duty of confidence or statutory bar protecting the information and he is satisfied that the disclosure would not be unlawful.

## **Schedule 2 conditions**

64. The sixth condition provides that:

*"personal data shall be processed in accordance with the rights of the data subjects under this Act"*

65. It establishes a three part test which must be satisfied:

- there must be legitimate interests in disclosing the information,
- The disclosure must be necessary for a legitimate interest of the public, and
- Even where the disclosure is necessary, it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.

66. The Commissioner believes there is a legitimate interest in TSol being as open and transparent as possible and that there is a general public interest in knowing that TSol lawyers are qualified to perform their roles. The Commissioner is of the view that disclosure of the information in question is necessary to achieve that aim.

67. Having already established that the processing is indeed fair, the Commissioner is also satisfied that the release of the individuals' names would not cause any unwarranted interference with the rights, freedoms and legitimate interests of them as data subjects. The Commissioner is satisfied that the information relates only to those individuals' professional lives and does not intrude on their private and family lives. Furthermore, there is no evidence to suggest that disclosure would compromise their personal safety or lead to harassment in their working lives.

## **Procedural Requirements**

68. 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."

69. 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'*

70. 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."

## The Decision

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71. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act, in that:

It failed to deny that it held information for part (b)(ii) of the request and in doing so breached section 1(1)(a) and section 10(1) of the Act.

For parts (a) and (c) of the request it wrongly applied section 21(1) of the Act and wrongly withheld information under section 36(2)(c) and 40(2), thus breaching section 1(1)(b) and section 10(1) of the Act.

72. For parts (a) and (c) of the request it failed to issue its refusal notice within twenty working days of receipt of the request and thus breached section 17(1) of the Act.

For parts (a) and (c) it failed to specify in its refusal that it was relying upon section 40(2) of the Act, and in doing so breached section 17(1)(b) and (c) of the Act.

## **Steps Required**

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73. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To provide the complainant with a list of the names, contact details, current areas of work, branch of profession and date of qualification of all lawyers falling under the Treasury Solicitor's remit as per parts (a) and (c) of the request.

74. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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

## Right of Appeal

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

Website: [www.informationtribunal.gov.uk](http://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 23<sup>rd</sup> day of March 2010**

**Signed .....**

**Lisa Adshead  
Senior FOI Policy Manager**

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

## Legal Annex

### 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."

**Section 1(2)** provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

**Section 1(3)** provides that -

"Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

**Section 1(4)** provides that -

"The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

**Section 1(5)** provides that -

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

**Section 1(6)** provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

### **Time for Compliance**

**Section 10(1)** 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."

**Section 10(2)** provides that –

"Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt."

**Section 10(3)** provides that –

"If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

**Section 10(4)** provides that –

"The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

**Section 10(5)** provides that –

"Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

**Section 10(6)** provides that –

"In this section –

"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

## **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."

**Section 17(4)** provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6)** provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7)** provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

### **Information Accessible by other Means**

**Section 21(1)** provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

**Section 21(2)** provides that –

"For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment."

**Section 21(3)** provides that –

"For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request,

unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

**Prejudice to effective conduct of public affairs.**

**Section 36(1)** provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
- (iii) the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 36(5)** provides that –

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

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

- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

## **Section 40 Personal Information**

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) 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.

(3) 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).