

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 13 June 2011**

**Public Authority:** The Governing Body of the University of Liverpool  
(‘The University’)

**Address:** University of Liverpool  
Foundation Building  
765 Brownlow Hill  
Liverpool  
L69 7ZX

### **Summary**

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The complainant requested a copy of a PhD thesis that had been submitted to the University and was at that time embargoed from publication.

The public authority confirmed that it held the relevant recorded information, but that it was not prepared to provide it because it believed that section 22(1) [information intended for future publication] and section 43(2) [likely to prejudice commercial interests] were appropriate exemptions. It maintained its position in an internal review and the complainant referred this matter to the Commissioner.

The Commissioner has carefully considered this case and has found that section 22(1) has been applied appropriately to the withheld information. He has not been required to consider section 43(2) and requires no remedial steps to be taken.

### **The Commissioner’s Role**

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

## **Background**

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2. The Commissioner has anonymised this notice because in his view this is appropriate in the circumstances of this case.
3. The Doctor of Philosophy award (PhD) is the highest award available from the University. Most PhD projects are purely research based and the candidate is expected to submit a thesis that is an original contribution to the field of study. All PhD projects require the thesis to be published to the academic community.
4. However, this does not mean that the PhD thesis will be published immediately. Instead, when submitting the thesis, a form can be filled in which asks for the publication to be restricted or delayed ('embargoed'). For this University, this will require a declaration form to be filled in that must be approved by both the thesis supervisor and the Head of School. The declaration form provides a number of options in relation to the likely damage that must be demonstrated to prevent immediate publication and explains the time period of embargo requested. This also accords with the University's stated policy in this area that is available to its students.
5. The PhD in question was privately funded. The thesis was submitted to the University in July 2010. The declaration form was filled in and approved by the relevant people and the external examiner of the thesis. The embargo was requested for 5 years and the reason provided was that disclosure would inhibit the commercial publication of the thesis. The University has explained to the Commissioner that it was agreed that the thesis would be embargoed until the book was published, but that the thesis would be then released to the library (or that it would be released if it became clear that the book would not be published).
6. The individual who created the thesis had a proposed publishing contract in June 2010 and signed a publishing contract on 21 September 2010. The contract states that the content of the thesis should not be published before the book. The book is due to be published in August to September 2011. In addition, the external examiner has written that the content of the research is of real commercial value to the individual.

## **The Request**

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7. On 10 August 2010 the complainant made a request for a hard copy of a specific completed PhD thesis.

8. On 18 August 2010 the University issued a response under the Act. It explained that it held the thesis but that it was not prepared to provide it to the complainant at that time under the Act. It explained that it believed that two exemptions were appropriate:

- (1) Section 22(1) [information intended for further publication]. It explained that the information was held with a view to its publication at some future date; and
- (2) Section 43(2) [disclosure would be likely to prejudice the commercial interests]. It explained that it believed pre-emptive disclosure could potentially prejudice the commercial interests of the author.

It did not explain when it believed publication would take place, why it believed it was reasonable to delay publication in this case or provide its public interest determinations.

9. On 26 August 2010 the complainant requested an internal review. She said that she wanted the application of the two exemptions to be reviewed. She explained:

- (1) For section 22(1) – that an embargo was an exception in what is recognized as the normal publication process for research degree theses (for they are normally deposited with the university library after examination). She believed that the embargo prevented the certainty of publication at a future date; and
- (2) For section 43(2) – one required certain or likely prejudice for this exemption to apply. She explained that the appropriate evidence from publishers and authors should be considered and any loss should be quantifiable. She explained that in her experience the embargoes are used to protect financially quantifiable commercial information, for this was required to obtain a patent.
- (3) She drew the University's attention to the public interest test requirements. She explained that the University was publicly funded and that she believed that the University sponsored this research. She said that she believed that University had wrongly decided that the balance of public interest did not lie in disclosure. The information should be disclosed in accordance with the general duty the University has to ensure the public good. She said that it was wrong to allow the uncertain enrichment of the author to outweigh this public good. She explained that the public interest in disclosure was enhanced by their being a lack of resources in research about this topic and

that cooperation and collaboration were believed to be essential for the scholarly effort.

10. On 8 September 2010 the University communicated the outcome of its internal review. It upheld its position. It explained:

(1) With regard to section 22(1) – it could confirm that the information requested was intended for future publication. It explained that it had discussed the issue with the author who had a contract to ensure that this is so and that it would be published in 2011. It explained that given its consultation it believed that it was reasonable in all the circumstances to use the exemption and that the public interest maintained the application of the exemption due to the inequity early disclosure would have on the author and other parties; and

(2) With regard to section 43(2) – it explained that it believes the commercial interests of the third party would, or would be likely to be prejudiced. It explained that the interests of the author and publisher could be harmed and that the public interest favoured the maintenance of the exemption.

## **The Investigation**

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### **Scope of the case**

11. On 14 September 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
12. On 12 November 2010 the complainant agreed that the scope of this investigation was to determine:
- Whether the information requested on 10 August 2010 had been withheld appropriately or whether it was suitable for disclosure to the public on 7 September 2010 (the date by which the University was required to comply with the request).

### **Chronology**

13. On 5 October 2010 the Commissioner wrote to the complainant and the University to explain that he had received an eligible complaint. He asked the University to provide him with its initial arguments and a copy of the withheld information.
14. On 2 November 2010 the University replied. It provided the Commissioner with what he requested.

15. On 11 November 2010 the Commissioner wrote to the University and made detailed enquiries about its position. He also explained that it appeared the arguments that had been made were relevant to the application of section 40(2) [third party personal data] and asked the University whether it sought to rely on it and if so, to present its detailed arguments.
16. Also on 11 November 2010 the Commissioner wrote to the complainant. He explained the proposed scope of his investigation and that his preliminary view was that the information had been withheld correctly. He asked whether given the preliminary verdict, she wished for this case to continue. If she wished to proceed, he asked the complainant to provide her specific arguments about why she believed this preliminary view was incorrect and outlined the areas that these arguments should cover.
17. On 12 November 2010 the complainant told the Commissioner that she did want this case to continue and asked for an extension to provide her detailed arguments. The Commissioner granted this extension.
18. On 8 December 2010 the Commissioner received detailed arguments from the complainant and acknowledged their receipt.
19. On 14 December 2010 the Commissioner received detailed arguments from the University. Within these submissions, it explained that it did also want to rely on section 40(2) in the alternative and why.
20. On 15 December 2010 the Commissioner made further enquiries of the University and received a response on the same day.
21. The Commissioner has considered all the arguments that have been submitted by both sides and has included those that were relevant in the analysis section of this Notice.

## **Analysis**

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### **Exemptions**

22. Relevant recorded information can be withheld correctly where an exemption appropriately applies to it. The Commissioner has decided to consider section 22(1) first.

#### ***Section 22(1)***

23. The University has argued that the whole thesis was exempt due to its operation of section 22(1). Section 22(1) is a qualified exemption so if it is engaged, the University is still required to consider whether the public

interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner will first consider whether the exemption was engaged.

*Was the exemption engaged?*

24. Section 22(1) states that:

*'Information is exempt information if-*

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
- (b) the information was already held with a view to such publication at the time when the request for information was made, and*
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).'*

25. It follows that in order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions:

- Was the information requested held by the University?
- Was there an intention to publish the information at some date in the future when the request was submitted?
- In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?

26. Before turning to consider each of these questions in turn, the Commissioner wishes to make it explicitly clear that his role in considering complaints under Part I of the Act is limited to considering the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17, i.e. within 20 working days following the receipt of the request. The Commissioner's approach follows that set out in a number of Information Tribunal decisions. For example, the Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072) noted that the application of the public interest test involved the consideration that 'the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA' (para 110).

27. The consequence of this approach is that the Commissioner cannot take into account events which have happened after the request has been submitted, or more accurately after 20 working days following the date

of request, but before the Commissioner has issued his Decision Notice. He is therefore considering the situation as it was on 7 September 2010.

**Was the information requested held by the University?**

28. It is accepted that the University held the thesis on 7 September 2010. It acquired the thesis when it was submitted to it by the student in July 2010. The Commissioner can therefore confirm that the thesis was held at the date of compliance and this criterion is satisfied.

**Was there an intention to publish the information at some date in the future when the request was submitted?**

29. In the Commissioner's view in order to demonstrate that the exemption under section 22(1) is engaged, a public authority must intend for the information to be disclosed to the public at a future point and that it must be able to demonstrate what information within the scope of the request will be published.
30. It is necessary for the Commissioner to consider and reach a conclusion on whether the University had a genuine intention at the date of compliance (7 September 2010) to publish the thesis in question at some date in the future.
31. The University in this case explained that all the information within the scope of the request (the thesis) would be published in the future. It explained that:
- A book would be published whose core would be the research included in the thesis;
  - Once the book was published, it would release the thesis into its library where it will be available on request; and
  - If it became clear that the book was not to be published, then it would also place the thesis in its library.
32. The complainant argued that the response and internal review were not clear about when or where the thesis would be published. She therefore argued that there was no settled intention to publish the information. The University has apologised for the confusion and has confirmed that it was aware that the content of the thesis was the foundation of a book to be published around August 2011. It has assured the Commissioner that its intention was to place the thesis into its library once either the book was published, or when it was clear that the book would not be published.

33. The University explained that the way it handled the embargoed thesis accorded with its normal process. It detailed how its embargo procedure was noted in its Student Handbook and explained that the future publication was agreed within the process that led to it granting the embargo. It explained that the embargo was not granted lightly and required evidence from suitable people that it was necessary.
34. The complainant also explained that the working title of the book and the title of thesis appeared to have different emphasis. In addition, a book and a thesis have different audiences and different purposes. She has therefore argued that the information published in the book may not be the same as the information published in the thesis. The University has explained that its intention has always been that it would disclose the thesis once the book was published and therefore the Commissioner believes that this submission on the facts of this case has little weight.
35. The Commissioner has considered whether it was necessary for the University to communicate its intention before it received the request and is satisfied that it was not. However, it is noted that this intention was communicated during the internal review process on 8 September 2010.
36. In conclusion, the Commissioner has been satisfied that the University has evidenced that there was a settled intention to publish all of the recorded information that was requested by the complainant. The Commissioner has therefore been satisfied that this requirement has been met.

**In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date (whether specified or not)?**

37. The University has explained that it believed its position was reasonable to delay publication for the following reasons:
  1. The author of the thesis had done everything expected to engage the embargo process and in all the circumstances this meant it was reasonable for the University to respect that process;
  2. While the University will receive no royalties from the book, the author of the thesis had got independent confirmation that there was financial value in the commercial publication of the content of the thesis and had entered into a publication contract on the understanding that nothing would happen that would place the material in the thesis into the public domain. It was reasonable for the University not to go back on its word and place the author in breach of the publishing contract. The University provided the Commissioner with a copy of the publication contract to evidence its arguments;

**3.** The University explained that the author of the thesis had acquired important new material in her area and there was a worry that the disclosure of the thesis to the public would remove the commercial value of this new material which she has done considerable work to gather;

**4.** It was anticipated at the date of compliance that the book (containing at its core the information in the thesis) would be published by August or September 2011 and the information would be made available to its audience then. At the date of compliance, the University had considered *amazon.com* and that indicated that the book was expected to be published at this time and could be pre-ordered. It explained that the relatively small amount of time that is required supports the reasonableness of the delay;

**5.** Once the book had been published, the University explained to the Commissioner that it would place the thesis in its library. It would do the same if it became apparent that the book would not be published. This will make the thesis available to the public because the British Library's thesis service allows interested academics to borrow it. It explained that the embargo period in this case was necessary to ensure the protection of the author's rights and was not disproportionate in achieving these aims. In its view this also rendered the delay in publication reasonable; and

**6.** The thesis in question was privately funded and the undermining of the process that whereby some of those funds may be recouped may lead to adverse effects on students obtaining such funding in the future and this should also be considered when considering whether the delay in publication was reasonable in all the circumstances of this case. In addition, the ability to appropriately protect one's work is an important factor to consider when one was undertaking a PhD thesis (as it amounts to four years' work) and this adds weight to the reasonableness of the delay in this case.

38. The complainant contends that it was not reasonable to delay publication for the following reasons:

**1.** The embargo process is flawed in that it fails to mention that a request under the Act could lead to the information being appropriately disclosed and gives the student an erroneous impression that the embargo is binding irrespective of the public interest in disclosure. It also was contractually discretionary as there was no certainty that it would be granted. It also fails to allow the student to understand what reasons they require to obtain an embargo. In addition, if consistently upheld, it allows the University to judge 'in house' whether restrictions

are appropriate rather than an independent body such as the Commissioner being involved;

**2.** The book that may contain the core of the thesis is likely to be very expensive, not be publicised and have limited distribution. It cannot be said in her view that in these circumstances it was reasonable to delay the publication of the thesis;

**3.** The Act contains other exemptions – such as section 41 [confidentiality], 43(2) [prejudice to commercial interests] and 40(2) [personal data] and thus any genuinely sensitive material can be protected in a way where the residue is disclosed.

**4.** It is appropriate for the thesis to be released on completion of the PhD for the following reasons:

(i) It accords with the normal state of affairs – it is typically a mandatory condition that to be granted a PhD the student must deposit a copy of their thesis in the library to ensure public benefit;

(ii) It enables real openness about the quality of thesis to ensure that the PhD remains a robust qualification. It also ensures that there is transparency about what the threshold is in awarding PhDs;

(iii) It enables academic development to be inspired – freely available material helps young researches and fulfils the academic goal of being read and cited;

(iv) The field that this thesis covers is currently developing. She explained that she was aware of three other individuals writing a PhD in this area whose work was potentially stymied by the holding back of this thesis;

(v) The field that this thesis develops is known to be collegiate and the author is likely to have relied on the work of others, so it is appropriate that her work is available to scrutiny; and

(vi) The field that this thesis develops relates to 'one of the greatest scandals of the last century' and the delay in publication 'disrupt[s] this vital scholarly effort'.

**5.** The interests of the author would not be prejudiced because she had already secured a publication contract and in her view publishers have recognized no detriment in such a process. She does not believe that there is a valid reason for a humanities thesis to be held back as there would be for a commercial thesis. While the disclosure of commercial information could undermine a patent, there is no such undermining in this case and copyright adequately protected the writer

from being usurped. She argued that there was a limited market for expensive books and that there was a limited quantum of loss for the author - particularly as the main market for such books is University libraries that will still want the book. She argued even if the book was a success its sales would be unlikely to be detrimentally effected by the disclosure of the thesis on which the core of it was based.

39. The Commissioner asked the University to respond specifically to the first point above. The University confirmed that the Act has been actively considered throughout the embargoed process. Indeed the individual ensured that the Act was expressly drawn to the attention of the members of staff who were required to provide consent to the embargo and the University has provided the Commissioner with evidence of this. The Commissioner believes that the evidence suggests that the first point is not founded.
40. In deciding whether it is reasonable in this case to withhold the information until the date of intended publication the Commissioner has considered his published guidance on the exemption: Freedom of Information Act Awareness Guidance No 7 – Information Intended for Future Publication.<sup>1</sup>
41. This guidance notes that in assessing reasonableness, *'generally, the sooner the intended date of publication, the better the case for maintaining the exemption'*. In its internal review, the University indicated that the majority of the information would be published in August 2011 – 12 months after the request. It later confirmed to the Commissioner that it intended to publish the thesis itself when the book was published, or when it was sure the book would not be published.
42. The Commissioner has carefully considered the circumstances of this case. He finds that he agrees that it was reasonable to delay publication in this case for the following reasons:
  - The University has allowed the author to embargo the thesis and in the Commissioner's view publishing the thesis before the book was published would be unfair to the author. This is particularly so in these circumstances, because the University's disclosure of the thesis (prior to publication) would be likely to place the author in breach of her publishing contract;
  - The Commissioner is satisfied that the thesis' contents are novel and the commercial impact of the book would be likely to be

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_7\\_-\\_information\\_intended\\_for\\_future\\_publication.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_7_-_information_intended_for_future_publication.pdf)

undermined by the premature disclosure of the thesis. He is aware that copyright would protect her expression of ideas, but would not protect the use of her novel sources;

- He is satisfied that the University has formally agreed to limit the embargo so that it only protects the author's interests up to publication and believes that this is a balanced and reasonable approach in these circumstances (it is noted by the Commissioner that it failed to communicate its position to the applicant by the time of its internal review). He is satisfied that the delay was not too long to achieve this limited purpose; and
  - He has been very aware of the public benefit in the swift publication of PhD theses and the benefit to the academic community; however, he has not been satisfied that it was unreasonable in this field and in these circumstances for publication to be delayed. He is aware that it is a developing field of research, but is not convinced that the waiting of a year will cause real detriment to the public interest in this case.
43. For the reasons outlined above, he is satisfied that the section 22(1) exemption has been engaged. He must now go on to consider the public interest test. Firstly, it is important to note that the Act is a public disclosure regime and therefore the Commissioner is only able to consider whether the information can be disclosed into the public domain, rather than a limited disclosure to the complainant<sup>2</sup>.
44. Section 22(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure.
45. It is important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight the information should be communicated. It is also important to note that just because some members of the public may be interested in the information, does not necessarily mean that the release

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<sup>2</sup> This point was confirmed by the Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) at paragraph 52.

of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public<sup>3</sup>.

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

46. In arguing that the public interest favoured withholding this information, the University asked for the Commissioner to take the following points into account:

1. Given the factual situation noted in paragraph 37 above, it is in the public interest to delay publication in accordance with its stated embargo policy until the book is published;
2. This is enhanced in this case considering the likely damage that premature disclosure would do to the author of the thesis and to the University's reputation when private organisations decide to fund PhD programmes and/or individuals choose where to study for their PhD;
3. In addition, the disclosure of the thesis early would be likely to damage the commercial interests of both the author and the publishing company and upset the integrity of its current embargo procedure. It is in the public interest to delay the disclosure until the book's publication. This would lead to a certain market place for future publishers and protect the rights of future students;
4. The University's reliance on section 22 is only for a small specific amount of time and this enhances the public interest in waiting for publication; and
5. A number of respondents whose comments were included in the thesis were provided to the author on the basis that disclosure would be managed by that individual. As the individual wishes to expand on their research, then the disclosure of the thesis early could lead to a breakdown in the relationship between themselves and these individuals and this may cause further unjustified damage to the author's academic career. The undermining of sources due to premature disclosure is also not in the public interest.

47. The Commissioner has noted above why he believes that the factors outlined above have some weight. He accepts that there are public

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<sup>3</sup> *Department of Trade and Industry v Information Commissioner* (EA/2006/0007) at paragraph 50.

interest factors that favour the maintenance of the exemption due to the specified circumstances of this case. He will discuss his weighting in more detail after considering those factors that favour the disclosure of the information.

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

48. The University acknowledged that the key principles that lie behind the Act are transparency and accountability. The Commissioner agrees with the complainant that these factors are enhanced by the context of the withheld information being a completed PhD thesis that has been submitted and accepted by the examination board. He accepts that there are strong arguments about the academic context and the necessity to disseminate knowledge and to ensure the transparency of PhD standards. He believes that these arguments should have a strong weight.
49. The Commissioner appreciates that this is a case where there are considerable legitimate interests for the public. He has been satisfied that the thesis is about an area of great public interest, that the academic research in its area is sparse and that in normal circumstances it would be expected that once a thesis was accepted that the information should be disclosed. In addition, the arguments about the publication of a thesis being a condition of the PhD award are very strong. The University's Regulations explain that:

*'After the thesis has been approved by the Examiners a copy must be submitted to the University library... and made available.'*

50. However, in the Commissioner's view, the weight of the factors above are substantially mitigated by the fact that the information will be released to the library once the book is published (or confirmed that it will not be published).
51. In arguing that the public interest lay in disclosure the complainant wanted the Commissioner to consider the following further arguments that can be dealt with swiftly:
  - Only a partial disclosure was required: the thesis rather than the book. This argument is misguided as only the thesis is held by the University and he is considering the full disclosure of it;
  - She argued that only a limited release was necessary because she only wanted the thesis to be placed in the library. This argument is also misguided because the Act is a public disclosure

regime and access to the thesis under it would mean its full disclosure to the world; and

- That any prejudice to the author was negligible. The Commissioner for the reasons outlined above does not agree that the prejudice was negligible.

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

52. The Commissioner's guidance note on section 22 explains that because the application of this exemption presupposes that the requested information will be disclosed, in balancing the public interest the focus is not on the harm that may arise from release of the information itself. Rather the balance of the public interest must focus on whether in the circumstances of the case it would be in the public interest for the public authority to keep to its original timetable for disclosure or whether the public interest would warrant an earlier disclosure.
53. The Commissioner has carefully balanced the public interest in the earlier disclosure causing greater transparency and accountability against the significant adverse impact to the author, the publisher and the University if its embargo process was undermined in these circumstances. While there are strong arguments on both sides, he has come to the conclusion that the stronger arguments on 7 September 2010 favoured the maintenance of the exemption.
54. Therefore, the Commissioner believes that in the circumstances of this case the public interest in maintaining the exemption contained at section 22(1) of the Act outweighs the public interest in disclosing the requested information.
55. For the avoidance of doubt, the Commissioner has also considered whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged. He has concluded that the weight of the arguments favours the maintenance of the exemption to the whole of the thesis.
56. For all the reasons above, he therefore determines that the exemption found in section 22(1) has been applied correctly and does not uphold the complaint.
57. As one exemption was applied correctly, he has not therefore been required to go on to consider the operation of sections 40(2) [third party personal data] or section 43(2) [prejudice to commercial interests].

## **The Decision**

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58. 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 correctly applied section 22(1) to the disputed information and it did not need to be disclosed.

## **Steps Required**

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59. The Commissioner requires no steps to be taken.

## Right of Appeal

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60. 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)

61. 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.

62. 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 13<sup>th</sup> day of June 2011**

**Signed .....**

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

## Legal Annex

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### The Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

(1) 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.

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

(3) 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 10 - Time for compliance with request

(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid 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.

(3) 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.

(4) 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.

(5) Regulations under subsection (4) may—

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

(6) 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom

...

## **Section 17 - Refusal of request**

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) A notice under subsection (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.

## **Section 22 – Information intended for future publication**

- (1) Information is exempt information if-
- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
  - (b) the information was already held with a view to such publication at the time when the request for information was made, and
  - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

## **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).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) 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)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- "the data protection principles" means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- "data subject" has the same meaning as in section 1(1) of that Act;
- "personal data" has the same meaning as in section 1(1) of that Act.

### **Section 43 - Commercial interests**

(1) Information is exempt information if it constitutes a trade secret."

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).