

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 November 2024

**Public Authority:** Department for Business and Trade ("DBT")  
**Address:** Old Admiralty Building  
London  
SW1A 2DY

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on the parties lobbying for and against proposed legislation regarding audit and corporate governance after the publication of a particular draft of the statutory instrument. DBT provided information with redactions withheld in reliance on FOIA section 36 – Prejudice to the effective conduct of public affairs; section 43 – Commercial interests; section 41 – Information provided in confidence and section 40 – Personal information.
2. The Commissioner's decision is that DBT has appropriately relied on FOIA exemption 36(2)(b)(ii) – Prejudice to the effective conduct of public affairs and section 40(2) – Personal information.
3. The Commissioner finds that DBT has breached FOIA section 10(1) (time for compliance) by failing to provide the complainant with the information it subsequently disclosed, within 20 working days. It has also breached FOIA section 17(1) by failing to provide a refusal notice within 20 working days.
4. The Commissioner does not require further steps to be taken.

#### **Request and response**

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5. On 17 October 2023 the complainant wrote to DBT and requested information in the following terms:

"I am writing to request information. It relates to the proposed "Corporate reporting: The Draft Companies (Strategic Report and Directors' Report) (Amendment) Regulations 2023", which was published in July 2023:

<https://www.legislation.gov.uk/ukdsi/2023/9780348250220/contents>

A guidance note on the Statutory Instrument was published by the Department on 19th July 2023<sup>1</sup>:

<https://www.gov.uk/government/publications/new-transparency-over-resilience-and-assurance-for-big-business/corporate-reporting-the-draft-companies-strategic-report-and-directors-report-amendment-regulations-2023>

The legislation was due to be debated in the House of Lords today but was withdrawn at the last minute. A note on the[sic] today's business papers said that "the Department for Business & Trade withdrew the "Companies (Strategic Report & Directors' Report) (Amdt) Regulations 2023" that were due to be debated today". No other information has been given to parliament.

As an interested party (member of the House of Lords), I would be grateful for the following information and related documents:

- 1) Names of the parties that lobbied for and against the proposed legislation in person or in writing, after the publication of the statutory instrument.
  - 2) Dates on which Ministers and/or DBT officials met the parties.
  - 3) All documents and correspondence relating to the above."
6. DBT responded on 12 January 2024. It stated that it held information within the scope of the request but the information was withheld in reliance on FOIA section 36(2)(b)(ii).
  7. Following an internal review request on 26 January 2024 DBT wrote to the complainant on 23 May 2024. It stated that it was revising its initial response and confirmed that the only information it held in the scope of the request was one letter from an external party, the name of which was not disclosed, and DBT's response to that letter and provided the date of a Ministerial meeting with external parties in respect to the second point of the request. DBT provided redacted copies of the letters which disclosed the external party's views on the future of the UK's audit

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<sup>1</sup> This link was updated on 20 October 2023 after the date of the request.

and corporate governance regime and its concerns about the UK's attractiveness as a location for medium and large sized public and private business. DBT, in addition to section 36(2)(b)(ii), also relied on sections 43(2); 41(1) and 40(2) to make limited redactions to the letters.

## Scope of the case

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8. The complainant contacted the Commissioner on 19 June 2024 to complain about the way their request for information had been handled. They explained:

"I disagree with the Department of Business and Trade's (DBT) interpretation of "public interest" and deny information which has been withheld.

The requested information would arguably have enabled parliament to hold Ministers to account and ask searching questions about how legislation is drafted and then suddenly withdrawn.

It is doubtful that parties lobby government with a specific request that their identities and requests must remain secret. It is a common practice for government departments to place all correspondence on the public record.

It is unlikely that the lobbying parties (in this case significant parties) would be acting unilaterally. They may well have intervened at the request, or on behalf of other parties. If so, their interventions would be known to that group. Thus, the information is likely to have been shared, and it is hard to believe that the details are now considered to be private. Even if the lobbying party requested non-disclosure, the intervention relates to policies and affects the ability of parliament to hold Ministers to account. Secrecy of such matters subverts parliament's ability to act and hold government to account."

9. The Commissioner considers that the scope of his investigation is to determine whether DBT is entitled to rely on the exemptions listed to withhold the requested information.

## Reasons for decision

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### Section 36 – Prejudice to the effective conduct of public affairs

10. Section 36(2)(b)(ii) of FOIA/EIR states:

“(2) 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...

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

(ii) the free and frank exchange of views for the purposes of deliberation,”

11. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
12. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. When deciding on the reasonableness of the qualified person’s opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. Any arguments advanced by the qualified person should not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
13. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against.
14. The Commissioner notes that this exemption is about the process which may be inhibited, rather than the specific content of the information. He considers that the issue is whether it is reasonable to conclude that disclosure would or would be likely to inhibit the processes of the free and frank exchange of views.
15. DBT advised the Commissioner that the qualified person in this instance was Kevin Hollinrake MP, the Department’s then Minister for Enterprise, Markets and Small Business. The Commissioner is satisfied that, as an appropriate Minister of the Crown, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
16. The opinion was sought on 27 October 2023. Minister Hollinrake was provided with a submission explaining why the exemption applied, copies of the withheld information and the public interest considerations for and against disclosure. DBT provided the Commissioner with a copy of the submission.

17. The qualified person's opinion must consider whether the relevant prejudice or inhibition would, or would be likely to, occur. 'Would prejudice' means that it is more likely than not (ie a more than 50% chance) that prejudice would occur. 'Would be likely' is a lower standard which means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.
18. On 2 November 2023 Minister Hollinrake's office responded confirming the Minister's approval of the use of the exemption and that disclosure would be likely to inhibit the free and frank exchange of views. DBT provided the Commissioner with a copy of the relevant email.
19. Minister Hollinrake agreed with the recommendation in the submissions that the prejudice would be likely to occur.
20. DBT explained:

"There is a real concern that the nature and quality of the exchanges with the Department by external parties would be likely to be inhibited and third parties would likely feel constrained in presenting free and frank exchanges, absence of which would be likely to impede free and frank exchanges of views for the purposes of deliberation."
21. However the Commissioner notes that DBT has not advised that the qualified person was consulted again at the time of the internal review when the disclosures were made, albeit this is not a requirement.
22. The Commissioner is satisfied that the arguments presented in the submission to the qualified person, and in submissions to the Commissioner, are ones that relate to the activities described by the exemption cited. The Commissioner has considered the level of likelihood of prejudice attributed by the qualified person and agrees that the lower threshold of 'would be likely to' prejudice has been met on the basis that it was reasonable for him to conclude, based on the material provided to him, that there is a real chance of prejudice occurring. He therefore accepts that the qualified person's opinion is reasonable. Consequently he has found that section 36(2)(b)(ii) is engaged.

### **Public interest test**

23. Section 36 is a qualified exemption, which means that, even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest test is separate from the qualified person's opinion. The qualified person need not carry out the public interest test themselves, but may do so.

24. The Commissioner's guidance explains that the qualified person's opinion will nevertheless affect the consideration of the arguments for maintaining the exemption, and appropriate weight should be given to their opinion that the prejudice or inhibition would or would be likely to occur. The Commissioner, having accepted as reasonable that prejudice would be likely to occur, will attach the appropriate weight in his considerations.

**The public authority's view**

25. DBT explained:

"We acknowledge that transparency improves engagement between the public and government and that it is desirable that the public can satisfy themselves that decisions are taken on the basis of the best available information. For this reason, we accept there is a general public interest in transparency in Government and in the policy-making and decision-making process. While the information we are continuing to withhold is very narrow in scope, we accept that disclosure of the names of parties lobbying Ministers could help serve this public interest in transparency."

26. Balanced against this DBT explained that the information it holds contains information provided 'freely and frankly' by a third-party, under an expectation that it would be treated in confidence.

"If this information was released it would be likely to inhibit the free and frank provision of commercially sensitive information in the future, since both the parties involved and other business stakeholders could reasonably conclude that they could not communicate similarly sensitive information to Government Ministers because both that information and their names could be disclosed. This would impact Government's ability to obtain information useful to fully consider and deliberate potential issues before reaching any well informed and considered decisions."

27. DBT added that disclosure would likely inhibit both the third-party who made representations to the Government in this case and other external parties from making candid and frank representations to Ministers in future about areas of policy or other concerns. It considers that this would undermine the quality of Government policy and decision making since it would not benefit to the same extent from free and frank views provided by external parties. It explained that such views can often provide valuable insights or evidence that has not been identified solely by internal deliberation and which can result in better policy outcomes that serve the public interest.

28. DBT also holds the view that disclosure of the redacted information would likely contribute towards a chilling effect on discussions between Ministers, officials and external third parties on matters of policy development.

### **The complainant's view**

29. The complainant drew the Commissioner's attention to a press release of 16 October 2023<sup>2</sup> which includes comment from various parties - London Stock Exchange; the Capital Markets Industry Taskforce, UK Finance, Lloyd's and TheCityUK. The complainant considered that these parties were "privileged" and advised:

"They knew that the legislation would be withdrawn before any hint to parliament. The DBT press release is unlikely to have precluded "free and frank exchange of views" with these parties on this of[sic] any other issue. Therefore, it is hard to believe that the release of the withheld information would somehow preclude "free and frank exchange of views.

... The withholding of information on the other hand does preclude 'free and frank' exchange of views in parliament, by various stakeholders and the public,"

30. The complainant pointed out that the "dropped legislation" was in line with the direction set out in the Government's response to its "Restoring trust in audit and corporate governance" White Paper issued in June 2022<sup>3</sup>. The complainant added:

"... the legislation was developed after extensive consultation and parliamentary time was set aside to consider it. Therefore, it is reasonable to assume that the government intended to press ahead with it. At no time between the June 2022 White Paper, 19 July 2023 guidance note, the publication of the Statutory Instrument and before the sudden withdrawal of the legislation, the government indicated that it had any reservations about the Statutory Instrument. The reply from DBT suggests that there were some late external interventions."

### **The balance of the public interest**

31. The Commissioner considers that there is a public interest in Government departments operating in an open and accountable manner. He believes that greater transparency leads to better public understanding of particular issues and enables the public to participate in the decision making process where possible. It therefore follows that

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<sup>2</sup> <https://www.gov.uk/government/news/burdensome-legislation-withdrawn-in-latest-move-to-cut-red-tape-for-businesses>

<sup>3</sup> <https://assets.publishing.service.gov.uk/media/6294ab378fa8f5039107d54d/restoring-trust-in-audit-and-corporate-governance-govt-response.pdf>

transparency of government departments' actions must carry weight when balancing the public interest.

32. The Commissioner has considered the complainant's comments and understands their interest and concern regarding the issue and the change of direction which took place.
33. The Commissioner can understand why the complainant considers that various parties had influenced the decision in noting the comments referenced in the press release of 16 October 2023. The Commissioner noted the limited amount of information held by DBT in the scope of the request and asked for further explanation of this following the comments cited in the press release. DBT explained:

"The internal decision to withdraw the SI was taken on 12th October. Most of the stakeholders referenced in the press notice did not lobby HMG on the SI. Those parties were approached for quotes after the decision to withdraw the SI had been taken."

34. DBT explained that the information in the scope of the request which has been disclosed explicitly mentions the Capital Markets Industry Taskforce ("CMIT") meeting with HM Treasury ("HMT") Ministers about the Statutory Instrument and can be cross-referenced with HMT's Ministerial meeting disclosures of 6th September 2023<sup>4</sup> to identify all the parties at that meeting.
35. Furthermore the Commissioner pointed out to DBT that lobbying may have taken place with other Government departments, in particular HMT and the request asks for information on parties lobbying for and against the proposed legislation. The request is not limited only to lobbyists contacting DBT therefore if DBT holds information (i.e. passed to DBT from HMT or other departments) on the lobbying it would be caught by FOIA because DBT would then hold that information. DBT stated:  
  
"DBT can confirm that the [disclosed] letter and the DBT reply to [named party] is the only information in scope of the FoI request that the Department holds, and that no other parties lobbied the DBT in person or in writing about the regulations.

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[https://assets.publishing.service.gov.uk/media/65f42ddbfa185100110117bc/Treasury\\_Ministerial\\_Transparency\\_Meeting\\_June-Sept2023.csv/preview#:~:text=Roundtable%20with%20Money%20Laundering%20Reporting%20Officers%20of](https://assets.publishing.service.gov.uk/media/65f42ddbfa185100110117bc/Treasury_Ministerial_Transparency_Meeting_June-Sept2023.csv/preview#:~:text=Roundtable%20with%20Money%20Laundering%20Reporting%20Officers%20of)



HMT subsequently disclosed the names of all the organisations that attended the 06.09.23 meeting, as part of HMT's quarterly disclosures of Ministerial meetings."

36. The Commissioner must therefore accept that the limited information which he has seen which comprises the same information, albeit with limited redactions, disclosed to the complainant, is the only information held by DBT in the scope of the request.
37. The Commissioner has considered the redactions in the letter and the Government response letter, for names of the third party companies and the content of the information. In the circumstances of this case he considers that disclosure of the names and the information are inextricably linked and contain commercially sensitive information such that he accepts that free and frank discussion would likely be inhibited.
38. The Commissioner notes that the press release of 16 October 2023 alongside proactive disclosures and the information placed in the public domain at the time of the internal review have assisted meeting the public interest in transparency and to some extent the understanding of the reasons for Government withdrawing the draft regulations. He is also mindful of the very recent age of the withheld information at the time of the request which adds weight to maintaining the exemption.
39. Regarding the complainant's comment in paragraph 29 in respect of precluding free and frank exchanges of views in parliament, the Commissioner considers that Parliamentarians have ways to hold Government to account other than relying on information disclosed into the public domain via FOIA.
40. The Commissioner has carefully considered the withheld information and the balance of the public interest. He considers that DBT has made a strong case in favour of withholding the redacted information. He accepts that disclosure of the withheld information would be likely to result in inhibiting the free and frank exchange of views between Ministers and third-parties which in turn would be likely to impair the quality of deliberation before final decision making, and would not serve the public interest.
41. The Commissioner is unable to provide further detail on his assessment without revealing the content of the withheld information. After careful consideration he has found the public interest for section 36(2)(b)(ii) to be finely balanced in this case. He accepts that understanding such a change in direction of Government with regard to the draft regulations has a weighty public interest particularly in the circumstances described by the complainant. However, the Commissioner has focussed on the particular withheld information and the limited, potential incremental benefit to the general public of disclosure of that information and

weighed that against the likely prejudice as a result of disclosure. In doing so he has determined that, by a narrow margin, the public interest is best served by maintaining the exemption.

## **Section 40 – Personal information**

42. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
43. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('GDPR').

44. DBT explained:

"The two documents in scope contain a name of an external individual, their job title, their email address and signature and an email address of a DBT official (the Deputy Director). The Department is applying section 40(2) to this information within the documents.

The external party whose name appears in the documents falls in the realm of both junior and middle management. The external party has not consented to the release of their name, and it is reasonable to accept that they would have no expectation that their personal information would be released in response to a FOI request given the level of their seniority and the nature of their responsibilities and accountability as an employee."

45. Regarding public sector employees the Commissioner's guidance<sup>5</sup> at page 12 explains:

"It is reasonable to expect that public authorities disclose more information about senior public authority employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds. For example, a junior employee who is not accountable for their submissions to a senior

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<sup>5</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

government minister has no expectation that their name will be disclosed in response to an FOI request.”

46. The Deputy Director’s name has been disclosed with only his contact details and personal signature withheld. The external party’s employee is not a senior member of staff and therefore the Commissioner agrees with DBT’s explanation in paragraph 44 above. The Commissioner also notes that the external individual’s name may be used to identify the party information which he has determined should be withheld under section 36(2)(b)(ii).

47. In the case of an FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

48. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>6</sup>

49. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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<sup>6</sup> Article 6(1) goes on to state that:- “Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”. However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- “In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

50. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

51. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
52. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
53. In this case the Commissioner is satisfied that the complainant's request was made in pursuit of a legitimate interest in order to understand the Government's change in position with regard to the proposed legislation.

### **Is disclosure necessary?**

54. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
55. In the circumstances of this case the Commissioner considers that disclosure is necessary as there is no other way to provide transparency about the identity of the external party's involvement, given that the Commissioner has found that the company names are exempt under section 36(2)(b)(ii).

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

56. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
57. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an

individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

58. DBT explained that the external party has not consented to the release of their name and it is reasonable to accept that they would have no expectation of the disclosure of their name and contact details in response to an FOIA request given their level of seniority and nature of their responsibilities.
59. In the overall balancing test the Commissioner finds that disclosure would not be fair in the particular circumstances of this case. This has been informed by both the Commissioner's finding on the names of the companies concerned and the reasonable expectations of the individual concerned. Having found it to be lawful and fair to withhold company names under section 36 he must also find it lawful and fair to withhold the individual connected to those companies under section 40(2).
60. In this case the Commissioner considers that disclosing the information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK GDPR. DBT was therefore correct to apply section 40(2) of FOIA to this request.
61. As the Commissioner has decided that the information redacted has been appropriately withheld in reliance of sections 36(2)(b)(ii) and 40(2) he has not gone on to consider sections 41 and 43.

## **Procedural matters**

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62. Section 1(1) provides that any person making a request for information to a public authority is entitled, subject to exemptions;
  - (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 the information communicated to him.
63. Section 10(1) provides that public authorities must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
64. Section 17(1) provides that a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
65. In this case DBT provided the complainant with its substantive response after 59 working days. The Commissioner has therefore found that the delay in in issuing its refusal notice in respect of the information it was seeking to withhold resulted in DBT breaching FOIA section 17(1).

## **Other matters**

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66. Although FOIA does not impose a statutory time within which internal reviews must be completed, the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days. In particular circumstances, for example when addressing complex issues or consulting with third parties, he accepts that more time may be required. This should be no more than an additional 20 working days, unless there are legitimate reasons why a longer extension is necessary.
67. In this case the complainant asked for an internal review of the outcome of their request on 26 January 2024. DBT did not provide the results of its review until 23 May 2024, 280 working days later. The Commissioner considers this to be an unreasonable delay for the complainant who had already suffered a delay in the provision of an initial response.

## **Right of appeal**

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68. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

69. 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.

70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**