

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 March 2009

Public Authority: Foreign and Commonwealth Office ('FCO')
Address: Old Admiralty Building
Whitehall
London
SW1A 2PA

Summary

The complainant requested information from the Foreign and Commonwealth Office ('FCO') about its analysis of an article which appeared in the *Lancet* medical journal about the level of civilian casualties in Iraq following the invasion in May 2003. The FCO provided the complainant with some information but withheld further information on the basis of the exemptions contained at section 21, 23, 27 and 35 of the Act. The Commissioner has concluded that a number of documents are exempt from disclosure on basis of section 21 (information accessible to the applicant by other means), 23 (information relating to or supplied by security bodies), 27(1)(a) (international relations), 35(1)(a) (formulation of government policy) and 35(1)(b) (ministerial communications).

However, the Commissioner has also concluded that the FCO has incorrectly applied section 21 as a basis to withhold one document which is not reasonably accessible to the complainant by other means. The Commissioner has also ordered this information to be disclosed. The Commissioner has also concluded that a number of documents are not exempt from disclosure on the basis of section 35(1)(a) because they do not relate to the formulation or development of government policy. The Commissioner has also ordered this information to be disclosed.

In handling this request the Commissioner has concluded that the FCO committed procedural breaches of sections 1(1)(b), 10(1), 17(1) and 17(1)(b) of the Act.

The Commissioner's Role

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

The Request

2. The complainant submitted the following request to the Foreign and Commonwealth Office ('FCO') on 1 January 2005:

'The Lancet recently published a report into the number of deaths caused by military action in Iraq...

On the Today programme on Radio 4, the Foreign Secretary said government epidemiologists and statisticians were looking at this report...The Prime Minister later stated in Parliament that the Government did not accept the figures put forward by The Lancet...

I would like to make a request under the Freedom of Information Act for factual information, comments or opinion about:

- o The Lancet report
 - o The Foreign Secretary and/or Prime Minister's comments on the Lancet report
 - o The feasibility, accuracy, and results of any assessments made by the UK government of the number of direct and indirect casualties in Iraq
 - o Any other assessments of which the government is aware, including, but not limited to:
 - o The Iraq Body Count organisation
 - o The Iraqi Ministry of Health
 - o Any assessment made by the United States government'.
3. On 16 February 2005 the FCO responded to the complainant's request and provided him with copies of the then Foreign Secretary's statement of 17 November 2004 concerning the Lancet report in question as well as the Iraqi Ministry of Health's (MOH) statements of 1 November 2004 and 28 January 2005 concerning casualty figures. However, the FCO also explained that it was withholding a number of further documents on the basis of the exemptions contained at sections 27(1), 27(2) and 35(1)(a) of the Act. The FCO also informed the complainant that it:

'could neither confirm or deny that the disclosed information and that covered by the above exemptions represents all of the information that would meet your request, as the duty contained at section 1(1)(a) of the Act does not apply to information by virtue of section 23(5) and section 24(2) of the Act. To the extent that section 24(2) applies, the FCO has determined 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 confirming whether the FCO holds the information...However, this should not be taken as conclusive evidence that any further information that would meet your requests exists or does not exist'.

4. The complainant asked the FCO to conduct an internal review of its decision to withhold some of this information on 23 February 2005.
5. The FCO contacted the complainant on 26 May 2005 and explained that it had conducted an internal review and concluded that all of the information withheld on the basis of section 35(1)(a) and sections 27(1) and 27(2) of the Act had been correctly withheld. Furthermore, the FCO explained to the complainant that:

‘I am satisfied that the information I have assessed in relation to your request is all the information held by the FCO relating to this issue. I can therefore confirm to you that, barring the information already released to you and those documents exempt from disclosure, no further information of relevance to your request exists’.¹

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 12 July 2005 in order to complain about the FCO's decision to refuse to disclose the information that he had requested.
7. The complainant did not ask the Commissioner to consider the FCO's initial reliance on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any further information falling within the scope of his request; in fact the Commissioner understands that the FCO effectively withdrew its reliance on these exemptions as a basis to refuse to confirm or deny whether any further information was held by stating in its internal review outcome that it did not hold any further information relevant to this request bar that already disclosed to the complainant or withheld on the basis of sections 27 and 35. (In fact during the course of the Commissioner's investigation the FCO explained that it was still seeking to rely on section 23(1) to withhold two documents, but not to confirm or deny whether it held these documents). Therefore the scope of the Commissioner's investigation has been to decide whether the documents that have been withheld are exempt from disclosure on the basis of the exemptions contained at sections 21, 23, 27 and 35 of the Act. (Although the FCO did not cite section 21 in either its refusal notice or its internal review it subsequently informed the Commissioner that it considered a number of documents to be exempt from disclosure by virtue of this exemption).
8. The Commissioner recognises that a significant period of time has passed since the complainant first made his request to the FCO and his subsequent section 50 complaint to the Commissioner. Clearly, the FCO's subsequent decision to disclose some of the information that it initially withheld (as detailed in the

¹ The Commissioner notes that the FCO's refusal notice did **not** include any reference to whether it considered some of the information exempt by virtue of sections 23 or 24 of the Act, or as set out in its refusal notice whether it was still relying on sections 23(5) and 24(2) of the Act to refuse to confirm or deny whether any further information was held.

chronology below) reflects the fact that information that may have been exempt in January 2005 when the complainant made his first request is, given the passage of time, no longer be exempt.

9. However, in assessing section 50 complaints the Commissioner's role is to consider the application of the exemptions and balance of the public interest test based upon the circumstances as they existed **at the time of the request**. This approach is in line with that adopted by the Information Tribunal in its decision in the case *Department for Business, Enterprise and Regulatory Reform v Information Commissioner (EA/2007/0072)*. At paragraph 110 of this decision the Tribunal stated 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'.
10. In certain cases if a complainant is provided with information during the course of the Commissioner's investigation he will not consider the public authority's application of exemptions to information that has subsequently been disclosed; in effect the Commissioner will treat these sections of the complaint to be informally resolved and a formal conclusion in the form a decision notice need not be made. However, in this case although the FCO has now provided the complainant with 10 of the 30 documents falling within the scope of his request, as a number contained significant redactions the Commissioner does not believe that these documents have been provided to the complainant in a form so that it is possible to conclude that this aspect of his complaint has been informally resolved. Therefore, the decision notice which follows includes a consideration of whether all 30 documents originally withheld by the FCO were exempt from disclosure on 1 January 2005.

Chronology

11. The Commissioner and the FCO exchanged correspondence between October 2006 and October 2008 in relation to this case. The Commissioner has detailed the key correspondence below:
12. On 9 October 2006 the Commissioner asked the FCO to provide it with a copy of the information that had been withheld from the complainant.
13. The Commissioner received a response from the FCO on 31 January 2007 in which it enclosed the 28 of the 30 documents that fell within the scope of the complainant's request but had been not been disclosed.² The FCO also provided the Commissioner with an indication as to which exemptions it considered each document to be exempt from disclosure under. (These documents, along with details of exemptions the FCO considers to apply to each are detailed in an annex attached to this notice).
14. In May 2007 the Commissioner contacted the FCO and explained that the complainant had highlighted the FCO's recent response to another request under the Act for information similar to that which he had requested, and noted that the

² The documents not provided the Commissioner are those numbered 20 and 21 which the FCO withheld on the basis of section 23(1). – Had FCO not withdrawn its reliance on s23 by the time of the internal review?

FCO had disclosed some information in response to this request. (This further request related to the FCO's analysis of another more recent report in the Lancet on causalities in Iraq which appeared in October 2006.) The Commissioner therefore asked the FCO for its comments in light of this disclosure as to whether it would re-consider its original decision to withhold the 30 documents falling within the scope of the complainant's request.

15. On 8 June 2007 the Commissioner formally asked the FCO for a copy of the information that had been disclosed in response to this related request; the FCO subsequently provided the Commissioner with these documents.
16. Having reviewed these disclosures, on 31 August 2007 the Commissioner asked the FCO to formally re-consider its decision to refuse the complainant's request in this case in its entirety.
17. A meeting took place on 12 October 2007 between the Deputy Commissioner and representatives of the FCO at which the nature of the information withheld on the basis of section 23(1) was discussed.
18. Further to this meeting, on 23 November 2007 the Commissioner was provided with a draft version of a letter from Director General of Defence & Intelligence at the FCO confirming that she had viewed the information that had been withheld on the basis of section 23 and confirmed that she was fully satisfied that the exemption had been correctly applied. The Commissioner was subsequently provided with a signed version of this letter from Director General.
19. On 27 February 2008 the FCO informed the Commissioner that it had re-evaluated its initial decision to refuse to disclose the remainder of the documents relevant to this request in light of the recent disclosures of information in response to the related request. The FCO maintained its position that at the time of the complainant's request in January 2005 it was correct to withhold the documents on the basis of either sections 21, 23, 27 or 35 of the Act. However, in the spirit of transparency it was prepared to disclose a number of these documents on the basis that the information had now been placed in the public domain or that the public interest no longer favoured withholding these documents. Although the FCO made it clear that the majority of the documents falling within the scope of the complainant's request remained exempt on the basis previously indicated by the FCO.
20. On 13 October 2008 the FCO provided the complainant with 10 of the documents that fell within the scope of his request; albeit that all of these documents had a number of redactions made to them. (The documents that have been disclosed are indicated on the attached annex).

Findings of fact

21. The article which the complainant refers to in his request (*'Mortality before and after the 2003 invasion of Iraq: cluster sample survey'*) was published in the 29 October 2004 edition of the medical journal, the Lancet. The focus of this article was the findings of the cluster sample survey which compared the level of civilian

- mortality in Iraq during the period of 14.5 months before the invasion with the 17.8 months after it. The article included a number of findings including the fact that the risk of death from violence in the period after the invasion was 58 times higher than in the period before the invasion and that based on conservative assumptions, around 100,000 excess deaths or more have happened since the 2003 invasion.³
22. The figures quoted in this article significantly exceeded those previously reported in the media and led to the Foreign Secretary making a statement to Parliament on 18 November 2004 which outlined the Government's views on the Lancet article.
 23. In the 21 October 2006 edition of the Lancet, a further related article was published. This was entitled: '*Mortality after the 2003 invasion of Iraq: a cross-sectional cluster sample survey*'.⁴ On the basis of further surveys this article sought to update the estimates provided in the previous article published in the Lancet in October 2004.
 24. It was this second article which was the focus of the related freedom of information request which is referred to in paragraph 14 above. This request, which was submitted in November 2006, was similar in content to the request which is the focus of this notice and read: 'I would like to see the Foreign Office's analysis of the Lancet report on casualties on Iraq'. In March 2007 the FCO disclosed 12 documents in response to this request. This information comprised briefings for Parliamentary questions submitted on this issue, interdepartmental emails discussing the accuracy of the figures quoted in the Lancet article and an article which appeared in another science journal discussing the Lancet article.

Analysis

Exemption

25. The Commissioner has considered below the application of the various exemptions cited by the FCO to the 30 documents listed in the annex. In some cases the Commissioner has found it necessary to consider the application of exemptions on a document by document basis (for example section 21) however, for other exemptions the Commissioner has decided that it is appropriate to consider whether a particular exemption applies to a set of documents (e.g. section 35(1)(b)).
26. As is clear from the attached annex, the FCO has argued that for a number of documents more than one exemption applies. For these documents the

³ The Lancet, Volume 364, Issue 9448, Pages 1857 - 1864.

This article can be viewed online at: [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(04\)17441-2/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(04)17441-2/fulltext)

⁴ The Lancet, Volume 368, Issue 9545, Pages 1421-1428.

This article can be viewed online at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(06\)69491-9/fulltext#article_upsell](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(06)69491-9/fulltext#article_upsell) .

Commissioner has addressed what he considers to be the most appropriate exemption and if he has concluded that the first exemption applies the Commissioner has not gone on to consider the application of any further exemptions. For example, as the Commissioner has concluded that document 22 is exempt from disclosure on the basis of section 27(1)(a) he has not gone on to consider whether this document is also exempt from disclosure on the basis of section 35(1)(a) of the Act.

Section 21

27. Section 21 states that information is exempt from disclosure if it is reasonably accessible to the applicant by other means.
28. The FCO has argued that documents 2, 6 and 11(iv) are exempt from disclosure on the basis of section 21.
29. Document 2 consists of the Foreign Secretary's statement to the House of Commons on 17 November 2004 regarding the Lancet article. The Commissioner accepts that this information is exempt from disclosure on the basis of section 21 because it is reasonable to argue that the complainant could access this statement at the online version of Hansard.⁵ (However, the Commissioner understands that in addition to applying section 21 to this document, the FCO also provided the complainant with this document when initially responding to his request.)
30. Document 6 comprises a number of internal FCO emails the contents of which include extracts from both the Prime Minister's and Foreign Secretary's interviews on the *Today* programme on BBC Radio 4. The emails also contain a small amount of commentary from FCO officials on the interviews in question. Although the Commissioner accepts that at the time of the request the complainant may have been able to access the transcripts from the BBC for the interviews in question, he would not have been able to access the comments contained in the remainder of the document which were made by FCO officials. Therefore, the Commissioner disagrees with FCO that document 6 could be said to be reasonably accessible to the complainant and therefore it is not exempt from disclosure under section 21 of the Act. (Although the Commissioner accepts that other exemptions may apply to the document, the FCO has not cited any further exemptions and therefore the Commissioner's conclusion is that this document should be disclosed.)
31. With regard to document 11(iv), as this comprises the full transcript of the Foreign Secretary's interview on the *Today* programme and such a document was reasonably accessible to the complainant at the time of his request by contacting the BBC archives, the Commissioner accepts that section 21 applies to this document.

⁵ This statement can still be viewed at: http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=iraq%20lancet&ALL=iraq%20lancet&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=41117-40_spm1&URL=/pa/ld200304/ldhansrd/vo041117/text/41117-40.htm#41117-40_spm1

Section 23

32. The FCO has argued that documents number 20 and 21 are exempt from disclosure by virtue of section 23(1).
33. The parts of section 23 which are relevant to this request are reproduced in the legal annex attached to this notice.
34. On the basis of the letter provided by the Director General of Defence & Intelligence at the FCO referred to at paragraph 18, the Commissioner is satisfied that section 23(1) has been correctly applied to documents 20 and 21 because the information contained within these documents was provided to the FCO either directly or indirectly by one or more of the bodies listed in section 23(3) or relates to one or more of the bodies specified in section 23(2).
35. This exemption is an absolute exemption and is therefore not subject to a public interest test.

Section 27

36. The FCO has explained to the Commissioner that it believes that a number of documents are exempt from disclosure on the basis of **both** sections 27(1) and 27(2). These sections of the Act state that:

'27 - (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held'.

The FCO's position

37. The FCO has not indicated to the Commissioner exactly which sub-section of 27(1) it is relying on. However, on the basis the arguments advanced by the FCO

- to support its reliance on section 27 of the Act, the Commissioner understands that the FCO is seeking to rely on section 27(1)(a) and also 27(1)(d).
38. In its submissions to the Commissioner the FCO conflated its arguments in relation to sections 27(1) and section 27(2) and did not draw a clear distinction between the those which it considered to apply to section 27(1) and those which it considered to apply to section 27(2).
39. However, the Commissioner believes that the FCO's arguments can be summarised thus: the effective conduct of international relations on Iraq policy depends upon maintaining trust and confidence between Governments and international organisations. The relationship of trust allows for the free and frank exchange of information on Iraq policy on the understanding that it will be treated in confidence. If the UK does not maintain this trust and confidence, its ability to protect and promote UK interests through productive international relations will be hampered. The material falling within the documents which the FCO considers to be exempt from disclosure was provided in confidence either by the Iraqi or US Governments, and as the subject of civilian casualties in Iraq is a sensitive subject with these governments, in the FCO's opinion disclosure of this information would be likely to prejudice relations between the UK and the Iraqi and US governments, as well as hampering the chances of further information being passed to the UK.

The Commissioner's position

40. The Commissioner has begun by considering whether the relevant documents are exempt from disclosure on the basis of section 27(1)(a).
41. Section 27(1)(a) is a prejudiced based exemption. This means information is not simply exempt by virtue of its status – as with the exemption contained at section 23(1) – rather it has to be demonstrated that a certain level of harm to the area the exemption is designed to protect would be likely to occur following disclosure of the information. Section 27(1)(a), as with all other prejudice based exemptions, provides two different levels of likelihood of such prejudice occurring; one that would occur or one that would be likely to occur.
42. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
43. Although the FCO's submissions to the Commissioner failed to specifically state which sub-sections of section 27(1) it was seeking to rely on, it did clearly state that it was seeking to rely on the lower test of prejudice of 'would be likely'.

44. With regard to the particular threshold of engaging the exemption contained at section 27(1)(a) the Commissioner has been guided by the comments in the Information Tribunal decision *Campaign Against Arms Trade v Information Commissioner & MOD* (EA/2006/0040). At paragraph 81 the Tribunal noted that:

'...we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary'

45. In considering the application of section 27(1)(a) to the various documents, the Commissioner has been conscious of two factors:
46. Firstly, that at the time of the request in January 2005, both UK and US forces (alongside the armed forces of other countries) continued to remain in Iraq as part of the Multi-National Forces (MNF). By January 2005 the emergence of insurgence and terrorist actions against both MNF and organs of the newly established Iraqi government had ensured that the invasion of Iraq and subsequent presence of MNF was an issue which dominated international and diplomatic relations of many countries and international organisations.
47. Secondly, the Commissioner is conscious that the topic of the information falling within the scope of this request, i.e. civilian casualties following the 2003 invasion, remained a topic of considerable sensitivity largely because of the alleged link between the invasion and the significant rise in the level of civilian deaths.
48. The Commissioner has considered the application of section 27(1)(a) to each of relevant documents in turn below. Obviously for some of the documents the Commissioner cannot explain in great detail why he considers the exemption to apply (or not apply) as to do so would reveal the nature of the withheld information.⁶
- Document 8: this document comprises figures of civilian casualties provided to the UK by the Iraqi Ministry of Health (MOH) and the UK's analysis of such figures. Although the Commissioner understands that in January 2005 some data had been placed into the public domain by the Iraqi MOH, this did not equate to all of the information contained within document 8. Furthermore, the UK's views on the MOH figures had not been placed in the public domain. Therefore in the context of the two key factors outlined above at paragraphs 46 and 47, the Commissioner accepts that disclosure of document 8 would be likely to prejudice the UK's relations with the Iraqi government because it would be likely to call for a particular diplomatic response to be made to contain or limit damage which would not otherwise have been necessary.

⁶ It should be noted however that as the FCO has subsequently disclosed some of the information covered by the scope of the complainant's request, albeit in a redacted form, the Commissioner is able for some of these documents withheld on the basis of both 27 and 35 to give a clearer indication of their contents in this decision notice than he would usually be in a position to do.

- Document 22: given the contents of this document, which contains details of the FCO's internal discussions about the MOH's figures and how they could be used by the Government, the Commissioner accepts that disclosure of these figures at the time of the complainant's request would be likely to have resulted in the need for a particular diplomatic response to be made in order to contain or limit damage which would not otherwise have been necessary and thus prejudice could be said to be likely to occur.
- Document 23: this document contains the views of a US diplomat on the Lancet article and according to the FCO was provided to the UK in confidence. The Commissioner notes that this document would appear to be an example of where the FCO has conflated its submissions regarding sections 27(1)(a) and 27(2); that is to say this document was provided in confidence and thus potentially falls within the scope of section 27(2), but also because of the basis upon which this document was provided to the UK disclosure would be likely to prejudice the UK's relations with the US. Having reviewed the contents of the views put forward by the US and given the sensitivity of the issues surrounding this topic, in addition to the basis upon which this information was provided to the UK, the Commissioner is satisfied that disclosure of this document at the time of the complainant's request would have been likely to prejudice the UK's relations with the US. In reaching this conclusion the Commissioner believes that when information is provided to the UK 'in confidence' although section 27(2) may of course be engaged, it is also reasonable to consider how relations between the UK and the country who provided the information will be affected, and thus section 27(1)(a) is also relevant.
- Document 25: as with document 23, the Commissioner understands that this document includes information provided to the UK by the US in confidence and therefore Commissioner accepts that if this document was disclosed at the time of the complainant's request it would have been likely to prejudice the UK's relations with the US given the basis upon which the information was originally provided to the UK. Consequently, the Commissioner believes that this document is exempt from disclosure on the basis of section 27(1)(a).
- Document 30: this document includes details of (and an analysis of) the Iraq MOH methodology for collecting civilian death figures. The Commissioner understands that parts of this information, at the time of the request, were not in the public domain and had been passed to the UK in confidence from senior officials at the MOH. Therefore, in line with the logic outlined above, the Commissioner accepts that disclosure of this document would be likely to lead to prejudice between the UK and Iraqi governments and therefore the exemption is engaged.

49. As the Commissioner has decided that all of the documents which the FCO considers section 27 to apply to are exempt from disclosure on the basis of

section 27(1)(a) he has not gone on to consider whether these documents are also exempt by virtue of the exemptions contained at sections 27(1)(d) or 27(2).

Public interest test

Arguments in favour of withholding the information

50. There is a strong public interest in the UK having good working relations with foreign governments so that the government of the day can effectively and efficiently manage the UK's international relations. The US is one of the UK's key international partners and the importance of the UK maintaining strong relations with the Iraqi government since the 2003 invasion are clear given the presence of UK forces in Iraq. Furthermore, in January 2005 it was clear that the issue of the invasion and the presence of the MNF was a subject that was likely to dominate the UK's, US's and Iraqi's relationship for a number of years to come.
51. Although the information that is being withheld in this case focuses on the civilian casualty figures, disclosure of the information has the potential to affect UK-US and UK-Iraqi relations in a number of wider issues. That is to say on other policy issues and areas in which the countries work closely on, e.g. the number of US and UK troops in Iraq and how long these troops should remain in the country. There is therefore a very strong public interest in ensuring that the UK's working relationship with these countries is not harmed.

Arguments in favour of disclosing the information

52. There is a general public interest in the Government being transparent about, and accountable for, decisions that it has taken. Disclosure of this information may aid the public's understanding of how the Government manages its relationships with key international partners.
53. At the time of the complainant's request in January 2005, the presence of the MNF in Iraq and the alleged link to a significant increase in civilian deaths was clearly an issue which attracted significant public attention and debate; consequently disclosure at the time of the request could be in the public interest as it would contribute to this debate.

Balance of public interest arguments

54. The Commissioner is conscious of the inherent public interest in the Government being accountable for, and transparent about, decisions that it has taken. Further it is clear that in January 2005 the public debate surrounding the issue of civilian casualty figures was one that was not confined to the pages of academic journals; disclosure of this information may inform this public debate as it would reveal in some detail the information considered by the Government regarding not only the Lancet report but also its wider position regarding causes of civilian casualties in Iraq. Moreover, the Commissioner recognises the fact that the debate around the level of civilian deaths in Iraq is inevitably linked to the question of the decision to invade Iraq in May 2003, something which in January 2005 remained a point of debate itself.

55. However, it is precisely because of the sensitivities surrounding the Iraq invasion and its consequences (including those outlined in the Lancet article) that has led the Commissioner to conclude the public interest favours withholding the documents exempt on the basis of section 27(1)(a) of the Act. At the time of the complainant's request in January 2005 the UK's armed forces, as part of the MNF, remained in Iraq and therefore the Commissioner is conscious of the strong and effective international relations the UK needed to maintain with Iraq and also, given the significant US involvement in the MNF, also the US. Although the withheld information focuses largely on the civilian casualty figures, the Commissioner accepts that disclosure has the potential to prejudice the UK's relationships with both Iraq and the US on a wide variety of policies, something which is strongly against the public interest.
56. Consequently, in the circumstances of this case the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 35(1)(a)

57. Section 35(1)(a) states that:

'35(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to –

(a) the formulation or development of government policy'

58. In its submissions to the Commissioner, the FCO has not explicitly stated what the policy or policies to which the withheld information relates. However, on the basis of these submissions the Commissioner understands that the FCO believes that there are two policies which the withheld information relates to, namely: firstly, the Government's position on civilian casualty figures in Iraq, especially in light of the Lancet article referenced in the complainant's request; and secondly, which Government department should take the lead on this issue.
59. However, having reviewed the documents to which the FCO has applied section 35(1)(a) to in some detail, the Commissioner has concluded that there are in fact four distinct decision making processes to which this information relates. These are:
- (i) The Government's views on, analysis of, and response to, the Lancet article (including lines to take to the press and Parliament).
 - (ii) Which department should take the lead on this work.
 - (iii) The Government's position on civilian casualty figures from a more long term, strategic point of view/how the Government should prepare to rebut future challenges such as those in the Lancet article. The Commissioner understands that this work appears to have begun **before** the publication of the Lancet article and continued **after** the Government's official response to the Lancet article (which the Commissioner takes to be the Foreign Secretary's statement to the House of Commons of 17 November 2004).
 - (iv) Again, which department should lead on this work.

60. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Section 35(1)(a) cannot apply to information relating to the later stages of stages of policy making, i.e. the implementation stage onwards.
61. In consideration of this case the Commissioner has been guided by the Information Tribunal decision in the case *DFES v Information Commissioner & the Evening Standard (EA/2006/0006)* in which the Tribunal commented on the term 'relates to' contained in section 35(1). The Tribunal suggested that the term 'relates to' could be interpreted broadly, and although this approach has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which caused no significant harm to the public interest. The Tribunal's approach also demonstrates that where the majority of the information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be considered as relating to section 35(1)(a).
62. Having considered the information relating to the first issue of the four issues identified by the Commissioner – i.e. the Government's consideration of and reply to the Lancet article - the Commissioner does not accept that this decision making process is one which constitutes policy formulation or development. Rather this process is simply the Government's consideration of, and reaction to, a particular press article. Simply because this information reflects decision making within government departments, this does not mean that it must relate to government policy making. If the Commissioner were to accept that such information fell within the scope of section 35(1)(a) then a consequence of this approach would be that every time the government prepared and reacted to some negative (or indeed positive) comment in the media then such a process would constitute the formulation or development of government policy. Whilst the Commissioner of course accepts that policy can be sourced and generated in a variety of ways, including a reaction to major incidents or public pressure (e.g. the Government's response to the foot and mouth crisis), the Commissioner is of the view that government policy is something that is more defined, and more substantial rather than simply the government's micro level reaction to any event, albeit that such an event may have some sort of political consequence or dimension.
63. Nor does the Commissioner accept that the decision as to which department should take the lead on the Government's response to the Lancet article is an example of policy formulation or development. Rather, it is an operational decision, albeit one that may involve the input of Ministers. This does not though, in the Commissioner's opinion mean that this equates to a policy decision.

64. The Commissioner has more sympathy with the FCO's argument that the decision making process outlined at point (iii) constitutes the formulation or development of government policy. Having looked at the information which relates to the decision making process described at (iii), the Commissioner accepts that this appears to be a more planned, strategic activity. The Commissioner accepts that information which relates to (iii) could be correctly seen as relating to the embryonic stages of formulation and development of a policy in which the Government aims to gain a greater understanding of the level of civilian deaths in Iraq with the overall intention of the policy presumably allowing the Government to be able to respond to queries on this issue in the future and potentially shape the Government's diplomatic and military strategies relating to this issue.
65. The Commissioner accepts that the term 'relates to' should be read broadly and therefore background information, including that falling in the categories (i) and (ii) above could be included in the scope of the exemption. The Commissioner acknowledges that the issues at discussion in (i) – and by implication (ii) – are linked to the policy making process described at (iii). However, the Commissioner is conscious of the fact that the Tribunal in *DFES* suggested that 'relates to' should be read broadly where the **majority** of the information relates to the formulation or development of government policy then any associated or background information can also be said to fall within the scope of the exemption.
66. However, in this case having reviewed the information falling within the scope of this request, the Commissioner does not believe that the majority of the information can be said to relate to the 'policy' covered by point (iii). Rather, although a significant amount of information relates to the policy process outlined at (iii), an equal amount of information also relates to the process contained at (i), i.e. the Government's initial handling of, and response to, the Lancet article, a process which for the reasons outlined above, the Commissioner does not accept relates to the formulation or development of government policy. Therefore, although the Commissioner accepts that information about the process described at point (iii) falls within the scope of section 35(1)(a), he does not consider it appropriate to conclude that the information about processes (i) and (ii) can be said to fall within the scope of the exemption contained at section 35(1)(a) by virtue of the fact that it is related to the formulation or development of government policy.
67. In reaching this conclusion the Commissioner does accept the topical link between the decision making process outlined at (i) and the policy making process described at (iii) and thus there could be a compelling argument which suggests that the two are related and thus all of the information should be considered to be exempt under section 35(1)(a). However, the Commissioner is conscious of the potential consequences of making such a decision; in effect any time Government departments formulate a response to a press article, and there is an ongoing development of policy in relation to issues discussed in such an article, all such information becomes the formulation or development of Government policy. Simply put the Commissioner believes that this is simply too wide a reading of section 35(1)(a); not least because it is clear that drafters of the

Act in including section 36 clearly provided other exemptions under which such information could be withheld.⁷

68. Nevertheless, the Commissioner does accept that the information relating to the decisions taken in relation to the decision making process described at (iv) falls within the scope of the exemption contained at section 35(1)(a) because it can be correctly said to constitute associated or incidental information about the decision making process outlined at (iii).
69. In summary then, the Commissioner accepts that the information which focuses on how the Government intends to develop its longer term strategic approach to monitoring of civilian death figures can be said to relate to the formulation of government policy. In the Commissioner's view this encompasses the following documents:
- Documents 9, 13 and 14 – these documents contain information relating to the Government's longer term strategic plans to monitor civilian casualties and therefore is part of the decision making process outlined at (iii) rather than that described at (i). On this basis the Commissioner is satisfied that they fall within the scope of section 35(1)(a).
 - Documents 15 and document 16 – although both in reality appear to focus on the decision process outlined at (iv), the Commissioner accepts that they also include discussions on the process outlined at (iii) and therefore fall within the scope of section 35(1)(a) on the basis outlined above.
 - Document 18 – although this document appears to focus on issues related to the Lancet article, the Commissioner notes that it dates from December 2004 and thus after the Foreign Secretary made his statement to Parliament on 17 November 2004 and furthermore, the Commissioner understands that it was used by the FCO in development of its wider policy position on casualty figures.
70. However, for the reasons outlined above, the Commissioner does not accept that following documents fall within the scope of section 35(1)(a):
- Document 3 – this contains the Chief Economist's initial views on the Lancet article and potential ways in which the Government could respond to it. Therefore, the Commissioner believes that the decision making process which this information relates to is that described at (i) above.
 - Doc 11(i) – having carefully reviewed this document the Commissioner has concluded that this document focuses on an analysis of the Lancet article and potential lines for the Government to take in response to the article rather than on the policy decision making process described at (iii) above.

⁷ Section 36 is closely related to section 35: information which is exempt under section 35 cannot also be exempt under section 36 and therefore section 35 should be considered before section 36. Section 36 sets out an exemption from the right to know if the disclosure of information, in the reasonable opinion of a qualified person would be likely to prejudice the effective conduct of public affairs.

- Document 12 – this contains the Chief Scientific Adviser's views on the Lancet article and therefore the Commissioner believes that the decision making process which this information relates is also that described at (i) above.
 - Documents 24 and 26 to 29 – again as with document 11(i), these documents focus on the analysis of the Lancet article and potential lines for the Government to take in response the article and thus relate to the decision making process described at (i) rather than that described at (iii).
71. On this basis the Commissioner has concluded that documents 3, 11(i), 12, 24 and 26 to 29 are not covered by the exemption contained at section 35(1)(a).
72. The Commissioner is conscious that in a number of previous cases, public authorities have argued that should the Commissioner conclude that information does not fall within the scope of an exemption contained at section 35(1) of the Act, in the alternative, they would seek to rely on the exemption contained at section 36 of the Act. (See for example the decision notice FS50165511 involving the Department for Work and Pensions). Had the FCO made submissions to the Commissioner that in the alternative to section 35, it would seek to rely on section 36 the Commissioner would have assessed whether these documents were exempt from disclosure on the basis of section 36. However, as the FCO has not made such submissions the Commissioner has not considered the potential application of section 36 to these documents.
73. Section 35(1) is a qualified exemption and therefore the Commissioner has gone on to consider the application of the public interest test to the documents that he considers to fall within the scope of section 35(1)(a).

When was the formulation/development process completed?

74. Before doing so it is important for the Commissioner to determine when the policy formulation and development process in this case was completed and the implementation of the policy began. As will be discussed below, whether the formulation and development of a policy is complete will have a bearing on the weight given to the public interest arguments.
75. Furthermore, section 35(2) of the Act states that:
- '(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded –
- (a) for the purposes of section 1(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection 1(b), as relating to Ministerial communications'
76. And section 35(4) states that:

'(4) In making any determination required by section 2(1)(b) or 2(b) in relation to information which is exempt information by virtue of subsection 1(a), regard shall be had to the particular public interest in disclosure of factual information which has been used, or is intended to be used, to provide an information background to decision-taking'.

77. In the DfES case the Tribunal itself commented that, 'The distinction between formulation/development on the one hand and implementation on the other will prove to be a very fine one in some cases since implementation itself usually spawns policies. ...Such cases will be more readily recognised when confronted than defined in advance.' (para 56). The Tribunal did suggest that 'a parliamentary statement announcing policy...will normally mark the end of the process of development'. (Para 75, (v))
78. In this case, the policy in question is not one that focuses on a 'formal' policy, for example one which is included in a party's election manifesto, followed by a green paper, then a white paper and a formal announcement to Parliament. Rather the policy in this case appears to have been one that has evolved out of the Government's concerns over the need to more accurately monitor the level of civilian casualties; in other words it is in essence a more organic (and perhaps reactive) type of policy. Consequently, it is not such a major piece of Government policy (such as the introduction of ID cards or the nationalisation of Northern Rock) where a clear announcement to Parliament was inevitable.
79. However, based on a review of the information falling within the scope of the complainant's request, and in particular the emails and letters dating from November and December 2004, it is clear that at the time of the complainant's request on 1 January 2005, the Government was still formulating its policy in relation its strategic approach to monitoring and reporting on civilian casualty figures. Although the FCO has not pin-pointed a date by which it considered the policy formulation/development period to have been completed, in its submissions to the Commissioner the FCO did make it clear that by the time it disclosed the information in response to the related request in March 2007, it considered the policy formulation/development to have been completed, and thus was prepared to disclose a number of documents in relation to this further request. Therefore, although the Commissioner cannot point to particular date or event which marks the end of the formulation/development phase in this case, he is confident that it occurred **after** the submission of the complainant's request in 1 January 2005.

The public interest test

Arguments in favour of withholding the information

80. The FCO did not make particularly lengthy submissions as to why it believed that the public interest favoured withholding the information falling within the scope of section 35(1)(a). However, it did argue that there was a public interest in withholding the information so that officials can have a clear space, immune from exposure to public view, so there can be a full and candid assessment of policy considerations without prematurely closing off discussion and development.

81. These arguments advanced by the FCO touch upon two public interest arguments that previous Tribunals (and the High Court) have discussed in some detail:
82. Firstly, the concept that civil servants and Ministers need a 'safe space' in which to be able to formulate policy and debate live issues away from public scrutiny and particular away from lobbying and media involvement. This safe space therefore allows policy makers to hammer out policy by exploring both safe and radical options without the fear that headlines suggesting that ideas that have merely been touched upon during the formulation/development process are in fact accepted policy. Consequently, if information relating to a particular policy was disclosed whilst that policy was still being formulated and developed then this could lead to the erosion of the safe space.
83. Secondly, the FCO's submissions also touch upon the concept that disclosure of information falling under the scope of section 35(1)(a) can result in a 'chilling effect'. The concept of a chilling effect is directly concerned with the loss of frankness and candour in debate and/or advice which it is said will result from disclosure of information under the Act. This chilling effect could work on a number of levels: disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties make contributions to that **particular** policy debate; disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, **different**, policy debates; or the idea that disclosing information relating to the formulation and development of a given policy (even **after** the process of formulating and developing that policy is complete) will result in a loss of candour with which relevant parties will contribute to other future, different policy debates.

Arguments in favour of disclosing the information

84. The FCO did not highlight any public interest factors in disclosure of the information covered by section 35(1)(a), but the Commissioner has identified the following arguments:
85. There is a general public interest in Government's being accountable for and transparent about decisions that it has taken, particular if such disclosure increases the public's understanding of how Government operates. Disclosure of this information could improve the public's understanding of how the Government's formulates and develops policy ideas.
86. Disclosure of the information at the time of the complainant's request could have allowed interested parties to feed into the Government's policy making process. The policy making process focused on the developing the accurate methods of recording civilian casualties in Iraq; the Commissioner understands that there were a number of non-governmental organisations, such as the Iraq Body Count organisation, who may have been able to usefully contribute to the policy making process. Such involvement could be in the public interest if this results in more efficient policy making and better quality policies.

87. Again, as discussed above in relation to the public interest test under section 27 of the Act in January 2005, the presence of the MNF in Iraq and the alleged link to a significant increase in civilian deaths was clearly an issue which attracted significant public attention and debate; consequently disclosure at the time of the request could be in the public interest as it would contribute to this debate.

Balance of the public interest arguments

88. In considering the balance of the public interest arguments under section 35(1)(a), the Commissioner has taken into account the comments of the Tribunal in the *DFES* decision along with the more recent comments contained in High Court judgments in which the *DFES* decision was referenced.⁸

89. In particular the Commissioner has considered key two principles outlined in the *DFES* decision. The first was that the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

‘Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the “...threat of lurid headlines depicting that which has been merely broached as agreed policy.” (Para 75 (iv)).

90. The second being:

‘The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.’ (Para 75(i)).

91. With these guiding principles in mind, the Commissioner is of the opinion that at the time of the request the Government **still** needed a safe space in which to discuss the policy in question because in January 2005 the formulation and development process had not been completed. In reaching this conclusion the Commissioner is conscious of the Tribunal’s comments in the case *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072)* which suggested that it was necessary to judge whether the weight of the public interest has diminished due to the policy becoming ‘more certain’. While the Commissioner would concede that by January 2005 the policy in question was definitely closer to the implementation stage than in say in May 2004 when the earliest documents falling within the scope of the request date from, based on the content of the later documents the Commissioner is satisfied that a safe space was still needed by policy makers in order to focus on the final stages of the policy’s development.

⁸ *Export Credit Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/638.html> and *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/737.html>

92. Furthermore, the Commissioner is conscious that a key aspect of the concept of a safe space is focused on protecting policy makers from media comment which could prejudice the policy making process. Given that the policy in question relates to the sensitive subject of civilian deaths in Iraq, and in particular the connection between these deaths and the invasion of Iraq and continued presence of MNF, a topic which has clearly been heavily scrutinised by the media, in the Commissioner's opinion disclosure of the information would very likely led to this safe space being compromised.
93. Turning to the concept of a chilling effect if the information in question was released, the Commissioner's position, which follows that adopted by numerous Tribunals, is to treat the argument that disclosure information will result in the wider consequences of a chilling effect, with some caution. That is not of course to dismiss the concept of a chilling effect out of hand and in the particular circumstances of the case (i.e. the content of the information and the timing of the request) the Commissioner accepts that the argument that may carry some weight, but only with regard to the narrower chilling effect, i.e. disclosure resulting in a loss of frankness and candour to future contributions to the particular policy in question whilst the policy is still being formulated and developed. This because the Commissioner does not feel that there is sufficient evidence to demonstrate how disclosure of this information would lead to the wider consequences associated with the chilling effect.
94. As previously discussed above, at the time of the request the policy making process was still continuing and thus the Commissioner accepts that disclosure of the information at this time could have resulted in a loss of frankness and candour that would have affected a live policy making process. Furthermore, having reviewed the information in question, the Commissioner accepts that it reflects discussions which could not be said to be trivial or insignificant and therefore it is plausible to argue that future discussions on this policy would also be of a free and frank nature. However, in submissions to the Commissioner, the FCO has not provided any specific evidence to link any potential disclosure to a chilling effect on this policy making process; rather the likelihood of the effect is one that simply remains implied. Consequently, in the circumstances of this case the Commissioner has not attached a significant amount of weight to the chilling effect argument.
95. Moreover, the Commissioner believes that disclosure of information containing evidence of policy making, rather than producing a chilling effect, may in fact lead to better quality advice being provided to Ministers and a more rigorous analysis of this advice. In the Commissioner's opinion it is plausible to argue that civil servants faced with the concept of disclosure of their advice under the Act are likely to ensure that they do the best job possible, and thus the prospect of public disclosure is actually capable of importing a greater degree of rigour to the process.
96. Furthermore, the Commissioner accepts that the inherent public interest arguments surrounding accountability and transparency are strong, and there public debate around the issue of civilian deaths in Iraq following the invasion is not one that is limited to the pages of the Lancet. The Commissioner also finds that disclosure of the particular information in question (that engages section

35(1)(a)) would not significantly enhance the debate. The Commissioner acknowledges the debate on the matter is of significant public interest and weight must still be given to the importance of transparency on this issue. In this case there is still significant weight to be given to the full picture being provided and removing any suspicion of spin. The Commissioner notes a contrast between this information and the value documents 3 and 12 could play in public debate (which the Commissioner has ruled should be disclosed).

97. However, having had the opportunity to review the withheld information the Commissioner is of the opinion that the arguments surrounding the need to provide a private space for policy makers should be given significant weight, particularly at the time of the complainant's request. Therefore the Commissioner has concluded that in this case the public interest in withholding the information under section 35(1)(a) outweighs the public interest in disclosing the information.

Section 35(1)(b)

98. The FCO has argued that document numbers 1, 5, 10, 11(ii), 11(iii), 17 and 19 are exempt from disclosure on the basis of section 35(1)(b) of the Act.
99. This section states that information is exempt from disclosure if it is held by government department and relates to Ministerial communications.
100. Section 35(5) of the Act explains that Ministerial communications means any communications between Ministers of the Crown and includes the proceedings of the Cabinet or any committee of the Cabinet.
101. In two recent cases, both involving the Scotland Office, the Information Tribunal confirmed that the definition of Ministerial communications could be read more broadly: In the case *Scotland Office v Information Commissioner (EA/2007/0070)* the Tribunal explained that 'communications between a Private Secretary writing on behalf of his/her Minister and another Minister, constitutes Ministerial communications' (paragraph 50). In the case *Scotland Office v Information Commissioner (EA/2007/0128)* the Tribunal confirmed the status to be accorded to a letter written by one Private Secretary to another: 'Such letters would contain the views of the relevant Ministers and so would, in our opinion, properly fall to be considered under section 35(1)(b)' (paragraph 75).
102. The Commissioner has established that the following documents comprise communications between two Ministers: 5, 10, 11(ii) and 11(iii) and therefore fall within the scope of the exemption contained at section 35(1)(b). Furthermore, on the basis that documents 1, 17 and 19 comprise letters between two Private Secretaries, and reflect the views of their respective Ministers, the Commissioner is satisfied that these documents also fall within the scope of section 35(1)(b). Although the FCO has not argued that document 4 is covered by the scope of section 35(1)(b), as it comprises a letter between two Private Secretaries the

Commissioner believes that this document is also exempt on the basis of section 35(1)(b) of the Act.⁹

103. However, section 35 is a qualified exemption and therefore the Commissioner must consider the public interest test set out in section 2 of the Act; and whether in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

Public interest arguments in favour of withholding the information

104. The FCO's submissions to the Commissioner in relation to the public interest test under section 35(1)(b) are somewhat concise; however, the FCO did submit that there was a public interest in withholding these documents because if they were released they would undermine the collective responsibility of government ministers. The convention of collective cabinet responsibility allows the Government to be able to engage in free and frank debate in order to reach a collective position, and to present a united front after a decision has been made.
105. In the Commissioner's opinion this argument can be expanded somewhat: the Commissioner believes that the public interest in maintaining the convention of collective responsibility covers two separate, though related, public interest arguments:
106. Firstly, there is a public interest in protecting the safe space required by Ministers to engage in frank and candid debate and reach a collective position in relation to a particular issue – this argument is akin to the 'safe space' argument often advanced in relation to the public interest test under section 35(1)(a).
107. Secondly, there is a public interest in allowing Ministers to promote and defend an agreed position without revealing divergent individual views. Not allowing this could potentially result in valuable government time being spent publicly debating (and defending) views that have only ever been individual views, rather than government positions, and in commenting on the significance of, and implications of, a divided Cabinet. In essence, it is not in the public interest that disclosures of information under the Act would undermine confidence so much that it is unable to devote sufficient attention to the process and business of governing.

Public interest in favour of disclosing the withheld information

108. The FCO did not highlight any public interest factors in disclosure of the information covered by section 35(1)(b), but the Commissioner has identified the following arguments:
109. As previously noted, there is a general public interest in increasing the public's understanding of how Government operates; disclosure of this information would reveal how the Government manages and adopts its position in relation to

⁹ The Commissioner notes that the documents that fall within the scope of section 35(1)(b) contain examples of both the decision making process described above on page 13 at point (i) in relation to section 35(1)(a) and decision making process described at point (iii) in relation to section 35(1)(a).

- situations that that arise, i.e. how does the Government respond to adverse press coverage, what factors does it take into account, who does it consult, what is its decision making process etc and moreover the role Ministers played in this process.
110. There is also a public interest in the Government being accountable for, and transparent about decisions that it has taken. Disclosure would ensure that the Government was accountable for the particular decisions it had made in this case.
 111. Disclosure may re-assure the public that the Government's consideration of, and reaction to the Lancet article was a serious and focused one. That is to say, the information may confirm that the Government took very seriously the issues raised by the Lancet article and that they were not summarily dismissed.
 112. Disclosure of the information contained within the section 35(1)(b) documents may also add to the public's understanding of the Lancet article and the surrounding arguments as to the accuracy or otherwise of the claims made by the authors. This could be said to be in the public interest if provides the public with a more informed understanding of the debate around the accuracy of the figures.
 113. Disclosure of the information could also inform the public about how the Government was considering the issue of civilian deaths in Iraq from a more long term strategic policy position rather than just in response to Lancet article.
 114. At the time of the complainant's request in January 2005, the presence of the Multi-National Forces in Iraq and the alleged link to a significant increase in civilian deaths was clearly an issue which attracted significant public attention and debate; consequently disclosure at the time of the request could be in the public interest as it would contribute to this debate.

Balancing of the public interest arguments

115. Before, considering the balance of the public interest in detail the Commissioner wishes to clarify that simply because information falls within the scope of section 35(1)(b) this does not mean that the convention of collective Cabinet responsibility is relevant. For example, some information may be anodyne or deal with simply with process rather than policy issues or communications may simply be for information purposes.
116. Rather, the convention of collective responsibility allows Government to be able to engage in free and frank debate in order to reach a collective position and to present an untied front after a decision has been made. The Tribunal in *Scotland Office (EA/2007/0070)* provided the following description:

'the long standing convention that Ministers are collectively accountable for the decisions of the Cabinet and are bound to promote that position to Parliament and the general public, regardless of their individual views. During the course of meetings of the Cabinet or of Cabinet Committees or through correspondence, Ministers may express divergent views, but once a decision is taken, the convention dictates that they must support it fully.'

When decisions are announced as Government policy, the fact that a particular Minister may have opposed it in Cabinet is not disclosed.' (para 82).

117. Having reviewed the information which falls within the scope of section 35(1)(b) the Commissioner is satisfied that they represent substantive and significant communications and therefore it is relevant in considering the public interest test to consider the convention of collective responsibility.

118. In balancing the public interest, the Commissioner is mindful of factors identified by the Tribunal, again in the case *Scotland Office (EA/2007/0070)*:

'Factors such as the context of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context are all matters that are likely to have a bearing on the assessment of the public interest.' (Para 87)

119. Furthermore, although the convention of collective responsibility may extend beyond immediate members of the Cabinet, the Commissioner considers the Cabinet to be the hub of the Government decision making process. Therefore, it may well be the case that the public interest in protecting the convention of collective responsibility is likely to be stronger in relation to information that reveals the workings of Cabinet itself than in relation to information further removed from the Cabinet.

120. The Commissioner has taken these various factors into account below:

121. The Commissioner understands that at the time of the complainant's request in January 2005 the issue of the Government's policy on civilian casualties in Iraq was one that could be said 'live' to the extent that the policy line on this issue had yet be completed. However, in the Commissioner's view to the extent that discussions in the information relate specifically to the Government's response to the Lancet article this issue could be said to have been concluded given the Foreign Secretary's statement to the House of Commons on 17 November 2004 setting out the Government's position on the Lancet article.

122. In the Commissioner's opinion considerable weight has to be placed on the fact there was a significant public interest in the issue of civilian casualties in Iraq given that this issue is inevitably linked to the debate surrounding the legality and legitimacy of the invasion of Iraq in March 2003. Consequently, and as previously noted, in the Commissioner's view the debate surrounding the accuracy of the figures published in article in question is one that extends beyond discussions in academic journals such as the Lancet to one where there is a legitimate and wide-spread public interest in, and debate on, the issues discussed in these documents.

123. Moreover, the Commissioner accepts that the information withheld under section 35(1)(b) are not Cabinet minutes (or sub-Cabinet committee minutes) but are letters between different Ministers and their respective Private Secretaries.

Consequently, the disclosure of these documents could not be said to reveal the decision making process at the 'hub' of Government.

124. However, precisely because these documents are letters between Ministers, or letters between their Private Secretaries, disclosure would reveal much more clearly the views of different Ministers than disclosure of Cabinet minutes may do. Consequently, any divergent views between the various Ministers, should there have been such divergence of course, would be explicitly revealed.
125. On balance then the Commissioner accepts the significant public interest in the issues discussed within the communications, not least because of the link between these issues and the wider debate on the Iraq war itself. Furthermore, with regard to the Government's response on the Lancet article, the Commissioner believes that by the time of the complainant's request there is a strong argument to say that this issue was no longer live. The Commissioner makes similar a finding to paragraph 96 on the weight given to the public interest in disclosure.
126. However, the Commissioner is also conscious of the strong public interest in the maintenance of the convention in collective responsibility; whilst the Tribunal have made clear that the convention did not elevate section 35(1)(b) to the equivalent of an absolute exemption for information which engages collective cabinet responsibility, it has however stated that: 'We accept that where collective responsibility of Ministers is engaged, there will nearly always be a public interest in maintaining the exemption.'¹⁰ Taking this into account, along with the fact that all of the individuals involved remained in Ministerial positions at the time of the request and in particular the content of the information itself (which of course the Commissioner cannot divulge in this notice), the Commissioner is satisfied that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
127. In reaching this conclusion the Commissioner has considered the implications of section 35(2)(b) of the Act. As outlined above with regard to the discussion of section 35(1)(a), in the Commissioner's opinion the information falling within the scope of this request can broadly be divided into two decision making processes: the Government's response to the Lancet article and the wider development of a longer term strategic policy in relation to civilian deaths in Iraq. As also noted above, in the Commissioner's opinion the policy making process with to the regard latter decision making exercise was not completed by the time of the complainant's request in January 2005. However, as the Commissioner has acknowledged above the decision making process with regard to Government's response to the Lancet case was in effect complete by the time of the complainant submitted his request.
128. However, the phrasing of section 35(2) makes it clear that for section 35(2)(b) to have effect, the Ministerial communications have to relate to 'government policy'; 'Once a decision as to **government policy** has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded...' (emphasis added). Therefore although some of the

¹⁰ *Scotland Office v The Information Commissioner* (EA/2007/0070) at paragraph 86.

information falling with section 35(1)(b) in this case clearly relates to a decision making process which has been completed, and this information includes statistics, the Commissioner does not believe that this process was about the formulation or development of 'government policy' and therefore in the Commissioner's opinion section 35(1)(b) still has effect with regard to such statistical information. Rather this information focuses on the decision making processes labelled as (i) and (ii) on page 13, for the reasons set out in paragraphs 59 to 67, the Commissioner does not accept that such information can be said to be about government policy.

Procedural matters

129. Section 1(1)(a) of the Act provides that in response to a request public authorities must provide an applicant with confirmation or denial as to whether it holds the information that has been requested. Section 10(1) requires that this confirmation be provided within 20 working days of the request.
130. In this case the complainant submitted his request on 1 January 2005 and the FCO responded on 16 February 2005. By failing to respond within 20 working days the Commissioner has concluded that the FCO breached section 10(1) of the Act. Furthermore, as the FCO issued the complainant with a refusal notice as it was withholding some information, the failure to issue this notice within 20 working days also constitutes a breach of section 17(1).
131. By failing to disclose to the complainant the information that the Commissioner has concluded is not exempt from disclosure (namely documents 3, 6, 11(i), 12, 24 and 26 to 29) the Commissioner has concluded that that the FCO breached section 1(1)(b) which requires public authorities to provide information that has been requested. This also represents a further breach of section 10(1).
132. Furthermore, in its refusal notice issued on 16 February 2005 the FCO did not specify the sub-sections of section 27 upon which it wished to rely – e.g. it simply stated that it considered section 27(1) to apply rather than 27(1)(a). This Commissioner believes that this constitutes a breach of section 17(1)(b) which requires public authorities to include in its decision notice the specific exemption upon which it is relying.
133. Finally, the Commissioner believes that when a public authority seeks to rely upon an exemption that it did not cite in its refusal notice – as the FCO did in this case when it sought to rely on the exemption contained at section 21 of the Act – this will constitute a breach of section 17(1) of the Act because it constitutes a failure to provide a proper notice.

The Decision

134. 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:

- Documents 2 and 11(iv) are exempt from disclosure on the basis of section 21 of the Act.
 - Documents 20 and 21 are exempt from disclosure on the basis of section 23(1) of the Act.
 - Documents 8, 22, 23, 25 and 30 are exempt from disclosure on the basis of section 27(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
 - Documents 9, 13, 14, 15, 16 and 18 are exempt from disclosure on the basis of section 35(1)(a) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
 - Documents 1, 5, 10, 11(ii), 11(iii), 17 and 19 are exempt from disclosure on the basis of section 35(1)(b) of the Act and in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
135. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Document 6 is not exempt from disclosure on the basis of section 21 of the Act.
 - Documents 3, 11(i), 12, 24 and 26 to 29 are not exempt from disclosure on the basis of section 35(1)(a) of the Act.
 - The FCO breached section 1(1)(b) of the Act by failing to provide to the complainant with the documents that the Commissioner has concluded are not exempt from disclosure.
 - By failing to respond to the complainant's request within 20 working days the FCO breached section 10(1) of the Act. Furthermore, as the FCO issued the complainant with a refusal notice as it was withholding some information, the failure to issue this notice within 20 working days also constitutes a breach of section 17(1).
 - The FCO breached section 17(1)(b) by failing to specify in its refusal notice which sub-sections of section 27 it was seeking to rely on.
 - The FCO also breached section 17(1) by relying on an exemption, namely section 21, which it did not cite in its refusal notice.

Steps Required

136. The public authority must disclose the documents numbered 3, 6, 11(i), 12, 24, 26, 27, 28 and 29 to the complainant within 35 calendar days of the date of this notice.

Failure to comply

137. 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

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

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

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

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

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

Dated the 5th day of March 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Reference: FS50083726



Document Number	Document description	Exemptions the FCO considers to apply	Has document been disclosed? If so, have redactions been applied?	ICO's position on application of exemptions
1	Letter from FCO PS to MoD PS dated 15.11.04	s35(1)(a) & s35(1)(b)	No	Exempt under s35(1)(b) - public interest does not favour disclosure.
2	Foreign Secretary's written statement to the House of 17.11.04	s21	No	Exempt under s21 – but in fact previously provided to the complainant.
3	Minute on Lancet report dated 8.11.04	s35(1)(a)	Disclosed, but with redactions to names & some comments.	Disclose – s35(1)(a) not engaged.
4	Letter FCO to Cabinet Office (comprises letter/draft version/covering note).	s35(1)(a)	1 letter disclosed, but some paragraphs redacted. Also some further documents not disclosed. Again names removed.	Exempt under s35(1)(b) - public interest does not favour disclosure.
5	Letters between Health Secretary to Foreign Secretary (comprises 3 documents)	s35(1)(b)	No	Exempt under s35(1)(b) - public interest favours non-disclosure.
6	Internal FCO email re: Foreign Secretary's comments on Today programme	s21	No	Disclose - not exempt under s21.
7	Internal FCO email re: PMQ's on Lancet report	Initially cited s21 but now relying on s35(1)(b)	No	Exempt under s35(1)(b) - public interest does not favour disclosure.
8	Letter FCO to Cabinet Office	s27(1) & s27(2)	Yes, but with names missing.	Exempt under s27(1)(a) – public interest does not favour disclosure
9	Letter Cabinet Office to FCO	Only one paragraph in scope of request - s35(1)(a). Also s35(1)(b).	No	S35(1)(a) engaged – public interest favours non-disclosure.



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10	Letter Defence Secretary to Foreign Secretary		No	Exempt under s35(1)(b) - public interest favours non-disclosure.
11	4 docs: (i) FCO memo (ii) Letter Foreign Secretary to Defence Secretary (iii) Letter Defence Secretary to Foreign Secretary (iv) Transcript of Foreign Secretary on Today programme	s35(1)(b) (i) - s35(1)(a) (ii) and (iii) – s35(1)(b) (iv) – s21	Document (i) disclosed, but some paragraphs redacted. Again names removed.	(i) Disclose – s35(1)(a) not engaged. (ii) and (iii) Exempt under s35(1)(b) - public interest favours non-disclosure. (iv) Exempt under s21.
12	Memo from Chief Scientific Adviser	s35(1)(a)	Disclosed, but with redactions to names.	Disclose – s35(1)(a) not engaged.
13	Letter MoD to FCO	s35(1)(a)	Disclosed, but with significant redactions including some names.	S35(1)(a) engaged – public interest favours non-disclosure.
14	Letter FCO to Cabinet Office	s35(1)(a)	Disclosed, but with significant redactions including some names.	S35(1)(a) engaged – public interest favours non-disclosure.
15	Letter MoD to FCO and covering email	s35(1)(a)	No	S35(1)(a) engaged – public interest favours non-disclosure.
16	Memo from FCO to various	s35(1)(a) s27(1) & s27(2) for paras 3 - 5 s35(1)(a) for whole document	No	S35(1)(a) engaged – public interest favours non-disclosure.
17	Letter PS at FCO to PS Cabinet Office	s35(1)(a) for whole document. Also s35(1)(b). Paras 3-7 & 11-12 covered by s27(1) &	Disclosed, but with significant redactions including some names.	Exempt under s35(1)(b) - public interest favours non-disclosure.

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		s27(2).		
18	Internal FCO email		Disclosed, but with significant redactions including some names.	s35(1)(a) engaged – public interest favours non-disclosure.
19	Letter PS at Cabinet Office to PS FCO	s35(1)(a)	No	Exempt under s35(1)(b) - public interest favours non-disclosure.
20	N/A	s35(1)(b) and s35(1)(a)	No	Exempt from disclosure on basis of s23(1)
21	N/A	s23(1)	No	Exempt from disclosure on basis of s23(1)
22	Internal FCO emails	s23(1)	No	Exempt under s27(1)(a) – public interest does not favour disclosure.
23	US State Dept to FCO	s27(1) & s27(2) & s35(1)(a)	No	Exempt under s27(1)(a) – public interest does not favour disclosure.
24	Internal FCO email	s27(1) & s27(2)	Disclosed, but with redactions to names.	Disclose – s35(1)(a) not engaged.
25	Internal FCO email	s35(1)(a)	No	Exempt under s27(1)(a) – public interest does not favour disclosure.
26	Internal FCO emails	s27(1) & s27(2)	No	Disclose – s35(1)(a) not engaged.
27	Internal FCO emails	s35(1)(a)	No	Disclose – s35(1)(a) not engaged.
28	Internal FCO emails	s35(1)(a)	No	Disclose – s35(1)(a) not engaged.
29	Internal FCO emails	s35(1)(a)	No	Disclose – s35(1)(a) not engaged.
30	Internal FCO emails	s35(1)(a)	No	Exempt under s27(1)(a) – public interest does not favour disclosure.
		s27(1) & s27(2)		

Legal Annex

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 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

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 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(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 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.”

Section 23(1) provides that –

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

Section 23(3) provides that –

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

- (a) the Security Service,
- (b) the Secret Intelligence Service,
- (c) the Government Communications Headquarters,
- (d) the special forces,
- (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
- (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
- (g) the Tribunal established under section 5 of the Security Service Act 1989,

- (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
- (i) the Security Vetting Appeals Panel,
- (j) the Security Commission,
- (k) the National Criminal Intelligence Service, and
- (l) the Service Authority for the National Criminal Intelligence Service.”

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”