

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 21 March 2011

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

### Summary

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The complainant requested information relating to a meeting between Tony Blair and the Countryside Alliance. The public authority refused to confirm or deny it held information relating to the provision of Law Officers' advice in accordance with the provisions of sections 35(1)(c) and 35(3) (Information relating to the provision of Law Officers' advice). The Commissioner found that the exemption was engaged and the public interest in maintaining the exemption outweighed the public interest in disclosure.

The public authority however withheld the information it held on the basis of the exemptions at sections 36(2)(b)(i) (free and frank provision of advice) and 35(1)(a) (formulation or development of government policy) in the alternative, and additionally 41(1) (Information provided in confidence). The Commissioner first considered whether the information withheld on the basis of section 36(2)(b)(i) was exempt on the basis of section 35(1)(a) because the Act stipulates that it is the former exemption rather than the latter that can be used as an alternative exemption.

The Commissioner found that section 35(1)(a) was engaged and the public interest in maintaining the exemption outweighed the public interest in disclosure. He also found that section 36(2)(b)(i) was not engaged in respect of the information to which it was specifically applied. The Commissioner however found that the information not exempt on the basis of section 36(2)(b)(i) was instead exempt on the basis of section 41(1). Consequently he has not ordered disclosure of the withheld information but found the public authority in breach of sections 1(1)(a) (Information held by a public authority), 10(1) (Time for compliance), 17(1) and 17(1)(b) (Refusal of request) of the Act.

## The Commissioner's Role

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

## The Request

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2. On 12 January 2009 the complainant requested the following information:  
  
'Any minutes or other records relating to the meeting between Tony Blair and representatives of the Countryside Alliance during June 2005.'
3. On 26 February 2009 the public authority responded. The information within the scope of the requested ('the disputed information/the disputed bundle') was withheld on the basis of the exemptions at sections 35(1)(a), 35(1)(c) & (3), 36(2)(b)(i), and 42(1).
4. On 26 April 2009 the complainant requested a review of the public authority's decision to withhold the disputed information.
5. On 24 June 2009 the public authority wrote back with details of the outcome of the review. The exemption at section 35(1)(a) was dropped but the exceptions at regulations 12(4)(e) and 12(5)(f) of the Environmental Information Regulations 2004 (EIR) were additionally relied on to withhold parts of the disputed information which the public authority considered might fall within the definition of environmental information.

## The Investigation

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### Scope of the case

6. On 01 July 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to review the public authority's decision to withhold the disputed information. Unfortunately, due to a backlog of complaints, it was some time before the Commissioner could commence the investigation.

## Chronology

7. On 16 June 2010 the Commissioner wrote to the complainant and confirmed the scope of the investigation.
8. On 16 June 2010 the Commissioner also wrote to the public authority. He requested copies of the disputed information and also invited the public authority to make additional representations on the application of the exemptions and exceptions. The Commissioner gave the public authority 20 working days to respond to his letter. On 26 August 2010, a representative of the public authority informed a representative of the Commissioner that the public authority's response would be available in two weeks.
9. On 22 September 2010, having received no response, the Commissioner issued an Information Notice (in accordance with his powers under section 51) in order to obtain the public authority's response to his letter.
10. On 22 October 2010 the public authority responded. It provided the Commissioner with copies of the disputed information. The public authority maintained its reliance on the exemptions at sections 35(1)(c) & (3), 36(2)(b)(i), and section 42(1).
11. The public authority however decided to rely on the exemption at section 35(1)(a) again, and additionally, the exemption at section 41(1).
12. The public authority also explained that it no longer considered that any of the disputed information was environmental information within the scope of the EIR. However, if the Commissioner disagreed, it asserted that the relevant information would in any event be exempt on the basis of the exceptions at regulations 12(4)(e) and 12(5)(f).
13. The Commissioner noted that the disputed information did not include copies of the minutes or records of the meeting between Tony Blair and the Countryside Alliance. It consisted of briefing documents for the Prime Minister and a letter from the Countryside Alliance to the Prime Minister's office.
14. On 01 November 2010 the Commissioner asked the public authority to clarify why the minutes or records of the meeting were not provided.
15. On 03 November 2010 the public authority responded. It confirmed that it did not hold minutes or records of the meeting.

## Analysis

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16. A full text of all the statutory provisions referred to below can be found in the legal annex.

### Applicable Access Regime

17. As noted above, at the time of the internal review, the public authority explained that some of the information within the scope of the request was caught by the EIR. However, in its submissions to the Commissioner, the public authority subsequently argued that it did not consider any of the information to fall within the scope of the EIR.
18. The public authority argued that the Information Tribunal (Tribunal) had accepted that although the definition of environmental information should be construed widely, Council Directive 2003/4/EC was not intended to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a).<sup>1</sup>
19. The public authority argued that the disputed information is primarily concerned with legal and political matters, and not environmental issues.
20. In the Commissioner's view, the Tribunal did not take a definitive position in that case on whether information which merely has a minimal connection to any of the elements is caught by the EIR. However, having carefully reviewed the disputed information, the Commissioner accepts that it is not primarily concerned with environmental matters and the context in which it was produced also clearly shows that its primary focus is on legal and political issues (i.e. animal welfare and the right to hunt wildlife in a particular way). For that reason therefore, he finds that the disputed information does not fall within the scope of the EIR.
21. In terms of specific information, the public authority stated that; 'there may be some environmental information scattered through the other information.' However, the public authority did not specify the relevant information it was referring to when it made that statement.
22. The Commissioner notes that in limited parts of the disputed information, minor references were made to information which relates

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<sup>1</sup> The Mersey Tunnel Users Association v Information Commissioner (1) EA/2009/0001 – paragraph 64

to the environment but for reasons explained more fully in the confidential annex, the Commissioner is satisfied that the relevant information does not fall within the scope of the EIR.

### **Information not held – minutes/records of the meeting between Tony Blair and the Countryside Alliance**

23. The public authority confirmed that it did not hold minutes or records of the meeting between Tony Blair and the Countryside Alliance and that all the information provided to the Commissioner was the only information it held within the scope of the request. According to the public authority, it identified a file series entitled 'Rural Affairs: Hunting from a spreadsheet which lists titles of file series and the dates of individual files as being the only file likely to contain information relevant to the request. It carried out a manual search of three files in the series: 5/5/2004 – 8/12/2004, 6/5/2005 – 31/10/2005 and 1/11/2005 – 27/06/2007. These were the files it considered would be most likely to contain documents produced within the period the meeting took place. The public authority confirmed that the only information relevant to the request (and subsequently provided to the Commissioner) was found in series 6/5/2005 – 31/10/2005.
24. The Commissioner is satisfied that, on a balance of probabilities, (which is the test he applies<sup>2</sup>) the information in the disputed bundle is all the information held by the public authority within the scope of the request.

### **Exemptions**

#### Sections 35(1)(c) & (3) – Law Officers' Advice

25. Information is exempt on the basis of section 35(1)(c) if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. Section 35(3) excludes a public authority from the duty to confirm or deny (as stipulated in section 1(1)(a) ) whether it holds any information relating to the provision of Law Officers' advice.
26. The public authority confirmed the true position to the Commissioner for the purpose of his investigation but in so far as the application of the Act is concerned, the public authority maintained the exclusion from the duty to confirm or deny whether it held any information relating to the provision of Law Officers' advice. The Commissioner is

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<sup>2</sup> The civil standard of proof was also considered adequate by the Tribunal in *Linda Bromley & Others v The Information Commissioner & Environmental Agency* – EA/2006/0072

satisfied that the public authority correctly relied on the exclusion from the duty to confirm or deny as provided for in sections 35(1)(c) and (3).

27. The public authority provided additional information relating to its reliance on sections 35(1)(c) and (3) which the Commissioner has reproduced in the confidential annex (to be supplied to the public authority only) in order not defeat the of purpose of applying the exemption.
28. The exclusion from the duty to confirm or deny is subject to a public interest test so that a public authority would need to demonstrate that in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny outweighs the public interest in disclosing whether or not information is held.

Public interest arguments in favour of confirming or denying whether the public authority held any information relating to the provision of Law Officers' advice

29. The public authority acknowledged the general public interest in the public knowing that decisions regarding issues which have generated considerable debate such as the hunting ban, were taken with the benefit of sound legal advice.

Public interest arguments in favour of maintaining the exclusion from the duty to confirm or deny whether the public authority held any information relating to the provision of Law Officers' advice.

30. The public authority argued that section 35 is a statutory recognition of the public interest in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of political debate. It explained that this principle was also judicially recognised in *Conway v Rimmer* [1968] AC 910, 952 (Lord Reith) and in *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, 1112 (Lord Wilberforce), 1121 (Lord Salmon), 1126-1127 (Lord Edmund-Davies) and 1143 – 1145 (Lord Scarman).
31. According to the public authority, there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. The public authority explained that this strong interest is reflected in the long standing convention (which is

- recognised in paragraph 2.13 of the Ministerial Code) observed by successive governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. The public authority further pointed out that the High Court<sup>3</sup> has also recognised the strength of the public interest in maintaining the convention of the confidentiality of the Law Officers' advice. According to the public authority, it is also an interest which is recognised by the particular form of words used in section 35(1)(c) which is different to the general provisions in relation to legal professional privilege in section 42(1).
32. The public authority further argued that since the Law Officers are the government's most authoritative legal advisers, their advice has particularly authoritative status within the government. However, the need for government to obtain legal advice on a very wide range of matters is such that it would be impossible for such advice to be provided by the Law Officers in every case. To disclose whether or not Law Officers have advised on a particular issue would potentially have a two-fold detriment.
  33. On the one hand, to disclose that they have advised on an issue could be taken to indicate that particular importance was attached to it or even that the government was in doubt about the strength of its legal position. Even if that impression was unfounded, the risk of creating it might deter the government from consulting the Law Officers in appropriate cases.
  34. On the other hand to disclose that the Law Officers have not advised on an issue might expose the government to criticism for not having consulted them and therefore failing to give sufficient weight to the issue. Again, even if this was unfounded, this could lead to pressure to consult the Law Officers in appropriate cases or in an unmanageably large number of cases.
  35. The public authority argued in conclusion that by citing the exemption at section 42(1) it had confirmed to the complainant that legal advice was sought in respect of the hunting ban and for that reason there was little if any public interest in knowing who provided that advice.

#### Balance of the public interest arguments

36. In addition to the public interest in disclosure acknowledged by the public authority, the Commissioner notes that in *Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and The BBC*

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<sup>3</sup> In *HMT v ICO and Evan Owen* [2009] EWHC 1811 (the HM Treasury case)

(EA/2006/011 and EA/2006/0013),<sup>4</sup> the Information Tribunal (Tribunal) commented on the general public interest in openness;

'While the public interest considerations in the exemption from disclosure are narrowly conceived the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and the informed and meaningful participation by the public in the democratic process.' (Paragraph 87).

37. Specifically in this case, the Commissioner considers that there was a strong public interest in knowing whether the public authority held any information relating to the provision of Law Officers' advice generally in connection with the hunting ban and specifically in connection with the meeting between the former Prime Minister, Tony Blair and the Countryside Alliance to discuss the hunting ban. This is because the issue generated considerable debate between animal welfare campaign groups and pro-hunt supporters, was subject to a vote in Parliament, and still generates considerable emotion from both sides of the divide.
38. The Commissioner also recognises, however, that there is a long standing convention reflected in the Ministerial Code against the disclosure of not only the content of Law Officers' advice but whether or not they have indeed provided advice on a particular issue. He further notes that this principle must be accorded significant weight even in the absence of evidence of any potential damage. In the HM Treasury case (HMT v ICO and Evan Owen [2009] EWHC 1811), the High Court commented that "Parliament intended real weight should continue to be afforded to this aspect of the Law Officer's Convention.....even in the absence of evidence of particular damage." (Paragraph 54)
39. The High Court however also pointed out that its comments were not intended to
 

".....undermine the important new principle of transparency and accountability that the FOIA has brought to government in many ways. The Law Officers' Convention will now operate subject to the principles of the FOIA..... I can certainly contemplate, for example, that the context of the commencement of hostilities in Iraq was of such public importance that....the strength of public interest in disclosure of the

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<sup>4</sup> The Heather Brooke case



advice as to the legality of the Iraq war might well have out-weighed the exemption in its general and particular aspects" (Per Mr Justice Blake at Paragraph 64).

40. Having weighed the public interest factors both for and against disclosure in the circumstances of this case, the Commissioner considers that notwithstanding the significant public interest in disclosure, the strong inbuilt public interest in maintaining the exclusion from disclosing whether or not the public authority held any information relating to the provision of Law Officers' advice in this case outweighed the public interest in disclosure.
41. In reaching his decision, the Commissioner also gave weight to the fact that the public authority had already confirmed via the application of the exemption at section 42(1) that it did in fact receive legal advice regarding the hunting ban. The Commissioner agrees with the public authority that the public interest in knowing whether the government had explored legal considerations in relation to the hunting ban had been met by that disclosure.
42. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny whether the public authority held information relating to the provision of advice by Law Officers outweighed the public interest in disclosure.

Mutual Exclusivity of sections 35(1)(a) and 36(2)(b)(i)

43. The public authority relied on section 35(1)(a) to the extent that the Commissioner disagreed that section 36(2)(b)(i) was engaged in respect of the information on pages 11 – 15 and 19 – 20 of the disputed bundle.
44. However, the Act stipulates that a public authority can only rely on the exemptions at sections 36 to withhold information, if, among other things, the requested information is not exempt by virtue of section 35.
45. Therefore the Commissioner first considered whether section 35(1)(a) was engaged in respect of the relevant information on pages 11 – 15 (excluding specific passages which are referred to in the confidential annex) and 19 – 20.

Section 35(1)(a)

46. Information is exempt on the basis of section 35(1)(a) if it is held by a government department and relates to the formulation or development of government policy.
47. The information on pages 11 – 15 and 19 – 20 consists of briefing notes to the former Prime Minister, Tony Blair in advance of his meeting with a representative of the Countryside Alliance.
48. In its submissions to the Commissioner on the application of the exemption, the public authority stated that the information 'concerns policy advice to the Prime Minister...'
49. The Commissioner recognises that there is no standard approach to the formulation or development of policy. He acknowledges that a range of activities could be described as government policy. Policy formulation or development could therefore vary from the classic, formal process in which the government attempts to develop practical measures to achieve its stated aims and objectives, to the reactionary one off measures in response to a specific issue.
50. In the context of this case, the Commissioner notes that the former Prime Minister was meeting with the Countryside Alliance to discuss aspects of the Hunting Act 2004 ("Hunting Act") about which the Countryside Alliance had expressed concerns. It had applied to the Administrative Court for the Hunting Act to be overturned on the grounds that it contravened the Human Rights Act 1998 (HRA).
51. The Countryside Alliance had written to the Prime Minister's office suggesting that a number of options should be considered by the government in order to make the Hunting Act compatible with the HRA. The briefing notes prepared for the Prime Minister contained the government's proposed response.
52. Although, in the context of section 35(1)(a), often used interchangeably with "formulation", the term "development" is suggestive of a stage beyond formulation which would include a process of improving or altering existing policy by analysing, reviewing, or recording the effects of the existing policy.
53. Furthermore, in the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question and does not need to be information specifically on the formulation or development of that policy.

54. In the Commissioner's view, the information in the briefing notes does not relate to the formulation of government policy because the Hunting Act had already been implemented at the time.<sup>5</sup> In terms of whether it relates to the development of government policy, the Commissioner notes that the feasibility of each of the suggested options was considered. It is therefore clear to the Commissioner that the information in the briefing notes was effectively a review of aspects of the Hunting Act in light of the concerns expressed by the Countryside Alliance and for that reason it relates to the development of government policy.
55. The Commissioner therefore finds that the information on pages 11 – 15 (excluding specific passages which are referred to in the confidential annex) and 19 – 20 of the disputed bundle was exempt on the basis of section 35(1)(a).

#### Public Interest Test

56. The exemptions at section 35 are qualified so that even if any of the exemptions is engaged, a public authority must go on to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

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

57. The public authority acknowledged the general public interest in openness and the public interest in citizens understanding how the decisions that affect them are taken.

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

58. The public authority argued that there is a public interest in the Prime Minister having the freedom to develop policy free from intrusion.
59. The public authority further argued that although a decision regarding the use of dogs in hunting wildlife had been taken, the Hunting Act remains controversial and as evident from steps already taken by the Countryside Alliance, it may yet be the subject of further legal challenge or legislative amendments. In support of its view, the public authority drew the Commissioner's attention to the fact that the Conservative Party manifesto contained a commitment to give Parliament an opportunity to repeal the Act and there was also nothing

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<sup>5</sup> The briefing notes were produced in June 2005

to suggest that the Countryside Alliance was no longer committed to its repeal. The public authority therefore concluded that the public interest in maintaining the exemption had not diminished over time and the disclosure of the advice to the former Prime Minister could still have a considerable impact on current policy development.

60. The public authority further argued that the expectation of the officials who provide advice to the Prime Minister was that their advice would remain confidential. It was important to maintain this expectation so that officials do not spend too much effort on the presentation, rather than the content of their advice otherwise this would lead to less robust and poor quality advice to the detriment of good administration.
61. The public authority also attached considerable weight to the possibility that disclosure of the advice provided to the former Prime Minister on the hunting ban could inhibit their successors from providing candid advice to the current Prime Minister on the same issue.

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

62. The Commissioner has already noted the general public interest in openness recognised by the Tribunal in the Guardian and Brooke case, referred to above. He would also comment that there was a significant public interest in knowing whether the former Prime Minister had benefitted from sound advice with regard to the policy decisions relating to the hunting ban.
63. In addition, there is a public interest in ensuring that, in providing advice, officials have considered all the relevant options. The exposure of their advice to public scrutiny could therefore help to ensure that officials rigorously consider all available options before providing advice, which would no doubt enhance the policy development process.
64. The Commissioner does not accept the argument that officials advising the Prime Minister expect that their advice will remain confidential. In a culture of openness under the Act, it is clear that officials would anticipate the possible public disclosure of advice that they have provided.
65. However, the Commissioner accepts that the issue was 'live' at the time of the request and still is now. There is certainly no doubt that the hunting ban still generates heated debate between pro-hunting groups and animal welfare campaigners. There is therefore a strong public interest in ensuring that those who may from time to time be called upon to advise the government on the issue are not constrained by the likelihood of disclosure which would expose their advice to public

scrutiny and possible criticism. Such an outcome would diminish the quality of the advice provided to the detriment of the development of policy on the hunting ban. Whilst there is a public interest in ensuring the transparency of the government decisions on the hunting ban, it remains a controversial issue and it is in the public interest to ensure that the government continues to receive the best possible advice on the subject. It would not be in the public interest if, for fear of premature disclosure to scrutiny, the advice provided was not candid or not based on a proper consideration of all the available options.

66. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in the disclosure of the relevant information on pages 11 – 15 and 19 – 20 of the disputed bundle.
67. In view of his decision above, the Commissioner has not considered the application of the exemption at section 36(2)(b)(i) to that relevant information.

#### Section 36(2)(b)(i)

68. The public authority submitted that the information on pages 1 – 10 was exempt on the basis of the exemption at section 36(2)(b)(i)
69. Pages 1 – 10 consist of a letter written by a representative of the Countryside Alliance to the former Prime Minister's office outlining the grounds for their opposition to the Hunting Act.
70. Information is exempt on the basis of section 36(2)(b)(i) if in the reasonable opinion of a qualified person (QP) disclosure would, or would be likely to, inhibit the free and frank provision of advice.
71. According to the public authority, the QP, Tom Watson MP, gave his opinion that the disclosure of the disputed information 'would or would be likely to inhibit the free and frank provision of advice'. The public authority provided the Commissioner with copies of the opinion and the submissions to the QP for the purposes of his investigation.
72. A QP includes any Minister of the Crown.<sup>6</sup> At the time he provided his opinion on the application of the exemption, Tom Watson MP was a Parliamentary Under Secretary of State at the Cabinet Office and therefore a QP by virtue of section 36(5)(a).

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<sup>6</sup> Qualified Persons are listed in section 36(5) of the Act.

73. The Commissioner has carefully reviewed QP's opinion and the submissions on which it was based. He notes that the opinion was provided on 24 February 2009. Although the relevant limbs of section 36(2)(b) were not cited in the submission, it was made quite clear to the QP that the information concerned the free and frank provision of advice and exchange of views for the purposes of deliberation. In its representation to the Commissioner, the public authority explained that the QP considered the information exempt on the basis of section 36(2)(b)(i) (free and frank provision of advice). The public authority did not specify the level of the likelihood of inhibition (i.e. 'would' or 'would be likely') in the event of disclosure.

Was the Qualified Person's opinion reasonably arrived at and reasonable in substance?

74. The Commissioner is satisfied that the QP's opinion was reasonably arrived at. The opinion was based on a consideration of the representations made by officials on the application of the exemption. There is nothing to suggest that the application of the exemption was not carefully considered.
75. As noted above, the opinion did not specify the actual limb of the section 36(2)(b) exemption relied on by the public authority. The Commissioner however recognises that the two limbs are not mutually exclusive. Nevertheless, in its submission to the Commissioner, the public authority confirmed that it had relied on section 36(2)(b)(i). The Commissioner is therefore satisfied that the QP considered the disputed information to be exempt on the basis of section 36(2)(b)(i).
76. Although the QP did not specify the level of the likelihood of inhibition in the event of disclosure, the Commissioner has interpreted this to mean that the QP considered that either of them would have applied. In other words, disclosure would inhibit the free and frank provision of advice or, in the alternative, it would be likely to. In these circumstances he considers the engagement of the exemption by reference to the lower threshold of "would be likely to prejudice..."
79. Having carefully considered the relevant disputed information on pages 1 – 10 of the disputed bundle and applying the lower threshold, the Commissioner finds that the opinion was not reasonable in substance as he does not consider that disclosure could have inhibited the free and frank provision of advice.
81. As already noted, the disputed information is contained in a letter from the Countryside Alliance to an official at the former Prime Minister's Office and, broadly speaking, it outlines the grounds for their

opposition to the hunting ban. The exemption at section 36(2)(b)(i) is designed to protect the free and frank provision of advice. The Commissioner cannot see how the disclosure of the contents of the letter from the Countryside Alliance to the Prime Minister's office would have been likely to lead to the inhibiting effect contemplated by the exemption at section 36(2)(b)(i). In the Guardian and Brooke case, the Tribunal commented that the substance of the QP's opinion must be objectively reasonable (Paragraph 60). The Commissioner does not consider that the opinion in relation to the information on pages 1 – 10 was objectively reasonable.

82. The Commissioner therefore finds the information on pages 1 - 10 was not exempt on the basis of section 36(2)(b)(i). Since the exemption is not engaged, the public interest test does not need to be considered.

#### Section 41(1)

83. The public authority also submitted that the information on pages 1 – 10 of the disputed bundle was exempt on the basis of the exemption at section 41(1). The Commissioner has further commented on the disputed information in the confidential annex.
84. Information is exempt on the basis of section 41(1) if it was obtained by a public authority from any other person and the disclosure of the information by the public authority would constitute an actionable breach of confidence.
85. Therefore for this exemption to be engaged two criteria have to be met. The public authority must have obtained the information from a third party and its disclosure would constitute an actionable breach of confidence.

#### Was the disputed information in question provided to the public authority by a third party?

86. As noted above, the relevant disputed information constitutes a letter from the Countryside Alliance to an official at the Prime Minister's Office. The Commissioner is satisfied that the information was provided by the Countryside Alliance to the public authority.

#### Would the disclosure of the disputed information constitute an actionable breach of confidence?

87. In the Commissioner's view, a breach of confidence will be actionable if:

- The information has the necessary quality of confidence;
  - The information was imparted with an expectation that it would be kept confidential (be that an explicit or implicit expectation); and
  - There was an unauthorised use of the information to the detriment of the confider.<sup>7</sup>
88. The Commissioner however also recognises that, in response to the introduction of the HRA, the law of confidence has evolved in respect of information on personal matters so that quite trivial information on personal matters can still be protected under the law of confidence even if disclosure may not be detrimental in terms of tangible loss.<sup>8</sup>
89. In view of the contents of the letter and the circumstances under which it was written, the Commissioner is satisfied that the information is not trivial and possesses the necessary quality of confidence. At the time the letter was written, the Countryside Alliance had applied to the Administrative Court for a ruling that the Hunting Act 2004 was incompatible with the HRA. The contents of the letter relate directly to the grounds on which it sought to have the Hunting Act overturned.
90. The Commissioner is also satisfied that the letter was written with an expectation that it would be kept confidential. This expectation is explicitly stated in the letter and given the circumstances mentioned above it is clear that the Countryside Alliance would not have expected the public authority to make the contents of the letter publicly available.
91. As noted above, the element of detriment is not always necessary. However, the Commissioner would argue that disclosure could have been prejudicial to the application by the Countryside Alliance to the Administrative Court to have the Hunting Act overturned and to that extent disclosure could have been detrimental to their cause.
92. For these reasons, the Commissioner accepts that disclosure of the disputed information would have constituted an actionable breach of confidence.
93. However, before reaching a conclusion on the application of section 41(1), the Commissioner has to consider whether there would be a public interest defence to disclosing the information. Although section 41 is an absolute exemption, under the common law of confidence a

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<sup>7</sup> The three elements required for a breach of confidence to succeed as identified by Megarry J in *Coco v AN Clarke (engineers) Limited* [1968] FSR 415

<sup>8</sup> This point was noted by the High Court in *Home Office v BUAV & the ICO* [2008] EWHC 892 (QB).



breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.

### Public Interest

94. The Commissioner first considered the public interest in the disclosure of the relevant information.
95. The public authority noted that the disclosure of information which would reveal fraud or protect the public or individuals from harm would likely outweigh the public interest in maintaining confidences.
96. The public authority also noted that a public interest defence may be available if disclosure was necessary to inform a hotly fought political debate on an issue.
97. The Commissioner notes that the letter was written as part of the exchanges between the government and the Countryside Alliance which were aimed at reaching the settlement of a legal action. The Commissioner is therefore of the view that there was a public interest in knowing the terms on which such a settlement might be reached, in circumstances where Parliament had already passed anti-hunting legislation.

### The public interest in maintaining the duty of confidence owed by the public authority to the Countryside Alliance

98. The public authority argued that the information does not reveal a crime or a danger to the public safety nor was disclosure necessary to inform the debate about the Hunting Act.
99. The public authority also argued that it would need to show that there was a compelling public interest which overrode its duty of confidentiality and it did not consider that there was such a compelling public interest in the circumstances of this case.
100. Generally, the Commissioner considers there is a wider public interest in preserving the principle of confidentiality. Whilst the Commissioner does not consider that an exceptional case needs to be made to override the duty of confidence, he would agree with the public authority that an obligation of confidence should not be overridden on public interest grounds lightly.
101. In the circumstances of this case, it is clear that the Countryside Alliance wrote to the Prime Minister's Office in confidence. The letter contained some of the grounds for its application to overturn the

Hunting Act. Whilst its disclosure could have contributed to the debate on the hunting ban, its disclosure was certainly not necessary and in the Commissioner's view, a public interest defence on that basis would be highly unlikely to succeed.

102. On balance therefore, the Commissioner finds that the public interest in maintaining the duty of confidence owed by the public authority to the Countryside Alliance outweighed the public interest in disclosure.
103. Consequently, the Commissioner finds that information on pages 1 – 10 was exempt on the basis of section 41(1).

### **Procedural Requirements**

104. Sections 1(1)(a) and 10(1) combine to impose on a public authority the duty to inform an applicant in writing no later than 20 working days whether it holds information of the nature described in their request.
105. The Commissioner therefore finds the public authority in breach of sections 1(1)(a) and 10(1) for failing to inform the complainant that it did not hold the actual minutes of the meeting between Tony Blair and the Countryside Alliance.
106. Under section 17(1), a public authority is required to issue a refusal notice within 20 working days of a request.
107. The Commissioner therefore finds the public authority in breach of section 17(1) for issuing its refusal notice outside the statutory time limit.
108. Under section 17(1)(b) a public authority is also required, within 20 working days of a request to specify in its refusal notice the exemption(s) it relied on to withhold requested information.
109. The Commissioner therefore also finds the public authority in breach of section 17(1)(b) for subsequently relying on the exemptions at sections 35(1)(a) and 41(1) during the course of the Commissioner's investigation.

### **The Decision**

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110. The Commissioner's decision is that the public authority dealt with parts of the requests for information in accordance with the Act.

111. The public authority correctly relied on the exclusion from the duty to confirm or deny it held information relating to the provision of Law Officers' advice as stated in sections 35(1)(c) and 35(3) of the Act.
112. The public authority correctly withheld the information on pages 11 – 15 and 19 - 20 of the disputed bundle on the basis of the exemption at section 35(1)(a).
113. The public authority correctly withheld the information on pages 1 – 10 of the disputed bundle on the basis of section 41(1).
114. However, the public authority did not deal with parts of the requests in accordance with the Act.
115. The exemption at section 36(2)(b)(i) was incorrectly applied in respect of the information on pages 1 – 10 of the disputed bundle.
116. The public authority breached sections 1(1)(a), 10(1), 17(1) and 17(1)(b) of the Act.

### **Steps Required**

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117. The Commissioner requires no steps to be taken.

### **Other matters**

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118. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
119. Part VI of the section 45 Code of Practice (the "section 45 code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complainant. As he has made clear in his *'Good Practice Guidance No 5'* published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that, despite the

publication of his guidance on this matter, it took the public authority just over 40 working days to complete its internal review in this case.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

**Dated the 21<sup>st</sup> day of March 2011**

**Signed .....**

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

## Legal Annex

### General Right of Access

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

"Any person making a request for information to a public authority is entitled -

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

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

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

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

"Where a public authority -

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

(b) has informed the applicant of that requirement,

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

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

"The information -

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

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

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

**Section 1(5)** provides that –

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

**Section 1(6)** provides that –

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

## **Refusal of Request**

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an

estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

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

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

**Section 17(5)** provides that –

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

**Section 17(6)** provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and



- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7)** provides that –

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

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

### **Formulation of Government Policy**

**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(3)** provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

**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."

**Section 35(5)** provides that –

"In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."

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

**Section 36(1)** provides that –

"This section applies to-

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

- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

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

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 36(3)** provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

**Section 36(4)** provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

**Section 36(5)** provides that –

“In subsections (2) and (3) “qualified person”-

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

- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

**Section 36(6)** provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and

- (c) may be granted subject to conditions.”

**Section 36(7)** provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

**Information provided in confidence.**

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”