

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 24 January 2011

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

### Summary

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The complainant submitted 8 requests to the Foreign and Commonwealth Office which all focused on two individuals who had been detained in Guantanamo Bay. The FCO provided the complainant with some information in response to these requests but withheld further information on the basis of sections 23(1), 27(1)(a), 32(1)(a), 32(1)(b), 35(1)(a), 35(1)(c) and 42(1) of the Act. The Commissioner is satisfied that these exemptions have been applied correctly with the exception of a limited amount of information which the FCO now accepts is in the public domain. The Commissioner has ordered the FCO to disclose this latter category of information to the complainant.

### The Commissioner's Role

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

### Background

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2. Bisher al-Rawi is an Iraqi citizen who became a British resident in the 1980s. Jamil el-Banna is a Jordanian with refugee status to remain in Britain.
3. In November 2002 Mr al-Rawi and Mr el-Banna were detained under the Terrorism Act 2000 at Gatwick airport before boarding a flight to Gambia. It was alleged that they were carrying a dangerous weapon. Both men were subsequently released without charge and allowed to

continue their journeys to Gambia. Upon arrival in Gambia on 8 November 2002 both men were arrested, purportedly on the basis of alleged links to al-Qaeda. In December 2002 they were moved to Bagram Airbase in Afghanistan and in March 2003 they were transferred to Guantanamo Bay.

4. Mr al-Rawi was released from Guantanamo Bay on 30 March 2007 and Mr el-Banna was released on 18 November 2007.

## The Request

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5. The complainant originally sent the Foreign and Commonwealth Office (FCO) twenty-two numbered requests on 20 May 2008. In submitting these requests the complainant acknowledged that given the number of requests the cost limit within the Act may be reached. The complainant therefore asked for as many of the requests to be dealt with as possible and noted that they were listed in order of priority. (The complainant also noted that FCO officials had previously confirmed to him that they would inform him if the cost limit was reached and put in place arrangements for dealing with the remaining requests.)
6. The FCO subsequently provided the complainant with a response to the requests numbered 1 to 5 in September 2008, noting that the remainder of the requests could not be answered within the cost limit.
7. The complainant then re-submitted the requests numbered 6 to 13 on 15 October 2008. These requests read as follows:
  - '6. The date on which the purpose of the modified battery charger, that was discovered during the detention of Bisher al-Rawi at Gatwick airport and noted in the telegrams of 1 November 2002 and 11 November, was first known.
  7. All information relating to the decision to detain the group including Bisher al-Rawi and Jamil el-Banna at Gatwick airport on 1 November 2002.
  8. All information relating to the threat to the security of Britain or any other nation posed by Bisher al-Rawi and Jamil el-Banna; the work allegedly carried out for the intelligence services by Bisher al-Rawi; and the location of Abu Qatada, between 11 September 2001 and 1 November 2002.
  9. All information received from the Gambian authorities, including that received via the US authorities, regarding Bisher

al-Rawi and Jamil el-Banna, between 1 November 2002 and 6 December 2002.

10. All records of communications between US and UK officials regarding the 'operation' cited in the Loose Minute of 6 November 2002, Subject: Baggage search Abu ANAS, between 1 October 2002 and 6 November 2002.

11. All records of communications between US and UK officials regarding Bisher al-Rawi and Jamil el-Banna, between 8 November 2002 and 6 December 2002, including records of the telephone conversation of 8 November 2002, and the records of the telephone conversation referred to in the 6 December 2002 telegram 'Islamists in Detention in the Gambia'.

12. All information relating to any visits made by UK officials to Bisher al-Rawi and Jamil el-Banna, the progress of the US investigation into Bisher al-Rawi and Jamil el-Banna's activities, and the intention of the US authorities to render Bisher al-Rawi and Jamil el-Banna to Bagram Airbase, between 1 November 2002 and 8 December 2002.

13. The 'matters' that enabled Jack Straw to approach the US authorities on Bisher al-Rawi's behalf.'

8. The FCO responded on 25 February 2009. In this response the FCO provided the complainant with a digest of the information falling within the scope of requests 6 to 9 and 11 to 13 which it believed he was entitled to. The FCO explained that the remaining information was exempt on the basis of various exemptions, namely: 23(1), 27(1)(a), 31(1)(a), 31(1)(b), 32(1), 35(1)(a), 35(1)(b), 40(2) and 42(1). In respect of request 10 the FCO explained that it was refusing to confirm or deny whether it held any information on the basis of section 23(5).
9. The complainant contacted the FCO on 2 April 2009 and asked it to conduct an internal review. In asking for this review the complainant included detailed submissions to support his view that the exemptions had been misapplied. The complainant noted his dissatisfaction with the fact that the refusal notice did not specify which exemptions applied to which requests. The complainant also noted that the FCO took four and half months to reply to these requests and he expected it to conduct its internal review in a timelier manner.
10. The FCO informed the complainant of the outcome of the internal review on 2 June 2009. The review upheld the application of the exemptions as set out in the refusal notice.

## The Investigation

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### Scope of the case

11. The complainant contacted the Commissioner on 27 July 2009 in order to complain about the FCO's handling of his requests numbered 6 to 13. The complainant's grounds of complaint were as follows:
  - The failure to consider the applications of the exemptions contained at sections 23, 27, 31, 32, 35 and 40 properly, including for the qualified exemptions a failure to apply the public interest test correctly.
  - The failure to specify which exemptions applied to which requests in the refusal notice.
  - The failure to provide a response to his requests within 20 working days.
  - The failure to conduct the internal review in a timely manner.
12. The complainant provided detailed submissions to support his views in respect of the application of the exemptions. The Commissioner has not included these submissions here but has included them in the relevant sections of the Analysis section below.

### Chronology

13. Unfortunately, due to a backlog of complaints received about public authorities' handling of requests under the Act, it was not until 18 February 2010 that the Commissioner wrote to the FCO in respect of this complaint. In this letter the Commissioner asked to be provided with copies of the withheld information along with detailed submissions to support the FCO's reliance on the various exemptions quoted in the refusal notice.
14. The Commissioner received a response from the FCO on 30 April 2010. In this response the FCO explained that regardless of whether it was prepared to, or indeed if Commissioner ordered it to, disclose the remainder of the requested information there was a practical bar to doing so which was as follows: The documents falling within the scope of the requests may be relevant to the related civil proceedings being brought against Her Majesty's Government by previous Guantanamo detainees. Across Whitehall there are 250,000 documents that have been submitted into court in relation to these proceedings. Therefore, the FCO argued that significant resources would have to be used in order to determine whether any disclosure under the Act of the

information falling within the scope of these requests was consistent with any disclosure of the 250,000 documents under civil litigation. The FCO explained that use of such resources would have a serious and adverse affect on Her Majesty's Government's ability to meet disclosure deadlines imposed by the Court for the benefit of the claimants. The FCO therefore suggested that at 'this stage' it would be most appropriate to use the exemption contained at s31(1)(c) to withhold all of the information falling within the scope of the requests. The prejudice to the administration of justice would arise because of the need to ascertain whether disclosures under the Act were consistent with potential civil litigation disclosures and the negative impact on Her Majesty's Government meeting its obligations to the Court by undertaking such an exercise. The FCO also has noted that by December 2010 a new document management system for the litigation material will be online so that any necessary cross referencing could be made much more easily. The FCO explained that it would then no longer want to rely on s31(1)(c) although it would of course want to revert back to the numerous other exemptions cited in the refusal notice in order to withhold the information falling within the scope of these requests.

15. The Commissioner contacted the FCO on 22 June 2010 and explained why he was of the opinion that the FCO could not rely on section 31(1)(c) in the manner suggested. Whilst the Commissioner acknowledged that undertaking the cross-referencing exercise described by the FCO had the potential to prejudice the administration of justice, the Commissioner did not accept that such an exercise was one which was relevant to disclosures of information under the Act. This was because the Commissioner did not consider it necessary to ensure that disclosures of information made in response to a request under the Act are consistent with any potential disclosures made during the course of the civil litigation. It followed that if the Commissioner did not accept that it was necessary to establish such consistency, then the cross referencing exercise described by the FCO did not need to be undertaken and thus the potential prejudice to the administration of justice was not relevant in respect of the FCO responding to these requests under the Act. The Commissioner acknowledged that the FCO may disagree with this reasoning and the Notice issued in respect of this complaint could address this application of section 31(1)(c) if the FCO wished it to. However the Commissioner explained that the Notice would also address the application of the exemptions set out in the refusal notice and therefore he repeated his request to be provided with detailed submissions to support the application of these exemptions along with a copy of the withheld information itself.

16. The FCO provided the Commissioner with a copy of the withheld information on 17 August 2010, the only exception to this was the material which was considered to be exempt from disclosure on the basis of section 23(1). However, the FCO's letter, written by the Head of Information Rights, confirmed that he had seen the section 23(1) material and was satisfied that it fell within the scope of the exemption. Accompanying the information itself the FCO provided the Commissioner with a detailed schedule which explained which exemptions had been applied to which documents. The FCO's response noted that a detailed analysis of the exemptions would be provided in the next few days. No reference was made to the FCO's previous suggestion that it would seek to rely in section 31(1)(c) for the reasons set out in paragraph 13.
17. On 25 August 2010 representatives of the FCO and representatives of the Commissioner's office met to discuss a number of ongoing complaints, including the complaint which is the subject of this Notice.
18. Following this meeting the Commissioner contacted the FCO on 26 August 2010 and confirmed that he still needed to be provided with detailed submissions to support the application of the exemptions cited in the refusal notice.
19. Having failed to receive a substantive response from the FCO, the Commissioner served an Information Notice on 19 October 2010 in which he asked to be provided with submissions to support the application of the exemptions. The Notice required the FCO to provide the Commissioner with this information within 30 calendar days of the date of the Notice, i.e. by 18 November 2010.
20. The Commissioner received a detailed (undated) response from the FCO on 22 November 2010 which fulfilled the requirements of the Information Notice. As part of this response the FCO also explained that its most recent review of the withheld material meant that a number of changes had been made to the application of the exemptions (and were detailed in its letter) and therefore the FCO asked the Commissioner to disregard the details set out in the schedule it provided with its letter of 17 August 2010. The FCO also confirmed that it was no longer seeking to rely on section 23(5) in respect of request 10 but was seeking to rely on section 23(1) with the exception of one document which it had discovered was in the public domain and therefore was now happy to provide to the complainant (rather than cite section 21 – information accessible to applicant by other means). The FCO also confirmed that it was no longer seeking to rely on section 23(1) to withhold two further documents as they had since been found in the public domain. Again, no reference was made

to the FCO's previous suggestion that it would seek to rely on section 31(1)(c) of the Act for the reasons set out in paragraph 14.

## Analysis

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21. As noted in the Chronology, the FCO has provided the Commissioner with the documents which fall within the scope of the requests which have not been withheld on the basis of section 23(1). The Commissioner has listed the documents he has been provided with, simply labelling them as document 1, 2, 3, etc, in the annex attached to this Notice. The annex indicates the FCO's position in respect of each document and the Commissioner's findings in respect of any exemptions that have been applied. The Commissioner has purposefully not listed in the annex the documents which have been withheld in their entirety on the basis of section 23(1) at the request of the FCO. (The FCO did not wish the total number of documents falling within the scope of these requests, or the proportion of this information that was exempt on the basis of section 23(1), to be disclosed). Furthermore, it may be the case that the documents listed in the annex have also been partially withheld on the basis of section 23(1) but in light of the FCO's concerns the Commissioner has not indicated which documents these are (if indeed section 23(1) redactions have been applied.) The Commissioner has however provided the FCO with a separate, more detailed annex, which sets out his findings in respect of all of the documents that fall within the scope of these requests.
22. As noted in the Chronology section above, the FCO is now prepared to disclose further documents to the complainant on the basis that such documents are in fact available in the public domain. These are the documents numbered 2 to 8 and 15. Therefore rather than consider the exemptions that the FCO originally used to withhold these documents in this Notice, the Commissioner has simply ordered the FCO to disclose these documents. The exception to this is document 5 because the FCO has withheld a small portion of this information on the basis of section 40(2). The Commissioner has addressed the application of this exemption in the Analysis section below. (The Commissioner notes that the versions of the documents which the FCO is now prepared to disclose contain a number of redactions. However, the Commissioner has established that such redactions are actually contained on the copies of these documents held by the FCO. That is to say, the FCO does not hold unredacted versions of these particular documents.)

## **Substantive Procedural Matters**

### **Section 1 – general right of access**

23. As the attached schedule indicates the FCO concluded that, having reviewed a number of these documents or parts of these documents, they did not fall within the scope of any of the requests numbered 6 to 13. The Commissioner has considered the content of these various documents carefully and he is satisfied that the FCO was correct to conclude that such documents, or parts of documents, fall outside the scope of the requests. The Commissioner's rationale for reaching this conclusion is based on the fact that the requests did not ask for **all** information on Bisher al-Rawi and Jamil el-Banna but rather focused on very specific pieces of information relating to these two individuals. Whilst the information that the Commissioner has concluded is outside the scope of these requests may relate in some way to these two individuals it does not, in the Commissioner's opinion, mean that it falls within the scope of the specific requests.

### **Exemptions**

24. As the attached schedule also indicates the FCO has relied upon a number of exemptions in order to withhold the information that it has not disclosed. The Commissioner has considered each of these in turn. In respect of all of the exemptions – with the exception of section 23(1) – the FCO has provided the Commissioner with detailed submissions to support their application, including breaking this analysis down to a document by document level. For the purpose of this Notice, whilst the Commissioner has considered the FCO's submissions in detail he has only made reference to them in a generic manner. This is because the FCO's submissions include detailed references to the content of the withheld information itself.

### **Section 23 – information supplied by, or relating to, bodies dealing with security matters**

25. The FCO has argued that some of the information falling within the scope of this request is exempt from disclosure on the basis of section 23(1) of the Act. This section states 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).'

26. The full text of section 23, including the full list of the bodies listed at subsection 23(3) is available in the legal annex attached to this notice.



27. This exemption is class based exemption. Therefore there is no need for a public authority to identify any particular prejudice in order for exemption to be engaged. If the information falls within the description contained at section 23(1) it is exempt from disclosure. The exemption is also absolute and thus not subject to the public interest test.
28. As noted in the Chronology section of this notice, the FCO has not provided the Commissioner with the information that it has withheld on the basis of section 23(1). In the circumstances of this case, and given the sensitive nature of the information which the FCO has withheld on the basis of section 23(1), rather than examine such information himself the Commissioner is prepared to conclude that section 23(1) has been correctly relied upon on the basis of the following: Firstly, in the letter sent to him dated 17 August 2010 the FCO's Head of Information Rights confirmed that he had reviewed the information in question and that it clearly fell within the scope of the exemption contained at section 23(1). Secondly, at the meeting with the FCO on 26 August 2010 the Commissioner's representatives were given a detailed explanation to support the FCO's reliance on section 23(1).

## **Section 27 - international relations**

29. As indicated on the attached schedule, the FCO has argued that a number of documents are exempt from disclosure on the basis of section 27(1)(a) of the Act.
30. This exemption states that information is exempt from disclosure if its disclosure would, or would be likely to prejudice, relations between the United Kingdom and any other State.
31. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the

likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

32. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.<sup>1</sup>

*The FCO's position*

33. The FCO argued that disclosure of the withheld information would, or would be likely to (depending on the content of the document) prejudice the UK's relations with US. This prejudice could occur for two broad reasons: Firstly certain documents consist of, or contain references to, US-UK exchanges which the US had the explicit expectation would be kept confidential. In light of this expectation the FCO argued that it was clear that its disclosure would have a negative impact on the UK's relations with the US. Furthermore as a consequence of disclosing such confidential information the US would be less willing to share information with the UK and it would also damage the ability of the UK government to be frank and open with the US government. Secondly, the FCO explained that parts of the information withheld on the basis of section 27(1)(a) also contained the UK government's comments on, or analysis of, US policy and practice and given the content of this information disclosure would, or would be likely to prejudice the UK's relations with the US.

*The complainant's position*

34. In his submissions to the Commissioner the complainant noted that the Information Tribunal had indicated that public authorities needed to provide evidence to support their position that disclosure of information would be prejudicial; it was not sufficient to make speculative opinions. The complainant argued that in this case this was exactly what the FCO had done by not providing any concrete or tangible reason why it believed that the risk of prejudice was anything more than merely a possibility. The complainant also noted that it was unclear with which State the UK believed its relations would be prejudiced but on the assumption it was the US, the complainant noted that current indications from the US Administration were that they favoured a greater openness on the issues of human rights in recent times. This

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<sup>1</sup> *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* (EA/2006/0040), paragraph 81.

broad policy change in the US suggested that disclosure of the requested information would not have the prejudicial impact on the UK-US relationship envisaged by the FCO.

### *The Commissioner's position*

35. The Commissioner accepts the FCO's argument that disclosure of the information would, or would be likely to, harm the UK's relations with the US is clearly an applicable interest falling within the scope of section 27(1)(a). The first criterion set out at paragraph 31 is therefore clearly met.
36. With regard to the second criterion, the Commissioner accepts that it is logical to argue that disclosure of the parts of the withheld information which the US had provided with the clear expectation that it would be treated confidentially would be likely to harm the UK's relations with that State. Furthermore having considered the content of the documents which include internal analysis of the US' position or policies the Commissioner can again understand why disclosure of this information could harm the UK's relations with the US.
37. The Commissioner is therefore satisfied that there is a causal relationship between the potential disclosure of the withheld information and prejudice to the UK's relations with the US. Furthermore, the Commissioner is satisfied that the resultant prejudice which the FCO believes would, or would be likely to occur, is one which can be correctly categorised, in light of the Tribunal's comments above, as real and of substance. In other words, subject to meeting the likelihood test at the third criterion, disclosure could result in making relations more difficult and/or demand a particular diplomatic response.
38. In relation to the third criterion of the test set out at paragraph 31 in the main body of the Notice, 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).

39. As noted above for some of the information withheld on the basis of section 27(1)(a) the FCO has explained that it was seeking to rely on the higher level of likelihood – i.e. would – whereas for other documents the FCO is only seeking to rely on the lower threshold – i.e. would be likely to. Having considered the FCO's submissions and the differing content of withheld information carefully the Commissioner accepts that it is clear that the lower threshold of likelihood is met for all of the documents and furthermore, where the FCO has indicated, that the higher threshold of likelihood is also met. The Commissioner has reached these conclusions on the basis of a number of reasons. Firstly, the fact that the prejudice could be created not just because of one source but two, i.e. disclosure of confidential information received by the UK and/or disclosure of internal UK comments. Secondly, the underlying importance that the US places upon its communications with foreign States remaining confidential (the FCO noted that the US had made it publically clear on a number of occasions that they attached great importance to this principal of confidentiality being scrupulously observed). Thirdly, the high profile and sensitive nature of the subject matter at the heart of the information which in the Commissioner's opinion increases the likelihood of prejudice occurring if the information was disclosed.
40. In reaching this conclusion the Commissioner has taken into account the arguments advanced by the complainant but has concluded they should not materially affect his position for the following reasons:
41. Whilst the Commissioner accepts that the refusal notice and internal review provided to the complainant were not in any way as detailed as the submissions provided directly to him by the FCO, in some ways this is inevitable given that the level of detail which can be provided to requesters is limited; to provide very detailed explanations supporting the applications of the exemptions would compromise the content of the withheld information. Moreover, regardless of the paucity or otherwise of the explanation given to the complainant, for the reasons set out above, the Commissioner is satisfied that exemption contained at section 27(1)(a) is clearly engaged.
42. The Commissioner does not dispute the fact that there would appear to have been a change in US policy towards alleged human rights abuses since President Obama took office in January 2009. However, the Commissioner notes that whenever disclosures have been made by the US, for example the publication of confidential documents on interrogation techniques, these disclosures have clearly been made after careful consideration within the Administration itself. Therefore, the Commissioner does not accept that such 'openness' means that the US has tacitly accepted that information provided to other States on any associated topics or cases is in effect 'fair game' for disclosure.

This is especially true when the information is frank in nature and was provided in confidence, which as explained above the Commissioner certainly accepts that some of the information in this case was. (The remaining information exempt from disclosure on the basis of the section 27(1)(a) consists, of course, of internal UK documents and the Commissioner does not believe that the complainant's counter-arguments are relevant to this class of information.)

### **Public interest test**

43. Section 27(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2(2)(b) of the Act and whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

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

44. The FCO acknowledged that there was general public interest in being transparent about the way the UK engages with its international partners. In the particular circumstances of this case disclosure of the information could provide the public with an insight into the policy surrounding Guantanamo Bay and how British residents were treated. Given the variety of information that had been withheld, disclosure could also serve a number of specific purposes: it would provide the public with an insight in the UK's analysis of the US' policies; it could provide the public with an insight into the UK's bargaining position with the US in respect of such diplomatic issues, including the decisions in relation to terrorists suspects; and it could provide an insight into how certain courses of action are reached.
45. In his submissions to the Commissioner the complainant argued that, as the FCO had acknowledged, there was clearly a general (and weighty) public interest in transparency of information but there were also a number of further specific ones, relevant to this case, namely: there was a high public interest in the government's alleged involvement in the extraordinary rendition of two British residents; detention for years without proper charge or trial; and the government's failure to intervene in their detention for a considerable period of time. (The complainant submitted these arguments in favour of disclosure in respect of all of the qualified exemptions. Whilst the Commissioner has only replicated them in full here he has taken them into account in the balance of the public interest tests for the other qualified exemptions considered below.)

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

46. The FCO argued that the ability of the UK to conduct effective relations with other States depended upon maintaining the trust and confidence between the UK and these other States. If the UK did not maintain this trust and confidence its ability to protect and promote UK interests through internal relations would be hampered. If the information was disclosed in this case the US would be less willing to share sensitive information with the UK, something which was clearly not in the public interest. Furthermore it would not be in the public interest for the UK's bargaining position to be undermined. Disclosure would also inhibit the frankness and openness of diplomatic reporting for fear that it would be disclosed and damage relations with the US. The need for such confidence to be maintained is all the more important in the case of sensitive issues such as these at the heart of the requests.

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

47. With regard to attributing weight to the public interest arguments in favour of disclosing the information the Commissioner notes that arguments surrounding the importance of public authorities being transparent about their actions are often cited in any consideration of the public interest test. However, as such a concept is inherent to the Act this should not diminish its relevance to this case. Furthermore the Commissioner believes that the public interest in disclosure should be accorded particular weight given the issues at the heart of this case, namely the extraordinary rendition of two British residents and the role the UK government allegedly played in it, and the actions of UK government in securing the men's release.
48. With regard to attributing weight to the public interest in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed if there was a negative impact on the provision of information provided to the UK by its foreign partners, either through information ceasing to be provided or through the information provided being of a less candid nature. This is especially true of relationships with its key partners, such as the US, particularly when the issues that need to be discussed in a free and frank nature are of such significance as those at the heart of this case. Furthermore, in the particular circumstances of this case, as the Commissioner has concluded that for certain parts of the withheld information prejudice would occur, not simply be likely to occur, he accepts that this adds further weight to the arguments in favour of maintaining the exemption.

49. In conclusion the Commissioner recognises the strength of the arguments on both sides of the public interest test; however, he has concluded that the public interest favours maintaining the exemption. The Commissioner has reached this decision because although he accepts that there is a compelling public interest in disclosing the information in order to ensure that the UK government is transparent about its actions in respect of the detention of these two individuals, he believes that the public interest is ultimately best served by ensuring that the UK can discuss issues of similar sensitivity and importance in a candid and frank manner with the US in the future. The latter interest would, in his view, be significantly compromised if the withheld information was disclosed.

### **Section 35(1)(a) – formulation and development of government policy**

50. As indicated on the attached schedule, the FCO has argued that a number of documents are exempt from disclosure on the basis of section 35(1)(a).<sup>2</sup>

51. This section states 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’

52. Section 35 is a class based exemption, therefore if information falls within the scope of a particular provision of section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these activities.
53. The FCO has explained to the Commissioner that the information withheld on the basis of section 35(1)(a) relates to the government’s policy on the release and return of former detainees from Guantanamo Bay. Whilst the FCO acknowledged that Mr al-Rawi was released in April 2007 and Mr el-Banna was released in November 2007 – and thus the policy regarding these two individuals had in effect been implemented by the time of the request, the handling of these releases fed directly into the ongoing policy formulation in respect of the release

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<sup>2</sup> The FCO has relied on section 35(1)(b) to withhold document 49. However, as the rationale for doing so is because it relates to government formulation and development of policy (in addition to being a Ministerial communication) the Commissioner has simply accepted that this document falls within the scope of section 35(1)(a).

of other detainees, who at the time these requests were submitted were still being held in Guantanamo Bay.

54. The Commissioner recognises that the term 'policy' is not a precise term and to some extent what is regarded as policy depends upon context. However, there would appear to be a general consensus that policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action and when. The white paper 'Modernising Government' refers to it as the process by which governments translate their political vision into programmes and actions to deliver 'outcomes' or desired changes in the real world.
55. Policy can be sourced and generated in a variety of ways. For example, it may come from Ministers' ideas and suggestions, manifesto commitments, significant incidents such as a major outbreak of foot and mouth disease, European Union policies, public concern expressed through letters, petitions and the like. Proposals and evidence for policies may come from external expert advisers, stakeholder consultation, or external researchers, as well as civil servants. Policy is unlikely to include decisions about individuals or to be about purely operational or administrative matters. For instance decisions about applications for licenses or grants are not likely to involve the formulation of policy but rather its application.
56. With regard to drawing a distinction between the stages of formulation and development, 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 or decision makers. '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. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
57. In terms of applying these concepts to the facts of this case, the Commissioner is prepared to accept that the government's approach to securing the release of detainees in Guantanamo Bay can be correctly described as a government policy for the purposes of section 35(1)(a).



Although the information focuses on the detention of two individuals, the Commissioner accepts that the government's approach to this issue has broader dimensions and wider consequences. For example, the fact that the government's approach to the detention in Guantanamo Bay of British residents has the potential to impact on the UK's relations with the US, in the Commissioner's opinion means that there is a clear political dimension to the detention of the two individuals named in these requests. Furthermore having had the opportunity to review the withheld information it is clear that the individuals' detention clearly involved decision making which required the development of options and priorities for Ministers. In reaching this conclusion the Commissioner also wishes to make it clear that he does not accept the argument that policy formulation and development is a 'seamless web' with one policy decision feeding into the next. However, having considered the content of the information withheld on the basis of section 35(1)(a) he is prepared to accept that it is sufficiently related to the government's overarching formulation and development of policy in relation to all Guantanamo detainees, not just the two individuals who are the focus of this request and who by the time the requests were submitted had been released.

### **Public interest test**

58. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must again consider the public interest test.

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

59. The FCO acknowledged that it could be argued that it would be in the public interest for it to be transparent about the rationale and strategy options the government considered with regards to securing the release of Guantanamo Bay detainees.

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

60. The FCO argued that for there to be effective formulation of government policy, the government required a clear space away from public view in which it could debate matters internally free from the pressures of public debate. It was vital that Ministers and civil servants have the ability to properly consider and discuss policy options to ensure the best possible response is achieved. The candour of contributions to this process would be affected if the officials believed that the content of their submissions and discussions would be disclosed in the near future. This would have a negative impact on the quality of decision making, something which was clearly not in the public interest.

## Balance of the public interest arguments

61. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) which considered the application of section 35(1)(a).

62. In particular the Commissioner has considered two key principles outlined in the *DFES* decision. The first was 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.’

63. 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)).

64. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:

65. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop live policy. In this case the Commissioner accepts that the government’s policy towards the British detainees in Guantanamo Bay, at the time of the request, could be correctly described as live: the requests were submitted in October 2008 and some British residents were still detained in 2009.

66. In line with the comments of the Tribunal quoted above at paragraph 62, the Commissioner believes that significant weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. It is clearly in the public interest that the FCO was able to candidly discuss the different policy options in respect of securing the release of British detainees. In attributing such weight in

this case, the Commissioner also notes that for some of the documents withheld in the basis of section 35(1)(a) the information in question is of a genuinely free and frank nature and includes a candid discussion of the pros and cons of a number of policy options.

67. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
- 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 make future contributions to that policy;
  - The idea that 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; and
  - Finally an even broader scenario where 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 affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
68. Clearly, in this case as the policy formulation and development was ongoing at the time of the request, the third scenario is not relevant to this case.
69. In considering the weight that should be attributed to the first two scenarios the Commissioner has taken into account the scepticism with which numerous Tribunal decisions have treated the chilling effect arguments when they have been advanced. The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner* (EA/2007/0047) accurately summarises these views:

'we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner* EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential ..... Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.' (para 26).

70. However, the Commissioner has also taken into account the comments of Mr Justice Mitting when hearing an appeal in the High Court against the Tribunal decision *Friends of the Earth v The Information Commissioner and Export Credits Guarantee Department* (EA/2006/0073). Whilst supporting the view of numerous Tribunal decisions that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

'Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as "ulterior considerations" was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.'

71. In light of these various Tribunal and High Court judgments, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.
72. Taking this into account the Commissioner does not believe that any particular weight should be given to the second, broader type of chilling effect. This is because the FCO has not identified any particular evidence which would demonstrate why there would be a chilling effect on different policy makers when making submissions in the future on different challenging policy issues beyond making an assertion that this would be likely to occur. The Commissioner is prepared to accept that disclosure of the information withheld on the basis of section 35(1)(a) could have a limited impact on how officials make contributions to future policy discussions on the topic of Guantanamo Bay. However, in the Commissioner's opinion this weight is limited to some extent

because as the Tribunal has argued it is reasonable to expect civil servants to continue to provide independent and robust advice: 'we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service' as they are 'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.'<sup>3</sup>

73. In respect of the weight that should be attributed to the arguments in favour of disclosing the requested information the Commissioner reiterates his position that given the issues at the heart of this case, these arguments should be given notable weight. However, given that the policy in question was still live when the requests were submitted and the weight that should be given to the safe space arguments, the Commissioner has concluded that the public interest favours maintaining the exemption.

## **Section 42 – legal professional privilege**

74. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
75. Legal professional privilege attaches to confidential communications between a lawyer and their client for the purposes of obtaining or receiving legal advice. There are two categories of legal professional privilege: advice privilege and litigation privilege.
76. Advice privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. For advice privilege to apply, the dominant purpose of the documents in question must have been to obtain legal advice or provide it. For example, if a client sends a copy of an existing contract with a covering letter asking for advice, the letter itself will be privileged but the enclosed contract will not be as it was created for another purpose.
77. Litigation privilege is attached to confidential communications exchanged between a client and its legal advisers made for the purpose of providing or obtaining legal advice in relation to proposed or

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<sup>3</sup> See EA/2006/0006 paragraph 75(vii).

contemplated litigation. There must be a reasonable prospect of litigation – a real likelihood, not just a fear or possibility.

78. As with advice privilege, for information to be covered by litigation privilege it must have been created for the dominant purpose of obtaining legal advice on the litigation or for lawyers to use in preparing the case. Information created for another purpose before the litigation was anticipated may sometimes still be covered if brought together for the purpose of the litigation. This may be the case if pre-existing documents are relevant to the case and the lawyer has exercised skill and judgement in selecting and compiling them, particularly if the selection of documents reveals the trend of the advice on the case. However, pre-existing documents will not become privileged just by being passed over to a lawyer.
79. Litigation privilege can cover a wide variety of information, including advice, correspondence, notes, evidence, reports or other documents. It will for example include confidential communications with third parties outside the lawyer-client relationship, as long as those communications were made to assist the lawyer with the preparation of the case.
80. The FCO has argued that all of the documents that it is withholding on the basis of section 42(1) attract litigation privilege and one of these documents also attracts advice privilege. The Commissioner is satisfied that all ten of these documents attract litigation privilege as they are clearly documents exchanged between the FCO and its legal advisers for the dominant purpose of obtaining or providing legal advice in respect of the judicial review case brought by Mr al-Rawi or clearly reflect the content of such communications. The Commissioner is also satisfied that the confidentiality of these communications has not been lost through any unrestricted disclosure.

### **Public interest in disclosing the information**

81. Once again the public interest which the FCO acknowledged to exist was similar to that discussed above, albeit that this time the public interest focused on the FCO being transparent about decisions it had taken in relation to the claims brought by Mr al-Rawi. It acknowledged that disclosure of the information would inform the public about the quality of the legal advice provided and how this was used in its decision making processes in respect of the claims.

### **Public interest in maintaining the exemption**

82. The FCO highlighted a number of concerns with regard to disclosure of the information withheld on the basis of section 42(1). In particular when seeking advice on sensitive matters, such as this case, it is

necessary to provide Counsel with a great deal of sensitive intelligence material in order that the advice provided is fully informed. As a result, the withheld information contains advice which is based upon sight of highly classified material. If this information was disclosed under the Act, it was likely that in future similar legal cases, particularly sensitive documents would be withheld from Counsel for fear that would later be exposed. This is not in the public interest as Counsel's advice would no longer be fully informed and this could lead to poor decision making in the case and a limit to the ability of the government to defend itself properly.

83. Furthermore, it is imperative that the confidential relationship between the lawyer and client is protected. The government needs to be able to consult lawyers in confidence and expects that any type of advice will fully bottom out the other side's position and other options for handling the case that may have been more or less desirable. The government needs to be able to give its lawyers all relevant information so that its lawyers can advise on the whole situation honestly. Exposing the government's options for defending a case and its legal position is not in the public interest as this could result in unnecessary legal challenges being brought that would be costly to defend. A further knock-on effect such disclosures is that there is a real chance that legal professionals would begin providing only verbal advice on sensitive issues to ensure that the government's confidence is maintained which is not in the interests of good record keeping.

### **Balance of the public interest test**

84. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest built into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Tribunal at para. 41).

85. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
- how recent the advice is; and
  - whether it is still live.
86. As a general approach, in order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has used the following criteria:
- the number of people affected by the decision to which the advice relates;
  - the amount of money involved; and
  - the transparency of the public authority's actions.
87. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Information Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to still be used as part of a decision making process.
88. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
89. At the time of the complainant's requests none of the documents withheld held were more than three years old and a number were more recent and thus the Commissioner accepts that the value of retaining the confidentiality of the information had not diminished to any great extent. Furthermore the Commissioner is prepared to accept that the issues discussed in the advice are ones that are still live.
90. In terms of attributing weight to the arguments in favour of disclosure in the context of section 42, the Commissioner acknowledges that it is the third criterion at paragraph 86 which is most relevant to this case. This is because the the issues at the heart of this case are not ones



involving levels of public spending or a financial relationship. Similarly, there are not a significant number of people directly affected by this case; albeit that the effects on Mr al-Rawi are profound. For the reasons discussed above the Commissioner does accept that arguments surrounding transparency, given the sensitive nature of the matters at the heart of this complaint, need to be accorded particular weight. However, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege, and in particular the fact that this information is recent and live, the Commissioner believes that public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Section 35(1)(c) – Law Officers’ advice**

91. The FCO has argued that some of the documents were exempt from disclosure on the basis of section 35(1)(c) of the Act. This is also a class based exemption and states that information is exempt if it relates to:

‘(c) the provision of advice by any of the Law Officers or any request for the provision of such advice’

92. The Commissioner accepts that the documents which the FCO has withheld on the basis of section 35(1)(c) fall within the scope of this exemption because they consist of advice from one of the Law Officers.

### **Public interest test**

93. Section 35(1)(c) is a qualified exemption and therefore the Commissioner must once again consider the public interest test set out at section 2.

### **Public interest in disclosing the information**

94. The FCO noted that it would be in the public interest test to disclose this information in order reveal the nature of the advice provided by the Attorney General on the subject of Guantanamo Bay given that this issue was of great public interest and scrutiny.

### **Public interest in maintaining the exemption**

95. The FCO argued that it was important to maintain the space for free and frank analysis for the government to be provided with legal opinion from the Law Officers, particular in relation to matters relating to live policy issues.

## Balance of the public interest test

96. The Commissioner's approach to the public interest test under section 35(1)(c) is similar to the public interest test under section 42(1). That is to say there will always be a strong element of public interest built into maintaining the Law Officers' advice exemption in the same way that there is a strong inherent weight in maintaining the legal professional privilege exemption. This is because of the long standing convention, built into the Ministerial Code, that Law Officers' advice is usually treated as confidential. Paragraph 24 of the Ministerial Code states that:

'The fact and content of opinions or advice given by the law officers, including the Scottish Law Officers, either individually or collectively, must not be disclosed outside Government without their authority.'

97. Support for the convention of confidentiality is generally couched in terms of protecting the right to free and frank exchange of views without fear of this later being revealed. Key to the confidentiality argument is the claim that if advice, or information relating to advice, is revealed, future governments may feel inhibited in asking for advice on other matters, and informed decision making will be threatened. (There is also a link to section 42(1) given the general right of confidence within the lawyer - client relationship.) However as also with section 42(1) it has to be remembered that section 35(1)(c) is not an absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption will not outweigh the public interest in disclosing the information.

98. In the circumstances of this case, as discussed above in relation to the other qualified exemptions, the Commissioner believes that there is a strong public interest in disclosure of information in relation to the topic of Guantanamo Bay detainees. The Commissioner also believes that there is particularly strong public interest in disclosure of the advice the government received from its most senior Law Officer, the Attorney General, in relation to this topic. However, the Commissioner accepts that the convention, and its underlying principles such as the free and frank provision of advice, in relation to this exemption have to be given notable weight. Having taken these factors into account, along with the actual content of the information itself, the Commissioner believes that in this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

## Section 32 – court records

99. The FCO has argued that some of the documents falling within the scope of the requests are exempt from disclosure on the basis of sections 32(1)(a) or 32(1)(b). These sections state that:

'32(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in -

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter'

100. For each of the documents withheld the FCO explained to the Commissioner why it believed it fell within the particular sub-sections, which court the document related to and how the FCO acquired the document. The FCO also confirmed that it only held the information contained in the documents by virtue of it being held in the court records. The Commissioner has reviewed the various documents in question and is satisfied that they were either filed with the court, served upon the FCO or created by the court in course of proceedings brought by Mr al-Rawi and others against the Secretaries of State for the FCO and Home Office. The Commissioner is also satisfied that the information in question is only held by the FCO by virtue of being contained in the court records. The Commissioner is therefore satisfied that the documents are exempt from disclosure on the basis of the sections cited by the FCO and thus are exempt from disclosure. Section 32 is an absolute exemption and therefore the Commissioner does not need to consider the public interest test.

## Section 40 – personal data

101. The FCO has argued that the residential address of Mr al-Rawi and Mr el-Banna are exempt from disclosure on the basis of section 40(2). In order to rely on the exemption provided by section 40(2), the information being requested must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

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

*a) from those data, or*

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

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

102. The Commissioner is satisfied that the residential address of Mr al-Rawi and Mr el-Banna clearly fall within this definition.
103. The FCO argued that disclosure would breach the first data protection principle because disclosure of the addresses could lead to vigilantes coming to the property and/or attacking the individuals given the history of the allegations against them.
104. The first data protection principle states that
1. Personal data must be processed fairly and lawfully and
  2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
105. Given the history and circumstances of this case the Commissioner is fully satisfied that disclosure of the two men's residential addresses as recorded in document 4 would be unfair and thus breach the first data protection principle. The addresses are therefore exempt from disclosure on the basis of section 40(2) of the Act.

## **Procedural Requirements**

### **Section 17 – refusal notice**

106. Section 17(1) states 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.'

107. The complainant argued that the refusal notice that was issued covered all 8 of his requests but, with the exception of section 23, it failed to specify which exemptions applied to which requests. Instead the refusal notice simply stated that each of the cited exemptions applied to some of the relevant information falling within the scope of the requests. The complainant argued that this method of aggregating the refusal of 8 separate requests and the failure to specify which exemptions applied to each request was in clear breach of section 17(1) of the Act. It was also contrary to the Commissioner's guidance on refusal notices which emphasised the importance of clear and fully explained refusal notices.
108. The FCO's refusal notice stated that 'In relation to information held by the FCO which falls within the terms of your request, we have concluded that some of the information should not be disclosed under sections 23, 27, 31, 32, 35, 40 and 42 of the Freedom of Information Act 2000. These exemptions are variously applicable across all requests, questions 6 to 13.' The notice went on to set out which of the specific sub-sections of these exemptions the FCO was relying on and why, albeit that it did not, as the complainant has identified, tie this analysis to the specific exemptions.
109. The Commissioner can understand why, when dealing with multiple requests, a public authority would find it convenient to issue a refusal notice in the manner in which the FCO did. However, having considered the content of the refusal notice carefully, he agrees with the complainant's assessment that it does not explicitly specify which exemption is being relied in relation to each request and therefore the FCO breached section 17(1).

### **Sections 10 and 17 - Time for compliance**

110. The right of access to information is provided by section 1(1) of the Act and is in fact split into parts: section 1(1)(a) – the right to know whether of the nature requested is held; and section 1(1)(b) – if held, the right to have that information provided.
111. Section 10(1) states that a public authority must comply with the requirements of section 1(1) no later than the twentieth working day following the date of receipt of the request.
112. If a public authority relies on exemptions to refuse to disclose any requested information, then a refusal notice must be issued in line with the time for compliance set out in section 17(1).
113. In this case the complainant submitted his requests on 15 October 2008 and the FCO did not issue its refusal notice until 25 February 2009 and thus breached section 17(1) of the Act. The FCO also

breached section 10(1) of the Act by failing to provide the complainant with the information it was prepared to disclose (i.e. the digest included in its letter of 25 February 2009) within 20 working days of the requests. The Commissioner has also concluded that the FCO breached section 1(1)(b) and 10(1) by failing to provide information which it accepts was in the public domain (i.e. the information that Notice orders to be disclosed) within 20 working days of the requests.

## The Decision

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114. 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:

- As detailed in the attached annex, the Commissioner is satisfied that the FCO is entitled to rely on the exemptions contained at sections 27(1)(a), 32(1)(a), 32(1)(b), 35(1)(a), 35(1)(c), 40(2) and 42(1) to withhold majority of the documents, or parts of documents, that have not been previously disclosed to the complainant. Although not detailed in the annex, the Commissioner is also satisfied that section 23(1) has been correctly cited.

115. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The FCO breached section 17(1) of the Act by failing to provide the complainant with a refusal notice within 20 working days following the date of his request. The FCO committed a further breach of the requirements of section 17(1) by failing to ensure that the refusal notice clearly stated which exemptions were being relied upon to the information falling within the scope of each request.
- The FCO also breached section 10(1) by failing to provide the information that it was prepared to disclose (i.e. the information contained in digest of its 25 February 2009) within 20 working days following the date of receipt of the requests.
- Furthermore the FCO breached sections 1(1)(b) and 10(1) by failing to disclose the complainant the information it accepts is in the public domain (i.e. the information which this Notice orders to be disclosed) within 20 working days following the date of receipt of the requests.

## Steps Required

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

- Disclosure to the complainant the documents numbered 2 to 8 and 15. (Document 4 can have the redactions applied on the basis of section 40(2) as described above.)

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

## Failure to comply

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118. 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.

## Other matters

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119. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

120. Part VI of the section 45 Code of Practice 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 complaint. 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. In this case the complainant requested an internal review on 2 April 2009 and the FCO informed him of the outcome on 2 June 2009, 42 working days later. The Commissioner expects that the FCO future handling of internal reviews will conform to his recommended timescales.

## Right of Appeal

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121. 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 24<sup>th</sup> day of January 2011**

**Signed .....**

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



## Legal Annex

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### **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.”

### **Effect of Exemptions**

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) 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 public authority holds the information section 1(1)(a) does not apply.”

**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"

### **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Advice and Assistance**

**Section 16(1)** provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

### **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.”

### **Information supplied by, or relating to, bodies dealing with security matters**

**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(2)** provides that –

“A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.”

**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 23(4)** provides that –

“In subsection (3)(c) “the Government Communications Headquarters” includes any unit or part of a unit of the armed forces of the Crown

which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.”

**Section 23(5)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

### **International Relations**

**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.”

### **Law enforcement**

**Section 31(1)** provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

### **Court Records**

**Section 32(1)** provides that –

"Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
  - (i) a court, or
  - (ii) a member of the administrative staff of a court,for the purposes of proceedings in a particular cause or matter."

### **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.

**Personal information.**

**Section 40(2)** provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

**Section 40(3)** provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

## **Legal Professional Privilege**

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

<b>Document number</b>	<b>Previously disclosed or now in public domain?</b>	<b>Exemptions cited by FCO</b>	<b>Commissioner's conclusions on application of exemptions / actions needed by FCO</b>
1	Some parts disclosed with refusal notice in relation to request 8.		The Commissioner is satisfied that the relevant parts of document have been disclosed.  No further action needed.
2	FCO now accept that this document is in public domain.		FCO needs to provide complainant with copy of this document.
3	FCO now happy to disclose document to complainant.		FCO needs to provide complainant with copy of this document.
4	FCO now happy to disclose document to complainant, subject to section 40(2) redactions.	Full addresses withheld under s40(2).	FCO needs to provide complainant with copy of this document with the only redactions allowable being those made on the basis of 40(2).
5	FCO now accept that document is in		FCO needs to provide complainant with copy of this document.



	public domain.		
6	FCO now accept that document is in public domain.		FCO needs to provide complainant with copy of this document.
7	FCO now accept that document is in public domain.		FCO needs to provide complainant with copy of this document.
8	FCO now accept that document is in public domain.		FCO needs to provide complainant with copy of this document.
9		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that the document is not in scope of requests.
10	Some parts disclosed with refusal notice in relation to request 8.	Document is exempt under s27(1)(a).	The Commissioner accepts that the remainder of the document that has not been disclosed is exempt from disclosure under section 27(1)(a).
11		Document withheld under s27(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
12	Some parts disclosed with refusal notice in relation to request	Document withheld under s27(1)(a). Comments about	The Commissioner accepts that the remainder of the document that has not been disclosed is exempt from disclosure under section 27(1)(a).

	11.	individuals withheld under s40(2).	
13		Document withheld under s27(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
14		Document withheld under s27(1)(a).  Comments about individuals withheld under s40(2).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
15	FCO now accept that document is in public domain.		FCO needs to provide complainant with a copy of this document.
16	Some parts disclosed with refusal notice in relation to request 12.		The Commissioner is satisfied that relevant parts of document have been disclosed.  No further action needed.
17		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that the document is not in scope of requests.
18		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that the document is not in scope of requests.

19		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that the document is not in the scope of requests.
20		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that the document is not in the scope of requests.
21		Document withheld under s35(1)(c).	The Commissioner accepts that the document is exempt from disclosure under section 35(1)(c).
22		Document withheld under s42(1).	The Commissioner accepts that the document is exempt from disclosure under section s42(1).
23		Document withheld under s42(1).	The Commissioner accepts that the document is exempt from disclosure under section s42(1).
24		Document withheld under s27(1)(a).	The Commissioner accepts that the document is exempt from disclosure under 27(1)(a).
25		Document withheld under 35(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 35(1)(a).
26		Document withheld under s27(1)(a).  Document withheld under s42(1).	The Commissioner accepts that the document is exempt from disclosure under section 42(1).

27		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
28		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
29		Document withheld under s42(1).	The Commissioner accepts that the document is exempt from disclosure under section 42(1).
30		Document withheld under s27(1)(a).  Document withheld under s35(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
31			Although not cited by the FCO the Commissioner accepts that this document is exempt from disclosure on the basis of section 42(1).
32		Document withheld under s35(1)(a) and (d).	The Commissioner accepts that the document is exempt from disclosure under section 35(1)(a).
33		Document withheld under s27(1)(a) and s35(1)(b).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).

34	Some parts disclosed with refusal notice in relation to request 12.		The Commissioner is satisfied that relevant parts of document have been disclosed.  No further action needed.
35		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that document is not in scope of requests.
36		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
37		Document withheld under s35(1)(c).	The Commissioner accepts that the document is exempt from disclosure under section 35(1)(c).
38		Document withheld under 35(1)(a).  Document withheld under s42(1).	Document is exempt from disclosure on the basis of s42(1).
39		Document withheld under s35(1)(b).	The Commissioner accepts that the document is exempt from disclosure under section 35(1)(b).
40	Some parts disclosed with refusal notice in relation to request	Document withheld under s35(1)(a).  Document withheld	The Commissioner accepts that the remainder of the document that has not been disclosed is exempt from disclosure under section 42(1).

	13.	under s42(1).	
41	Some parts disclosed with refusal notice in relation to request 13.	Document withheld under s35(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 35(1)(a).
42		Document withheld under s27(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
43	Some parts disclosed with refusal notice in relation to request 12.		The Commissioner is satisfied that relevant parts of document have been disclosed.  No further action needed.
44	Some parts disclosed with refusal notice in relation to request 12.		The Commissioner is satisfied that relevant parts of document have been disclosed.  No further action needed.
45		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
46		Document withheld under s27(1)(a).  Comments about	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).

		individuals withheld under s40(2).	
47		Document withheld under s35(1)(a).  Comments about individuals withheld under s40(2).	The Commissioner accepts that the remainder of the document that has not been disclosed is exempt from disclosure under section 35(1)(a).
48		Document withheld under s27(1)(a).  Document withheld under s42(1).	The Commissioner accepts that the remainder of the document that has not been disclosed is exempt from disclosure under section 42(1).
49		Document withheld under s27(1)(a).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
50		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that document is not in scope of requests.
51		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that document is not in scope of requests.
52		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that document is not in scope of requests.

53		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that document is not in scope of requests.
54		Document withheld under s27(1)(a).  Comments provided by individual withheld under s40(2).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).
55	Some parts disclosed with refusal notice in relation to request 13.		The Commissioner is satisfied that relevant parts of document have been disclosed.  No further action needed.
56	Some parts disclosed with refusal notice in relation to request 13.		The Commissioner is satisfied that relevant parts of document have been disclosed.  No further action needed.
57		Document withheld under s27(1)(a) and 35(1)(b).	The Commissioner accepts that the document is exempt from disclosure under section 27(1)(a).



58	Some parts disclosed with refusal notice in relation to requests 9, 11 and 12.	Document withheld under s27(1)(a).	The Commissioner accepts that the remainder of the document that has not been disclosed is exempt from disclosure under section 27(1)(a).
59		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
60		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
61		All of document withheld under s32(1)(a) and (b).	Document is exempt from disclosure on basis of s32(1).
62	Some parts disclosed with refusal notice in relation to requests 12 and 13.		The Commissioner is satisfied that relevant parts of document have been disclosed.
63		Document withheld under s42(1).	The Commissioner accepts that the document is exempt from disclosure under section 42(1).
64	Some parts disclosed with refusal notice in relation to requests		The Commissioner is satisfied that relevant parts of document have been disclosed.

	12 and 13.		No further action needed.
65		FCO position is that document is not in scope of requests.	The Commissioner is satisfied that the document is not in scope of requests.
66	Some parts disclosed with refusal notice in relation to requests 12 and 13.		The Commissioner is satisfied that the relevant parts of document have been disclosed.  No further action needed.