

## Freedom of Information Act Awareness Guidance No. 24

### Policy Formulation, Ministerial Communications, Law Officers' Advice, and The Operation of Ministerial Private Office.

The right under the Freedom of Information Act to request official information held by public bodies (known as the **right to know**) comes into force in January 2005. The **Awareness Guidance** series is published by the Information Commissioner to assist public authorities and, in particular, staff who may not have access to specialist advice in thinking about some of the issues. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in preparing for implementation. Here we consider the exemption relating to the formulation of government policy. This is set out in section 35 of the Act.

Advice on this exemption will also be available from the Department for Constitutional Affairs. The Commissioner also intends to issue further advice over the course of 2004.

#### A) What does the Act say?

##### a) General

Section 35 of the Act sets out an exemption from the **right to know** if the information in question is held by a government department and relates to one of the following:

- The formulation or development of government policy
- Ministerial communications
- The advice of the law officers
- The operation of a Ministerial private office.

The separate elements of the exemption are discussed in Sections B-E below.

Section 35 is closely related to section 36 ("Prejudice to the effective conduct of public affairs"), although section 35 is only available for government departments and the Welsh Assembly. Information which is exempt under section 35 cannot also be exempt under section 36. Government department is defined in section 84 as including a Northern Ireland department, the Northern Ireland Court Service, and any other body or authority exercising statutory functions on behalf of the Crown, but does not include the Scottish Parliament, or Scottish Administration or any Scottish public authorities. Further information on the section 36 exemption can be found in [Awareness Guidance 25](#).

The information need only 'relate to' the topics listed above. This means that it is broad enough to capture documents not only which themselves are ministerial communications etc, but which simply refer to those ministerial communications etc.

Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed above, it is exempt. However, it is also a so-called qualified exemption. This means that even if information is exempt a public authority must consider whether there is an equal or greater public interest in disclosure. This issue is considered further in subsection f) below.

#### **b) The timing of the request**

As a general rule, the sensitivity of information is likely to reduce over time, such that the age of the information, or timing of the request may be relevant in determining whether to apply the exemption or where the public interest may lie. In any event, section 35 does not apply beyond 30 years at which point the information becomes a “historical record”. Moreover, as is discussed in the next section, once a decision has been taken, any statistical information used to inform that decision ceases to be covered by the exemption.

#### **c) Statistical information**

The Act specifies that once a decision about government policy has been taken, statistical information used to provide a background to that decision taking will no longer be regarded as being related to either the formulation or development of government policy, or to Ministerial communications. In other words, after policy decisions are made, in requests for information which relate to policy formulation or ministerial communications, statistical information is not exempt under s.35 and must be disclosed. The Commissioner notes that delaying disclosure of statistical information until after the decision has been taken means that it cannot be used by those who might wish to participate in an informed way on possible policy choices. This may be a relevant consideration in applying the public interest test.

Statistical information incorporates analyses, projections and meta-data, as well as the statistics themselves; numerical data which may take the form of a table or graph or simply be a sum total. Statistics must be derived from a recorded or repeatable methodology, and commentary on this is also statistical information.

Indicators of a ‘decision taken’ include public announcements about a policy or ministerial communication, or where a policy in its current form is capable of being applied or used.

#### **d) Factual information**

Subsection 35(4) provides an explicit indication that there is a strong public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. The Information Commissioner’s therefore advises it is only where factual information is inextricably interlinked with advice etc, that it might not be disclosable in the public interest.

However, in distinguishing factual material from opinion, advice and recommendation, it must be stressed that just because something is not factual, it is not automatically exempt but, on the contrary, any decision not to release the information is subject to the public interest test.

### **e) The duty to confirm or deny**

The **right to know** has two elements: the duty to confirm that information of the sort requested is held and, if so, to communicate that information to an applicant. Both elements must be considered in turn, although if it is concluded that there is an exemption from the duty to confirm or deny holding the information, it would not make sense to then go on to consider whether to provide a copy of the information.

Government departments will not normally wish to deny that information as to developing policy is held since generally that will be information which is already in the public domain. However, there may be some exceptions where a premature indication of the possible direction of government policy might make that policy more difficult to develop.

It is not acceptable, however, to provide no response to a request for information. Section 17 of the Act requires public authorities to explain their reasons for any refusal to confirm or deny the holding of information as to the development of policy or the seeking of a law officer's advice etc. For more advice on the duty to confirm or deny, see [Awareness Guidance No. 21](#).

### **f) The public interest test**

Section 35 is subject to the public interest test, such that even where the exemption is triggered, the decision about whether to disclose the information in question must take into account public interest factors such as promoting accountability of government or allowing greater participation in decision making. It is only where the public interest in upholding the exemption outweighs the public interest in disclosure that the information should not be released. General advice on the public interest test is given in [Awareness Guidance No. 3](#). The sorts of public interest considerations that are likely to arise in connection with the different elements of the exemption are discussed under the relevant sections.

### **g) Environmental information**

Section 35 will not apply to policy formulation etc related to the environment because of section 39 of the Act and the Environmental Information Regulations (EIR). This is significant since a number of policies may well fall within the definition of 'environmental information' in the EIR; even though they are not labelled as 'environmental' (e.g. transport and energy policies).

## **B) Formulation or Development of Government Policy (S.35(1)(a))**

### **a) What is 'policy'?**

Policy is not a precise term and to some extent what is regarded as policy depends on context. However, there is 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 'Modernising Government' white paper 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. 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. Similarly, in most cases, information about an individual's FOI application will not fall into the category of information relating to the formulation or development of policy.

#### **b) What is special about 'government policy'?**

The information must relate to government policy as compared to 'departmental policy' or any other type of policy. This suggests that it is policy which requires Cabinet input, or represents the collective view of ministers or that it applies across government. This also suggests that it is a political process. Departmental policy will frequently be derived from and be identical to government policy, however where a departmental policy applies only to the internal workings of the department it would not be caught (for instance, departmental policy about working hours or estate management).

An example of a government policy might be a policy to promote equality of opportunity by imposing a positive duty across the public sector. By contrast, the policies developed in support of that policy by a department's personnel unit would be departmental policy.

Section 35(5) specifically includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly of Wales in the definition of government policy.

#### **c) What do 'formulation' and 'development' mean?**

These terms do not have precise meanings. **Formulation** suggests the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister. **Development** is sometimes used interchangeably with 'formulation', however 'development' may go beyond this stage. It may refer to the processes involved in improving on or altering already 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 – that is, something must be happening to the policy. The exemption cannot apply to a 'finished product' or a policy which is agreed to, in operation, or already implemented.

#### **d) Why protect the formulation and development of government policy?**

The thinking behind this exemption is that it is intended to prevent harm to the internal deliberative process as it relates to policy-making. The arguments for maintaining the government's 'private thinking space' are essentially that the threat of public exposure of this information will lead to less candid and robust discussions about policy, a fear of exploring extreme options, poorer recordkeeping, hard choices being avoided, good working relationships and the neutrality of the civil service being threatened, and ultimately the quality of government policy making being undermined.

#### **e) What issues should be considered in deciding to treat information as exempt under this subsection?**

The following is a suggested list of questions to consider in applying this exemption:

- In this particular case, would release of this information make civil servants less likely to provide full and frank advice or opinions on policy proposals? Would it, for example, prejudice working relationships by exposing dissenting views?
- Would the prospect of future release inhibit the debate and exploration of the full range of policy options that ought to be considered, even if on reflection some of them are seen as extreme?
- Would the prospect of release place civil servants in the position of having to defend everything that has been raised (and possibly later discounted) during deliberation?
- On the other hand, would the possibility of future release act as a deterrent against advice which is ill-considered, vague, poorly prepared or written in unnecessarily brusque or defamatory language? Would the prospect of release in fact enhance the quality of future advice?
- Is the main reason for exempting the information to spare a civil servant or a minister embarrassment? If so, then it is not appropriate to use this exemption.
- Quite apart from possible disclosure under FOI, does the civil servant have a duty to give the best advice possible to a Minister?

The Information Commissioner's view is that there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by the threat of disclosure under the Act.

#### **f) What are the relevant public interest considerations under section 35(1)(a)?**

##### **i) Arguments to consider against disclosure**

These are essentially the same considerations as are used for establishing the exemption. Namely, there is a solid public interest in maintaining the quality of government policy making through allowing 'private thinking space' where free and frank exchanges can occur, and civil servants are able to consider thoroughly all policy options, however extreme, without fear of having to defend them. The arguments on this front may also raise the issues of maintaining the quality of records, good working relationships and a neutral civil service. In addition the

particular circumstances of the case may indicate that public participation in a policy is inappropriate.

## ii) Arguments to consider in favour of disclosure

These are essentially arguments related to public participation in and accountability of government decisions. Participation refers to the ability of people to input into policy prior to a final decision being taken, whereas accountability refers to the need for government to explain why something has happened, or show that it has been rigorous in taking into account all relevant considerations, or addressing legitimate objections, or that it is keeping to its word and delivering what it has promised.

In terms of participation consider:

- Participation cannot be meaningful without access to relevant recorded information about how policy decisions are reached, what options are being considered and why some are excluded and others preferred.
- Without the ability of the wider public to participate in key policy decisions, there is a potential for selected individuals or groups to have an unduly privileged position of influence in these policy making processes.
- A key driver for FOI legislation is allowing people access to information that will allow informed participation in the development of government proposals or decisions which are of concern to them.
- Information disclosed prior to a decision being taken will lead to more informed public debate.

In terms of accountability consider:

- Disclosure of the information in question may expose wrongdoing, or the fact that wrongdoing has been dealt with, or dispel suspicions of wrongdoing.
- Government press offices control the dissemination of information about achievements, services and processes which they wish to make known to the public. Access to information under the FOI Act which has not been 'spun' by government media units would, in these circumstances, better enable the public to make objective judgements on the facts
- In general terms, where a policy decision is going to lead to large amounts of public expenditure on a particular project there is probably going to be a strong public interest in disclosure.
- Where a policy decision involves a departure from routine procedures or standard practices are deviated from there is again going to be a strong public interest in disclosure. E.g. the Parliamentary Ombudsman in the Silverstone Bypass case ordered the release of files revealing the decision making that resulted in a ministerial direction regarding the acceleration of the Silverstone Bypass construction project. The Ombudsman found that when ministerial directions are issued and especially when that direction is justified as being in the wider national interest, there is a valid public interest in good governance which requires transparency in the new decision making process (Case No. A.37/03).

The Commissioner recognises that it will not necessarily be easy to immediately identify what weight to attach to each interest in the balancing of the public interest. Traditionally the view in government circles has been that the public interest in government being able to deliberate or 'think in private' in order to function effectively was the paramount one. The Commissioner recognises that there will be circumstances where public participation in government decision making process is inappropriate or impractical. However, FOI legislation changes the landscape of the government-citizen relationship, and so it must be acknowledged that the public interest in allowing access to that thinking process will sometimes outweigh the public interest in protecting that process. In applying the public interest test in the context of this exemption, public authorities may find it helpful to ask the applicant to articulate the public interest arguments in favour of disclosure.

### **C) Ministerial Communications (S.35(1)(b))**

#### **a) Ministers of the Crown**

The role of Ministers includes the following:

- Setting and directing the policy agenda of central government.
- Political functions in representing the interests of their departments in Cabinet, Parliament, the EU Council.
- High level managerial tasks in relation to the running of their departments.
- Executive decision making.

Legally and politically, government ministers are at the core of central government as most legal power to conduct the business of central government rests with individual ministers.

#### **b) What are 'Ministerial communications'?**

In the context of this exemption 'communications' should be taken to include written correspondence in any form (such as email), memoranda, ministerial submissions etc. Section 35(5) defines the extent of ministerial communications, i.e. communications between Ministers of the Crown, or between Northern Ireland Ministers, or between Assembly Secretaries. Communications between civil servants on behalf of their minister are also likely to be included. Communications outside of these lines will not be caught i.e. between, for example a Minister of the Crown and a Northern Ireland Minister, or between a Welsh Assembly Secretary and a Northern Ireland Minister. Cabinet proceedings are included in the definition in section 35(5).

#### **c) Cabinet proceedings**

Comprising of senior ministers, the Cabinet is the ultimate arbiter of all government policy. Cabinet Committees provide a framework for collective consideration of and decisions on major policy issues and issues of significant public interest. Further information regarding the Cabinet can be found on the Cabinet Office website ([www.cabinet-office.gov.uk](http://www.cabinet-office.gov.uk)).

Traditionally the only information in the public domain regarding the Cabinet and its committees relates to membership and terms of reference. Exemption 2 of the Open Government Code is less restrictive as it covers:

“Information whose disclosure would harm the frankness and candour of internal discussion, including:

- Proceedings of Cabinet and Cabinet committees”.

However, the Ombudsman’s powers to see documents do not extend to cabinet or cabinet committee papers, with the result that the Ombudsman has been limited in investigating complaints involving cabinet papers.

Additionally, Cabinet Office guidance states that any papers concerning proceedings, briefings or correspondence relating to Cabinet and its committees are deemed to be classified and not to be made public. The guidance also advises government departments not to disclose whether a particular subject has or has not been discussed by a committee, or whether a minister has attended.

#### **d) Why specifically exempt ministerial communications?**

Commentators have questioned why it has been necessary to separately cover both Ministerial communications and the formulation and development of government policy, suggesting that if ministerial communications do not concern government policy or any other matter which would otherwise be exempt, the mere fact that they were written by ministers should not lead to exemption. It has been further suggested that there is some potential for abuse since ‘ministerial’ communications may be used to convey information between civil servants and the simple act of persuading a minister to affix his or her signature to a document which is, in point of form, addressed to another minister, may bring that communication within the scope of the exemption regardless of its content. Ministerial communications include proceedings of cabinet. The release of detailed proceedings might undermine the convention of collective ministerial responsibility.

#### **e) Public Interest Test in relation to ministerial communications**

As previously discussed, the presence of a ministerial signature on a document may bring that communication within the scope of the exemption, irrespective of its content. In applying the public interest however, the content of the communication is likely in itself to have a significant bearing on the decision to disclose in that the public interest test will be applied to the content of the information. The Information Commissioner will expect authorities to apply the test robustly since the exemption protects ministerial communications where, on balance, their disclosure would be harmful to the public interest. Not all communications will cause such harm and in the absence of good reason to believe that such harm will occur, it will be difficult to justify a decision to withhold.

Passage of time may also be critical in determining the outcome of the public interest test in relation to disclosure of information contained within ministerial communications. This inference is further strengthened by Section 63(1) which



provides that historical information, i.e. that older than thirty years, will not be exempt from the Act. This, together with the current practice of release of cabinet papers after 30 years recognises that the sensitivity of information of this kind decreases over time and that the age of the information being requested should be taken into account when applying the public interest test.

Public interest arguments in favour of disclosure would also challenge the assumption that the public are not already aware that there are differences of opinion between ministers. As such, disclosure would in fact promote accountability and transparency by showing that decisions have been made after a variety of views has been expressed and a robust debate has occurred. On the other hand, collective responsibility protects high level government decisions from becoming personalised and also enables ministers to be totally frank and candid in their discussions.

Finally, a public authority may, in applying the public interest test, seek to justify withholding information because of the embarrassment likely to be caused to an individual minister. It is important to understand, however, that there is no such exemption and any consideration of likely ministerial embarrassment cannot be justified.

#### **D) Provision of Advice by the Law Officers (S.35 (1)(c))**

##### **a) Who are the Law Officers?**

Whilst governmental departments have access to lawyers employed by the Government Legal Service, legal advice functions are also carried out by appointees, who must be either an MP or peer qualified as a barrister or solicitor. It is these who are the Law Officers and their positions are specific. They are listed in section 35(5) as the Attorney General, Solicitor General, Advocate General for Scotland, Lord Advocate and Attorney General for Northern Ireland.

The Attorney General and Solicitor General are the principal legal advisers to the government. The latter is the Attorney General's deputy and can discharge any of their functions in their absence or incapacity. Their work is supported by the Legal Secretariat to the Law Officers, which is itself headed by a legal secretary.

The post of Advocate General for Scotland was created by the Scotland Act 1998 as a consequence of the constitutional changes therein. The holder is the third of the UK law officers and they are the principal legal advisor to the government on Scottish legal matters where competence is reserved to Westminster. The office has its own supporting secretariat. The Lord Advocate is Scotland's chief legal advisor, and was transferred to the devolved administration under the Scotland Act. They are supported by the Solicitor General for Scotland, a position not defined as a Law Officer in this section.

There is no longer a separate Attorney General for Northern Ireland and has not been for some time. The Northern Ireland Constitution Act 1973 provides that the Attorney General, by virtue of his office, holds this office also. The possibility exists that at some time this role may be taken by another and the inclusion of the role in section 35(5) allows for this.

Given the roles and functions of the various Law Officers it is most likely that information sought under the Act will be that which relates to the advice of the Attorney General, the government's principal legal advisor. The Lord Advocate is a member of the Scottish Executive and it is unlikely that their advice would be covered by the UK Act. Although the Advocate General for Scotland has specific duties with regard to advice on Scots law, they are nevertheless subordinate to the Attorney General, as is the Solicitor General who explicitly deputises for him. The following section, therefore, focuses on the Attorney General's work.

#### **b) What are the functions of the Attorney General?**

The Attorney General's work falls into four categories: Legal Advisor to Government, Superintending Minister, Guardian of the Public Interest and Miscellaneous Functions.

The first of these functions clearly falls within the remit of the exemption; indeed it might appear to be all that is intended to be captured by it. It is certainly commonly understood that the Law Officers' advice is that which he provides in his capacity as legal adviser. However, it may be that the Attorney General provides advice under another of his functions. For example, as Superintending Minister, the Attorney General is responsible for a number of departments including, amongst others, the Crown Prosecution Service. It may be that the Attorney General, as superintendent of the CPS, provides advice to a governmental department on prosecution policy - this advice could be exempt by virtue of section 35. Similarly, miscellaneous functions of the law officers include providing advice to the Committee on Standards and Privileges and providing advice to the Sovereign where the succession to peerage is uncertain. Should this information be held by a government department, it too could be exempt.

#### **c) Advice**

This exemption is limited to the provision of advice. Advice can be defined as guidance or recommendations offered with regard to future action. The advice of the law officers is, like any advice, simply an opinion and although informed, authoritative and legally substantive, it is not a ruling and is not binding.

It might be thought that the advice of the Law Officers is captured by the section 42 exemption concerning legal professional privilege. This is true to a certain extent, but subsection (1)(c) allows for a broader range of advice than would be included in the somewhat limited scope of legal professional privilege which can only, by definition, be about legal rights and obligations. Section 35(1) (c), therefore, has greater scope than section 42.

#### **d) When is advice sought?**

Circumstances in which ministers ought to consult the Law Officers are set out in paragraph 22 of the Ministerial Code, though the list is not intended to be a comprehensive one. It states that it will ordinarily be appropriate to consult where the legal consequences of an action by the government might have repercussions in the

foreign or domestic field, where there is doubt concerning the legality of legislation, subordinate legislation or administrative action, where two or more departments are in disagreement on legal questions and where the matter raises particularly difficult legal issues. Ministers involved in litigation in their personal capacity which, may however, have professional implications should also consult the Law Officers, who can offer advice regarding public interest factors.

#### **e) Why is law officer's advice protected?**

The advice of the Law Officers is usually treated as secret or confidential based on a long standing convention and, latterly, the Ministerial Code. Section 35(1) (c) gives recognition to that convention. The expectation has been that the Code and convention will be maintained, although the issue has been raised in parliamentary debates over disclosure in certain politically controversial cases where there was a strong argument for access to this information.

Non-disclosure of the law officer's advice is articulated in paragraph 24 of the Ministerial Code which reads:

"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."

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. Mention has also been made of legal professional privilege and the general right of confidence within the lawyer - client relationship.

Although in the main the convention is one of secrecy, it also allows for disclosure under exceptional circumstances. Erskine May states,

"If a minister deems it expedient that such opinions should be made known for the information of the House, he is entitled to cite them in debate."

Advice was last fully disclosed in 1993 over the Maastricht controversy. In the Factortame litigation in the 1990s, their advice on the legality of Spanish owned vessels fishing in British waters was disclosed to the Courts and can be accessed by the public at the House of Lords Records Office.

Although this exemption recognises in statute an existing convention, it is important that this does not result in a reduced likelihood of advice being disclosed. Clearly advice can be disclosed, it has been in the past, albeit infrequently - and the Information Commissioner's view is that the public interest test is to be considered carefully in each case. Conventions develop over time and the FOI Act is a mechanism through which such conventions may be questioned, so that where it is in the public interest to disclose the advice, it should be disclosed.

## **f) Public Interest Test in relation to the Law Officer's Advice**

In considering requests for information which relate to the provision of advice by the law officers or the request for that advice, the decision must be made whether the public interest in maintaining the exemption exceeds the public interest in communicating the requested information. The factors above regarding effective government and good decision making should be taken into account when assessing the public interest in upholding the exemption.

The matter of convention is a fact, but not a deciding consideration in assessment of the public interest, although the reasons for the existence of the convention may turn out to be the same as those offered to justify upholding the exemption.

## **E) Ministerial Private Office (S.35 (1)(d))**

### **a) What is a ministerial private office?**

All government ministers have their own private offices comprising of a small team of civil servants. They form the bridge between the minister and their department and have a vital role in assisting the minister in achieving the best possible service from their department whilst ensuring that ministers efficiently despatch the work generated by the department. The private offices' role is to optimise the ministerial workload by allocating to others every possible task except that of making decisions; thereby enabling the minister to concentrate on meetings, reading documents, weighing facts and advice and making policy decisions.

### **b) Why exempt information relating to the operation of private office?**

Many aspects of the operation of ministerial private offices are not related to policy formulation. Academic commentators have suggested that the purpose of this provision is to ensure that the disclosure of such information is at the discretion of the minister who is best placed to assess the effect of any disclosure. It seems more likely however that the purpose of the exemption is concerned with circulation lists and whether the minister has seen a document, initialled it and signed it off. The exemption reflects the convention that whilst advisers advise on policy matters only a minister may decide and dispense that policy. The purpose of the exemption therefore is to protect civil servants in order that the 'drafter' of a ministerial speech or letter of response will remain anonymous.

There has been considerable discussion regarding the extent and specific wording of the exemption which refers to the **operation** of a ministerial private office which provides **personal administrative support** to the minister. It is the Information Commissioner's view that **operation** should be interpreted quite narrowly, thereby limiting the scope of the exemption to include only such practical matters such as routine emails, procedures for handling ministerial papers, travel expenses, staffing, organisation etc. For example, the management of the minister's diary (i.e. the process of its handling) may be caught by the exemption although the entries themselves are unlikely to be caught under this provision. The effect of the limited

application of this exemption will not mean that just because information has originated in a private office or has passed through its doors it will be exempt.

It is also worth considering those duties that would be covered within the definition of **personal administrative support**. It is the Information Commissioner's view that this should be interpreted to define the more routine administrative support functions provided by the private office which would again have the effect of limiting the scope of the exemption. Further discussion of the extent of the exemption is discussed in the section on the application of public interest below.

### **c) The Public Interest Test in relation to the operation of Ministerial private offices**

In applying the public interest test, the exact nature of the information requested in relation to the operation of the ministerial private office is likely to have a significant bearing on the decision to disclose. The Information Commissioner will expect government departments to apply the public interest test in a robust manner to ensure that the maximum information is made available.

Given the volume and range of work undertaken within ministerial private offices there could be many varied requests for information ranging from details of Ministers' diaries; the names of all those working within the office; details of working relationships and arrangements with other offices and departments; details of meetings etc., to which the public interest test will be applied.

Requests for information regarding ministerial diaries and meetings will need to be decided on a case by case basis. Whilst in some cases the information requested is likely to be innocuous, for example the fact a meeting took place, in other cases the authority may judge it not to be in the public interest to confirm that a meeting took place as it would not wish to identify that a minister met with a specific individual. Additionally, the authority may be unwilling to release information regarding the details of the meeting itself claiming that it is not in the public interest to do so. An authority may also seek to use the public interest test to withhold details of the meeting arguing that to disclose information would prejudice future relationships between the parties to the meeting.

It is likely that a distinction will be made when deciding the public interest between a request for information concerning a minister's private and official business. Authorities will likely take the view that details of a minister's private arrangements should be withheld.

In the current climate concern regarding security issues may also be given as a public interest justification for refusal of information regarding details of those working within the ministerial private office, their working hours and arrangements etc. In considering requests for information regarding the details of those working within the private office, Section 40 may also apply.

In dealing with requests for information falling outside the narrow interpretation of section 35(1)(d) a public authority will only be able to withhold the information by claiming one of the other exemptions within either section 35 or section 36 and

confirming that on balance the public interest test permits withholding the information requested.