Parliamentary and Health Service Ombudsman

Access to Official Information

Investigations Completed

July 2004 to March 2005

Part Two

HC 63-II

Parliamentary and Health Service Ombudsman

Access to Official Information

Investigations Completed

July 2004 to March 2005

Part Two

2nd Report
Session 2005-2006
Presented to Parliament Pursuant to Section 10(4) of the Parliamentary Commissioner Act 1967

Ordered by
The House of Commons
to be printed on
26 May 2005

HC 63-II
London: The Stationery Office
£20.00

Contents

Arts Council England

4 Refusal to provide information relating to the award of funding and the failure to appoint a Diversity Officer *A.11/05*

Cabinet Office and Department for Constitutional Affairs

17 Failure to provide information relating to potential Ministerial conflicts of interest under the Ministerial Code of Conduct *A.16/03*

Cabinet Office and Department of Trade and Industry

31 Refusal to provide information about a business breakfast meeting hosted by the Prime Minister *A.34/05*

Cabinet Office

38 Refusal to provide information as to whether or not the Prime Minister had met certain named individuals *A.19/05*

Charity Commission

43 Refusal to provide information relating to a complaint made against the trustees of a charity *A.10/05*

47 Refusal to provide information relating to the Indenture and Grant of Licence for a charity *A.21/05*

Ministry of Defence, Department of Trade and Industry and HM Treasury

52 Failure to provide information relating to a Ministerial Direction about the ordering of Hawk 128 aircraft *A.1/05*

Ministry of Defence

62 Refusal to provide details of meetings with members of the Czech republic in relation to the sale of supersonic jets *A.20/05*

67 Refusal to provide information about meetings between representatives of BAE Systems and the secretary of State for Defence and other defence Ministers *A.31/05*

Office of the Deputy Prime Minister

75 Refusal to release a Ministerial Direction *A.9/05*

Foreign and Commonwealth Office

80 Refusal to release information relating to allegations of bribery and corruption of foreign officials and politicians *A.42/04*

86 Refusal to provide information about contacts between FCO and the Jersey Attorney General relating to the freezing of trust funds *A.43/04*

90 Refusal to provide copies of representations about detainees at Guantanamo Bay *A.4/05*

94 Refusal to provide the date on which the Government first sought legal advice about the legality of military intervention in Iraq *A.16/05*

Department of Health

99 Refusal to provide a copy of a report into allegations about the General Osteopathic Council *A.13/05*

104 Refusal to provide information relating to allegations of malpractice *A.38/05*

Home Office

111 Refusal to provide information relating to the cost of insurance premiums for detention centres *A.17/05*

115 Refusal to provide information about the failure of the Government to proscribe an organisation *A.26/05*

120 Refusal to release full copies of applications for a licence to conduct animal experiments *A.29/05*

Department of Trade and Industry

134 Refusal to provide information about the progress of an investigation into allegations of smuggling made against British American Tobacco *A.28/05*

140 Refusal to provide information relating to meetings between the Secretary of State for Trade and Industry and the chairman of British American Tobacco *A.35/05*

Arts Council England

Case No: A.11/05

Refusal to provide information relating to the award of funding and the failure to appoint a Diversity Officer

Summary

Mr M had asked Arts Council England for information about the award of certain funding to a third party and their failure to appoint a Diversity Officer. The Ombudsman noted that the Council had provided Mr M with some of the information requested but were unable to supply other information because they did not hold it. She found that there were, however, certain elements of Mr M's information request which the Council should have considered under the Code. They comprised information relating to the Vision 2002 conference, the correspondence with a third party relating to a secondment to the post of diversity officer and Mr M's wish to have a copy of a complete version of the Council's staff code. Although not specifically cited by the Council, the Ombudsman concluded that Exemptions 7 and 8 applied respectively to the information about the conference and the correspondence about the secondment, and the Council were entitled to withhold that information. However, the Ombudsman recommended, and the Council agreed, that they release to Mr M a full copy of their staff code. While she welcomed the Council's acceptance of that recommendation, the Ombudsman was nevertheless critical of their handling of Mr M's information request.

1. Mr M complained that Arts Council England (the Council) had refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

2. I should say at the outset that my investigation is concerned solely with Mr M's information complaint and I offer no comment on his substantive dispute with the Council, which I set out below solely to put his information complaint into context.

Background to the complaint

3. On 25 April 2003 Mr M formally lodged a complaint under the Council's complaints procedure. By the Council's account, his complaint was divided into four parts: (a) that his research project, about the diversity of minority ethnic individuals in the creative sector, had been misappropriated by the Council and awarded to Bretton Hall (part of the University of Leeds); (b) that a person not connected with the Council, whom I shall refer to as Ms X, had stolen his ideas in order to present a conference (Vision 2002) on diversity in the creative sector; (c) that the Council had defamed him and caused the demise of a project, called CreativeFutures, related to the provision of careers guidance to young people wanting to work in the creative sector; and (d) that the Council had discriminated against him by not short-listing him for the position of Diversity Officer.

4. On 27 May 2003 the Council notified Mr M of the outcome of the complaints investigation. In response to (a) the Council found that the officer who had assessed and rejected Mr M's application for funding had acted reasonably, that the proposal put forward by Bretton Hall had been more comprehensive and was not stimulated by Mr M's research proposal and that the research experience of Leeds University was superior to that of Mr M. In response to (b) the Council found that Ms X had never been an employee or agent of the Council. They had provided a small amount of funding for her event but had not been involved in its delivery. They did not believe that there was anything in Mr M's complaint about Ms X that could be imputed to the Arts Council. With regard to (c) the Council

concluded that they had not acted unreasonably, while in respect of (d) the Council found that they had not discriminated against Mr M.

Mr M's information complaint

5. On 21 May 2003 Mr M e-mailed the Council and asked for (i) an explanation as to why no one had been selected for the post of Diversity Officer and details of any plans/contingencies following from this and (ii) any communications that the Council may have had since he lodged his complaint with nine separate organisations, all of which he named. The Council replied on 22 May 2003. In response to (i) the Council said that recruitment processes were confidential due to the need to respect the privacy and confidentiality of the individuals who applied. As regards (ii) they said that they had had no contact with any of the organisations he had listed in connection with his complaint in the period since his complaint had been received.

6. On 3 July 2003 Mr M wrote to the Council again and expanded his previous request for information. He asked that his solicitors be provided with the following information, which I have summarised: -

(i) A statement from the Council about the way in which one of their members of staff had responded to his e mails and telephone calls.

(ii) A copy of Ms X's original funding application for the Vision 2002 conference and a statement as to how it came to be funded, as well as any documentation (including notes, minutes, letters, etc.) about how the conference came to be funded, how the Council evaluated the impact and success of the conference and why no one from the Council attended it.

(iii) A statement and any documentation relating to the non-selection of a Diversity Officer as well as any documents relating to discussions between the Council and other organisations about the possibility of a secondment to fill the post and any documents detailing the nature of any relationship between Creative Industries Development Agency (CIDA) and/or Interculture in respect of this matter.

(iv) Copies of any communications between the Council and 11 organisations that he named regarding his complaints about these issues.

(v) A statement and any documentation relating to the contact made between the Council and Ms X regarding the Vision 2002 conference.

(vi) Copies of policy documents regarding the Council's disciplinary procedures and the way in which the Council's staff should conduct themselves.

(vii) A statement and any documentation relating to the approach made by the Council to Bretton Hall about undertaking research into minority ethnic individual representation in the creative sector workforce, and information relating to whether or not Bretton Hall and Yorkshire Forward were aware that he had submitted a similar proposal some months earlier.

(viii) A statement and any documentation relating to the reasons behind a request made by the Council to the cultural diversity employment research steering group for an advance copy of a draft report to be given to CIDA.

(ix) A copy of any explanation that the Council might provide explaining why CreativeFutures was not to go ahead.

(x) All documentation relating to Mr M's original application for diversity employment research funding, including the application itself.

(xi) A statement from the Council detailing any contact with CIDA about CreativeFutures.

(xii) A statement and any documentation relating to a proposal by a Ms Y for a follow-up conference to Vision 2002, including the level of the Council's involvement.

7. On 30 July 2003, and again on 5 August 2003, Mr M asked for a response to his request. The Council replied on 8 August 2003 and said that, as he had not given the legal basis for his information request, it was unreasonable for the Council to apply resources to comply with such an imprecise request. They suggested that Mr M seek legal advice on his information request and submit any further requests to the Council's solicitors.

8. On 18 August 2003 Mr M e-mailed the Council and requested all of the information he was entitled to, under both the Code and the Data Protection Act 1998 (the Data Protection Act). The Council replied on 12 September 2003. They said that they assumed that Mr M's request referred to the information sought in his letter of 3 July 2003. They said that the Code did not require them to provide information that they did not possess and that requests for new statements therefore fell outside the Code. They also said that they were not required to disclose information where such a disclosure would interfere with the effective management of their organisation. They believed that communications with other organisations would fall into this category. They also said that the Data Protection Act prevented them from releasing material identifying third party data subjects. Much of Mr M's information request was therefore refused on these two grounds. However, they said that they were prepared to disclose to him copies of their policy documents and disciplinary procedures (paragraph 6, (vi)) and that they would release information in response to his request for copies of his application for funding (paragraph 6, (x)) once they had investigated whether or not they still held information in which he was the data subject.

9. On 22 September 2003 Mr M wrote to the Council and said that he found their response unacceptable. He disputed the reasons for not providing the information that he was seeking and asked them to forward to him all relevant documentation. He said that he had also requested copies of documents relating to recruitment and selection and made a further request for a copy of the Council's governing document and confirmation of their powers.

10. On 1 October 2003 the Information Commissioner's Office wrote to the Council to say that they had received a complaint from Mr M about the way the Council had processed his personal data. They said that they were treating his complaint as a request for assessment under section 42 of the Data Protection Act. They said that it appeared that Mr M had asserted his right of subject access and that he did not appear to have received a copy of any personal data the Council might hold about him. While they acknowledged that much of the information requested was unlikely to be regarded as Mr M's personal data, they suggested that the Council examine each piece of information requested to decide whether or not it could be considered to be personal to Mr M and, if it was, whether or not it should be released to him.

11. On 3 October 2003 the Council wrote to Mr M and enclosed information relating to their policy

on disciplinary procedures (paragraph 6, (vi)) as well as a copy of one of his e-mails dated 1 August 2001, which they said was the only information that they now held relating to his proposal for funding (paragraph 6, (x)). The Council also said that, as he had raised the issue of recruitment and selection in his letter of 22 September 2003, they enclosed documents relating to the recruitment to the post of Cultural Diversity Officer in January 2003 and April 2003. They said that the names of candidates, other than that of Mr M, had been removed under the terms of the Data Protection Act.

12. On 9 October 2003 the Council wrote to the Information Commissioner's Office in response to their letter of 1 October 2003 (paragraph 10) and provided comments on each of the requests made by Mr M in his letter of 3 July 2003. The following is extracted from the Council's letter and corresponds to the requests set out in paragraph 6: -

(i) This information does not contain any personal data about Mr M. Under the terms of the Code we are not required to provide information we do not possess, nor create new statements of information.

(ii) This information does not contain any personal data about Mr M. It does however contain personal data about another individual, which under the terms of the Data Protection Act we are not permitted to divulge. Mr M's complaint was processed according to our complaints procedure, and this was addressed in previous correspondence with him.

(iii) This information does not contain any personal data about Mr M. Mr M's complaint was processed according to our complaints procedure, and information relating to this has been provided to him in previous correspondence. In addition we have provided Mr M with copies of his application form and all recruitment selection documents in which he is identified – for details see below.

(iv) This information does not contain any personal data about Mr M. We feel that disclosing details of our communication with other organisations would interfere with the effective management of our organisation, and is not appropriate in this case.

(v) This information does not contain any personal data about Mr M. Under the terms of the Code we are not required to provide information we do not possess, nor create new statements of information.

(vi) This information does not contain any personal data about Mr M. However, copies of our policy documents and disciplinary procedures were sent to Mr M on 3 October 2003.

(vii) This information does not contain any personal data about Mr M. Mr M's concerns were addressed according to our complaints procedure, and information relating to this has been provided to him in previous correspondence.

(viii) This information does not contain any personal data about Mr M. Mr M's concerns were addressed according to our complaints procedure, and information relating to this has been provided to him in previous correspondence.

(ix) This information does not contain any personal data about Mr M. Under the terms of the Code we are not required to provide information we do not possess, nor create new statements of information.

(x) This information was provided as requested on 3 October 2003. Mr M was sent a copy of his original application for diversity employment research (dated 1 August 2003). We have also confirmed to Mr M that we do not hold any other personal data on him in any other format with regard to this application.

(xi) This information does not contain any personal data about Mr M. Under the terms of the Code we are not required to provide information we do not possess, nor create new statements of information.

(xii) This information does not contain any personal data about Mr M. Under the terms of the Code we are not required to provide information we do not possess, nor create new statements of information.

The Council also outlined the action they had taken following Mr M's request for information, including the additional information they had provided on 3 October 2003 about recruitment to the post of Cultural Diversity Officer in January 2003 and April 2003.

13. On 10 October 2003 Mr M wrote to the Council in response to their letter of 3 October 2003 (paragraph 11). He said that he required the whole of the Council's staff code and not just an extract. He also asked them to explain what had happened to the rest of the information relating to his e-mail of 1 August 2001. On 13 October 2003 Mr M wrote again to the Council and acknowledged that they were not obliged to provide new statements in relation to his request for information. However, he complained about their failure to provide any more information than they had already disclosed. On 14 October 2003 the Council wrote to Mr M in response to his letter of 10 October 2003. With regard to his request for information, they said that they had nothing further to add to the responses they had given previously to him and to the Information Commissioner's Office. As for his request for the whole of the Council's staff code, they said that this was not relevant to his complaint and was not a publicly available document. On the same day the Information Commissioner's Office wrote to the Council to say that, having considered the correspondence further, they were of the view that it was unlikely that a breach of the Data Protection Act had taken place. They said that they did not anticipate pursuing the matter any further.

14. On 17 October 2003 Mr M wrote again to the Council. He referred to a previous request that he had made for access to a complete copy of the Council's staff code. He said that the Council had refused to provide it on the grounds that the document was not available to the public. He asked for reasons why he was being denied access to this information.

15. On 28 October 2003 Mr M's Member of Parliament wrote to the Council on his behalf. The Council replied on 4 November 2003 and said that they had provided all of the information to which Mr M was entitled under current legislation and noted that the Information Commissioner's Office had confirmed that they intended to take no action with regard to Mr M's requests. They said that they were clear that they had dealt properly and correctly with Mr M's complaint throughout.

Department's comments on the complaint

16. In response to the Statement of Complaint, the Chief Executive of the Council provided details of legal proceedings that Mr M had taken against the Council. He said that Mr M had filed an application for disclosure against the Council in the Bradford County Court on 8 March 2004. He said that the hearing had taken place on 11 May 2004 and that Mr M's application had been dismissed. The Chief Executive said that the Council had legitimately dealt with Mr M's requests for information in every instance and he hoped that this matter could be concluded swiftly without the need for further legal expense.

Investigation

17. Following further correspondence between a member of the Ombudsman's staff and the Council, it was established that the court action taken by Mr M had been concerned solely with his applications for personal information under the terms of the Data Protection Act. They therefore accepted that the remaining information sought by Mr M fell outside the scope of the legal proceedings he had taken under the Data Protection Act.

18. So how much of the remaining information requested by Mr M should have been considered under the terms of the Code? Some of the information requested by Mr M had already been given to him. Moreover, the Council had told Mr M that they were not obliged, under the Code, to acquire or create information that they did not possess. That is correct and I accept, as has Mr M (paragraph 13), that the Council were not required to provide written statements of the kind he had requested. Having taken all of this into account, I still believed that some of the information requested by Mr M on 3 July 2003 should have been considered under the terms of the Code. In order to assess whether or not this information could be correctly withheld under the Code I needed to establish exactly what information was held by the Council. I therefore asked the Council to provide the following information, which corresponds with the numbers in Mr M's request of 3 July 2003 (paragraph 6):

(ii) Any documentation held by the Council regarding the way in which the Vision 2002 conference came to be funded, how the Council evaluated the impact and success of the conference and why no one from the Council attended it.

(iii) Any documentation relating to the non-selection of a Diversity Officer. Any documents relating to discussions between the Council and other organisations about the possibility of a secondment to fill the post. Any documents detailing the nature of any relationship between CIDA and/or Interculture about this matter.

(iv) Copies of any communications between the Council and the 11 organisations that Mr M had named in his letter of 3 July 2003 regarding his complaints about these issues.

(v) Any documentation relating to the contact made between a member of the Council's staff and Ms X regarding the Vision 2002 conference.

(vi) An explanation as to why the Council had refused Mr M's request for a copy of their entire staff code (paragraph 14).

(vii) Any documentation relating to the approach made by the Council to Bretton Hall about undertaking research into minority ethnic individual representation in the creative sector workforce, and whether or not Bretton Hall and Yorkshire Forward were

aware that he had submitted a similar proposal some months earlier.

(viii) Any documentation relating to the reasons behind a request made by a member of the Council's staff to the cultural diversity employment research steering group for an advance copy of a draft report to be given to CIDA.

(ix) Any statement that the Council might have sent out explaining why CreativeFutures was not to go ahead.

(xii) Any documentation relating to Ms Y's proposal for a follow-up conference to Vision 2002, including the level of the Council's involvement.

I also asked the Council to state which exemption(s) of the Code they were relying upon when refusing to provide the information requested by Mr M.

19. In response, the Council provided a bundle of documents. Some of those documents had already been provided to Mr M, others had been denied to him, while others were provided as evidence in support of the Council's decision to withhold information from him. As regards (ii) and (v) they said that, due to the pressure of work, no Council officer had attended the Vision 2002 conference. They said that it was not their policy to attend every event they funded as to do so would be physically impossible. They provided several documents relating to the application and subsequent grant for funding Vision 2002 but said that they could not locate the post-conference evaluation report. They provided evidence to show that they had asked Interculture for a copy of that information but that they too could not find it. At my request, the Council also asked Interculture if they would consent to the disclosure of the information that they did possess on these matters, but they declined to do so.

20. In response to (iii) the Council provided a recruitment analysis form that had already been given to Mr M as well as an e-mail between the Council and Mr M dated 5 February 2003. The Council said that they had not corresponded with either CIDA or Interculture about this matter. However, they provided copies of two letters concerning the appointment of a secondee to the post of diversity officer. One of the letters was written to a third party and the other was in reply. The Council said that they had been withheld from Mr M on the grounds that they contained third party personal data and because the release of those letters would jeopardise the Council's confidential dealings with that third party.

21. In response to (iv) the Council provided a copy of their letter to Careers Bradford dated 22 April 2003, which they had already given to Mr M, and a copy of Careers Bradford's response of 24 April 2003, which they had not given to Mr M because Careers Bradford had declined to release it, exercising their rights under the Data Protection Act. As regards (vi), the Council said that the Chief Executive's office had been unable to locate a copy of any response to Mr M's letter of 17 October 2003. They believed that it was conceivable that it was overlooked owing to the voluminous number of complaints and requests coming from and going to Mr M from various parts of the Council. They asked the Ombudsman in this context to consider the exemption of the Code that related to the effective management and operations of the public service.

22. In response to (vii) the Council said that they did not hold any information specifically related to the approach made to Bretton Hall. They said

that they had worked with Bretton Hall from the mid 1990's with the Cultural Industries Baseline Studies and, from 2002, with Creative Yorkshire. They said that Bretton Hall had already undertaken some research into minority ethnic groups in the sector in as early as 1998 but had not published specific findings. This activity was a partnership with the University of Leeds and, since 2002, with Yorkshire Forward. They said that cultural diversity and employment had been a key issue in the arts for some time and research into aspects of it went back to the 1990's, before Mr M's proposals. They said that discussions with Bretton Hall had led to the production of a research brief, which they enclosed, against which they had made an offer of a grant. They also enclosed several documents relating to the application and subsequent offer of funding.

23. In response to (viii) the Council provided a copy of a letter dated 27 February 2003, which they had sent to all of the members of the cultural diversity employment research steering group following a meeting on 24 February 2003 at which they had discussed the draft report. They said that Mr M had been sent a copy of this letter as he had been a member of the group and he had been present at the meeting at which they had decided to send a copy of the draft report to CIDA. They said that they did not have any minutes of the meeting of 24 February 2004 but said that the decision to provide CIDA with a draft copy of the report had been made because one of the members of the group had introduced the idea of the wider value of the report to the cultural sector in the region.

24. In response to (ix) the Council said that they had not sent out any statement explaining why Creative Futures was not to go ahead. Similarly, in response to (xii), the Council said that they had no information relating to Ms Y's proposal for a follow-up conference to Vision 2002.

25. The Council said that they had withheld information from Mr M because it contained personal data relating to third parties or because releasing it would either jeopardise their confidential dealings with a third party or harm the effective management and operations of the public service.

Exemptions of the Code

26. In the preamble to part II of the Code, under the heading 'Reasons for confidentiality', it states:

'The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

27. Exemption 7 is headed 'Effective management and operations of the public service' and reads as follows:

'(a) Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;

- negotiations or the effective conduct of personnel management, or commercial or contractual activities;

- the awarding of discretionary grants.

(b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.'

28. Exemption 8 is headed 'Public employment, public appointments and honours' and reads:

'(a) Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.

(b) Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.

(c) Information, opinions and assessments given in relation to recommendations for honours.'

Assessment

29. In assessing this complaint I have to consider not only the substantive issue of whether or not the information requested by Mr M should be released to him but also the way in which his request was handled. I shall look first at the information being sought by Mr M. In doing so, I should emphasise that my investigation is concerned solely with the question of whether or not Mr M is entitled, under the Code, to the information he has requested. The Council have considered much of the information he requested under the terms of the Data Protection Act. Any dispute Mr M may have about the non-disclosure of that information, and I am aware that he has already taken legal action in this regard, is not for the Ombudsman. It is for the Information Commissioner's Office, or for the courts, to interpret data protection legislation and its applicability in individual cases. I, therefore, am confining my observations only to matters that fall outside the scope of the Data Protection Act but within the Code.

30. Furthermore, I am confining my investigation to information that is held by the Council. As I have already stated (paragraph 18), there is no requirement under the Code for departments or bodies to acquire or create information that they do not possess (part I, paragraph 4 of the Code). I am satisfied, therefore, that the Council were correct in refusing to provide Mr M with the statements that he requested and, moreover, that they were not obliged to provide information that they did not possess.

31. So how does all of this impact on Mr M's request of 3 July 2003? The Council have said that they withheld the letter from Careers Bradford dated 24 April 2003, in response to Mr M's request (iv), because Careers Bradford had declined to release it, exercising their right under the Data Protection legislation (paragraph 21). I asked the Council to confirm whether or not they had sought the consent of Careers Bradford to the release of that letter to Mr M. In response, the Council provided evidence of Careers Bradford's refusal to give their permission to disclose the letter to a third party. They also said that the letter had been subject to the claim for disclosure that had been heard in Bradford County Court on 11 May 2004 (paragraph 16). Having looked very carefully at this letter, I am satisfied that it does contain personal data and therefore should be considered under the terms of the Data Protection Act rather than the Code. I therefore offer no comment on the disclosure of this information.

32. Mr M's requests at (i) and (xi) were for statements, which the Council were not obliged to provide under the terms of the Code. Moreover, the Council have said that they do not possess some of the information sought by Mr M. Part of his request at (ii) was for a copy of any information related to the way the Vision 2002 conference was evaluated. The Council have said that they cannot find a copy of the evaluation report for that conference and I have seen evidence that they tried, and failed, to obtain a copy of that report from Interculture. That is unfortunate but, as the Council do not hold that information, they are not obliged to provide it.

33. Mr M also asked for information relating to the Council's approach to Bretton Hall to undertake research in relation to minority ethnic individual representation in the creative workforce sector (vii). Moreover, he asked for any information about whether or not Bretton Hall and Yorkshire Forward were aware that he had submitted a more detailed proposal some months earlier. In response to my request for information about these matters, the Council said that they did not hold any information specifically related to the approach made to Bretton Hall (paragraph 22). While the Council did forward several documents related to Bretton Hall's application for funding I do not consider that any of the information contained in those documents would meet Mr M's request in this regard.

34. The Council have also said that they do not possess any minutes of a meeting held by the cultural diversity employment research steering group at which, they said, the decision was taken to send a copy of a draft report to CIDA (viii). While they do not hold any information about this decision they have, however, provided an account of their recollection of why that decision was taken (paragraph 23). Moreover, the Council have said that they do not hold any information with respect to Mr M's requests at (ix) and (xii).

35. Some of the information sought by Mr M has already been disclosed to him. The Council have provided some of the information requested at (iii), (iv) and (vi), and all of the information with regard to his request at (x).

36. So, in the light of the above, what information remains for me to consider under the Code? I believe that I need to consider the non-disclosure of the following information, which again corresponds to the numbering of his request of 3 July 2003 (paragraph 6): -

(ii) Information relating to the Vision 2002 conference:

a. Letter and conference proposal from Ms X.

b. File copy of grant offer letter dated 10 September 2001.

c. Internal grant approval/authorisation form.

(iii) Correspondence (two letters) with a third party relating to a secondment to the post of diversity officer.

(v) See (ii)

(vi) A complete version of the Council's staff code.

37. As far as the information at (iii) is concerned, the Council have stated that they did not disclose this information to Mr M because it not only contains personal data relating to a third party but that its release would jeopardise their confidential dealings with a third party. As before, I offer no comment on the non-disclosure of the personal data held in these documents: that is

not a matter for the Ombudsman. As for the remaining information, should it be released under the Code? I do not think so. In response to Mr M's initial request for this information (paragraph 5) the Council said that recruitment processes were confidential due to the need to respect the privacy and confidentiality of the individuals who applied. Although they did not specifically refer to any of the exemptions in part II of the Code as justification for refusing to release this information, Exemption 8 is designed to protect exactly this type of information. Information held by departments in their capacity as employers is exempt from disclosure under the Code and includes information given in relation to recruitment, promotion and security vetting. I am satisfied that the two letters that have been withheld from Mr M relate to public employment and that they are therefore exempt from disclosure under Exemption 8 of the Code.

38. I shall now look at the non-disclosure of the Council's staff code (vi). Although the Council released an extract from this document, they subsequently refused to provide the entire copy on the grounds that it was not available to the public. When I queried this, the Council said that it was being withheld on the grounds that its disclosure would harm the effective management and operations of the public service (paragraph 21). I noted, however, that the Council's current staff code was publicly available as part of their publication scheme under the Freedom of Information Act 2000 and I therefore asked them to reconsider their decision not to disclose it to Mr M. In response, the Council said that they had no objection to the release of that information to Mr M and agreed to do so. I welcome that decision and I recommended to the Chief Executive of the Council that it be disclosed to him as soon as possible. In reply, the Acting Chief Executive said that they would forward a copy of the Council's staff code to Mr M when this report was issued.

39. I now turn to the remaining information that was requested by Mr M at (ii) and (v) (paragraph 36). This relates to Interculture's application for funding for the Vision 2002 conference. The Council have so far refused to provide it to Mr M on the grounds that it contains personal data relating to third parties and because releasing the information would either jeopardise their confidential dealings with a third party or harm the effective management and operations of the public service (paragraph 25). As before, I am satisfied that there is information in these documents that could be defined as personal data for the purposes of the Data Protection Act and I shall offer no comment on the non-disclosure of that information. Is there any justification for not disclosing the remaining information under the Code? Again, the Council have not specifically referred to any of the exemptions in part II of the Code. However, it is clear that they are referring to Exemption 7, which relates to the effective management and operations of the public service (paragraph 27). This exemption is intended to prevent the disclosure of information where such a disclosure would be damaging to the work of the department concerned. I accept that an applicant seeking funding would provide information to the Council in the quite reasonable expectation that it would not be made available to third parties. Moreover I believe that, if the Council were required to make such information available, it would undermine the necessary working relationship between the Council and those applying for funding to the extent that it would be damaging to their work. I am satisfied, therefore, that this information can be correctly withheld under Exemption 7 of the Code. While this exemption could be circumvented if the applicant consented to the disclosure of the

requested information, in this case that consent was not forthcoming (paragraph 19) and I therefore uphold the Council's decision not to disclose it to Mr M.

40. Finally, I shall consider the way in which the Council handled Mr M's request for information. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005 all requests for information should have been treated as if made under the Code, irrespective of whether or not it was referred to by the applicant. Information should have been provided as soon as practicable and the target for responses to simple requests for information was 20 working days from the date of receipt. While this target could have been extended when significant search or collation of material was required, an explanation should have been given in all cases where information could not be provided. It was also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they were relying in making that refusal. Moreover, they should have made the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to the Ombudsman if, after completion of the review process, they remained dissatisfied.

41. I should first say that, in this case, the question of the disclosure of information was complicated by the fact that the Council were looking at Mr M's information request at the same time as they were dealing with his substantive complaints made against them (paragraph 3). Moreover, his request was for information that needed to be considered under both the Code and the Data Protection Act. The relationship between the Code and the Data Protection Act was always a little unclear, particularly as the definition of what constitutes personal information has narrowed over the past few years following decisions in the courts. It was not always easy, therefore, to determine with any accuracy what information should have been considered under the terms of the Data Protection Act and what information should have been considered under the Code. Notwithstanding these complications, the Council's handling of Mr M's request was not entirely without fault. While, on the whole, the Council responded timeously to Mr M's requests for information, in most other respects they failed to follow the basic requirements of the Code. They initially failed to respond to Mr M's request of 3 July 2003, erroneously believing that he would have to provide a legal basis for his request before they could consider disclosing the information he was seeking. When subsequently refusing to provide much of the information requested, they failed to make specific reference to any of the exemptions in part II of the Code. Furthermore, they failed to advise Mr M of his right to seek an internal review of their decision or of his right to approach the Ombudsman if he remained dissatisfied following that review. I am critical of these failings and I recommended to the Chief Executive of the Council that he remind his staff of the importance of identifying requests for information and acting in accordance with the relevant requirements for handling such requests. While the Code has now been superseded by the Freedom of Information Act 2000, I believe that there are lessons that can and should be learnt from this case.

42. In reply, the Acting Chief Executive acknowledged that they should have provided Mr M with the information to which he was entitled within the target time of 20 working days. He said that, where they had considered the request to be legitimate and where additional advice was not required, responses had been made within the prevailing timeframe. However, he said that they understood the 20 working day timeframe to be a target which could be

extended when significant search or collation was required and they considered that they had acted responsibly in seeking legal advice and, having sought it, acting upon it. He said that it was unfortunate that this sometimes meant that they did not respond within the 20 working days, but the complexity of their dealings with Mr M was such that they needed the time to properly consider his requests and to supply the right level of information to each individual request. The Acting Chief Executive also accepted that their responses, where relevant, should have referred directly to the specific exemptions on which their refusal to supply information relied. Similarly, he said that they accepted that it was good practice to make the requester aware of the next stages, something they did as a matter of course when individuals were making their way through the complaints procedure. The Acting Chief Executive said that they were now operating under the Freedom of Information Act 2000 and that they would make sure that they complied with the requirements of that Act.

Conclusion

43. In responding to Mr M's request for information the Council devoted a great deal of time and resources to deciding what information they should release to him. While I was critical of some aspects of the way they handled the request under the Code, I found that they were largely justified in refusing to provide any further information than they had already disclosed.
I welcome the Acting Chief Executive's agreement to release a copy of the Council's staff code and I see that, and his commitment to complying with the relevant legislation for handling future requests for information, to be a satisfactory outcome to a partially justified complaint.

Cabinet Office and the Department for Constitutional Affairs

Case No: A.16/03

Failure to provide information relating to potential Ministerial conflicts of interest under the Ministerial Code of Conduct

Summary

Following receipt from the Cabinet Office of a Notice in Writing under section 11(3) of the Parliamentary Commissioner Act 1967, the Ombudsman discontinued her investigation into Mr Evans's complaint that the Cabinet Office and the then Lord Chancellor's Department (now the Department for Constitutional Affairs) had refused to provide him with information about potential Ministerial conflicts of interest (A.16/03, Access to Official Information: Failure to provide information relating to potential Ministerial conflicts of interest under the Ministerial Code of Conduct, HC 951). She re-opened her investigation following a decision by the Administrative Court to quash the Notice by consent. The Ombudsman criticised both departments for their handling of Mr Evans's complaint both before and since Mr Evans complained to her, concluding that responsibility for their joint shortcomings laid primarily with the Cabinet Office. She was also critical of the Cabinet Office for the substantial delay in providing central guidance on the handling of information requests impinging on the Ministerial Code. As to the information sought by Mr Evans, the Ombudsman found that the Cabinet Office and the Lord Chancellor's Department were not entitled to rely on Exemptions 2 and 12 as a basis for withholding much of the information requested by Mr Evans but that, in particular as regards Exemption 12, each case needed to be considered on its merits. She recommended that additional information be released to Mr Evans, and expressed disappointment that neither the Cabinet Office nor the Lord Chancellor's Department replied substantively to that recommendation.

1. Mr Evans complained that both the Lord Chancellor's Department (LCD) (now the Department for Constitutional Affairs, but I use the term LCD throughout for ease of reference) and the Cabinet Office refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Information Code).

2. On 7 July 2003 I discontinued my investigation into Mr Evans's complaint following receipt from the Cabinet Office of a Notice in Writing under section 11(3) of the Parliamentary Commissioner Act 1967 (paragraph 22 below). Following a decision by the Administrative Court to quash the Notice by consent, I re-opened my investigation. I have not put into this report every detail investigated by my staff but I am satisfied that no matter of significance has been overlooked. I should explain that since 1 January 2005 the Information Code has been superseded by the Freedom of Information Act 2000. As a result, references to the Information Code are couched in the past tense.

The Information Code

3. In July 1993 the then Government published a White Paper entitled *Open Government,* as part of the Citizen's Charter programme. The White Paper contained proposals for, among other things, the creation of the Information Code. It also stated that the then Ombudsman had agreed that complaints that Departments and other bodies within his jurisdiction had failed to comply with the Information Code could be investigated by him, if referred by a Member of Parliament in the usual way. When the Information Code came into force, on 4 April 1994, the Ombudsman wrote personally to the permanent heads of the bodies within his jurisdiction about his new role to explain how, in accordance with arrangements already made with the Select Committee on Public Administration, he intended to operate under the new Code.

4. While the Information Code was in force, the Ombudsman was able to consider complaints that, in breach of its provisions, bodies within the Ombudsman's jurisdiction had refused to provide information which was held by them. Refusal to supply information might have been justified if the information fell within one or more of the exemptions listed in Part II of the Information Code. The Information Code gave no right of access to documents: the right, subject to exemption, was only to information. Both of my predecessors, however, took the view that the release of the actual documents was often the best way of making available information which the Ombudsman recommended should be disclosed. In accordance with paragraph 4.19 of the White Paper, they also accepted that refusal to release information which should have been released was sufficient to found a complaint to the Ombudsman. I can see no reason to depart from these established practices.

Exemptions

5. Exemption 2 to the Information Code was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet Committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

6. Exemption 2 was subject to the preamble to Part II of the Information Code which stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.'

'References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

7. Exemption 12 was headed 'Privacy of an individual' and read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

Jurisdiction

8. The Ombudsman has the jurisdiction to investigate complaints made under the Information Code against those central Government Departments and other bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967. Both LCD and the Cabinet Office are so listed.

The Ministerial Code of Conduct (The Ministerial Code)

9. The Ministerial Code *(A Code of Conduct and Guidance on Procedures for Ministers)* was originally published on 31 July 1997. It updated the Questions of Procedure for Ministers published in 1992 under the previous Government. The Ministerial Code is the Prime Minister's guidance to his colleagues on how they should conduct themselves while in Government. I have no jurisdiction over the content of the Ministerial Code, which is a matter for the Prime Minister. At the time of Mr Evans's information request, the 1997 version was in force. A revised version was published on 20 July 2001. The paragraphs of the 1997 Ministerial Code relevant to this investigation are:

'110. Where it is proper for a Minister to retain any private interest, it is the rule that he or she should declare that interest to Ministerial colleagues if they have to discuss public business in any way affecting it, and that the Minister should remain entirely detached from the consideration of that business. Similar steps may be necessary should the matter under consideration in the Department relate in some way to a Minister's previous private interests such that there is, or may be thought to be, a conflict of interest.

'123. In all cases concerning financial interests and conflict of interest Ministers may wish to consult financial advisers as to the implication for their (or their families') affairs of any action which they are considering to avoid any actual or potential conflict of interest. They should also consult the Permanent Secretary in charge of their Department, who is the Minister's principal adviser and who also, as Accounting Officer, has a personal responsibility for financial propriety and regularity. It is in the end for Ministers to judge (subject to the Prime Minister's decision in cases of doubt) what action they need to take; but they should record, in a minute to the Permanent Secretary, whether or not they consider any action necessary, and the nature of any such action taken then or subsequently to avoid actual or perceived conflict of interest.'

Background

10. On 19 February 2001 Mr Evans wrote to 17 Government Departments seeking information about the occasions on which their respective Ministers had sought the advice of the Permanent Secretary of the Department concerned (and of the Prime Minister where appropriate) about potential conflicts of interest with their public duties. Citing the Information Code, Mr Evans asked to be told, in relation to paragraph 123 of the Ministerial Code of Conduct (and since 1 January 1999):-

(a) how many times Ministers in each Department had consulted the Permanent Secretary;

(b) on what dates they had consulted the Permanent Secretary;

(c) which Ministers had consulted the Permanent Secretary;

(d) for what reasons did each Minister consult the Permanent Secretary; and

(e) what action was taken in each case and in which of them was it necessary to consult the Prime Minister.

11. Mr Evans also asked, for each case, for a copy of the minute to the Permanent Secretary from the Minister recording what action was necessary and the nature of any action taken to avoid any actual or perceived conflict of interest. He asked that the requested information be sent to him within 20 days in accordance with the Information Code.

12. In response to his requests, 15 of the 17 Departments he had contacted replied, including LCD and the Cabinet Office, refusing to provide him with the information he sought, all citing Information Code Exemptions 2 and 12 as the basis for their refusal. In their letter of refusal of 19 March 2001 the Cabinet Office referred to the Guidance on the Interpretation of the Information Code, which states with regard to Exemption 2 that 'it is not the intention to change or undermine the long-established conventions protecting the confidentiality of the internal decision-making process', and noted that one of the conventions listed was Questions of Procedure for Ministers (see paragraph 9 above). The Cabinet Office said that the type of information considered under such conventions was particularly sensitive and it was in recognition of this sensitivity that the guidance gave great weight to the fact that any disclosure in this area could harm the frankness and candour of future discussions. As to Exemption 12, the Cabinet Office said that the provisions in the Ministerial Code relating to the seeking of advice and declarations of possible conflicts of interest were there to ensure that the boundaries between the private and public lives of Ministers were properly set and maintained. The Cabinet Office said that they believed that the disclosure of information about such issues would be an unwarranted invasion of privacy. LCD wrote to Mr Evans in effectively identical terms on 29 March 2001.

13. Between 28 November 2001 and 4 December 2001 Mr Evans contacted the Government Departments which had refused to provide him with information, seeking a review of their decisions. In response he received holding replies from several of the Departments concerned (although not from LCD and the Cabinet Office), from one of which he became aware that they were awaiting guidance from the Cabinet Office on how to respond to information requests involving matters covered by the Ministerial Code before replying to him substantively.

14. Having received guidance from the Cabinet Office on how to respond to this and other information requests which Mr Evans had made, LCD issued it to the Government Departments concerned on 8 August 2002. In relation to the present complaint the guidance advised that:

'Departments should state that they have reviewed their response to the original request and, for the reasons set out in the original reply, maintain that Exemption 2 (internal discussion and advice) and Exemption 12 (privacy of an individual) continue to apply.

'Departments should also highlight that the July 2001 revision of the Ministerial Code strengthened the rules in this area. All Ministers are now required, on appointment to each new office, to provide their Permanent Secretary with a list of their financial and other interests which could give rise to a conflict of interest. If any are reported they then have to have a meeting with the Permanent Secretary to discuss them and consider what action, if any, is necessary.'

The Cabinet Office and LCD replied to Mr Evans's review requests of 28 November 2001 in those terms on 21 August and 12 September 2002 respectively.

15. On 22 August 2002 my predecessor, having had Mr Evans's complaint referred to him by the Member, issued a statement of complaint to the Permanent Secretaries of both LCD and the Cabinet Office, inviting their comments and asking to see all of the papers relevant to the complaint, including the information sought by Mr Evans, by 13 September 2002.

The Permanent Secretaries' comments on the complaint

16. The Permanent Secretary of LCD replied on 5 September 2002, apologising for the length of time taken to reach a view on Mr Evans's review request. He explained that, as with an earlier complaint from Mr Evans, it had been necessary for LCD to consult the Cabinet Office because of the latter's responsibility for the Ministerial Code. He said that, in response to Mr Evans's letter of 19 February 2001, on 29 March 2001 LCD had refused to provide him with the information he had requested, setting out the reasons for the refusal and the exemptions on which the refusal was based. The Home Office (the previous custodians of the Information Code) had already rejected a similar request from Andrew Robathan MP, which had been subject to the Ombudsman's investigation, and about which the judgment (that the Home Office had wrongly withheld information) was published on 13 November 2001(A.28/01 Access to Official Information: Declarations Made Under The Ministerial Code Of Conduct, HC 353). LCD had acknowledged Mr Evans's review request of 28 November 2001 by e-mail on 30 November 2001, pending advice from the Cabinet Office, by which time central responsibility for the Information Code had transferred to LCD. The Permanent Secretary of LCD said that Mr Evans had been in contact with his officials, who had tried to keep him informed and that, following consultation with the Cabinet Office and the issue by LCD of the Cabinet Office's central guidance, they had responded to Mr Evans on 22 August 2002 in the terms of that guidance, maintaining that Exemptions 2 and 12 continued to apply.

17. The Permanent Secretary of the Cabinet Office replied on 10 October 2002, saying that he had seen the reply from the Permanent Secretary of LCD. He said that he could find no trace of a letter from Mr Evans between 28 November 2001 and 4 December 2001 seeking a review of the decision to refuse the information requested; however the Cabinet Office had decided to proceed as if they had received such a request. He said that central guidance on this and other round robin requests from Mr Evans concerning matters under the Ministerial Code was issued by LCD on 8 August 2002. Following that guidance the Cabinet Office had replied on 12 September 2002, maintaining the refusal to provide information on the basis that Exemptions 2 and 12 applied. The Permanent Secretary said that the Cabinet Office's response to Mr Evans's original request for information made it clear that they were satisfied that it was not the intention that the Information Code should be interpreted in a way which would lead to the disclosure of confidential and sensitive discussions under constitutional conventions, and which could harm the frankness and candour of future discussions. The response had also made it clear that the Cabinet Office considered that it would be an unwarranted invasion of an individual Minister's privacy to disclose the information requested. The Permanent Secretary said that the Government had maintained this view in their consideration of the Ombudsman's conclusions the previous year on the related complaint from Mr Andrew Robathan MP. The Permanent Secretary said that he had arranged for a copy of the letter of 12 September 2002, together with copies of other papers specific to this case that I did not already hold, to be sent to my Office. He echoed the regret expressed by the Permanent Secretary of LCD about the length of time taken to reach a view in relation to these requests.

Investigation

18. On 20 September 2002 my Office received from LCD their papers relating to Mr Evans's complaint, but these papers failed to include the information sought by Mr Evans. Following telephone requests from my staff on 24 September, 5 and 17 October 2002, my Office received the relevant information.

19. On 14 October 2002 the Cabinet Office telephoned a member of my staff to say that they intended to send their papers to my Office that day. Following a number of reminders some papers were received on 5 November 2002 but, again, these did not include the information requested by Mr Evans. On 7 November 2002 one of my staff wrote to the Cabinet Office reminding them that we had asked to be sent that information by 13 September 2002, and requesting its provision as soon as possible. In their response of 2 December 2002 the Cabinet Office expressed the view that the issues in this case were comparable to those in the Robathan case in which the Government had not accepted the Ombudsman's conclusions. The Cabinet Office were of the opinion that Mr Evans should be referred to the Robathan report, which set out the Government's position.

20. On 24 January 2003, having still not received the information, I wrote to the Permanent Secretary of the Cabinet Office about this and other complaints, reminding him that the Ombudsman's right of access to information and documents under the Parliamentary Commissioner Act 1967 applied equally to investigations carried out in relation to complaints under the Information Code, and that this right included the material to which access was sought.

21. I subsequently met the Permanent Secretary on 13 February 2003 in an attempt to take matters forward. I then wrote to him on 18 February 2003 recording my understanding of the conclusion reached, which was that material in Mr Evans's case would now be sent to my Office so that my investigation could proceed without further delay. Since papers still failed to appear, I wrote again to the Permanent Secretary on 5 March 2003, expressing my disappointment that they had not been sent and asking that they be received within the next week, or for an explanation if this were not possible. The Permanent Secretary replied on 13 March 2003, saying that the Ministerial Code made it clear that personal information which Ministers disclosed to those who advised them was treated in complete confidence and could not be disclosed without their permission. He said that the Government had considered these issues carefully but had concluded that the release of information relating to Ministers' financial interests would harm the frankness and candour of internal discussion and they did not therefore intend to release such papers; this point had been previously stressed in the Government's response to the Robathan report. In response, on 21 March 2003, I asked the Permanent Secretary for confirmation that their reply meant not only that they were maintaining their refusal to release to Mr Evans the information he had requested but also that they were not prepared to make that information available to me. The Permanent Secretary replied 9 April 2003, in effect confirming that this was indeed the case.

22. Following further correspondence I received, on 25 June 2003 from the Cabinet Office a Notice in Writing, under section 11(3) of the Parliamentary Commissioner Act 1967 (the Act), dated 23 June 2003 and signed by:

(a) the Secretary of State for Constitutional Affairs and Lord Chancellor; and

(b) the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster. Section 11(3) of the Act states that:

'A Minister of the Crown may give notice in writing to the Commissioner, with respect to any document or information specified in the notice, or any class of documents or information so specified, that in the opinion of the Minister the disclosure of that document or information, or of documents or information of that class, would be prejudicial to the safety of the State or otherwise contrary to the public interest; and where such a notice is given nothing in this Act shall be construed as authorising or requiring the Commissioner or any officer of the Commissioner to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.'

The Notice informed me that the disclosure of the information sought by Mr Evans would be contrary to the public interest. In those circumstances, I considered that I had no option but to discontinue my investigation.

23. It was not until 23 June 2003 that the Cabinet Office finally sent me an example of the type of information sought by Mr Evans (albeit not information falling within the period of his request), as an Annex to the section 11(3) Notice. That delay was regrettable and, I am sorry to have to say, indicative of the substantial lack of co-operation that my Office received from the Cabinet Office during the early stages of this investigation.

Later developments

24. On 12 November 2003 Mr Evans was granted permission to apply for judicial review of the joint decision to issue a section 11(3) Notice. On 18 March 2004 the Cabinet Office notified me that, by consent, they and LCD had agreed to the quashing of the section 11(3) Notice, on the grounds that the decision to issue it had been flawed. In her witness statement to the Administrative Court supporting the order to quash, the Assistant Treasury Solicitor acting on behalf of the Cabinet Office and LCD quoted their counsel as saying that Mr Evans would receive the answers to his five questions (paragraphs 10(a)-(e)) to the extent that they could be given without revealing the contents of any consultation; that it was recognised that Mr Evans had previously asked similar questions of 15 other Departments and the Cabinet Secretary was advising those departments that they should now proceed to provide answers to the original questions in so far as possible without revealing the content of any consultation between Ministers and their Permanent Secretaries; and, for the avoidance of doubt, LCD and the Cabinet Office should emphasise that they would continue to uphold the confidentiality of the content of Ministerial consultations and would need to take fresh decisions in relation to any further information which Mr Evans might ask to see.

25. In the light of the decision quashing the Notice, I concluded that there was no longer any bar to completing my investigation and, on 25 March 2004, I wrote to the Cabinet Office (copied to LCD) and to Mr Evans notifying them of my intention to re-open the case. On 25 March 2004 I also received from Mr Evans a copy of a letter he had sent on 24 March 2004 to all of the Government Departments of which he had made his original information request, referring them to the Assistant Treasury Solicitor's witness statement and the undertaking it contained and asking them to provide without further delay the answers to the five questions set out in his original request (although he

believed that it was for me to decide how much of the actual content of the consultations should be disclosed to him).

26. On 26 April 2004 the Managing Director of the Cabinet Office wrote to me to confirm that they had advised Departments to deal with Mr Evans's letter in accordance with the terms of his updated request. Having further studied the item of correspondence mentioned in paragraph B of the section 11(3) Notice, the Managing Director said that the letter in question did in fact fall outside the period of Mr Evans's information request (1 January 1999 to 19 February 2001). The Managing Director said that the Cabinet Office had written to Mr Evans to explain that there had been no instances of any formal consultations between Cabinet Office Ministers and their Permanent Secretary in that period, although it was possible that Ministers may have had some consultations on an informal basis, for example in the margins of meetings; there were, however, no records of any such consultations.

27. Also, on 26 April 2004, the Permanent Secretary of LCD wrote to me saying that, with hindsight, LCD accepted that the release of information relating to the number of occasions on which consultations (between Ministers and their Permanent Secretary) had occurred, the dates of those consultations, the names of the relevant Ministers, the purpose in general terms of the consultation and the action that was taken, would not normally harm the frankness and candour of internal discussions. Nor would disclosure of such information usually constitute an unwarranted invasion of Ministers' privacy. They accepted that they should have provided that information at the outset.

28. The Permanent Secretary of LCD went on to say that to go further than simply state what was discussed (for example, a financial interest) and to give details of the nature of that financial interest could reasonably be expected to harm the frankness and candour of internal discussion and advice. LCD further believed that in this case the harm likely to arise from disclosure outweighed the public interest in making the information available.

29. The Permanent Secretary said that, since June 2001 (after Mr Evans's request), the Ministerial Code had been strengthened to include an absolute requirement for Ministers, on appointment to each new office, to provide their Permanent Secretaries with a list of any of their interests which might be thought to give rise to a conflict. The Ministerial Code specified that any interest 'which might be thought to give rise to a conflict' should be brought to the attention of Permanent Secretaries. LCD provided guidance to Ministers on the issues that should be covered in their lists but the onus was still on Ministers to exercise their judgement as to what 'might be thought' to give rise to such a conflict. The Permanent Secretary said that the promise of confidentiality in paragraph 118 of the (2001) Ministerial Code, and the general relationship of high trust that existed between Ministers and their Permanent Secretaries and other senior officials, led to Ministers being very candid in their judgment about what might be thought to give rise to a conflict, to the extent of also seeking advice over issues which could not be thought to raise such a possibility.

30. As to the specific cases covered by Mr Evans's information request, the Permanent Secretary said that the conversations between the Ministers and their Permanent Secretary took place in the expectation of confidentiality (see above) and were, as a result, very frank and open. He said that if Ministers thought that the conversations they had with their senior officials could be made public, or that they would have to make public

details of private financial interests which do not give rise to any conflict of interest, then there was a reasonable expectation that the frankness and candour of discussions would be harmed; Exemption 2 therefore applied. As to whether the public interest in releasing the information would override the harm caused by its release, the Permanent Secretary said that there clearly was a public interest in ensuring that the Ministerial Code was complied with; however, compliance with the Ministerial Code was in the end ensured through the advice provided by an impartial Civil Service. He said that the public gaze in this case could damage the public interest in ensuring that the Ministerial Code was complied with. The Permanent Secretary went on to say that LCD believed that there was also a strong public interest in preventing the harm that would be caused to the frankness and candour of future internal discussions of this kind and the risk of such harm, in his view, outweighed the public interest in openness in this case.

31. The Permanent Secretary also commented on the point that the balance of public interest had to take account of the fact that some of the information in question claimed to have been placed in the public domain by an article in the press. He said that the Government had not commented on the subject of the article and had never said whether or not the information contained in it was correct: that remained the position. He said that even if the details set out in the article were correct, there would be a marked difference between information entering the public domain as a consequence of a supposed leak and speculation and information being officially released. He concluded that the supposed fact of information already being in the public domain was not relevant to the question of whether or not the information in question should be officially released.

32. The Permanent Secretary said that LCD also believed that to make public the content of the discussions would amount to an unwarranted disclosure of personal information: Exemption 12 therefore applied.

Assessment

33. In assessing this complaint there are two aspects I have to consider: the general handling of Mr Evans's information requests by LCD and the Cabinet Office, and the substantive matter of whether or not the information requested should be released to him. I turn first to the handling of the information requests.

34. I draw attention to paragraph 5 of Part I of the Information Code, which was headed 'Responses to requests for information' and read:

'Information will be provided as soon as practicable. The target for response to simple requests for information is 20 working days from the date of receipt. This target may need to be extended when significant search or collation of material is required. Where information cannot be provided under the terms of the Code, an explanation will normally be given.'

35. Mr Evans's original request for information was made on 19 February 2001. The Cabinet Office responded to him on 19 March and LCD on 29 March 2001. Albeit that LCD's reply was slightly outside the deadline, given the nature of the information requested, both departments' initial response was commendably prompt. However, it was a different story when it came to Mr Evans's review requests made between 28 November and 4 December 2001 as LCD and the Cabinet Office replied to Mr Evans only on 22 August and 12 September 2002 respectively. Although the Information Code laid down no specific timescale for the carrying out of reviews, these clearly took much longer than they should have done even

allowing for the nature of some of the information sought.

36. A detailed account of the delays in this case is set out in the published report of the investigation into a related complaint by Mr Evans (A.7/03, Access to Official Information: Refusal to release information relating to the acceptance of gifts by Ministers in accordance with the Ministerial Code of Conduct, HC 951). It is clear from the papers I have seen in connection with these two complaints that the fundamental cause of the delay resulted from LCD's need to have from the Cabinet Office the central guidance that they (LCD) could then issue on the handling of information requests impinging on the Ministerial Code. Despite persistent attempts on LCD's part to expedite matters they did not receive that guidance from the Cabinet Office until shortly before they (LCD) issued it on 8 August 2002, some nine months after Mr Evans had instigated the process. That being so, I firmly believe that the responsibility for the delay in dealing with Mr Evans's review request must be laid squarely at the door of the Cabinet Office.

37. As my predecessor has said, any delay in securing information often deprives it of value: any delay by departments in answering information requests is therefore regrettable. I strongly criticise the Cabinet Office for the length of time it took them to provide central guidance in this case. The substantial overall delay in providing guidance to 17 Government Departments on a matter such as this is wholly unacceptable, not least because this delay made it impossible for every other Department in receipt of Mr Evans's review request to meet their obligations under the Information Code.

38. The central guidance that was eventually issued on 8 August 2002 advised Departments that their response to Mr Evans's review requests should maintain, for the reasons set out in their original replies (paragraph 12 above), that Exemption 2 (internal discussion and advice) and Exemption 12 (privacy of an individual) continued to apply, and that was the line followed by LCD and the Cabinet Office in their letters to Mr Evans of 21 August and 12 September 2002 respectively.

39. I now turn to the applicability or otherwise of Exemption 2 to the information sought by Mr Evans (paragraphs 5 and 6). In their initial letter refusing to provide him with information the Cabinet Office have noted that the Guidance on Interpretation of the (Information) Code (the Guidance) stated that it was not the intention of the Information Code to change or undermine the long-established conventions protecting the confidentiality of the internal decision-making process. As I have stated above (paragraph 9), one of the conventions listed in the Guidance was the Questions of Procedure for Ministers, the forerunner of the Ministerial Code. I should say here that my role is to consider complaints about refusals of access to information under the terms of the Information Code and I am not bound necessarily to interpret that Code in the same way as the Guidance.

40. The purpose of Exemption 2 was to allow Government Departments the opportunity to discuss matters, particularly those which were likely to be sensitive or contentious, on the understanding that their thinking would not be exposed in such a way as to impede their deliberations by inhibiting the frankness and candour of future discussion. However, Exemption 2 incorporated a 'harm test', which required the harm that would arise from disclosure of information to be weighed against the public interest in making the information

available. In their letters of 19 March and 29 March 2001 the Cabinet Office and LCD said that the type of information considered under the Ministerial Code was particularly sensitive and that it was in recognition of this fact that the Guidance gave great weight to the fact that any disclosure in this area could have harmed the frankness and candour of future discussions. I agree that matters considered under the Ministerial Code are potentially sensitive, particularly when they relate to a possible conflict between a Minister's public duties and his or her private interests. However, I find it hard to see how details of the number of occasions on which Ministers had consulted their Permanent Secretaries, the dates of those consultations, the names of the relevant Ministers, the purpose in **general terms** of the consultation and the action that was taken would have been likely to have harmed the frankness and candour of future discussions. Both the 1997 and current versions of the Ministerial Code make it clear that, where a Minister retains any private interest which might impinge on Ministerial responsibilities, it is the rule that they should declare that interest to a Ministerial colleague (paragraph 9 above). Those obligations would not in any way be reduced if Ministers knew that their declarations might be made public. However, LCD and the Cabinet Office now accept that Exemption 2 does not apply here, and I welcome that development. I also welcome their acceptance that the release of that information would not constitute an unwarranted invasion of a Minister's privacy and that Exemption 12 does not apply either. I am pleased that the Cabinet Office have now issued guidance to the Government Departments concerned in the information request advising them to release to Mr Evans any such information which they hold for the period in question. This development is particularly welcome given the refusal by the Home Office to accept a recommendation to release very similar information in a case considered by my predecessor and reported in November 2001 (see paragraph 16).

41. I now move on to consider whether or not the **precise details** of the discussions between individual Ministers and their Permanent Secretaries should be released to Mr Evans. Such consultations would fall, without argument, within the definition of internal advice, recommendation, consultation and deliberation contained in Exemption 2. I therefore accept that, in principle, Exemption 2 could be held to apply to that information, which means that I must now go on to consider the 'harm test'. There is a very considerable degree of public interest in the way in which Ministers conduct themselves and their business: the question is, would the release of information relating to those matters cause a degree of harm sufficient to outweigh that public interest? As this report indicates, that public interest in such matters has intensified in recent years in a climate where greater openness about conflicts between the public and private interests of Ministers is increasingly seen as a desirable end in itself. This is not only for general reasons of good governance but to avoid any suspicion of improper Ministerial influence. And, given the new requirements of the Ministerial Code (set out in paragraph 29 above) in respect of the disclosure of such interests, it is in my view unlikely that the release of this information would have affected the candour and frankness of future, similar, discussions. On that basis, I feel that the public interest test in respect of Exemption 2 operated in favour of disclosure.

42. However, the Cabinet Office and LCD also cited Exemption 12 as a basis for their refusal to provide the information sought. Clearly the purpose of Exemption 12 was to protect **personal information,** the disclosure of which would have constituted an unwarranted invasion

of privacy. The Permanent Secretary of LCD has claimed (paragraphs 17) that it would be an unwarranted invasion of Ministers' privacy to disclose any information that had been provided to Permanent Secretaries in an expectation that it would remain confidential under the terms of the Ministerial Code. However, the Information Code contained no such class exemptions. The Information Code required an assessment to be made in response to each individual information request and the approach to the release of information should in all cases have been based on the assumption that information would be released except where its disclosure would not be in the public interest, as specified in Part II of the Information Code. In considering the interface between the requirements of the two Codes, I note in particular what is said in point iv. of the foreword to Chapter 1 (Ministers of the Crown) of the Ministerial Code. This stated:

'Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be in accordance with relevant statute and the Government's Code of Practice and (sic) Access to Government Information (Second Edition, January 1997)...'

43. In my opinion this statement, which is repeated in the revised version of the Ministerial Code issued in July 2001, makes it quite clear that any decision to refuse to provide information should have been taken in accordance with the requirements of the Information Code. Matters pertaining to the Ministerial Code did not, therefore, fall outside the jurisdiction of the Information Code. The fact that the information sought in this case is of a type which Ministers are not required to disclose under the Ministerial Code does not mean that the information automatically fell within the scope of Exemption 12 (or any other exemption) or that disclosing it must automatically be assumed not to be in the public interest. Each case should have been considered on its individual merits.

44. As I see it, the purpose of the Ministerial Code was to clarify how Ministers should account to, and be held to account by, Parliament and the public. That being so, once a determination had been made that there was a potential/actual conflict of interest, whether financial or otherwise then, if transparency is to be maintained, I can see no basis for protecting that information. In consulting their Permanent Secretaries Ministers are conducting themselves in accordance with the requirements of the Ministerial Code, and it seems to me that it would have been in the interests of the Government and of the Ministers themselves to demonstrate adherence to the Code. I consider that the public interest would clearly have been served by the disclosure that they had done so and I do not believe that this would have caused harm to the privacy of the individual concerned. Exemption 12 cannot therefore be held to apply.

45. However, my view that Exemption 12 cannot be held to apply in **general terms** to information of this kind does not mean to say that Departments were required in all cases to release specific details of Ministers' financial and other interests. Much would have depended on the precise information contained in Ministers' requests for advice and in the Permanent Secretaries' record, if any, of what action was taken. With that in mind, I now turn to Mr Evans's request for copies of the documents in which Ministers sought their respective Permanent Secretary's views and in which the latter recorded what action was necessary. It might be appropriate here to issue the reminder that the Information Code only gave an

entitlement to information, not documents, and that it is on that basis that I consider Mr Evans's request.

46. It appears from the papers I have seen that Mr Evans has already received the information contained in those documents, partly by informal means and partly in tabular form in preparation for the now abandoned court case. What is at issue here is the question of whether or not he should have received it under the Information Code. In both the cases cited by LCD the Ministers in question acted entirely in accordance with the Ministerial Code. I am pleased to see that LCD now accept that Exemption 12 would not apply to the names of the Ministers concerned and the purpose **in general** of the consultation and the action that was taken. However, it also seems to me that Exemption 12 would not apply to the detail of the request for advice where, as in the first instance, the subject matter could be said to potentially impinge on Ministerial duties. I am reinforced in this view through having had sight of copies of correspondence which Mr Evans had exchanged since this case was re-opened with a number of other current and former Ministers who had sought the advice of their Permanent Secretaries and who were identified as having such a potential conflict. Mr Evans had asked them if they would be prepared to provide further details of the nature of the potential conflict of interest and, for the most part, they have been more than willing to do so; this I find to be commendable. Moreover I note that, in reference to the first case, the specific details of the advice contained in the documents sought by Mr Evans are now in the public domain, having been published in an article by the Guardian newspaper, and I can see no basis for LCD continuing to formally withhold that information. (I note that LCD have argued that, where a Government Department has neither confirmed nor denied the accuracy of information in a press article, such an article should not be regarded as publication of information in the same way as information released through official channels. However, the Information Code made no distinction as to the way in which information is published – the material factor is that it is demonstrably in the public domain.)

47. It is, however, a different matter where, as in the second case cited by LCD, a Minister provided the Permanent Secretary with details of his financial and non-financial interests, all of which were of a personal nature and which were deemed **not** to impinge on his Ministerial duties. In such circumstances I consider that Exemption 12 could be said to apply to that information as no question of a conflict arose.

48. How then should the information which can be released to Mr Evans now be made available to him? Mr Evans initially addressed his information request to some seventeen Government Departments. I have seen that the guidance to Government Departments prepared and issued by the Cabinet Office after the quashing of the section 11(3) Notice (see paragraph 26) suggested that following the tabular format as adopted by LCD in the annex to that Notice would be the best way of providing Mr Evans with answers to the five questions set out in paragraph 10 above. In the light of my findings, on 21 October 2004 I issued my draft report to the Cabinet Office, recommending that the guidance be expanded to include advice that the table should allow (where appropriate) for the provision of more details of the reasons for consultation and the action taken in those cases where a Minister's private interests were deemed to impinge on his or her Ministerial duties.

49. Despite a number of reminders, I am deeply disappointed that I have not received a

substantive response to my recommendation. In his interim comments on behalf of the Cabinet Office and LCD, the Managing Director of the Cabinet Office apologised to me for the delay in replying in full, saying that the case raised some complex issues which had taken longer to consider than they would have wished. He said that, since Mr Evans complained to me, Departments had provided him with most of the factual information he had requested (paragraph 10 above) for the period 1 January 1999 to 19 February 2001, including the broad reasons for consultation (he gave, as an example, consultation on a financial interest). He said that, in addition, Departments were in the process of providing similar information to Mr Evans for the period 19 February 2001 to 26 November 2004. He further said that a Department had recently received a request under the Freedom of Information Act in similar terms to Mr Evans's Code request, and that the Government were considering the issues raised by this request. The Managing Director said that he would send me a full reply in the light of that consideration. Although I have written to the Managing Director explaining that I did not consider that it would be appropriate for me to wait for the completion of those deliberations, the only response I have received makes no reference to my recommendations and repeats the Cabinet Office's intention to first consider the Freedom of Information Act request before giving me a substantive reply. I therefore find myself in a position of having to complete this investigation without the benefit of the Cabinet Office and LCD's comments on my recommendations, which is most regrettable, particularly in the light of the history of this case.

Conclusion

50. The Cabinet Office and LCD's handling of this matter, both before and since Mr Evans complained to me, has been lamentable and it is clear to me that responsibility for their joint shortcomings lies primarily with the Cabinet Office. I found that the Cabinet Office and LCD were not entitled to rely on Exemption 2 and 12 as a basis for withholding much of the information requested by Mr Evans but that, particularly when considering the applicability or otherwise of Exemption 12, each case needed to be considered on its merits. I therefore upheld Mr Evans's complaint and recommended that additional information should be disclosed to him. I am disappointed that the Cabinet Office and LCD have not seen fit to respond to that recommendation.

Department of Trade and Industry and the Cabinet Office

Case No: A.34/05

Refusal to provide information about a business breakfast meeting hosted by the Prime Minister

Summary

Mr Evans asked the Department of Trade and Industry (DTI) and the Cabinet Office for information relating to the decision to invite a representative of Powderject Pharmaceuticals to attend a breakfast meeting hosted by the Prime Minister at 10 Downing Street. DTI provided Mr Evans with some of the information that they held relating to the meeting, but declined to provide the remaining information, citing Exemptions 2, 7 and 12 of the Code. The Ombudsman found that Exemption 2 applied to some of the outstanding information and that DTI were entitled to withhold that information because the public interest in disclosure was not strong enough to outweigh the potential harm which might have resulted from making the information available. She also found that Exemption 12 applied to the remaining information, and again DTI were entitled to withhold it. She was however critical of their handling of Mr Evans' information request. The Cabinet Office declined to provide the information that they held, also citing Exemption 2 of the Code. They maintained that exemption after Mr Evans sought a review. While the Ombudsman found that Exemption 2 applied to that information, she concluded that the balance of the harm test operated in favour of its disclosure and she recommended that it be released to Mr Evans. She expressed disappointment that the Cabinet Office did not see fit to accept that recommendation.

1. Mr Evans complained that the Department of Trade and Industry (DTI) and the Cabinet Office failed to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by my staff but I am satisfied that no matter of significance has been overlooked. I should explain that since 1 January 2005 the Code has been superseded by the Freedom of Information Act 2000. As a result, references to the Code are couched in the past tense.

The complaint

2. On 23 June 2004 Mr Evans e-mailed DTI and the Cabinet Office seeking information about a business breakfast meeting hosted by the Prime Minister at 10 Downing Street on 6 December 2001. Mr Evans said that the Cabinet Office had stated that one of the individuals who had attended the meeting was a representative of Powderject Pharmaceuticals (Powderject). He asked, under the Code, for complete copies of all documents compiled by Downing Street, the Cabinet Office and DTI staff relating to the decision to invite a representative of Powderject to the meeting. He said that his request covered complete copies of all documents such as memos, letters, e-mails, notes of conversations and briefing documents compiled before the event which discussed the proposal to invite a representative from Powderject. He also requested complete copies of all documents compiled by officials which recorded any contribution or issues raised by the representative of Powderject before, during, or immediately after the meeting as well as complete copies of all documents recording action taken as a result of those representations, or any discussion after the meeting relating to the representative. Mr Evans asked to have the information within 20 working days as required by the Code. He further asked the Cabinet Office and DTI to provide a schedule of the documents which were relevant to his request, the schedule to include a brief description of the nature of each document, its date, and whether or not it was being released.

3. On 25 June 2004 the Cabinet Office acknowledged Mr Evans's information request. On 28 July 2004 they apologised that they were not

then able to send him a full reply, but said that they expected soon to be in a position to do so. On 2 August 2004 Mr Evans e-mailed a reminder to DTI asking what progress they were making with responding to his request. On 19 August 2004 DTI apologised for the delay and said that they hoped to respond soon.

4. The Cabinet Office replied substantively to Mr Evans on 28 August 2004, saying that the information they held which was relevant to his information request was exempt from disclosure under Exemption 2 of the Code, relating to internal discussion and advice. They said that the information consisted of internal opinion and consultation and its disclosure would harm the frankness and candour of internal discussions. They considered that the inhibiting effect that the disclosure would have on the free and frank provision of advice and opinion which was necessary for effective government would outweigh the public interest in making it available. The Cabinet Office told Mr Evans that he could seek an internal review of their decision and that it was open to him to complain to my Office if, following that review, he remained dissatisfied.

5. On 1 September 2004 Mr Evans asked the Cabinet Office to review their decision and he gave detailed reasons to support his view that the information should be disclosed. He said that the Government should do more to explain its decision to invite representatives of certain companies to the breakfast meeting but not others and that, while he accepted that lobbying was part of the democratic process, he believed that it should be as transparent as possible. He also argued that there was a clear public interest in disclosing information regarding the relationship between the Government and Powderject Pharmaceuticals. He said that the relationship was controversial. Mr Evans said that more openness would help to raise public confidence in the political process. He also expressed his concern that the Cabinet Office had neither felt able to release even redacted documents to him nor had they provided him with a schedule of relevant documents as he had requested. Also on 1 September 2004 Mr Evans again e-mailed DTI, notifying them that the Cabinet Office had replied, in the hope of prompting a response from DTI.

6. 'The Cabinet Office acknowledged Mr Evans's review request on 3 September 2004. On 27 September 2004 they wrote to him saying that the review process was underway, and that they would let him know the outcome as soon as they were able. As to his request for a schedule of documents, they apologised for not making it clear earlier that the only document they held which was relevant to his information request was a note of the meeting taken by an official. On 11 October 2004 the Cabinet Office wrote to Mr Evans maintaining their decision to withhold the information he sought under Exemption 2 of the Code.

7. On 1 November 2004 DTI replied substantively to Mr Evans. They enclosed a dossier containing some of the information that was within the scope of his information request, but withheld other information under Exemptions 2, 7 and 12 of the Code. Insofar as the exemptions relied upon related to harm or prejudice, DTI considered that the harm arising from disclosure would outweigh the public interest in making the information available. They told Mr Evans that it was open to him to apply for an internal review and to complain to my Office if he remained dissatisfied.

Departmental comments on the complaint

8. In offering his comments on the complaint the Permanent Secretary of DTI scheduled all of the information held on DTI files about the meeting in question, as follows:

- An e-mail dated 3 December 2001 from their Secretary of State's office seeking briefing for the meeting on 6 December 2001. This request included details of the attendees;

- Three e-mails of 3 and 5 December 2001 forwarding the briefing request to the relevant officials;

- An e-mail of 5 December 2001 covering a short brief about Powderject and its representative at the meeting.

DTI issued edited versions of those documents to Mr Evans, citing Exemption 2 of the Code as the basis for withholding some of the information contained in the briefing and Exemptions 7 and 12 in order to protect the identity of individuals mentioned in the documents.

9. As to the briefing, the Permanent Secretary said that DTI believed that to release the withheld information was likely to cause harm to the frankness and candour of internal discussion and advice because:

- Individuals and organisations would be inhibited from making frank criticism of government if they thought that criticism would be made public. Even if their criticisms were unfounded they must be free to make them as frankly as possible in order for government to operate effectively;

- If officials knew that their briefing relating to such criticisms were to be made public they could be inhibited from covering it in their briefing to the Secretary of State which would undoubtedly affect her ability to represent the Government and engage effectively in this and potentially other meetings;

- Government Departments might be inhibited from sharing with DTI the fact of their Ministers' discussions with third parties if they thought that this might be disclosed by DTI, and this could jeopardise effective and joined up government.

The Permanent Secretary said that there was no other information on DTI files that was relevant to Mr Evans's request.

10. The Managing Director of the Cabinet Office said that the only information held by the Cabinet Office relevant to Mr Evans's information request was a note of the 6 December 2001 meeting that had been drafted by an official in the Prime Minister's office. He said that any other relevant documents had been routinely weeded and destroyed in accordance with their normal records management and destruction policy.

11. The Managing Director went on to say that the Cabinet Office believed that the note of the meeting, which summarised the views expressed by those who attended the meeting, was exempt from disclosure under Exemption 2 of the Code, relating to internal discussion and advice. He said that Ministers needed to be free to consult widely if they were to be able to consider policy proposals properly, with full knowledge of the relevant facts, and that decision-making must be based on the best advice available, which should be broadly based. He said that, if details of advice and views presented were disclosed, they believed that this would have a deterrent effect on experts or stakeholders for the future. Those prepared to take part in deliberations were likely to be constrained in what they said and their views would be expressed less completely and frankly. The Managing Director said that they believed that fewer people would be prepared to take part in such deliberations at all. He said that to disclose the content of the note would, therefore, harm the frankness and candour of

internal discussions.

12. The Managing Director also said that the Cabinet Office had gone on to consider whether any harm or prejudice arising from disclosure was outweighed by the public interest in making the information available. They considered that it would not be in the public interest to make the information available because it would have a deterrent effect on the individuals who would be prepared to take part in such deliberations and the candour with which they would be prepared to express their views. This, they believed, would have the effect of making the policy-making process less well informed, which would lead to less effective policy making and government, which would not be in the public interest. He said that, alternatively, views which were expressed might not be recorded, limiting the possibility of future reference and analysis.

Exemptions of the Code

13. In the preamble to part II of the Code, under the heading 'Reasons for confidentiality', it stated:

'The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

14. Exemption 2 of the Code was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

15. Exemption 7 was headed 'Effective management and operations of the public service' and read as follows:

'(a) Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;
- negotiations or the effective conduct of personnel management, or commercial or contractual activities;
- the awarding of discretionary grants.

(b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.'

16. Exemption 12 was headed 'Privacy of an individual' and read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

Assessment

17. Before turning to the substantive issue of whether or not the information requested by Mr Evans should be released, I shall look first at how DTI and the Cabinet Office handled his request. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005 all requests for information should have been treated as made under the Code, irrespective of whether or not it was referred to by the applicant. Information should have been provided as soon as practicable and the target for responses to simple requests for information was 20 working days from the date of receipt. While this target might have been extended when significant search or collation of material was required, an explanation should have been given in all cases where information could not be provided. It was also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they were relying in making that refusal. Moreover, they should have made the requesters aware of the possibility of a review under the Code, and of the possibility of making a complaint to my Office if, after the completion of the review process, they remained dissatisfied.

18. So did the Cabinet Office and DTI's handling of Mr Evans's information request comply with those provisions? Mr Evans sought information from both departments on 23 June 2004. The Cabinet Office did not reply substantively to that request until 28 August 2004, which is significantly longer than the 20 working days envisaged by the Code. Their response to Mr Evans's review request of 1 September 2004 was also delayed, until 11 October 2004. This is disappointing, particularly as in all other respects the Cabinet Office handled Mr Evans's information request in full accordance with the Code. There were, however, even more substantial delays on DTI's part. They did not reply substantively to Mr Evans's initial information request until 1 November 2004 even though he sent them two requests for progress in the intervening period. Although DTI otherwise fully complied with the requirements of the Code, this substantial delay is far from satisfactory and warrants my criticism. In responding to my comments, the Permanent Secretary of DTI said that Mr Evans's request had identified serious issues that had required consideration, including a proper assessment of the harm test, before any substantive response could be prepared and finalised. She said, however, that the substantial delay in responding to the initial request was regrettable.

19. I now turn to the question of the information sought and, in so doing, I should emphasise that the Code gives an entitlement to information, not to documents, and it is on this basis that Mr Evans's request has been considered.

20. In his comments on the complaint, the Permanent Secretary of DTI set out the information that is held by DTI relating to the breakfast meeting on 6 December 2001 (paragraph 8). The three internal e-mails of 3 and 5 December 2001 simply forward the briefing request to the relevant officials and ask for a reply by 5 December 2001. They do not contain any discussion about the proposal to invite a representative of Powderject Pharmaceuticals to the breakfast meeting and I have not, therefore, considered that information

as being part of Mr Evans's request. While DTI have provided Mr Evans with much of the remaining information they hold relating to the breakfast meeting, they have nevertheless relied on Exemption 2 of the Code as the basis for withholding certain information contained in the briefing prepared for that meeting. The purpose of Exemption 2 was to allow Government Departments the opportunity to discuss matters, particularly those which were likely to be sensitive or contentious, on the understanding that their thinking would not be exposed in a manner likely to inhibit the frank expression of opinion. I recognise the strength of the argument that the advice and recommendations contained in briefing for Ministers depends on candour for their effectiveness and that the value of this advice could be substantially reduced if it were thought that it would be made available to a wider audience. I am therefore satisfied that the advice contained in the briefing is covered, in principle, by Exemption 2.

21. However, that is not the end of the matter. The Code also made it clear that, in those categories such as Exemption 2 which referred to harm or prejudice, the presumption remained that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available (paragraph 13). While I have taken account of Mr Evans's views (paragraph 5) and recognise that there is a valid public interest in knowing how representatives of companies come to be invited to such meetings, I nevertheless accept that the provision of candid advice by officials to Ministers on such matters may be hampered if their views were in all cases to be widely available. Having read the withheld information, I do not consider that the public interest in having access to that information is strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. I accept therefore that DTI were entitled to rely on Exemption 2 as a basis for withholding that information from Mr Evans.

22. DTI have also cited Exemptions 7 and 12 of the Code as the basis for withholding the identity particulars of the other attendees at the breakfast meeting. Mr Evans's information request specifically related to matters concerning the representative of Powderject at that meeting and I consider that it would constitute an unwarranted invasion of privacy to reveal the names of other attendees in this context. I therefore agree that Exemption 12 applies to that information, and that DTI were entitled to withhold it. As I have concluded that Exemptions 2 and 12 apply to the information withheld by DTI, no useful purpose would be served by my going on to consider whether or not Exemption 7 could likewise be said to apply to the same information.

23. The Cabinet Office also cited Exemption 2 as their grounds for refusing to provide Mr Evans with the information they hold relating to the breakfast meeting. That information comprises the contribution to the meeting made by the representative of Powderject, as recorded in the minutes of the meeting. I fully accept that attendees at such meetings need to be able to express themselves frankly for their contributions to be of value and that, in principle, Exemption 2 does apply to the information sought by Mr Evans. However, as I explained above, I must also go on to consider whether or not the harm likely to arise from disclosure would outweigh the public interest in its release. I recognise that the disclosure of advice and views in all cases would be likely to deter individuals from expressing themselves freely and have a detrimental effect on the quality and availability of future advice. However, each case must be considered on its merits and, in this specific case, I consider that very little harm would be caused by the release of

the comments attributed to the representative of Powderject Pharmaceuticals and that any potential harm is outweighed by the public interest in making that information available. I therefore recommended that it be released to Mr Evans, in whatever form the Managing Director of the Cabinet Office considered to be most appropriate.

24. In response, the Managing Director said that he regretted that he was unable to accept the conclusion that the information requested by Mr Evans should be disclosed to him. He said that, for the reasons he had already outlined (paragraphs 11 and 12) and regardless of the sensitivity of the information in this particular case, he had concluded that it was not in the public interest to release this information on the grounds that advice to government should be broadly based and that there may be a deterrent effect on external experts or stakeholders to provide advice in the future if they knew that it might be disclosed. He said that he was sorry that he was unable to agree with my recommendation but he hoped that he had explained why he believed disclosure of the information would be harmful to the free and frank exchange of views between government and the outside stakeholders.

Conclusion

25. I found that DTI were justified in citing Exemptions 2 and 12 of the Code to refuse to provide Mr Evans with the information they held relevant to his request. However, having applied the harm test, I recommended the disclosure of a small amount of information held by the Cabinet Office on the grounds that the public interest in disclosure outweighed the potential harm that might be caused by its release. I am disappointed that the Cabinet Office have not agreed to my recommendation.

Cabinet Office

Case No: A.19/05

Refusal to provide information as to whether or not the Prime Minister had met certain named individuals

Summary

Mr Taylor asked the Cabinet Office whether the Prime Minister had held any meetings with five named individuals since 1 January 2000. The Prime Minister declined to provide the information, saying that it was not the Government's practice to provide details of such meetings, citing Exemptions 2 and 7 of the Code. In commenting on Mr Taylor's complaint to the Ombudsman the Cabinet Office also cited Exemption 9, saying that the necessary trawl through all of the Prime Minister's diaries for the relevant period would represent an unreasonable diversion of resources. As a result of the Ombudsman asking to have access to the diaries, the Cabinet Office nevertheless later undertook a search of the diaries and said that the Prime Minister had not met the named individuals since 1 January 2000. The Ombudsman made no findings on the Cabinet Office's reliance on Exemption 9, but was critical of their failure to make a timely search of the diaries. She was also critical of their use of Exemptions 7 and 12 to protect information which was found not to exist, and of various aspects of the way in which they had handled Mr Taylor's request for information and the investigation of his complaint.

1. Mr Taylor complained that the Cabinet Office refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked. I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Code are couched in the past tense.

Background to the complaint

2. On 29 March 2004 Mr Taylor wrote to the Cabinet Secretary and asked whether the Prime Minister had held any meetings, since 1 January 2000, with five well-known individuals, who he named. If so, he said that he wanted to know the dates on which they had met. He asked the Cabinet Secretary, when considering his request, to take account of a recent ruling I had made on requests of this nature (Case Number: A.15/04, *Investigations Completed – July 2003 to June 2004,* HC 701). He asked for a response within 20 working days and said that, as it would only take a look through the Prime Minister's official diary, it should require no more than a simple and cheap search.

3. The Prime Minister replied on 2 July 2004. He said that he had meetings and discussions with a wide range of organisations and individuals. He said that, as with previous administrations, it was not the Government's practice to provide details of all such meetings, and he cited Exemptions 2 and 7 of the Code.

4. On 20 July 2004 Mr Taylor complained, via his Member of Parliament, to my Office. The Code stated that complaints about a refusal of access to information should be made first to the department concerned and I normally required an internal review of the original refusal to have been conducted by the department before intervening in such a complaint. However, in this case the decision had been made by the Prime Minister and I saw little merit in asking Mr Taylor to first seek a review of a decision that had already been made at the highest level. On 22 July 2004 I issued a statement of complaint to the Cabinet Office with a request that they provide comments on the complaint within three weeks, in accordance with the Memorandum of Understanding between my Office and the Government that had been agreed by myself and

the Cabinet Office on 22 July 2003. On 1 October 2004 I received a letter from the Cabinet Office in which they said that they had decided that the best way forward in this instance was to conduct an internal review of the initial decision. They said that this would, inevitably, take a little while and that they hoped to be in a position to send a definitive reply to my Office and Mr Taylor in the next few weeks. I wrote to the Cabinet Office on 14 October 2004, expressing my disappointment at the time this matter was taking and asking for an urgent response to the statement of complaint. Despite several telephone calls and e-mails chasing progress, I did not receive a response to the statement of complaint until 2 December 2004.

The Cabinet Office's response to the complaint

5. The Managing Director of the Cabinet Office apologised for the delay in replying. He said that he first wanted to clarify the sequence of events. He said that, while Mr Taylor had said that he had written to the Cabinet Secretary on 29 March 2004 asking whether the Prime Minister had met with the five named individuals, that letter had asked whether the Cabinet Secretary had met those individuals, and he had replied stating that he had not. The Managing Director said that Mr Taylor had written a further letter, also dated 29 March 2004 but not received until 11 May 2004, in which he had asked whether the Prime Minister had met those particular individuals. The Prime Minister replied on 2 July 2004 (paragraph 3).

6. The Managing Director said that, as they had indicated in their letter of 1 October 2004 (paragraph 4), they had reviewed the original reasons for withholding the information sought by Mr Taylor. He said that they had concluded that, quite apart from the original reasons cited, a particularly compelling ground for withholding the information was that the amount of information that would need to be processed was such that it would require an unreasonable diversion of resources, so as to fall within Exemption 9 of the Code. He said that they had come to this conclusion because of the unique way in which the Prime Minister's diary was managed and maintained. He said that the Prime Minister's diary was required to record his appointments and movements for 24 hours a day, seven days a week and contained a mixture of official, personal and political engagements. It was not compiled in such a way as to enable a rapid trawl of entries in order to identify meetings with particular individuals or organisations. He said that, when investigating a recent complaint by Mr Norman Lamb MP that the Cabinet Office had refused to name people whom the Prime Minister had met officially at Chequers, members of my staff had visited the Prime Minister's office to examine his diaries and other relevant documents (my report of this investigation has not yet been published, although the findings have been widely reported in the press). The Managing Director quoted from my report as follows, 'the structure and format of the diaries would render it impossible for a manual trawl to establish, with any degree of accuracy, which of the diary entries recorded therein were related to official business conducted at Chequers and which were private or political meetings. That being so, I consider that for the staff in the Prime Minister's office to be required to make such a trawl with no real likelihood of success would be an unreasonable diversion of resources.' The Managing Director said that the factors in Mr Lamb's case which prevented an easy search of the Prime Minister's diary operated also in Mr Taylor' s case. For the Prime Minister' s staff to have to carry out a trawl through all of his diaries for a period in excess of four years could only be carried out at a disproportionate cost of staff time, which would represent an unreasonable diversion of resources. He said that he therefore considered the

information sought to be exempt from disclosure under Exemption 9 of the Code.

The exemptions of the Code

7. Exemption 2 was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet Committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis, analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

8. Exemption 7 was headed 'Effective management and operations of the public service' and read:

'(a) Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;
- negotiations or the effective conduct of personnel management, or commercial or contractual activities;
- the awarding of discretionary grants.

(b) Information whose disclosure would harm the proper and efficient conduct of the operations of a department or other public body or authority, including NHS organisations, or of any regulatory body.'

9. Exemption 9 was headed 'Voluminous or vexatious requests' and read:

'Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.'

Further developments

10. On 14 December 2004 a Senior Investigation Officer (SIO) on my staff wrote to the Cabinet Office to say that the circumstances of Mr Lamb's case were rather different from the present one; in particular, that the information being sought by Mr Lamb would have required a manual trawl of the Prime Minister's diary in order to establish which of the diary entries were related to official business conducted at Chequers and which were private or political meetings. As the relevant diary entries did not always record the purpose or location of meetings, the SIO said that I had accepted, in that case, that it would have been unreasonable to have expected the Cabinet Office to conduct a manual trawl which had no real likelihood of success. Mr Taylor, however, had asked only for the dates on which the Prime Minister had met five particular individuals between 1 January 2000 and 29 March 2004. In assessing the use of Exemption 9 to withhold that information the SIO said that I would need to establish exactly how difficult it would be to find diary entries relating to those five individuals over that period. In order to do that, we would need to see the Prime Minister's diary. The SIO

therefore asked the Cabinet Office to contact him in the next week or so to arrange a mutually convenient time in order to view the diary.

11. On 15 December 2004 I wrote to the Managing Director to express my concern about the length of time it had taken them to reply to the statement of complaint and to seek their assurances that I would receive their co-operation in dealing with this case, as well as two other Code complaints against the Cabinet Office, within the timescales laid down by the Memorandum of Understanding.

12. On 24 January 2005 the Managing Director said that he would reply to me about Mr Taylor's complaint shortly. On 26 January 2005 I wrote to the Managing Director and asked him to contact my Office as soon as possible. On 2 February 2005 the Managing Director said again that he would reply to me about this case very shortly. On 15 February 2005 I wrote to the Managing Director and said that it was now over six months since I had issued the statement of complaint on this case and that I had still not been able to begin my investigation. I asked him to ensure that progress would be made as a matter of urgency and that, unless my Office was contacted within seven days, I would have little option but to discontinue my investigation of Mr Taylor's complaint.

13. The Managing Director replied on 21 February 2005. He said that he could confirm that they had now undertaken a search of the Prime Minister's diary and meeting-related papers. He said that, with the exception of one of the named individuals, no official meetings had been held between the Prime Minister and the individuals listed in Mr Taylor's request. In relation to that one individual, he said that the Prime Minister had met him in Downing Street on 16 October 1997. He said that the fact of this meeting, and the issues discussed, had been placed in the public domain, and he enclosed a copy of the relevant transcript from the BBC website dated 16 November 1997 (http://news.bbc.co.uk/1/hi/uk/31866.stm).

Assessment

14. In the light of the Managing Director's letter of 21 February 2005, and in the absence of any evidence to question the accuracy of their search, I see no merit in my further intervention in Mr Taylor's complaint. However, I do believe that it is necessary to comment on several aspects of the way the Cabinet Office have handled this matter.

15. First, I am critical of the length of time the Cabinet Office took to conduct a search of the Prime Minister's diary. Had they conducted the search at the time of Mr Taylor's request, it would have saved all parties a great deal of time and effort. Without sight of the Prime Minister's diary I have not been able to assess how difficult it would be to conduct a search for the names of the five individuals concerned over a four year period. I can, therefore, make no finding on the Cabinet Office's use of Exemption 9. However, the fact that they have now felt able to conduct such a search must raise questions as to the validity of its use.

16. Secondly, I must also question the initial use of Exemptions 7 and 12 to refuse Mr Taylor's request for information. It is now clear that these exemptions were cited to prevent the disclosure of information that did not in fact exist (the Prime Minister's meeting of 16 October 1997 with one of the named individuals was not within the timescale of Mr Taylor's request). The Cabinet Office, therefore, refused to provide the information requested without either establishing if they had it or if they did, without assessing its individual merits on the grounds that, by implication, it was the kind of information for which a class exemption existed in the Code. As I

have said on several occasions in the past, the Code did not recognise class exemptions and required an assessment to be properly made in response to each individual information request.

17. Thirdly, I am extremely disappointed by the way in which the Cabinet Office responded to my investigation of Mr Taylor's complaint. The Memorandum of Understanding between my Office and the Government, signed on 22 July 2003, stated that I expected a response to statements of complaint within three weeks of receipt. It took the Cabinet Office 19 weeks to respond to the statement of complaint and a further ten weeks to reply to my request to gain access to the Prime Minister's diary. Such delays frustrate my aim of investigating complaints as quickly and as efficiently as possible and it is highly regrettable that such delays should have occurred on this occasion, particularly from the joint authors of the Memorandum of Understanding.

Conclusion

18. While I am pleased that the Cabinet Office finally conducted a search of the Prime Minister's diary and disclosed the fact that he had not met any of the individuals concerned since 1 January 2000, I have been critical not only of the way in which the Cabinet Office handled Mr Taylor's request for information, but also of how they handled my investigation of his subsequent complaint.

Charity Commission

Case No: A.10/05

Refusal to provide information relating to a complaint made against the trustees of a charity

Summary

Mr L asked the Charity Commission to provide him with copies of the information on which they had based their conclusion that his complaint against the trustees of a charity was not justified. The Charity Commission refused to provide the information, citing Exemptions 4(b) and 14(a) of the Code. The Ombudsman did not consider that Exemption 14(a) applied to the information in question, but she concluded that Exemption 4(b) was applicable and that the Charity Commission were entitled to withhold all of the information sought. She did not uphold the complaint.

1. Mr L complained that the Charity Commission (the Commission) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff but I am satisfied that no matter of significance has been overlooked.

The Code of Practice on Access to Government Information

2. Until the Freedom of Information Act 2000 came fully into effect on 1 January 2005, all requests for government-held information should have been considered under the terms of the Code. Exemption 4(b) of the Code, which the Commission have cited, is headed 'Law enforcement and legal proceedings' and reads as follows:

'Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.'

Exemption 14(a), which is also cited by the Commission is headed 'Information given in confidence' and reads:

'Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or

- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.'

3. Exemptions 4 and 14 are subject to the preamble to Part II of the Code which states that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Background to the complaint

4. In October 2001 Mr L complained to the Commission about the conduct of the trustees of a charity, 'Mind in the Vale of Glamorgan,' of which he had formerly himself been a director and trustee. He believed that the trustees of the charity had failed in their leasehold obligations with regard to a building used by them. As a result of that alleged failing, Mr L claimed that the charity had had to pay £10,000 in unnecessary

legal costs in defending a court action brought by the landlord to ensure that they undertook the necessary maintenance work.

5. On 18 January 2002 the Commission sent Mr L a decision letter explaining that they did not find his complaint to be justified. In reaching that decision it had been necessary for the Commission to seek comments from the current trustees of the charity. On 21 January 2002 Mr L replied, disagreeing with the Commission's decision and expressing his dissatisfaction with their handling of his complaint. On 7 February 2002 Mr L wrote again to the Commission, requesting 'all correspondence used to discredit (his) complaint against Mind in the Vale.' Although he did not specifically ask for a review of the Commission's decision, he did ask for 'a re-examination' of his complaint. The Commission treated Mr L's letter as a request for a review and on 4 March 2002 they wrote to Mr L maintaining their earlier decision not to uphold his complaint. With regard to his request for disclosure of information under the Code, the Commission explained that the information they held in connection with his complaint, namely material supplied by the trustees of the charity, was exempt from disclosure under Exemptions 4(b) and 14(a) of the Code. They explained that the information was given in confidence and was given freely by the trustees of the charity and was therefore withheld under Exemption 14(a) of the Code (see paragraph 2). The Commission said that even if the information supplied by the charity was considered to have been supplied under an implied legal obligation (and consequently Exemption 14(a) would not apply), they were of the view that Exemption 4(b) (see paragraph 2) also applied to the information. They explained that Exemption 4(b) applied because if Mr L had no right to obtain the information from the charity, he should not be able to obtain it, instead, from them, as a consequence of his having complained about the charity. The Commission did, however, undertake to seek the trustees' consent to the release of information, but, on 22 March 2002, the Commission wrote to Mr L notifying him that the trustees did not wish for the information to be disclosed.

6. On 8 January 2004 Mr L wrote to the Commission asking whether he had entitlement to the information under the Freedom of Information Act or the Data Protection Act. The Commission replied on 13 January 2004 saying that they were unable to advise him as to his rights to the information under the above Acts but that he could request an internal review of their decision not to disclose the information. Mr L wrote to the Commission on 14 January 2004 requesting a review of their decision. However, that request was initially overlooked by the Commission. Following a further letter from Mr L on 24 March 2004, the Commission wrote to him on 31 March 2004 with the results of their internal review. The Commission explained that the information sought by Mr L had been provided by the trustees in confidence. The Commission explained that the provisions of the Freedom of Information Act, giving members of the public a right to request information from public authorities, were not due to be implemented until January 2005. The Commission was therefore satisfied that the information was exempt from disclosure under the exemptions of the Code that they had previously cited.

The Commission's comments on the complaint

7. The Commission said that they believed that their decision not to release the papers requested by Mr L was in accordance with Exemptions 4(b) and 14(a) of the Code. The Commission noted that, from his letter of 14 January 2004, Mr L appeared to believe that they had sent copies of his correspondence with them to the trustees of the charity. The Commission have told me that,

other than putting forward the issues raised by Mr L (but not disclosing their source), they could find no evidence that any of Mr L's correspondence had been passed to the charity. The Commission commented that to have done so would have been in breach of the very exemptions on confidentiality which they themselves have given as the reason for non-disclosure of the information sought by Mr L.

Assessment

8. Before turning to the substantive issue of whether or not the information requested by Mr L should be released, I shall look first at how the Commission handled his request for it. The Ombudsman has said that it was good practice, if departments refused information requests under the Code, for them to identify in their responses the specific exemption or exemptions in Part II of the Code on which they were relying. Moreover, the possibility of a review under the Code needed to be made known to the person who requested the information at the time of that refusal, as did the possibility of making a complaint to the Ombudsman if, after the completion of the review process, the requester remained dissatisfied. Finally, departments were expected to respond to requests for information within 20 working days, although the Code recognised that this target may have needed to be extended when significant search or collation of material was required.

9. From my examination of the papers, it is clear the Commission dealt with Mr L's initial request for information in a timely manner and within the requisite 20 working day time limit. In refusing the information, they specified the Code exemptions (4(b) and 14(a)) under which they were withholding the information and why it was they felt those exemptions to be appropriate. Having refused to provide the information, the Commission did, however, undertake to seek the trustees' permission to disclose to Mr L the information they had provided. That permission was not forthcoming and the Commission duly notified Mr L of that. The Commission outlined to Mr L his right to an independent review of that decision.

10. It was not until two years later, in January 2004, that Mr L wrote to the Commission requesting a review of their decision not to disclose the information. Unfortunately, the Commission failed to respond to the request until Mr L wrote again on 24 March 2004. They then actioned his request, replying within two weeks, albeit to inform him that they remained of the opinion that Exemptions 4(b) and 14(a) applied to the information. I therefore consider that the Commission dealt with Mr L's request for information, and subsequent review, in a satisfactory manner and, in doing so, fulfilled their obligations under the Code.

11. I turn now to the Commission's refusal to disclose information under Exemptions 4(b) and 14(a) of the Code. In this context, it may be useful to issue the reminder that the Code gives an entitlement only to information, not to documents, and that it is on this basis that the complaint has been examined. With regard to Exemption 14(a) the Commission have said that the information was given to them in confidence and given freely by the trustees of the charity. However, as the Commission themselves have noted, Exemption 14(a) does not apply in circumstances where information is supplied by persons who were under a legal obligation, whether actual or implied, to supply it. The Charities Act 1993 is the legislation from which the Commission takes its regulatory powers. In summary, sections 8 and 9 of that Act provide the Commission with the power to obtain, from any person, information or documents relating to any charity which is deemed by the Commission to be relevant to the discharge of its regulatory

function. It would therefore appear to me that that statutory obligation on the part of the charity to provide the information in question to the Commission consequently puts that information outside the ambit of Exemption 14(a). Importantly, however, the Commission have cited a further Exemption, namely 4(b), under which they consider all the information to have been rightfully withheld. I therefore turn now to consider whether or not that exemption applies to the withheld information.

12. Exemption 4(b) concerns information, the disclosure of which could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders. The 'proper administration of the law' in this context also applies to regulatory functions, such as that carried out by the Commission, and the exemption applies to information which, if disclosed, would prejudice regulatory and enforcement procedures. It is noted in the Code, under this exemption, that 'ill-disciplined disclosure could impair the ability of the regulators to secure information, effectively reducing their ability to protect the public interest'. That is an important consideration. The Commission have provided me with all the information that was provided to them by the charity during the course of their consideration of Mr L's complaint. That information includes minutes of the charity's AGMs, its Director's reports, the financial accounts and the charity's comments on specific aspects of Mr L's complaint. In addition, I have had sight of the correspondence between the landlord, his solicitors and the trustees concerning the lease dispute. However innocuous the nature of some of the information, all the information either emanates from or directly relates to dealings with third parties. Seen in the bigger picture, the implications of routinely compelling the disclosure of information from third parties could undermine the Commission's ability to obtain comprehensive disclosure in cases involving third parties who would otherwise have been willing to provide it. I note that the Commission itself was concerned about the consequences of being used as a backdoor route to obtaining information (see paragraph 5) and they are right to be watchful in that regard. It is therefore clear to me that, in principle, the information contained in the documents falls squarely within the ambit of Exemption 4(b).

13. However, that is not the end of the matter. The Code makes it clear that in those categories, such as Exemption 4, which refer to harm or prejudice, consideration must be given as to whether or not any harm arising from disclosure is outweighed by the public interest in making the information available. Mr L has an obvious and understandable wish for sight of the information provided by the charity and so too, no doubt, would other complainants in similar situations. However, for the reasons I have given above (see paragraph 12), I consider that disclosure of the information sought by Mr L would undermine the ability of the Commission to undertake comprehensive and probing evaluations of complaints like the one he made. In my view, any undermining of the Commission's regulatory function in that regard cannot be said to be in the public interest. On this basis, I think that the balance of the argument in this instance lies against disclosure.

Conclusion

14. For the reasons I have outlined above, I am satisfied that the information sought by Mr L was correctly withheld by the Commission, in its entirety, under Exemption 4(b) of the Code. Consequently, I do not uphold the complaint.

Charity Commission

Case No: A.21/05

Refusal to provide information relating to the Indenture and Grant of Licence for a charity

Summary

Mr N asked the Charity Commission for information relating to the lease of a masonic hall from a parochial church council. In particular he sought a copy of the relevant Indenture and Grant of Licence. The Charity Commission refused to provide the information, citing Exemption 14 of the Code. Mr N sought a review, but the Charity Commission still maintained that Exemption 14(a) applied. The Ombudsman accepted that the Charity Commission were entitled to withhold the information under Exemption 14(a), and she did not uphold the substance of Mr N's complaint. She was, however, critical of several aspects of the way in which they had handled Mr N's information request.

1. Mr N complained that the Charity Commission (the Commission) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff, but I am satisfied that no matter of significance has been overlooked.

Background to the complaint

2. Mr N is a member of a lodge of freemasons. The masonic lodge of which Mr N is a member uses the church hall, and some rooms in its neighbouring buildings, of a local parish church. The freehold of the church hall and neighbouring masonic hall are held by the parochial church council (PCC) on charitable trusts. Mr N was of the view that the lodge paid insufficient rent for use of the hall and its upkeep and that this was causing the PCC's finances to suffer. Mr N made enquiries of the church about their financial arrangements, but he was unhappy with their replies. As the PCC had told Mr N that the church hall was a charity administered by trustees, Mr N subsequently complained, in February 2003, to the Commission about the financial arrangements between the PCC and the freemasons. On 30 April 2003 the Commission wrote to Mr N informing him of the results of their evaluation of his complaint. They told him that they could see no cause for concern in the arrangements between the PCC and the freemasons. They also found that the trust which governed the masonic hall was not registered as a charitable trust, but that it was capable of being registered. On 27 May 2003 Mr N asked the Commission to review their evaluation of his complaint. (Between May 2003 and September 2003 the Commission attempted to obtain from Mr N confirmation of the grounds on which he was seeking a review.) On 2 June 2003 the Commission wrote to Mr N, explaining in more detail the outcome of their evaluation. They enclosed a copy of the Lease of 1922 and the Conveyance of 1923, together with copies of the church accounts for the financial years ending December 2000, 2001 and 2002.

3. On 4 July 2003 Mr N wrote to the Commission, complaining about the PCC's financial arrangements with the freemasons, as he believed the agreement between the parties did not serve the best interests of the PCC. In his letter he specifically requested a copy of the Grant of Licence of 1929 between the freemasons and the PCC. He followed that with a further letter on 11 July 2003, reiterating his complaint and requesting not only the Grant of Licence, but also the Indenture of 29 September 1923. (The Indenture concerns the church's agreement with the freemasons to extend the terms of the original lease and the Grant of Licence puts that agreement into licence form.) He also requested details of the financial arrangements for 2002/2003 between the PCC and the freemasons. On 21 July 2003 the Commission wrote to Mr N explaining that the documents were not in the public domain and that they would be unable to provide him with copies without the trustees'

prior approval. The Commission therefore told Mr N to contact the trustees of the charity and they provided him with a contact address. That letter crossed in the post with a further letter from Mr N, also dated 21 July 2003, in which he repeats his request for the information. The Commission replied on 11 August 2003 explaining that the documents were not in the public domain and that they fell within Exemption 14 of the Code. Mr N replied, on 19 August 2003, asking for sight of the correspondence in which the PCC asked the Commission to keep the documents in question confidential. He asked that they review their decision not to disclose to him the documents.

4. On 9 September 2003 Mr N wrote to the Commission outlining his reasons for considering their evaluation to have been flawed. In this letter he repeats his request for a copy of the Grant of Licence and the Indenture. On 16 September 2003, the Commission wrote to Mr N, maintaining that the information he requested fell under Exemption 14(a) of the Code. They explained that the Commission had a common law duty of confidence to persons who supplied them with information, whether supplied as a result of them exercising their statutory powers or supplied without them exercising their statutory powers but in circumstances where they could have done so if necessary. They said that that duty of confidentiality applied regardless of whether or not the person supplying the information had requested that it remained confidential; unless they had expressly stated that they had no objection to its disclosure, the duty of confidentiality applied. With regard to the financial agreement between the parties for 2002/2003 that Mr N had also requested, the Commission explained that their files did not hold that information. In explaining why they had been able to disclose copies of the 1922 Lease and 1923 Conveyance, the Commission said that together they constituted the trusts of the charity and as such were disclosable, regardless of whether the charity was registered or not, provided it was subject to the requirement to register. They said that the Grant of Licence and Indenture were distinct from the other documents as they did not form part of the charity's trusts. The Commission outlined to Mr N the further avenues open to him, namely his right to seek an internal review of their decision and, if necessary, details of this Office if he subsequently wished to take his complaint further.

5. On 19 September 2003 Mr N wrote to the Commission requesting a review of their decision not to disclose the information. On 28 October 2003 the Commission wrote to Mr N, apologising for the delay in replying and maintaining their original decision, under Exemption 14(a) of the Code, not to supply the information. The Commission explained that, as the Indenture and the Grant of Licence were simply agreements between the various parties, they did not form part of the charitable trusts on which the hall was held and would therefore not be provided to members of the public requesting copies of the charity's governing document were the charity registered. On 13 November 2003 the Commission wrote to Mr N explaining that they would be taking no further action with regard to his complaint against their original evaluation, ostensibly because they had been unable to agree with him the grounds for any such review.

The Code of Practice on Access to Government Information

6. Until the Freedom of Information Act 2000 came fully into effect on 1 January 2005, all requests for government-held information should have been considered under the terms of the Code. In refusing to provide the information sought by Mr N, the Commission cited Exemption 14(a) of the Code. Exemption 14(a) of the Code

was headed 'Information given in Confidence' and read:

'Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or

- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.'

Assessment

7. Before turning to the substantive issue of whether or not the information requested by Mr N should be released, I shall look first at how the Commission handled his request for it. Departments were expected to respond to requests for information within 20 working days, although the Code recognised that this target might have needed to be extended when significant search or collation of material was required. The Ombudsman has said that it was good practice, if departments refused information requests, for them to identify in their responses the specific exemption or exemptions in Part II of the Code on which they were relying in making that refusal. Moreover, they should have made the requester aware of the possibility of a review under the Code, which in all cases should have been a single stage process. The aim of the review was to ensure that the applicant had been fairly treated under the provisions of the Code and that any exemptions had been properly applied. It was good practice for such reviews to be conducted by someone not involved in the initial decision. Finally, the department should have made the requester aware of the possibility of making a complaint to the Ombudsman if, after the completion of the review process, they remained dissatisfied.

8. I am aware that all those requirements are clearly set out by the Commission in their operational guidance for staff and that that guidance is also more widely available to the public on their website. However, despite the guidance, it is clear that there have been shortcomings in the Commission's handling of Mr N's request for information. Although the Commission dealt with Mr N's initial request, in July 2003, for a copy of the Grant of License, the Indenture and the financial arrangements for 2002/2003 in a timely manner and within the 20 working day time limit, they failed to explain to Mr N the Code exemption(s) under which they were withholding that information and the fact that he had a right to a review of their decision. Besides failing to cite the relevant Code exemptions, the explanation the Commission gave for withholding the information, namely that it was not information that was in the public domain, was an inadequate explanation at best. Furthermore, having explained to Mr N that the information could not be disclosed without the trustees' consent, the Commission merely provided Mr N with the name and contact address of a trustee from whom he could seek consent to the disclosure himself. It seems to me that it would have been more appropriate, as they themselves were in possession of the information, to have been the ones to make that contact.

9. A further letter from the Commission to Mr N, dated 11 August 2003, and consequently outside the 20 working day time limit, did state the Code exemption under which they were withholding the information, namely Exemption 14. But that letter again failed to advise Mr N of his right to an internal review of that decision. Nevertheless, on 19 August 2003, Mr N requested a review of the decision, a request which he had cause to repeat on 9 September 2003. The subsequent reply from the Commission dealt with Mr N's request for a review as though it was a request for information

being made for the first time. In fact, they concluded their letter by informing him of his right to such a review. Mr N duly requested the review, which resulted in the Commission maintaining their refusal to disclose the information under Exemption 14(a) of the Code.

10. While it is clear that Mr N's request for information was bound up with his substantive complaint against the charity, his requests to the Commission were direct, specific and repeatedly made. I can see no excuse for the Commission's failure to follow their own guidance in terms of recognising an information request under the Code and dealing with that request and subsequent review in accordance with the Code. I criticise them for that failure and, although not in time to be of any immediate benefit to Mr N, this is an area of its operations in which the Commission is aware that improvement is necessary. The Ombudsman recently reported on a complaint in which the Commission had failed to provide timely and full responses to a separate information request. As a result of the Ombudsman's criticisms in that case, the Commission gave a commitment to dealing with all future requests for information with reference to the requirements of the Code and, from 1 January 2005, with reference to the statutory requirements of the Freedom of Information Act 2000. I am reassured that the Commission, as a result of that recent case, is considering how staff training and awareness can address the current shortcomings in their responses to information requests.

11. I turn now to the substantive issue of the Commission's refusal to disclose the information under Exemption 14(a) of the Code. In this context, it may be useful to issue the reminder that the Code gave an entitlement only to information, not to documents, and that it is on this basis that the complaint has been examined. Exemption 14(a) relates to information which was given in confidence and was either given under a statutory guarantee that its confidentiality would be protected or was given by persons who were not under any legal obligation to supply it and therefore did not consent to its disclosure. In this case, the trustees were clearly under a statutory obligation to provide the information but, for the following reasons, I consider that they can be said to have given the information under a statutory guarantee that its confidentiality would be protected. The Commission's regulatory function is governed by the Charities Act 1993. The Act provides the Commission with statutory information gathering powers. Information which has been obtained as a result of those statutory powers can only then be disclosed by the Commission in the circumstances prescribed by the Act and to those bodies or persons listed therein. Essentially, the Act specifies that the disclosure of information supplied to the Commission in the course of their regulatory function can be disclosed by them to other government departments, local authorities, police or public bodies, including regulatory bodies, for the purposes of the Commission's regulatory function or in order to enable the bodies or persons specified in the Act in the discharge of their functions. It is clear that Mr N, being a complainant in this instance, does not fall within those categories of person to whom the Commission has a statutory obligation to disclose the information nor is he performing a public duty whose function is cited in the Act. There is therefore no statutory duty on the Commission to provide the information to Mr N and, as the information was obtained in the course of their regulatory function, I see that it falls squarely to be covered by Exemption 14(a).

12. I am mindful of the preamble to Part II of the Code which, at paragraph 0.1, states that: 'Because the Code is not statutory it cannot set aside

restrictions on disclosure which are based in law. These will include those statutory provisions restricting disclosure which leave no discretion to disclose in the public interest. It may also in some circumstances include circumstances where there is a common law duty of confidentiality.'

There are, therefore, statutory restrictions on information supplied to the Commission for the purposes of their regulatory function. The Commission also consider that they owe a common law duty of confidentiality to those persons or bodies from which they obtains the information in the course of their regulatory function. However, the restrictions and Code exemption would not apply were the information already in the public domain, be it either generally known, contained in a public register or other document open to inspection by the public. The 1923 Indenture and the 1929 Grant of Licence, sought by Mr N, are documents which, the Commission have argued, do not form part of the trusts of the charity and are not therefore in the public domain. The 1922 Lease and 1923 Conveyance, however, do constitute the trusts of the charity and, as such, are a matter of public record. Hence their disclosure. It is the Commission's case that, as the Indenture and Grant of Licence do not form part of the trusts, they cannot be considered to be in the public domain and must, consequently, be withheld under their common law duty of confidentiality to the charity. I have seen no evidence to give me cause to dispute what the Commission have said with regard to which documents constitute the trusts of the charity.

13. Accordingly, as the Indenture and Grant of Licence do not constitute the trusts of the charity, and were provided by the trustees to the Commission for the purposes of their regulatory function, I am therefore satisfied that the information contained in those documents falls within Exemption 14(a). That said, in the event that the charity were to consent to the release of the information to Mr N, arguments of confidentiality would be irrelevant. Therefore, in concluding my consideration of Mr N's case, I asked my contact at the Commission to ensure that they contacted the charity's trustees to ascertain if they were content for the information to be disclosed to Mr N. No such contact had previously been made. The Commission made the necessary contact but, in the event, the trustees would not consent to the release of the information.

Conclusion

14. I am satisfied that the information of which Mr N sought disclosure was correctly withheld by the Commission under Exemption 14(a) of the Code. Nonetheless, there were a number of shortcomings in the Commission's handling of Mr N's request for information. Consequently, I am reassured by the action proposed by the Commission, as a result of a similar and recent complaint to this Office, to improve their response to future requests for information. Those handling issues aside, I have not found the substance of Mr N's complaint to be justified.

Ministry of Defence, Department of Trade and Industry and HM Treasury

A.1/05

Failure to provide information relating to a Ministerial Direction about the ordering of Hawk 128 aircraft

Summary

Mr Evans complained that the Ministry of Defence (MoD), the Department of Trade and Industry (DTI) and HM Treasury (the Treasury) failed to provide him with access to copies of all of the documents that they held relating to a Ministerial Direction overriding the advice of the Permanent Secretary of the Ministry of Defence regarding the order of 20 Advanced Jet Trainer Hawk aircraft. Each department declined to provide him with much of the information he sought, citing Exemptions 2 and 13 of the Code. Although MoD released further information to Mr Evans following his request for a review, they and DTI and the Treasury maintained their reliance on those exemptions to withhold from him the remaining information he sought. At that stage the Treasury also cited Exemption 14. In his comments on the complaint made to the Ombudsman the Permanent Secretary of MoD further cited Exemption 15. The Ombudsman concluded that Exemptions 2 and 13 applied to all of the information withheld by MoD, DTI and the Treasury, and that she was unable to recommend the release of any further information to Mr Evans. She did not uphold the complaint.

1. Mr Evans complained that the Ministry of Defence (MoD), the Department of Trade and Industry (DTI) and HM Treasury (the Treasury) refused to provide him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by my staff but I am satisfied that no matter of significance has been overlooked. I should explain that since 1 January 2005 the Code has been superseded by the Freedom of Information Act 2000. As a result, references to the Code are couched in the past tense.

Ministerial Directions

2. Where an Accounting Officer of a government department considers that a Minister is contemplating a course of action that would be likely to infringe financial propriety or regularity, or the Accounting Officer's wider responsibilities for economy, efficiency and effectiveness, it is the duty of the Accounting Officer to so advise the Minister. If that advice is then overruled the Accounting Officer will be required to seek a written Direction from the Minister to enable that action to be carried out. If such a Direction is issued by the Minister, the Accounting Officer must comply with it but must also notify the Treasury and pass the relevant documents to the Comptroller and Auditor General as soon as possible.

The complaint

3. On 7 January 2004 Mr Evans e-mailed MoD about a Ministerial Direction given by the Secretary of State for Defence in which he overruled the advice of the Permanent Secretary of MoD relating to the ordering of 20 Advanced Jet Trainer Hawk 128 aircraft from BAE Systems. Mr Evans said that the Permanent Secretary had conveyed his advice in a minute dated 29 July 2003, and that the Secretary of State had issued the Ministerial Direction on 30 July 2003. Citing the Code, Mr Evans asked MoD for complete copies of all the documents held by them relating to the Direction, by which he meant briefing material, minutes and papers for meetings, e-mails, letters received and sent, memoranda of conversations, and any other relevant paperwork. He asked for the information to be supplied within 20 days, as required by the

Code. MoD acknowledged his request on the same day. Mr Evans wrote to DTI and the Treasury in virtually identical terms on 8 January 2004.

4. On 9 January 2004 Mr Evans again wrote to MoD, saying that he wished to have access to a complete copy of the Permanent Secretary's minute of 29 July 2003: he had however seen from a letter sent by the Parliamentary Under Secretary of State for Defence to Mr Vincent Cable MP on 1 December 2003 that MoD were withholding it. Mr Evans said that he assumed that if he were also to submit a request for the minute it would likewise be refused, in which case he wished to request a review. On 23 January 2004 MoD wrote to Mr Evans saying that they considered that the minute fell within the scope of the documents he had requested on 7 January 2004.

5. On 4 February 2004 MoD wrote to Mr Evans saying that they had reviewed all of the key documents and e-mails relating to the request for a Direction as well as the Ministerial Direction itself, and that they had considered the points he had made, including the argument that the public interest would be best served by the release of the documents. They said that they were willing to release two documents, namely the Secretary of State's minute of 30 July 2003 which constituted the Ministerial Direction to the Permanent Secretary and a letter of 5 August 2003 from the Permanent Secretary to the Treasury Officer of Accounts. They withheld the other documents and e-mails that fell within the scope of Mr Evans' request, citing Exemptions 2 (internal discussion and advice) and 13 (third party's commercial confidences) of the Code.

6. On 5 February 2004 the Treasury wrote to Mr Evans to say that they were not then in a position to reply to his request, but hoped to be able to do so shortly: they apologised for the delay. On 11 February 2004 they wrote to Mr Evans saying that they had reviewed all of the information held by the Treasury on the Ministerial Direction but had concluded that, with the exception of a letter from the Permanent Secretary of the MoD to the Treasury Officer of Accounts (the Ministerial Direction copied to Mr Evans by MoD – see paragraph 5 above), which they enclosed, the information was exempt from disclosure under Exemptions 2 and 13 of the Code. They considered that the release of the information would harm the frankness and candour of internal discussion and advice and would constitute an unwarranted disclosure of commercial confidences that would harm the competitive position of a third party. The Treasury said that they were satisfied that the harm that would result from disclosure of the information sought was not outweighed by the public interest in disclosure. They drew Mr Evans' attention to MoD's Press Notice 172/03 of 30 July 2003 which explained the basis of the government's decision in placing the order for the aircraft.

7. DTI acknowledged Mr Evans' information request on 12 January 2004. On 18 February 2004 they sent him a substantive reply, saying that they had considered all of the information that they held regarding the Ministerial Direction on the Hawk 128 and had concluded that DTI had not originated any documents that dealt specifically with either the request for a Direction or the Ministerial Direction itself. However, DTI said that they did retain documents that contained references to the Ministerial Direction sent to them by other government departments as part of the normal consultation process in reaching decisions on major defence equipment procurements, but they concluded that these documents should be withheld, citing Exemptions 2 (relating to internal discussion and advice) and 13 (relating to third party's commercial confidences) of the Code.

8. All three departments explained to Mr Evans that it was open to him to seek an internal review of their decision with recourse to the Ombudsman if, following such a review, he continued to remain dissatisfied.

9. Mr Evans therefore e-mailed MoD, the Treasury and DTI on 19, 20 and 24 February 2004 respectively asking them to reconsider whether or not the Code exemptions cited had been properly applied in this case. He said that he believed that there was a clear public interest in releasing the material. He accepted that the Ministerial Direction had been sought on value for money grounds rather than in terms of the regularity and propriety of the Secretary of State for Defence's decision. He said, however, that the contract for the advanced jet trainer was worth a considerable amount of money, at least £800m, and he believed that one of the aims of open government must be to allow the public to scrutinise how their money was spent. He believed that each department should therefore release the material as it would shed more light on the reasons for the Ministerial Direction. He also asked them to consider redacting documents so that some information could be released. He asked all the departments for a reply within 20 working days, in accordance with their published targets.

10. DTI acknowledged receipt of the review request on 24 February 2004. They sent Mr Evans a full reply on 22 March 2004, saying that they had considered the matters raised in his e-mail of 24 February and were satisfied that Exemptions 2 and 13 of the Code applied to the information he had requested. DTI said that they considered that the harm arising from disclosure would override the public interest in making that information available, despite the further points which Mr Evans had made.

11. The Treasury acknowledged receipt of the review request on 24 February 2004 and, on 23 March 2004 they sent Mr Evans a holding reply. On 1 April 2004, they wrote to him saying that they had concluded that the information he had requested fell within the terms of Exemptions 2 (internal discussion and advice), 13 (third party's commercial confidences) and 14 (information given in confidence) of the Code, and that the public interest in access did not outweigh the harm that would be caused by the release of the information. They said that they were therefore unable to release any further information to him.

12. On 23 February 2004 MoD acknowledged receipt of the review request. On 17 March 2004 MoD sent Mr Evans a holding reply, apologising for the delay in sending him a substantive response. On 23 April 2004 they wrote to him saying that, although the Code gave an entitlement to information and not documents, they concluded that two further documents could be released to Mr Evans, namely Lines to Take and Question and Answer material, both prepared in July 2003, which they believed answered the substance of Mr Evans' original request. They said that the remaining documents constituted correspondence both within MoD and more widely, relating to the selection of the Hawk 128 and the need for a Ministerial Direction. They were satisfied that those documents fell within the scope of Exemptions 2 and 13 of the Code. They also concluded that the harm likely to result from disclosure of the documents relating to the direction would outweigh the public interest in making them available to Mr Evans.

13. Following his original complaint to me, Mr Evans made further representations on 18 August 2004, saying that he believed that the disclosure of the documents would be in the public interest as he felt that there was a certain amount of confusion as to the reasons for the

Direction. He said that it seemed to be unclear whether there was a recommendation by officials to open up the contract to competition or to award the contract to a rival company, and cited press articles to illustrate the point. He said that one of the main declared aims of the Code was to explain the basis of decisions and that it was clear that the reasons behind the Ministerial Direction remained opaque. He said that disclosure would help the public to establish why a decision about a large amount of money was taken, and cited my decision in an earlier complaint involving a Ministerial Direction (A.37/03, published in Access to Official Information: Investigations Completed July 2003 –June 2004: HC 701) in support. He also questioned whether Exemption 2 was justified in cases of a Ministerial Direction, since the very fact that there was a Direction demonstrated that the advice from officials was contrary to the view of the Minister. He contended that, given that the existence of a disagreement was already in the public domain, there could be no harm caused by the release of the information and argued that secrecy in this case undermined the public's confidence in the government's decision-making process.

MoD's comments on the complaint

14. The Permanent Secretary said that the information MoD had withheld could be separated into four categories :

(a) his submission to the Secretary of State;

(b) drafts of that submission and of the Secretary of State's reply with covering e-mails;

(c) Ministerial correspondence and a letter from the Chief Executive of the Office of Government Commerce;

(d) a draft and final version of a letter from the Comptroller and Auditor General to the Chairman of the Public Accounts Committee outlining why the Ministerial Direction was necessary.

15. The Permanent Secretary said that his strong view was that all of the material requested constituted internal discussion and advice and thus fell within one or more of the subdivisions of Exemption 2. He said that a submission about the need for a Ministerial Direction was one of the most candid pieces of advice a Permanent Secretary could tender to Ministers, and the public interest in retaining the ability to cover the issues fully and clearly, rather than drafting with an eye to publication, was strong: in his view this far outweighed any public interest there might be in release. He said that the documents also contained much information of commercial significance which fell under Exemption 13 of the Code.

16. The Permanent Secretary went on to say that the letter MoD sent to Mr Evans notifying him of the outcome of the internal review had acknowledged that there was a legitimate public interest in expenditure decisions taken by government departments. It said that MoD had accepted that the need for a Ministerial Direction was indicative of a situation in which the decision was a difficult one, but it had also pointed to the process whereby the Comptroller and Auditor General and the Public Accounts Committee had to be informed when such Directions were given: a process which existed to allow for Parliamentary scrutiny of the use of public money. The Permanent Secretary said that it was therefore for the Public Accounts Committee and the National Audit Office to decide whether, as a matter of public interest, the decision to procure Hawk 128 should be investigated. He said that all this strengthened the case for withholding the submission (category (a) above).

17. As to categories (b) and (c) above the Permanent Secretary again considered that they fell within Exemptions 2 and 13. He considered that the public interest in continuing to be able to have frank exchanges and in maintaining the convention of collective responsibility was far stronger than the public interest in the release of the documents. As to category (d) he again considered that Exemptions 2 and 13 applied and, because the correspondence related to possible proceedings of the Public Accounts Committee, he believed that it was subject to Parliamentary privilege and therefore fell within Exemption 15.

18. The Permanent Secretary said that he fully supported and upheld the decision reached at the internal review stage. He said that the effective operation of government departments rested on the ability of officials to conduct free, frank and open debate between themselves and with Ministers. Similarly, Ministers must be able to air their different perspectives and evaluate the relative merits of competing options before reaching difficult decisions that would then be upheld under the convention of collective responsibility. He said that it was in the public interest for such dialogue to be fully recorded but there was a significant danger that this process would be undermined if officials and Ministers believed that candid exchanges would become public knowledge. He considered the use of Exemptions 2 and 13 to be fully justified. He said that the additional information disclosed to Mr Evans following the internal review had given him some further background to the decision to select Hawk 128, but that it would not be appropriate to disclose more. The Permanent Secretary said that the arguments for withholding the letter to the Chairman of the Public Accounts Committee were equally strong and he believed that Parliamentary privilege brought Exemption 15 into play.

DTI's comments on the complaint

19. The Permanent Secretary said that DTI had declined to release documents relating to the Ministerial Direction under Code Exemptions 2 (relating to information whose disclosure could harm the frankness and candour of internal discussion and the confidential communications between departments, public bodies and regulatory bodies) and 13 (relating to third party's commercial confidences). The documents which they considered fell within the information request comprised Ministerial correspondence, a submission to the Secretary of State, and notes of, or about, interdepartmental meetings. The Permanent Secretary said that the decision to purchase Hawk 128 was reached after extensive discussion between departments at the highest levels of government. In relation to Exemption 2, he said that the information DTI held represented frank and candid debate on the part of Ministers and officials and that if the documents in question were to be released there would be a risk of harming the frankness and candour of internal advice on similar matters in the future. He quoted paragraph 2.9 of the Cabinet Office's guidance on interpretation of the Code, which said that 'collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached'. He said that this clearly had happened in this case and that the privacy of opinions expressed by Ministers in the period prior to the Ministerial Direction being made should be respected.

20. As to Exemption 13, the Permanent Secretary said that one of DTI's functions was to form strong business relationships with key UK companies on their future strategy and investment of high value work in the UK. He said that if companies felt that commercially confidential information shared with government

were to be subject to future disclosure, it would inhibit discussion and damage government's relationship with business. He said that the commercially sensitive nature of some of the information and conclusions of the documents were clear reasons for non-disclosure.

21. The Permanent Secretary acknowledged that there was a legitimate public interest in the expenditure decisions taken by government departments. He said that the need for a Ministerial Direction highlighted that the factors bearing on this particular case were finely balanced. DTI were nonetheless of the view that the harm likely to arise from disclosure of the documents related to this Ministerial Direction would outweigh any public interest in disclosure. He commented that the Comptroller and Auditor General had been told about the Direction, as the procedure required in such cases: it then fell to the Comptroller and Auditor General to notify the Chairman of the Public Accounts Committee. He echoed the comments of the Permanent Secretary of MoD that this process had been established by Parliament to ensure effective oversight of the use of public money and that through this process the public interest was recognised.

Treasury's comments on the complaint

22. The Permanent Secretary said that, in their initial consideration, Treasury had concluded that, given the nature of the information held, the harm caused by disclosure would outweigh the public interest in allowing access to the information sought. He said that, in making that judgment, the Treasury had taken the view that, while there was clearly a legitimate public interest, given that the objection of the Permanent Secretary of the MoD had been raised on value for money grounds, release of the information requested would:

- harm the frankness and candour of internal discussion through the disclosure of sensitive internal advice and expose the process of discussion around the purchase of Hawk 128 and undermine the principle of Cabinet collective responsibility (Exemption 2);

- undermine the government's broader relationship with industry since it could affect confidence in the government's commitment to safeguard information provided to it on a confidential basis and strain the government's relationship with key defence suppliers (Exemption 13); and

- prejudice the future supply of information from defence suppliers and impact negatively on the future willingness of companies to provide information to the government in confidence (Exemption 14).

23. The Permanent Secretary said that, as part of the established process for enabling Parliament to scrutinise public spending, the Treasury had considered that the Permanent Secretary of MoD's letter seeking a Direction should be disclosed. Following Mr Evans' request for Treasury to reconsider their decision to withhold the remaining information, a review was conducted by the Treasury's Managing Director who concluded that all of the exemptions cited were appropriate. The Permanent Secretary said that Mr Evans had asked the Treasury to consider releasing redacted documents but the Treasury concluded that this would not have been possible because any redactions would remove the very information which Mr Evans wished to see.

24. For reasons which were virtually identical to those of the Permanent Secretary of DTI (paragraphs 19 to 21 above) the Permanent Secretary maintained that Exemptions 2 and 13 of the Code were applicable, and that the harm

likely to be caused by disclosing further information relating to the Direction would outweigh the public interest in disclosure. In addition, in relation to Exemption 2, he said that it was essential that Ministers and civil servants could have frank and open discussions on issues such as this without fear that such discussions would become public. To make such discussions public would harm the frankness and candour between Ministers and civil servants and would ultimately be damaging to policy development and decision-making. The Permanent Secretary also agreed that the release of the information requested would be likely to undermine the principle of Cabinet collective responsibility. As to Exemption 13 the Permanent Secretary said that if companies felt that commercially confidential information shared with the government were subject to future disclosure, it might mean that they could be reluctant to share confidential and market sensitive material with government in the future.

The Code of Practice on Access to Government Information

25. In refusing to provide the information sought by Mr Evans, MoD, DTI and the Treasury all cited Exemptions 2 and 13 of the Code. Exemption 2 was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

26. Exemption 13, headed 'Third party's commercial confidences', read:

'Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.'

27. In their response to Mr Evans' review request the Treasury also cited Exemption 14 of the Code. That exemption was headed 'Information given in confidence'. Paragraph (b) read:

'(b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.'

28. When commenting on Mr Evans' complaint to me the Permanent Secretary of MoD also cited Exemption 15 of the Code, which was headed 'Statutory and other restrictions'. Paragraph (b) read:

'(b) Information whose release would constitute a breach of Parliamentary Privilege.'

29. In the preamble to Part II of the Code, under the heading 'Reasons for Confidentiality', it stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

30. Before considering the question of whether or not Mr Evans is entitled to the information he requested, I shall look at the way in which the three departments handled his information request. I and my predecessors have said that it was good practice, when departments refused requests for information, for them to identify the specific exemptions in Part II of the Code on which they were relying to support that refusal. Also, where information had been refused, the possibility of a review under the Code needed to be made known to the person requesting the information at the time of the refusal, as did the possibility of making a complaint to me if, after the review process had been completed, the requester remained dissatisfied. Finally, departments were expected to respond to requests for information within 20 working days, although the Code recognised that this target might have needed to have been extended when significant search or collation of material was required. While MoD, DTI and the Treasury took somewhat longer than 20 working days to respond to Mr Evans' information request (paragraphs 3-12 above), I do not consider that to be unreasonable given the sensitivities of the information sought. From my examination of the papers it appears to me that all three departments have otherwise handled this request for information in full accordance with the requirements of the Code, for which I commend them.

31. I now turn to the question of whether or not the information sought by Mr Evans should be released to him and, in doing so, I should emphasise that the Code gives an entitlement to information, not documents and it is on this basis that his request has been considered.

32. All three departments have cited Exemptions 2 and 13 of the Code in refusing to release to Mr Evans more information than he has already been provided with (paragraphs 5-7, 10-12, 15, 17-20, 22 and 24). I shall first assess the merits of Exemption 2, in respect of which all the departments have argued that the information they hold reflects frank and candid debate on the part of Ministers and officials and that it is therefore essential, for the future provision of similar advice, that such discussions are carried out without fear that they will become public. On the other hand, Mr Evans questions whether Exemption 2 could be justified in cases where a Ministerial Direction has been issued, since the very existence of such a Direction shows the advice from officials to have been contrary to that of the Minister (paragraph 13). The purpose of Exemption 2 was to allow departments the opportunity to discuss matters, particularly those which are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. I am satisfied, therefore, that the information sought by Mr Evans falls within the criteria of Exemption 2.

33. However, that is not the end of the matter. Exemption 2 incorporated a harm test, which was a test of whether or not any harm likely to arise from the disclosure of the information requested

would be outweighed by the public interest in making the information available. MoD, DTI and the Treasury have argued that the need for a Ministerial Direction highlighted the fact that the various elements bearing on the case were finely balanced and that Ministers needed to be able to air their different views and evaluations of competing options before reaching difficult decisions that would then be upheld under the convention of collective responsibility (paragraphs 18-19 and 24). They also argued that it was in the public interest for such dialogue to be fully recorded and that this practice would be undermined if officials and Ministers believed that candid exchanges of this nature would become public. Mr Evans has argued that the very need for a Direction highlights a difference of opinion between officials and Ministers and, thus, that no harm would be caused by the release of the information. He has also argued that secrecy in this case would undermine public confidence in the Government's decision making process (paragraph 13), particularly as he contends that there remains a degree of public confusion about the nature of the decision before Ministers.

34. I have reviewed the substantial number of background documents in this case and I have considered the departments' and Mr Evans' comments very carefully. I have also examined the information already released to Mr Evans, not least the quite comprehensive Question and Answer material (paragraph 12). I recognise that this particular Government decision was informed by a wide range of sometimes conflicting considerations and I do not doubt that some information relating to it needs to be available in the public domain. The question is, should there be any more than has already been released? I think, on balance, that the case for releasing more has not been made out. In cases such as this, where there are a number of opposing views, Government and officials must be able to discuss them in private, and I do not consider that the public interest in having access to the withheld information is strong enough, given what has already been released, to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. I am therefore satisfied that Exemption 2 can be held to apply to much of the information requested by Mr Evans.

35. I now turn to Exemption 13. That exemption deals with the need to protect sensitive commercial information from disclosure in circumstances that would adversely affect those to whom the information relates. MoD, DTI and the Treasury have argued that the disclosure of commercially sensitive information would inhibit discussion and damage Government's relationship with business and would engender reluctance on the part of companies to share confidential and market sensitive material with them in the future (paragraphs 15, 20 and 24). They further argued that disclosure of the documents in question would be likely to affect BAE Systems (paragraphs 20 and 24). Having examined the relevant documents from each department, I conclude that Exemption 13 does, indeed, apply in principle to the information withheld by MoD, DTI and the Treasury.

36. Again, however, I need to balance the harm that might be caused by disclosing this information against any public interest there might be in making it available. I fully recognise that there is a legitimate and ongoing public interest in establishing how substantial expenditure from the public purse on contracts such as that awarded to BAE Systems came about. However, having considered the terms of the documents which fall within the ambit of Mr Evans' information request, I have nevertheless concluded that the potential harm that would be caused by the disclosure of the information

requested would outweigh the public interest in its release, and that Exemption 13 therefore applies to that information. I should add that, in reaching this conclusion, I have taken account of the decision reached in the earlier case to which Mr Evans refers (A.37/03 – see paragraph 13 above) in which I recommended that certain key documents should be released. I am, however, of the opinion that that case can be distinguished from the one currently under consideration, in that there has been no suggestion that the information at issue in that earlier case was of a nature likely to cause damage to a third party. More pertinently, I believe that the current case is more closely analogous to the case of A.40/03, reported in the same volume as A.37/03 (see paragraph 13). In that case I took the view that the information at issue was also covered by Exemption 13 and that the release of it could cause damage of the kind covered by that exemption to a third party.

37. I have also considered the argument for a partial release of information, which Mr Evans has indicated he would be willing to accept. However, in my view, to edit the documents in question so as to remove from them all of the potentially harmful material would be to render them meaningless and of no value. I do not therefore consider that I can recommend the release to Mr Evans of any information other than that already released to him.

38. Since I have concluded that Exemptions 2 and 13 apply to the information sought by Mr Evans, no useful purpose would be served by my discussing whether Exemption 14, additionally cited by the Treasury, and Exemption 15, additionally cited by MoD, have any applicability. I therefore make no findings on these issues.

Conclusion

39. I found that MoD, DTI and the Treasury were entitled to withhold from Mr Evans the information he sought. I do not therefore uphold his complaint.

Ministry of Defence

Case No. A.20/05

Refusal to provide details of meetings with members of the Czech Republic in relation to the sale of supersonic jets

Summary

Mr Evans asked the Ministry of Defence (MoD) for copies of all documents relating to meetings between the Secretary of State for Defence and representatives of the Czech Republic in respect of allegations of bribery by BAE Systems in their attempts to sell Gripen supersonic jets to the Czech Government. MoD said that only one meeting had taken place at which the subject of unsubstantiated allegations of corruption had arisen, but considered the discussion to have been confidential and that the relevant material should be withheld under Exemption 1(b) of the Code. MoD said that disclosure of the relevant part of the note of the meeting would harm the UK's relationship with both the USA and the Czech Republic. The Ombudsman agreed that release of the requested information would potentially cause harm to international relations, and that Exemption 1(b) had been correctly applied in this instance. While accepting that the public had a legitimate interest in knowing whether there was any substance in the suggestion of corruption surrounding arms sales, the Ombudsman considered that disclosure of the information sought would add little to what had already been reported on the subject, and would inhibit future discussions between the Governments involved and potentially damage good relations. Therefore, the Ombudsman did not believe that the public interest in disclosing the information outweighed the potential harm that could be caused by its release. The Ombudsman did not uphold the complaint.

1. Mr Evans complained that the Ministry of Defence (MoD) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated but I am satisfied that no matter of significance has been overlooked.

Background

2. On 26 November 2003 Mr Evans wrote to and e-mailed MoD asking for copies of all documents relating to a series of meetings between the Secretary of State and representatives of the Czech Republic during the period 23 November 1999 to 30 April 2003, at which the possible sale of Gripen supersonic jet aircraft and the Czech decision to buy such aircraft were discussed. On 27 November 2003 MoD acknowledged Mr Evans' request and, on 29 December 2003, an official from MoD's Defence Export Services Organisation (DESO) wrote to him explaining that they were reviewing the relevant files. On 19 January 2004 DESO wrote to Mr Evans with a substantive response. They confirmed that the prospective sale of Gripen aircraft had been mentioned at the meetings in question, but said that the related documents and information contained in them were being withheld in accordance with the Data Protection Act 1998 and under Exemptions 1, 2 and 13 of the Code.

3. On 4 June 2004 Mr Evans wrote to MoD asking them to review their decision not to release the information he had requested. He said, however, that he was now restricting his request to documents in relation to meetings concerning allegations of bribery. He also asked for a schedule of relevant documents. He said that it had been alleged that BAE Systems had been accused of bribery in relation to its attempts to sell Gripen jets to the Czech Republic. Such accusations had been made by the United States Government and made known to MoD. For that reason Mr Evans believed that the public interest clearly outweighed the benefits of keeping the information secret. Mr Evans pointed out that the British Government had said that it was taking a stand against bribery in foreign contracts and that the Foreign Office had advised their staff to tell businesses that the payment of bribes was

unacceptable behaviour for UK companies or nationals. Mr Evans believed that one effective way of deterring such corruption was through publicity; and releasing the requested documents would help to publicise allegations of bribery and prevent corruption in the future.

4. On 6 July 2004 MoD wrote to Mr Evans in response to his request for a review. They said that, in accordance with Mr Evans' wishes, they had focussed on identifying notes made of any discussion of allegations of bribery by BAE Systems. They confirmed that, within the timeframe given by Mr Evans in his original request, there had been no meetings between the Secretary of State for Defence and Ministers of the Czech Government to discuss allegations of bribery by BAE Systems. They said, however, that the Secretary of State had briefly touched on the subject of corruption during a bilateral meeting with the Czech Defence Minister at the Farnborough Air Show on 23 July 2002. However, MoD considered the discussion to have been confidential and concluded that the relevant material should be withheld under Exemption 1(b) of the Code (information whose disclosure would harm the conduct of international relations or affairs.) In relation to the request for a schedule of documents, MoD said that the note of 23 July 2002 was the only document relevant to Mr Evans' request. They gave a description of the document, its date and confirmation as to why it was not being released. They advised Mr Evans that, if he remained dissatisfied, he could complain to the Ombudsman.

MOD's comments on the complaint

5. In his response the Permanent Secretary of MoD outlined the background to the complaint and provided copies of all the relevant papers, including the information sought by Mr Evans. The Permanent Secretary reiterated that Mr Evans' original request for information had been refused because it was considered that Exemptions 1, 2 and 13 applied. In his request for a review, Mr Evans had narrowed the scope of his request to just those documents concerning meetings relating to allegations of bribery by BAE Systems in connection with its bid to sell Gripen jets to the Czech Republic. He had also asked for a schedule of all relevant documents. Accordingly, the review had focussed on information relating to bribery allegations rather than the original request for complete copies of all documents relating to bilateral meetings. He said that it had been established during the internal review that there had been no meetings specifically to address bribery allegations in the timeframe specified by Mr Evans – November 1999 to April 2003. The Permanent Secretary confirmed, however, that the documents showed that the Secretary of State had briefly touched on the subject during a bilateral meeting with the Czech Defence Minister at the Farnborough Air Show on 23 July 2002. The note of the meeting was not a verbatim transcript, and it did not explicitly mention BAE Systems, but the context suggested that there was some discussion of unsubstantiated allegations of bribery which had been made by the US authorities.

6. The Permanent Secretary said that the information withheld amounted to just four sentences in the note of the meeting while the remainder of the document consisted of an exchange of views on subjects that were not relevant to Mr Evans' request. The Permanent Secretary pointed out that the Code only gave an entitlement to information and not to the document in which the information was contained, and he had therefore not made a case for withholding the entire document. He cited the Cabinet Office guidance on Exemption 1(b), which includes the following examples of potential areas of harm:

- disclosure which would impede negotiations, for example, by revealing a negotiating or fall-back position, or weakening the Government's bargaining position;

- disclosure which would undermine frankness and candour in diplomatic communications; and

- disclosure which would impair confidential communications and candour between Governments or international bodies.

7. The Permanent Secretary said that, in practice, he believed that disclosure of the part of the note in question would harm the UK's relationship with both the USA and the Czech Republic. The whole tenor of the record shows this to have been a frank and open discussion. The Czech Defence Minister shared information in confidence with the Secretary of State and it would undoubtedly damage future trust and good relations if MoD were to disclose what was said. The Permanent Secretary considered that release of the information could only be unhelpful to the general relationship with the US and the course of ongoing bilateral projects.

8. The Permanent Secretary acknowledged that there was a public interest in allegations of corrupt practice by a leading UK company. However, the allegations were unsubstantiated: release of the record of discussions between the Secretary of State and the Czech Defence Minister would serve no useful purpose, but would certainly have a detrimental effect on important international relationships. He therefore fully supported and upheld the decision to withhold the information sought, and considered the use of Exemption 1(b) to be fully justified. He said that, although it had taken longer than 20 working days to provide Mr Evans with a substantive response to his initial request for information, a holding letter had been sent, the request for a review had been dealt with within 20 days, and Mr Evans was correctly informed of his right of appeal to the Ombudsman. He therefore thought that the matter had been handled efficiently and in accordance with the Code.

The Code of Practice on Access to Government Information

9. In refusing to provide the information sought by Mr Evans MoD cited Exemption 1(b) of the Code. This Exemption is headed 'Defence, security and international relations' and reads:

'Information whose disclosure would harm the conduct of internal relations or affairs.'

10. Exemption 1 is subject to the preamble to part II of the Code which states that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

11. Before considering the substantive issue of whether or not the information sought by Mr Evans should be released, I shall look first at how MoD handled his request. Until the Freedom of Information Act 2000 comes into force on 1 January 2005, all requests for information should be treated as if made under the Code,

irrespective of whether or not it was referred to by the applicant. Information should be provided as soon as practicable and the target for responses to simple requests for information is 20 working days from the date of receipt. While this target could be extended when significant search or collation of material was required, an explanation should have been given in all cases where information is not provided. It is also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they are relying in making that refusal. Moreover, they should make the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to the Ombudsman if, after the completion of the review process, they remain dissatisfied.

12. For the most part MoD handled Mr Evans' request for information in full compliance with the Code, for which I commend them. They cited the relevant exemption as justification for withholding the information being sought, advised Mr Evans of his right to request a review, and of his right to complain to the Ombudsman. My only minor criticism is that MoD took well over 20 working days to respond substantively to Mr Evans' initial request for information. However, I accept that the Christmas and New Year holidays will have had an effect on the throughput time, and I note that a holding letter was sent to him.

13. I turn now to the question of the information sought by Mr Evans. In doing so, I should emphasise that the Code gives an entitlement only to information, not to documents, and it is on this basis that his request has been considered. MoD have cited Exemption 1(b) as the basis on which they have withheld the information sought by Mr Evans. The purpose of Exemption 1(b) is to protect information the disclosure of which would impair the effectiveness of the conduct of international relations. The information which has been withheld by MoD consists of extracts from notes of a discussion between the Secretary of State for Defence and the Czech Defence Minister. This forms a very small part of the note of the meeting and includes comments on dealings with US officials at which the subject of corruption was raised.

14. MoD have referred to the Cabinet Office guidance on the interpretation of the Code, which gives several instances of the potential harm that might be caused by disclosure (paragraph 6). It is clear that MoD were mindful of the potential damage any disclosure would have on relations with the Czech Republic and with the USA. Having considered carefully the information contained in the document in question, I am satisfied that Exemption 1(b) has been correctly applied.

15. Exemption 1(b) is, however, subject to a harm test which requires me to consider whether or not the potential harm caused by disclosure is outweighed by the public interest in making the information available. Mr Evans has argued that the public interest in accusations of bribery against a major employer clearly outweighs any benefits of keeping the information secret. However, MoD make the point that the allegations are unsubstantiated, and that to disclose the information would certainly harm relationships between the UK, the USA and the Czech Republic.

16. I have seen the note of the meeting in question and it seems to me that the arguments are finely balanced. I accept the strength of the argument that the public have a legitimate interest in knowing whether there is any substance in the suggestion of corruption in relation to arms sales. However, the element of

the note that refers to accusations of bribery adds little of substance to what has already been reported on the subject and I consider there to be little doubt, particularly as the information was shared in confidence, that there would be a real prospect that disclosure would inhibit future discussions between the Governments involved and potentially damage good relations. On balance, therefore, I do not believe in this case that the public interest in disclosing the information outweighs the potential harm that could be caused by its release. I do not, therefore, consider that I can recommend the release to Mr Evans of the information which he seeks.

Conclusion

17. While there was a minor delay in MoD's handling of Mr Evans' request for information, I am satisfied that the information was correctly withheld under Exemption 1(b) of the Code. I do not, therefore, uphold the complaint.

Ministry of Defence

Case No: A.31/05

Refusal to provide information about meetings between representatives of BAE Systems and the Secretary of State for Defence and other defence Ministers

Summary

Mr Evans asked the Ministry of Defence (MoD) for copies of documents relating to meetings between BAE Systems and either the Secretary of State for Defence, the Minister for Defence Procurement or the Minister of State for the Armed Forces. MoD provided Mr Evans with details of the months and year and a brief description of each meeting, but did not provide copies of the documents that he had requested. After Mr Evans sought a review MoD concluded that some of the documents could be disclosed but refused to provide the remaining information, citing Exemptions 1, 2,7(a), 13 and 14(a) of the Code. The Ombudsman found that MoD had correctly applied Exemptions 2 and 7 to the majority of the outstanding information and that, having applied the harm test, MoD were entitled to withhold that information. She also concluded that Exemptions 1 and 13 applied to the remaining information. She did not uphold the complaint.

1. Mr Evans complained that the Ministry of Defence (MoD) had refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff, but I am satisfied that no matter of significance has been overlooked. I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Code are couched in the past tense.

Background to the complaint

2. On 20 February 2004 Mr Evans wrote to MoD and asked, under the Code, for complete copies of the minutes and agendas of any meetings held between representatives of BAE Systems and either the Secretary of State for Defence, the Minister for Defence Procurement or the Minister of State for the Armed Forces since 1 July 2003. He also asked for complete copies of all documents that were prepared for or were connected with these meetings, either before or after the event.

3. MoD acknowledged Mr Evans' request on 23 February 2004. On 19 March 2004 they wrote to Mr Evans to say that there had been eleven meetings held between BAE Systems and either the Secretary of State for Defence or the Minister for Defence Procurement between 1 July 2003 and 20 February 2004. The Minister for the Armed Forces had not, however, met with BAE Systems representatives during that period. They also told Mr Evans that, as all the relevant documentation was not held centrally, they would not be able to complete their consideration of his request until 23 April 2004. On 24 March 2004 Mr Evans expressed his concern about the expected delay in replying to him and on 26 March 2004, MoD wrote to him outlining their policy on responding to complex requests for information. They said that they believed they were acting in accordance with that guidance.

4. On 14 May 2004 MoD provided a substantive reply to Mr Evans. They said that the Code gave a right to information, not to documents, and that they believed the information he had requested was if and when meetings had taken place between MoD Ministers and BAE Systems. They therefore provided the month and year of each of the eleven meetings in question and a brief description of the event's purpose. MoD believed that this reply was in accordance with the Code but advised Mr Evans of his right to seek an internal review of their decision if he

was not satisfied with it and to complain to the Ombudsman if he remained dissatisfied following that review.

5. On 19 May 2004 Mr Evans asked MoD to review their decision. He believed that their response was in breach of the terms and principles of the Code. MoD acknowledged the request on 20 May 2004. On 9 June 2004 Mr Evans asked MoD to give the exact date of each of the eleven meetings they had listed. On 11 June 2004 MoD said that they would consider this request as part of their internal review of their original decision. On 16 June 2004 MoD wrote to Mr Evans to apologise for the delay in actioning the review. They said that they hoped to reply in the near future. On 11 August 2004 MoD wrote to Mr Evans again, apologising for the continuing delay and assuring him that he would be informed as soon as a final decision had been made.

6. On 16 September 2004 MoD wrote to Mr Evans with a substantive reply. They said they believed that their original decision to disclose only the fact that the meetings had occurred, and their respective dates had been a reasonable one and in accordance with the Code's requirement to provide information, as opposed to documents. They did say, however, that as Mr Evans had identified a group of documents rather than information they should have asked him to resubmit his request in the form of a request for information. They said that, as they had failed to do so, they had considered disclosure of the documents in question as part of their review. Their conclusion was that whilst some of the documents could be disclosed, they considered that certain information could rightfully be withheld under Exemptions 1, 2, 7(a), 13 and 14(a) of the Code. The documents they released in full included letters between BAE Systems and the Secretary of State/ Minister for Defence Procurement, the final draft of a speech by the Minister for Defence Procurement to an audience, including the press, a compilation of factual information, plus a press release, and a fact sheet. Two further documents were partially released. The first was a report concerning the practical aspects of a visit by the Minister for Defence Procurement to Brough, a BAE Systems site. The third paragraph of the report, concerning details of discussions, was withheld on the basis that it constituted internal discussion and advice relating to ongoing commercial and confidential business and for which MoD cited Exemptions 2, 13 and 14(a) and (b). The second document partially released by MoD comprised sections of briefing sheets which referred to information already withheld. MoD also provided Mr Evans with the exact dates of each of the eleven meetings. They advised Mr Evans of his right to complain to the Ombudsman, via a Member of Parliament, should he remain dissatisfied with their response to his request for information.

MoD's comments to the Ombudsman on the complaint

7. The Permanent Secretary of MoD responded to the Ombudsman's statement of complaint on 2 November 2004. Firstly, with regard to MoD's handling of Mr Evans' request, the Permanent Secretary said that while it took them longer than the prescribed 20 working days to provide a substantive response to Mr Evans' original request of 19 February 2004, he believed that, in general, the request was handled efficiently by MoD and in accordance with the Code. He said that, due to the nature of the information requested in this case and the deliberation over the interpretation of Mr Evans' request, it was not possible to reply within the 20 working days advocated by the Code. He said that holding letters were, however, sent to Mr Evans on 19 and 26 March 2004 and that there was then extensive internal and external discussions of the issues raised by the

request. He added that their substantive reply to Mr Evans correctly informed him of his right of appeal.

8. With regard to the internal review, the Permanent Secretary commented that MoD aimed to conduct internal reviews within 20 working days, but that it had not been possible in Mr Evans' case due to the complexity of the issues raised and the volume of information to be considered. He said, however, that they had sent Mr Evans holding letters on 16 June 2004 and 11 August 2004, informing him of the progress of the review and the delay caused by internal deliberation over whether the public interest would best be served by releasing or withholding the documents. He added that they had correctly informed Mr Evans of his right to seek the support of his Member of Parliament for an appeal to the Ombudsman.

9. Secondly, with regard to the withholding of information in Mr Evans' case, the Permanent Secretary believed Mr Evans' request and MoD's response to it raised an important point of principle. He said that the Code gave an entitlement to information, and not to the documents within which it was contained (while recognising that the release of the document in question might be the simplest way of actioning a request for information), but that Mr Evans had appeared to interpret his entitlement to information as an entitlement to all the documents relating to the information, regardless of whether those documents contained information that did not form the subject of his request. The Permanent Secretary commented that dealing with such a wide-scoping request would involve searching, identifying, collating and analysing all the documents in question which would place a significant burden on the department for, in his view, no benefit, because most of the information was not relevant to the actual topic of interest. He said that what they should have done in response to Mr Evans' request, which they had done in other cases, was to ask the requester to refine their request and specify precisely what information was being sought. He said that, as they had not given Mr Evans the opportunity to do so in this instance, their internal review had accepted his request as expressed and they had considered all the documents relating to the meetings accordingly. He said that he believed that that 'pragmatic approach', at review stage, had effectively dealt with Mr Evans' complaint in a way that their response to his initial request had failed to do.

10. In summary, the Permanent Secretary explained their application of the Code exemptions as follows:

- Exemption 1: the information withheld included references to partner and potential customer nations and their views on MoD contracts;

- Exemption 2: the information withheld included frank internal discussion of the availability of funding for a major MoD contract and calculations of the amount of business the MoD had placed with BAE Systems;

- Exemption 7(a): the information withheld included discussion of the availability of funding for a major MoD contract and calculations of the amount of business the MoD had placed with BAE Systems;

- Exemption 13: the information withheld included discussion on affordability, intellectual property rights and other issues in relation to major MoD contracts; and

- Exemption 14(a) and (b): the information withheld included BAE Systems' estimate of the cost of a MoD contract.

11. The Permanent Secretary said that he fully supported and upheld his department's decision, following the internal review, to withhold the information. He further explained that the effective operation of government departments rested upon the ability of officials to conduct free, frank and open debate between themselves and with Ministers. As such, in respect of one of the documents withheld, he believed Exemption 2 applied throughout as all the material centred directly on internal discussions and advice relating to the policy-making process which he believed it was in the public interest to withhold. However, with regard to another document, which contained communications of the type that would ordinarily be withheld, in this instance it contained simply factual information which he believed could be disclosed, particularly as much of that information was already in the public domain. Commenting generally on the material withheld, he said that Ministers 'must be able to air their different perspectives and evaluate the relative merits of competing options before they reach difficult decisions that will then be upheld under the convention of collective responsibility'. The Permanent Secretary recognised that it was in the public interest for such dialogue to be fully recorded, particularly in a case such as this where contracts and the potential commitment of public money was at hand. However, he believed that there was a 'significant danger that this process will be undermined if officials and Ministers believe that candid exchanges will become public knowledge, thereby adversely affecting the management and operations of the public service'. He added that, in this case, 'there (was) also a real prospect of damaging the relationship with BAE Systems and also their commercial position, and in turn prejudicing the competitive position of the MoD'. He consequently believed the use of the exemptions cited to be fully justified.

The Code of Practice on Access to Government Information

12. In refusing to provide the information sought by Mr Evans, MoD cited Exemptions 1, 2, 7(a), 13 and 14 (a) and (b) of the Code. Exemption 1 was headed 'Defence, Security and international relations' and read:

'(a) Information whose disclosure would harm national security or defence.

(b) Information whose disclosure would harm the conduct of international relations or affairs.

(c) Information received in confidence from foreign governments, foreign courts or international organisations.'

13. Exemption 2, headed 'Internal discussion and advice', read:

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

- proceedings of Cabinet and Cabinet Committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

14. Exemption 7(a), headed 'Effective management and operations of the public service', read:

'Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;
- negotiations or the effective conduct of personnel management, or commercial or contractual activities;
- the awarding of discretionary grants.'

15. Exemption 13, headed 'Third Party's Commercial Confidences', read:

'Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.'

16. Exemption 14, headed 'Information given in Confidence', read:

'(a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.

(b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.'

17. All the exemptions cited above were subject to the preamble to Part II of the Code which stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

18. Before turning to the substantive issue of whether or not the information withheld by MoD should be released to Mr Evans, I shall look first at how MoD handled his request for that information. MoD have acknowledged that they took longer than the 20 working days advocated by the Code for their processing of his initial requests. I accept that, in this case, the material requested was not insubstantial and that the issues involved in considering its disclosure were relatively complex. However, that delay by MoD is less excusable when considered in light of the reply they eventually sent. That reply contained only the month and year of each meeting and a brief description of the purpose of the meeting (see paragraph 4). That reply was, in my view, inadequate. MoD's letter to Mr Evans, and the Permanent Secretary's subsequent comments on the complaint, have argued that Mr Evans' request appertained merely to if and when meetings had taken place, but I do not accept their interpretation of Mr Evans' request. The very fact that Mr Evans specified the range of documents of which he

wished to have sight was a clear indication, as I see it, that he was seeking information as to the detail of the meetings, not merely confirmation of their existence. MoD are, of course, correct in saying that the Code applied to information, not to documents. However, the Ombudsman and her predecessors always took the view that, where a department received a request for a copy of a document, this should have been construed as a request for all the information contained in that document. MoD recognised that they could have dealt with the initial request more effectively. Specifically, they have said that it was their usual practice, in response to general requests such as Mr Evans', to ask the requester to refine his request. MoD's failure, in that regard, was unfortunate but ultimately not detrimental to Mr Evans' case as they chose to deal with his more generally framed request at the review stage.

19. With regard to the review, a delay of some four months ensued while MoD considered the issues behind disclosure. While that delay was an understandable source of frustration for Mr Evans, I do not see that it was wholly avoidable. A substantial amount of material had been requested by Mr Evans, in respect of which MoD were considering the applicability of a number of Code exemptions, and I note that MoD kept Mr Evans informed as to the progress of their deliberations. Consequently, while I find MoD's initial response to Mr Evans' request to have been inadequate, in most respects they handled the request in compliance with the Code and I do not consider the subsequent delay at the review stage to have been altogether unreasonable. Indeed, I commend the detailed and time-consuming approach taken by MoD at that stage, which resulted in the release of redacted versions of several of the documents sought by Mr Evans.

20. I now turn to the more substantive matter of whether or not the information sought by Mr Evans should be released to him and, in doing so, I should emphasise, as did the Permanent Secretary, that the Code gave an entitlement to information, not documents, and it is on this basis that his request has been considered. MoD cited Exemptions 1, 2, 7(a), 13 and 14(a) and (b) of the Code in refusing to release to Mr Evans the further information he seeks. I shall first assess the merits of Exemption 2 which, MoD have argued, applied to a substantial amount of the documentation as the information it contains reflects frank and open debate between departmental officials and Ministers. I have seen the documentation containing that information. In summary, it comprises internal minutes containing briefings for Ministers for meetings with BAE Systems' representatives, subsequent internal reports of those meetings, minutes outlining proposals for future procurement strategies and an internal 'company overview' document concerning BAE Systems, whereby sections on 'MoD business' and comments on potential future contracts between MoD and BAE Systems have been redacted. The purpose of Exemption 2 was to allow departments the opportunity to discuss matters, particularly those which are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. Exemption 2 was only intended to protect opinion and advice, not factual information and some of the documentation I have seen does contain elements of factual information. That said, to extract that information would render it meaningless and would add nothing to the public record. I therefore see no purpose in so recommending its release. Furthermore, I am persuaded by the argument that the advice and opinion contained in internal documents of his kind depend upon candour for their effectiveness, and that the value of such advice would be substantially less if it were thought that it would be made available to a wider audience.

The question in this case, therefore, is whether or not the release of the information listed above, containing opinion and advice, would affect the frankness and candour of the advice offered in future, similar, cases. I have to say that I believe it would. As I see it, officials must be allowed to provide an objective assessment of a case without having to worry that their views would be disclosed to a wider audience. I am satisfied, therefore, that, in principle, the above information sought by Mr Evans falls within the criteria of Exemption 2.

21. But what of the remaining information, not covered by Exemption 2? MoD have cited Exemption 7(a) as justification for withholding much of that information, including reports of meetings and conversations between senior MoD officials and BAE Systems representatives, together with redacted text from a 'company overview', compiled by MoD, relating to BAE Systems, concerning 'MoD Business.' The purpose of Exemption 7(a) was to protect from disclosure any information the disclosure of which could prejudice the effective management and operations of the public service. In particular, it concerned information whose disclosure could adversely effect the competitive position of a department, their negotiations, or their commercial or contractual activities. The information withheld by MoD under this exemption centres on internal MoD considerations in relation to specific commercial dealings with BAE Systems and the resultant opinions and proposals arising from meetings between MoD officials and BAE Systems representatives. Consequently, it is clear to me that, in principle, the information falls squarely within the scope of Exemption 7.

22. That is not, however, the end of matters. Both Exemption 2 and Exemption 7(a) incorporated a harm test, which posed the question: would the harm that might be caused by disclosure of the protected information be outweighed by the public interest (if any) in making it available? The Permanent Secretary has argued that, while it is in the public interest for such dialogue to be fully recorded, particularly in a case such as this where contracts and the potential commitment of public money is at hand, he was of the view that there was 'a significant danger that this process will be undermined if officials and Ministers believe that candid exchanges will become public knowledge, thereby adversely affecting the management and operations of the public service'. He added that, in this case, there was 'a real prospect of damaging the relationship with BAE Systems and also their commercial position, and, in turn, prejudicing the competitive position of the MoD'. I have to say that, having had sight of the information withheld, I am persuaded that while there is a very real public interest in ensuring public money is spent wisely by public bodies, that very interest could itself be potentially damaged through the disclosure of the information in question. Not only might such a disclosure cause harm to the future need for frank and candid internal discussion between Ministers and officials, but I believe it might also have a negative impact on the ongoing commercial and contractual activities of the MoD and its business partners. It is on that basis that I consider that the balance of the argument in this instance lies against making any further disclosure and that Exemptions 2 and 7(a) were correctly applied.

23. There is also a small amount of information that does not fall within the scope of either Exemptions 2 or 7(a) but which MoD believe should be withheld under either Exemption 1 or 13. Having carefully considered that information I am satisfied that it was not only correctly withheld but also that the potential harm outweighs the public interest in disclosure. Since I have concluded that Exemptions 1, 2, 7(a) and 13 apply to the information sought by Mr Evans, no useful

purpose would be served by my discussing whether or not the other exemptions additionally cited by MoD, namely Exemptions 14(a) and (b), have any applicability. I therefore make no findings on those issues.

24. In the light of the above, I asked the Permanent Secretary of MoD for his comments on my findings. In response he said that, while he welcomed my commendation of the way they had handled the internal review of Mr Evans' request, he questioned the finding that the initial reply to the request had been inadequate (paragraph 18). He said that he accepted the position, taken by the Ombudsman and her predecessors, that a request for a copy of a document should be construed as a request for all the information contained in the document. However, his concern in this case was that Mr Evans was speculating about the existence of documents rather than describing specific information in which he had an interest. The Permanent Secretary's contention was that, in order to respond to requests for information, public authorities must know what information an applicant requires and they should then be free to determine which documents (if any) contain that information. He said that Mr Evans had not made his interest clear in this case: instead he had targeted, in general terms, a class of documents (records of meetings held at Ministerial level) on the suspicion that this would yield information of interest to him. He therefore believed that their approach to his request, interpreting it in the way they had, had been valid. Where he accepted that they were wrong, which was consistent with the above interpretation, was in failing to give Mr Evans the opportunity to resubmit his request as a refined request for information.

25. The Permanent Secretary said that he wanted to spell out his concerns about this point of principle regarding information and documents because of the wider potential relevance to the handling of a generic type of request made under the Freedom of Information Act. He said that it did not affect the immediate issue to hand because it had been recognised that their decision to review the full range of documents at internal review had not been ultimately detrimental to Mr Evans' case. He confirmed that he accepted the outcome of the investigation.

Conclusion

26. While I have found MoD's handling of Mr Evans' request for information to have been not entirely without fault, I am satisfied that the information requested by Mr Evans was correctly withheld by them under Exemptions 2 and 7(a) of the Code. Consequently, I do not uphold the complaint.

Office of the Deputy Prime Minister

Case No: A.9/05

Refusal to release a Ministerial Direction

Summary

In November 2000 in answer to a Parliamentary Question from Matthew Taylor MP, the Secretary of State of the then Department for the Environment, Transport and the Regions declined to place in the House of Commons Library the text of, and supporting documents for, Directions made by Ministers in his department in 1997 and 1998, citing Exemption 2 of the Code. In January 2004, in the light of a ruling by the Ombudsman in another case involving a Ministerial Direction, Mr Taylor asked the Deputy Prime Minister to review his predecessor department's decision not to release information about one of those Directions which related to the Millennium Dome. The Permanent Secretary of the Office of the Deputy Prime Minister reiterated that Exemption 2 applied to the information sought by Mr Taylor and refused to provide it. After careful consideration of the undisclosed material, and taking into account the age of that material, the Ombudsman concluded that the balance of the harm test operated in favour of its release, and she recommended that it be supplied to Mr Taylor. She welcomed the Permanent Secretary's acceptance of that recommendation.

1. Mr Taylor complained that the Office of the Deputy Prime Minister (ODPM) refused to provide him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff but I am satisfied that no matter of significance has been overlooked. I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Code are couched in the past tense.

Ministerial Directions

2. Where an Accounting Officer of a government department considers that a Minister is contemplating a course of action that would be likely to infringe financial propriety or regularity, or the Accounting Officer's wider responsibilities for economy, efficiency and effectiveness, it is the duty of the Accounting Officer to so advise the Minister. If that advice is then overruled the Accounting Officer will be required to seek a written Direction from the Minister to enable that action to be carried out. If such a Direction is issued by the Minister, the Accounting Officer must comply with it but must also notify the Treasury and pass the relevant documents to the Comptroller and Auditor General.

The complaint

3. On 15 November 2000 Mr Taylor received a written answer (*Hansard*, column 652W) to a Parliamentary Question in which he had asked the Secretary of State of what was then the Department for the Environment, Transport and the Regions (DETR) if, pursuant to an earlier answer from the Chief Secretary to the Treasury relating to Ministerial Directions, he would place in the House of Commons Library the text and supporting documentation of such Directions made by Ministers in his department in 1997 and 1998. Replying on the Secretary of State's behalf, the then Parliamentary Under-Secretary of State declined to do so. Citing Exemption 2 of the Code, she said that providing the information sought would harm the frankness and candour of internal discussion within government.

4. On 9 January 2004 Mr Taylor wrote to the Deputy Prime Minister saying that he had been reviewing some old Parliamentary Answers in the light of a ruling that the Ombudsman had made in another case concerning a Ministerial Direction (A.37/03 – *Investigations Completed July 2003-June 2004:* HC 701). Mr Taylor said that, in that

case, the Ombudsman had concluded that the public interest in the release of the Direction, which related to the Silverstone by-pass, outweighed the reasons for withholding the information under Exemption 2 of the Code. He said that, as a result, the Department for Transport had agreed to place both the direction and relevant submissions by civil servants into the public domain. Mr Taylor referred to the written answer he had received on 15 November 2000 (paragraph 3) and asked the Deputy Prime Minister to review, under the Code, his predecessor department's decision not to disclose information relating to a Direction on the Millennium Dome. He asked for a full reply within 20 working days of receipt of his letter.

5. On 16 February 2004 the Permanent Secretary of ODPM replied to Mr Taylor and said that she had reviewed his original information request in the light of the Silverstone by-pass case, but had concluded that providing the information would occasion significant harm to the frankness and candour of internal discussion within government as set out in Exemption 2 of the Code. She expressed regret that she was unable to accede to Mr Taylor's request.

ODPM's comments on the complaint

6. In her comments to the Ombudsman of 21 June 2004, the Permanent Secretary of ODPM said that, while there appeared to be a number of similarities between this case and the decision that the Ombudsman had made in the Silverstone case (A.37/03 – see paragraph 4), she believed that there were significant differences between the two cases. First, she said that the decision in the Silverstone case had been made against the background of disclosure of certain documents by the then DETR. She said that the Ombudsman's decision had stated that the arguments for withholding the documents in question were undermined by the fact that those documents did not contain any information which had not already been placed in the public domain voluntarily by the department. The Permanent Secretary said that there had been no such voluntary disclosure in this case. She said that Exemption 2 of the Code existed to protect the ability of officials to deliver, and Ministers to receive, frank and candid advice in private and away from the public gaze. She said that setting out reasons was recognised as essential for demonstrating that those decisions had been properly taken and, as such, was in the public interest. She said that it was not, however, in the public interest to provide information as to the process and the detail of how those decisions were reached; and that to do so not only risked harming the frankness and candour of written advice but also risked harming the historical record by making officials think twice about recording information if they were concerned that what they wrote could be made public. The Permanent Secretary said that ODPM believed that in this case Exemption 2 of the Code applied because disclosure of the accounting officer's advice relating to the Direction risked harming the frankness and candour of future internal advice of this kind, and that the harm that could be caused by disclosure outweighed the public interest in the release of the documents in question.

7. The Permanent Secretary said that the second point to be made was that, whereas the advice to Ministers and the ministerial decisions in the Silverstone case had been taken under the current, Labour, administration, those in the case of the Millennium Dome had been taken under the previous, Conservative, administration. She said that the convention remained in place that Ministers in a current administration were not permitted access to papers (advice and decisions) of Ministers in a previous administration of a different political complexion. She further said that the convention existed to protect the ability

of governments to consider and discuss policy without fear of their deliberations being made available to their political opponents, and to protect the impartiality of Civil Service advice being threatened by Ministers seeing, out of context, advice given to the previous administration. She said that to permit public disclosure of the papers requested by Mr Taylor would mean that Ministers in this administration could indirectly gain access to these documents and thus breach the convention. She cited the Cabinet Office's Guidance on Interpretation of the Code (paragraph 2.6 in part II) which specifically referred to the importance of maintaining this exemption. She said that ODPM had concluded that, because of the constitutional conventions, the public interest in maintaining the exemption in this instance outweighed the public interest in disclosing the information sought by Mr Taylor.

The Code of Practice on Access to Government Information

8. Exemption 2 of the Code was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

9. In the preamble to Part II of the Code, under the heading 'Reasons for Confidentiality', it stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available'.

Assessment

10. Before turning to the substantive issue of whether or not the information sought by Mr Taylor should be released to him, I shall look first at how ODPM handled his request. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005, all requests for information should have been treated as if made under the Code, irrespective of whether or not it was referred to by the applicant. The Ombudsman and her predecessors have said that it was good practice, if departments refused information requests, for them to identify in their responses the specific exemptions in Part II of the Code on which they were relying in making that refusal. Also, where information had been refused, the possibility of a review under the Code needed to be made known to the person requesting the information at the time of the refusal, as did the possibility of making a complaint to the Ombudsman if, after the review process had been

completed, the requester remained dissatisfied. Finally, departments were expected to respond to requests for information within 20 working days, although the Code recognised that the target might have needed to be extended when significant search or collation of material was required. While for the most part ODPM and its predecessor department handled Mr Taylor's information request in accordance with the requirements of the Code, I am disappointed to note that ODPM did not advise him that, following the review, he was entitled to complain to the Ombudsman. Mr Taylor is experienced in the workings of the Code and was not disadvantaged by that oversight. However, that might not have been the case had the person seeking information been unfamiliar with the Code's provisions.

11. I now turn to the question of whether or not the information sought by Mr Taylor should be released to him. In doing so I should explain that the information in question comprises a submission dated 10 January 1997 from the then Permanent Secretary of the former Department of the Environment to the then Secretary of State for the Environment seeking a Direction to incur expenditure relating to the Millennium Exhibition, and the resulting Ministerial Direction made on 16 January 1997. I should also point out that the Code gave no right of access to documents: the right, subject to exemption, was only to information. However, the Ombudsman and her predecessors took the view that the release of the actual documents was often the best way of making available information that was recommended for disclosure.

12. In refusing to provide the information sought by Mr Taylor, ODPM and its predecessor department cited Exemption 2 of the Code (paragraph 8). The purpose of Exemption 2 was to allow government departments the opportunity to discuss matters, particularly those which were likely to be sensitive or contentious, on the understanding that their thinking would not be exposed in a manner likely to inhibit the frank expression of opinion. I recognise the strength of the argument that advice and recommendation such as that contained in the Permanent Secretary's advice to the Secretary of State depends on candour for its effectiveness, and also that the value of such advice would be substantially reduced if it were thought that it would be made routinely available to a wider audience. Exemption 2 does not, however, prevent the disclosure of factual information and ODPM are unable, therefore, to rely on this exemption as a basis for withholding any of the factual information contained in the documents under consideration. As ODPM have not cited any other Code exemption to justify the non-disclosure of the factual information in the submission of 19 January 1997 or the Ministerial Direction of 16 January 1997, I see no reason why it should not be released to Mr Taylor.

13. With regard to the remainder of the information being sought by Mr Taylor, I am satisfied that those parts which constitute either advice or recommendation are covered, in principle, by Exemption 2. But that is not the end of the matter. Exemption 2 incorporated a harm test (paragraph 9), which was a test of whether or not any harm likely to arise from the disclosure of the information requested would be outweighed by the public interest in making it available. I fully accept that the provision of candid advice by officials to Ministers might be hampered if their views were in all circumstances to be made widely available. I should say at this point that I also recognise that in the Silverstone case there had already been an agreement to place in the House of Commons Library a copy of the relevant submission and Ministerial Direction, and it was only further background information

that was being considered for release, which is not the situation here. I should emphasise, however, that each request for information made under the Code must be considered on its individual merits.

14. Having carefully considered the undisclosed material and the terms in which the advice to the Secretary of State and the Ministerial Direction were expressed, it seems to me that any potential harm that would be caused by its release is outweighed by the public interest in making the information publicly available. In reaching this decision I have taken account of the fact that the information is now some eight years old and that the sensitivity of information usually reduces over time. I have also considered ODPM's argument that the release of the information would breach the convention whereby current administrations are not permitted to see documents prepared by a previous administration of a different political complexion. My role is to consider the disclosure of government-held information under the terms of the Code. If such a disclosure was likely to lead to a breach of a long-standing convention such as the one referred to by ODPM it may be a factor in my consideration, but not necessarily an overriding one. In this instance I do not believe it is a sustainable reason under the Code to withhold the information sought by Mr Taylor solely because its release would mean that Ministers in the present administration could indirectly gain access to it. As the Guidance on the Interpretation of the Code explains, the convention operates primarily to prevent the release of information which might undermine collective Cabinet responsibility. I do not see the information sought by Mr Taylor as falling within that category, and I consider that the balance of the harm test operates in favour of its release. I therefore recommended to the Permanent Secretary that it be released to Mr Taylor.

15. How then should that information be provided to Mr Taylor? It seems to me that the most sensible way of doing so would be to release the submission and the Ministerial Direction to him, edited to remove the names of the officials to whom those documents were copied in accordance with usual practice. In response, the Permanent Secretary acknowledged the public interest involved in this case, and agreed that the two documents formed an integral part of the decision-making process. Taking into account the public interest that would be served by making the entire correspondence publicly available, and in view of the period of time that had elapsed since the events referred to in the exchange, she accepted that the balance of the public interest was now in favour of release. She agreed, therefore, to disclose the documents to Mr Taylor.

Conclusion

16. I found that Exemption 2 could be held to apply to some, but not all, of the information sought by Mr Taylor. However, having applied the harm test, I recommended that the entire contents of the two documents in question should be released to him on the grounds that the public interest outweighed any potential harm that would be caused by its disclosure. I am pleased that ODPM accepted my recommendation and I regard their willingness to disclose the information requested by Mr Taylor to be a satisfactory outcome to a justified complaint.

Foreign and Commonwealth Office

A.42/04

Refusal to release information relating to allegations of bribery and corruption of foreign officials and politicians

Summary

Mr Evans asked the Foreign and Commonwealth Office (FCO) for copies of reports they had received from British Diplomatic posts overseas regarding allegations of bribery and corruption of foreign officials and politicians. FCO declined to provide the information sought, citing Exemptions 2, 4(b) and (c), 12, 14 and 15 of the Code. The Ombudsman found that Exemption 4(b) applied to some of the information sought and that FCO were entitled to withhold that information on the basis that the public interest in its disclosure did not outweigh the potential harm that would be caused by its release. The Ombudsman also found that Exemption 4(c), an absolute exemption not subject to the harm test, applied to the remaining information. Since all of the information requested was covered by Exemptions 4(b) or (c) the Ombudsman did not go on to consider whether the other exemptions cited by FCO could also be held to apply.

1. Mr Evans complained that the Foreign and Commonwealth Office (FCO) had refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

Background to the complaint

2. Part 12 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act) made two important changes to the law of corruption. Section 108 clarified and confirmed that the existing offences of corruption applied to the bribery of foreign public office holders, including foreign MPs, judges, ministers and 'agents' (as defined by the Prevention of Corruption Act 1906). Section 109 gave courts in the United Kingdom (UK) jurisdiction over certain offences of corruption when they were committed overseas by UK nationals or by bodies incorporated under UK law. The relevant offences are: (a) the common law offence of bribery; (b) the offences under section 2 of the Public Bodies Corrupt Practices Act 1889; and (c) the first two offences under section 1 of the Prevention of Corruption Act 1906.

3. Part 12 of the 2001 Act came into force on 14 February 2002 and cases can only be prosecuted under it if a relevant offence took place after that date. If all the action took place before 14 February 2002, a prosecution can still be considered provided that some part of the crime took place in the UK or the offender was a UK national in the service of the Crown (see section 31 of the Criminal Justice Act 1948).

4. On 4 January 2002 FCO provided guidance about the 2001 Act to all of their overseas posts. The guidance required that any of their staff who became aware of, or received information relating to, acts of bribery committed by UK nationals or legal persons, should report the matter immediately to FCO. The guidance said that the reports would be passed to the appropriate authorities in order for them to decide whether or not to pursue an investigation.

The complaint

5. On 31 December 2003 Mr Evans wrote to and e-mailed FCO about reports that they had received from British Diplomatic posts overseas regarding allegations of bribery and corruption of foreign officials and politicians. Mr Evans said that he had noted from an answer provided to a Parliamentary Question (*Hansard,* 28 October 2003, column 189W) that four such reports specifically relating to guidance on the 2001 Act had been received by FCO since 14 February 2002. Mr Evans asked, citing the Code, for copies of these four reports and any further such reports received by FCO since 28 October 2003.

6. On 6 January 2004 FCO acknowledged receipt of Mr Evans' information request. They responded substantively on 29 January 2004. They said that as well as the four reports referred to in the Parliamentary Answer of 28 October 2003, FCO had received one subsequent report. They said that they had considered each report individually but had determined that the information contained within all of them was exempt from the commitments to provide information under the terms of the Code. They said that they believed that Exemptions 2, 4(b), 4(c), 12, 14 and 15 were applicable. FCO said that, where the test of harm or prejudice applied to an exemption, they had determined that the harm likely to arise from disclosure outweighed the public interest in making the information available. FCO also advised Mr Evans of his right, under the Code, to seek an internal review of their decision.

7. On 2 February 2004 Mr Evans wrote to FCO seeking an internal review. He said that he believed, in this case, that the public interest clearly outweighed the benefits of keeping the information secret. He highlighted the guidance provided to overseas posts on 4 January 2002 (paragraph 4) and said that he believed that disclosure of the information he was seeking would be an effective way of publicising the allegations of bribery and of preventing future corruption. Mr Evans also suggested that FCO should release the requested information with any sensitive information redacted. Moreover, he asked FCO to clarify why they thought Exemption 15 was applicable to the information he had sought. FCO acknowledged Mr Evans' review request on 5 February 2004 and responded substantively on 4 March 2004. They said that, having reviewed the papers again, they considered that the exemptions previously cited were correct. They said that they had also considered whether it would be possible to release redacted versions of the reports, as Mr Evans had suggested, but had decided that to do so would render the documents meaningless. FCO also clarified their use of Exemption 15, which they said had been cited in relation to the Data Protection Act 1998. Finally, FCO advised Mr Evans of his right to now make a complaint to the Ombudsman.

Department's comments on the complaint

8. In providing his comments on the complaint, FCO's Director for Strategy and Information (the Director) said that Mr Evans' request for information was refused on the grounds that disclosing the information he sought would harm the frankness and candour of internal discussion and would prejudice the enforcement or proper administration of the law. They considered that the second and fourth strands of Exemption 2 and Exemption 4(b) applied and that the public interest in disclosing the information did not outweigh the harm which would be caused to the interests covered by the exemptions. The Director said that they had also applied Exemptions 4(c), 12, 14 and 15 to some of the information. He said that, in accordance with the Code, they had weighed the harm to internal discussion and advice and to the enforcement of proper administration of the law against the public interest in making the information available but they believed that the public interest was best served by non-disclosure. The Director also said that they had considered releasing redacted versions of the documents at the time of Mr Evans' original request, at internal review and again in the light of the complaint made to the Ombudsman. However, he said that their view remained that if they were to remove all of the sensitive information (i.e. the country name, individuals' names, company names and the nature of the allegations), the documents would not contain anything meaningful. For my information, the Director enclosed copies of the guidance that they had sent to their overseas posts about the

2001 Act (paragraph 4). He said that this information had been provided to Mr Evans in response to a separate request made under the Code.

Exemptions of the Code

9. In the preamble to part II of the Code, under the heading 'Reasons for confidentiality', it states:

'The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

10. Exemption 2 is headed 'Internal discussion and advice' and the parts cited by FCO read as follows:

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

- ...
- internal opinion, advice, recommendation, consultation and deliberation;
- ...
- confidential communications between departments, public bodies and regulatory bodies.'

11. Exemption 4 is headed 'Law enforcement and legal proceedings' and the parts cited by FCO read as follows:

'(b) Information whose disclosure could prejudice the enforcement or proper administration of the law, including the prevention, investigation or detection of crime, or the apprehension or prosecution of offenders.

(c) Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.'

12. Exemption 12 is headed 'Privacy of an individual' and reads:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

13. Exemption 14 is headed 'Information given in confidence' and reads:

'(a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.

(b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information.

(c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.'

14. Exemption 15 is headed 'Statutory and other restrictions' and reads:

'(a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.

(b) Information whose release would constitute a breach of Parliamentary Privilege.'

Assessment

15. In assessing this complaint I have not only considered the substantive issue of whether or not the information requested by Mr Evans should be disclosed to him, but also the way in which FCO handled his request. As regards the latter, I am pleased to note that FCO responded promptly to Mr Evans' request for information and to his request to have the initial decision reviewed. Moreover, FCO identified the specific exemptions in part II of the Code on which they were relying in making their decision and advised Mr Evans both of his right to seek a review under the Code and of the possibility of making a complaint to the Ombudsman if, after the completion of the review process, he remained dissatisfied. It is clear to me that FCO handled the matter in full accordance with the requirements of the Code, and for this I commend them.

16. I turn now to the question of whether or not Mr Evans is entitled, under the Code, to the information that he requested. I should begin by saying that the non disclosure of information that FCO have withheld under the Data Protection Act 1998 is not a matter for the Ombudsman: it is for the Information Commissioner's Office, or for the courts, to interpret data protection legislation and its applicability in individual cases. I am, therefore, confining my assessment solely to matters that fall within the scope of the Code. In doing so, I should emphasise that the Code gives an entitlement only to information, not to documents, and it is on this basis that Mr Evans' complaint has been considered.

17. Mr Evans requested copies of any reports received by FCO from overseas diplomatic posts specifically relating to the guidance on the 2001 Act that was issued on 4 January 2002 (paragraph 4). FCO identified five such reports, which relate to five separate cases of alleged bribery and corruption by UK nationals abroad. However, it is clear from the papers provided to me by FCO that the information relating to these five allegations was not always contained in a single report. While FCO's files may have started with a report from an overseas post about alleged corruption, that initial allegation was followed by a raft of documents between various organisations and offices seeking further background information and clarification of the allegations. At some point in the process, the file of documents containing the allegations was forwarded to the appropriate authorities. For simplicity, however, I shall continue to refer to the information sought by Mr Evans as the five reports.

18. All of the information contained in those five reports was collected in consequence of FCO's guidance on the 2001 Act that was issued to their overseas posts on 4 January 2002. That guidance required that any of their staff who became aware of, or received information relating to, acts of bribery committed by UK nationals or legal persons, should report the matter immediately to

FCO. The information would then be forwarded to the appropriate authorities to further investigate the circumstances of the case and to decide whether or not to prosecute the offenders. Four of the five reports received by FCO at the time of Mr Evans' request related to events that had taken place after 14 February 2002 and could possibly therefore lead to prosecutions under the 2001 Act. One of the reports concerned events that had taken place before 14 February 2002 and could not, therefore, be considered under the 2001 Act. However, the information in that case was provided on the premise that there was a possibility of a prosecution under the 2001 Act and, although it soon became apparent to FCO that that was not in fact possible, I understand that there was still a possibility that the information provided could have led to a prosecution, depending on the particular circumstances of the case (paragraph 3).

19. Of the various exemptions of the Code cited by FCO, I believe that the ones most relevant to this information are Exemptions 4(b) and 4(c) (paragraph 11). I shall turn first to Exemption 4(b) and in doing so I shall need also to have in mind the harm test, which requires me to consider whether or not the harm likely to arise from disclosure is outweighed by the public interest in its release (paragraph 9).

20. In coming to a view on this matter I have taken into account the Cabinet Office's Guidance on Interpretation of the Code (the Guidance); in particular paragraph 4.10 of part II, which includes an extract from the White Paper on Open Government and reads:

'Investigation of suspected crime including fraud must normally be kept secret from the suspect and others. Witness statements, names and addresses of witnesses and reports from the police and others to prosecutors could, if disclosed other than as required by the courts, jeopardise law enforcement or the prevention or prosecution of crime, or be extremely unfair to a temporary suspect against whom (in the event) no real evidence existed. It is in the interests of both the individuals concerned and the integrity of the prosecution process that material relating to both live and completed prosecutions and to prosecutions which do not go ahead can be kept confidential.'

The information protected by Exemption 4(b) is wide-ranging: the Guidance refers, for example, to 'information obtained or prepared in the course of [crime or fraud] investigations' and 'information obtained in confidence as part of an investigation... where it is likely that disclosure could prejudice co-operation with such inquiries in future cases' (part II, paragraph 4.11). The latter example is relevant to this case because FCO were particularly concerned that the disclosure of information provided by third parties, including foreign governments and organisations, could prejudice the future supply of such information and undermine the trust that had been placed in the UK Government to keep such information confidential. While I am satisfied that information of this type falls within the ambit of Exemption 4(b), it should be noted that there are other exemptions of the Code that could also be relevant to the same information, most notably Exemption 14(b) (paragraph 13), which was also cited by FCO, and Exemption 1(c), which relates to information received in confidence from foreign governments, foreign courts or international organisations.

21. In the light of the above, I am satisfied that the information sought by Mr Evans falls, in principle, within the scope of Exemption 4(b) of the Code. However, what of the harm test (paragraph 9)? Mr Evans argued that the release of the reports he requested and the subsequent publicity

surrounding them would be an effective way of preventing corruption in the future (paragraph 7). While that may be true, the most effective way of deterring such corruption is by prosecuting offenders under the terms of the 2001 Act. To my mind, the means by which FCO and other organisations gather information and investigate allegations of corruption must be safeguarded to ensure that the processes leading to a prosecution under the 2001 Act are not prejudiced. While I acknowledge the validity of Mr Evans' argument in disclosing this information, in the light of the Guidance and my comments above, I consider that there is a reasonable likelihood that the disclosure of the five reports he requested could prejudice the enforcement or proper administration of the law. Moreover, I do not believe that this potential harm is outweighed by the public interest in disclosure. I therefore conclude that Exemption 4(b) of the Code can be held to apply to this information.

22. Furthermore, I believe that Exemption 4(c) is also relevant to the five reports. What needs to be demonstrated for the purposes of this exemption is that the information gathered by FCO has, or might have, resulted in legal proceedings. It is clear to me that the information was gathered solely on the premise that an investigation and prosecution might have resulted. I am therefore satisfied that Exemption 4(c) applies to all of the information obtained for that purpose. This part of Exemption 4 does not incorporate a harm test and, in this instance, I cannot therefore balance the potential harm that would be caused by disclosing this information against the public interest in its release.

23. While there may be a small amount of information in the five reports that is not covered by Exemptions 4(b) or 4(c), I agree with FCO that to remove everything that is exempt from disclosure would render the remaining information meaningless. I therefore uphold FCO's decision to refuse to provide any of the information requested by Mr Evans. As such, I see no merit in assessing the applicability or otherwise of the other exemptions cited by FCO to the same information.

Conclusion

24. I am satisfied that FCO were justified in refusing to disclose the information requested by Mr Evans under Exemptions 4(b) and 4(c) of the Code. I do not, therefore, uphold his complaint.

Foreign and Commonwealth Office

Case No: A.43/04

Refusal to provide information about contacts between FCO and the Jersey Attorney General relating to the freezing of trust funds

Summary

Mr Evans asked for copies of documents relating to meetings between FCO and the Jersey Attorney General relating to the freezing of the funds of Trusts whose beneficiaries included the Foreign Minister of Qatar. FCO refused to provide the material, citing Exemptions 1(b), 2 and 4(c) of the Code. Mr Evans sought a review of the decision, contending that the public interest in disclosure outweighed the benefits of keeping the information secret. FCO maintained their reliance on the exemptions they had quoted. The Ombudsman found that FCO were entitled to rely on Exemption 4(c) as a basis for withholding much of the information sought by Mr Evans. She also considered that Exemption 1(b) applied to the remaining information and concluded that the harm that might be caused by the release of the information would outweigh the public interest in its release. She did not uphold the complaint.

1. Mr Evans complained that the Foreign and Commonwealth Office (FCO) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff but I am satisfied that no matter of significance has been overlooked.

Background to the complaint

2. On 4 July 2003 Mr Evans e-mailed FCO in connection with a Parliamentary Answer about contacts between FCO and the Jersey Attorney General in relation to the freezing of the funds of Trusts whose beneficiaries included the Foreign Minister of Qatar (*Hansard* column 1359W – 13 June 2002 refers). Mr Evans noted that there had been four such meetings in 2001, following which investigations into the Trusts were discontinued. Mr Evans asked, citing the Code, for copies of all documents held by FCO relating to the meetings, including minutes, agendas, briefing material, memos, telegrams, cables, e-mails, records of conversations, and telephone logs.

3. FCO responded on 31 July 2003. They said that they had considered all relevant material held by them but had determined that all of the information was exempt from the commitments to provide information under the terms of the Code. They said that they believed that Exemptions 1(b), 2 and 4(c) of the Code were applicable. FCO also said that they had considered the public interest in the disclosure of the information but had concluded that it was outweighed by the harm that would be caused by the release of the information. FCO advised Mr Evans of his right, under the Code, to seek an internal review of their decision.

4. On 5 August 2003 Mr Evans wrote to FCO, seeking an internal review. He said that he believed that, in this case, the public interest outweighed the benefits of keeping the information secret. He understood that there had been a suggestion that the British Government had put pressure on the Jersey authorities to drop their investigation, and that the public interest would be better served by disclosing the requested information and thereby shedding light on the validity of that suggestion. FCO responded substantively on 26 November 2003 and apologised for the delay. They said that, having reviewed the papers in the light of Mr Evans' comments, they considered that the original decision to exempt the information from disclosure was correct. They were satisfied that the Code exemptions had been correctly applied and that the public interest had been adequately

considered. They added, by way of additional information, that the documents showed that FCO had not obstructed the Jersey Attorney General's investigation. They advised Mr Evans of his right to complain to the Ombudsman if he remained dissatisfied, which he duly did.

FCO's comments to the Ombudsman on the complaint

5. The Director for Strategy and Information at FCO responded to Mr Evans' complaint on 6 May 2004. Firstly, he said that he regretted that their reply to Mr Evans' request for an internal review of their original decision was delayed. He explained that they had kept Mr Evans informed throughout the period of the delay, which was caused by substantial pressure of work on the department concerned.

6. Secondly, in respect of the substance of the information sought by Mr Evans, the Director said that FCO had refused Mr Evans' request, and upheld that refusal at internal review, on the grounds that disclosing the information would harm international relations between the United Kingdom and Qatar and the frankness and candour of internal discussion. In addition, he explained that the information related to investigations which have or might have resulted in proceedings. He said that FCO therefore considered that Exemptions 1(b), 2 and 4(c) of the Code applied and that the public interest in disclosing the information did not outweigh the harm which would be caused to the interests covered by the exemptions. With regard to FCO's citing of Exemption 1(b), the Director enclosed a copy of a minute from FCO's Middle East department, which is responsible for relations with Qatar. The minute set out the concerns behind the decision to apply Exemption 1(b) and stated that they were in no doubt that bilateral relations with Qatar would be harmed by the disclosure. The Director further explained that FCO considered Exemption 2 applied because some of the information they held concerned discussions with other government departments and the Jersey Attorney General's office or was prepared in response to internal FCO requests for advice.

The Code of Practice on Access to Government Information

7. In refusing to provide the information sought by Mr Evans, FCO cited Exemptions 1(b), 2 and 4(c) of the Code. Exemption 1(b) of the Code is headed 'Defence, security and international relations' and reads:

'Information whose disclosure would harm the conduct of international relations or affairs.'

Exemption 2 is headed, 'Internal discussion and advice' and reads:

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberations;
- projections and assumptions relating to internal policy analysis, analysis of alternative policy options and information relating to rejected policy options;
- confidential communications between departments, public bodies and regulatory bodies.'

Exemption 4(c) is headed 'Law enforcement and legal proceedings' and reads:

- 'Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.'

8. Exemptions 1(b) and 2 are subject to the preamble to Part II of the Code which states that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

9. Before turning to the substantive issue of whether or not the information requested by Mr Evans should be released, I shall look first at how FCO handled his request for it. The Ombudsman has said that it is good practice, if departments refuse information requests, for them to identify in their responses the specific exemption or exemptions in Part II of the Code on which they are relying. Moreover, the possibility of a review under the Code needs to be made known to the person who requests the information at the time of that refusal, as does the possibility of making a complaint to the Ombudsman if, after the completion of the review process, the requester remains dissatisfied. Finally, departments are expected to respond to requests for information within 20 working days, although the Code recognises that this target may need to be extended when significant search or collation of material is required.

10. From my examination of the papers, it is clear that FCO fulfilled their obligations under the Code with regard to responding to Mr Evans' information request, citing the relevant exemptions and outlining his right to an internal review and the option of complaining to the Ombudsman. There was, however, a substantial delay by FCO in actioning Mr Evans' request for a review, a delay for which FCO have apologised and offered the explanation of pressure of work. That delay is regrettable and warrants my criticism.

11. However, I turn now to the question of the information sought by Mr Evans and, in doing so, I should emphasise that the Code gives an entitlement only to information, not to documents, and it is on this basis that his request has been considered. Mr Evans' request was for copies of all the documents appertaining to the four meetings held between FCO and the Jersey Attorney General with regard to Trust funds involving the Foreign Minister of Qatar and the latterly discontinued investigation. In refusing to provide the information, FCO cited Exemptions 1(b), 2 and 4(c). Exemption 4(c) is intended to protect from disclosure information relating to legal proceedings, or as in the case of the information sought by Mr Evans, information which has been gathered in the course of an investigation, regardless of whether or not that investigation resulted in proceedings. The Code envisaged that releasing such information, other than in court or as part of other appropriate proceedings, could prejudice the effective operation of the body conducting operations, and cause unjustified harm to the subject of an

investigation. I have examined very carefully the information sought by Mr Evans. Having done so, it is clear that most of the information he seeks directly centres on the investigation into the Trust funds and I am satisfied that that information can reasonably be said to be covered by Exemption 4(c). I should add that Exemption 4(c) of the Code is an absolute exemption: there is no reference to harm or prejudice that would allow me to consider the argument as to whether or not the public interest in the information was sufficiently strong to outweigh the harm which would arise from its disclosure.

12. There are, however, elements of the information sought by Mr Evans which do not fall squarely within Exemption 4(c) as they do not directly relate to the information obtained during the course of the investigation. I shall therefore consider one of the further exemptions cited by FCO in relation to that information, Exemption 1(b). That exemption is intended to protect information the disclosure of which would harm the conduct of international relations or affairs. It is clear that, from the outset, FCO were mindful of the potential damage any disclosure would have on bilateral relations with Qatar. Indeed, they sought internal advice from their Middle East department on that very point following Mr Evans' initial request (see paragraph 6). The resultant advice concluded that the disclosure of the information sought by Mr Evans would cause 'a great deal of bilateral problems.' Having seen the information in question and the advice from the Middle East department, I am satisfied that those concerns are reasonably held.

13. However, this is not the end of the matter. Exemption 1(b) has a harm test which requires me to consider not only if the information sought is covered by the exemption but if the release of it would cause harm when balanced against the public interest in having that information made available. Mr Evans has argued strongly that it would be in the public interest to release the information (see paragraph 4) and there has certainly been press coverage about the investigation. I agree with Mr Evans' argument that the public have a legitimate interest in knowing whether there is any truth in the suggestion that the British Government put pressure on the Jersey authorities to drop the investigation. But what of the harm that would be caused to the British Government's conduct of international relations? FCO have assured Mr Evans that they 'did not obstruct the Jersey Attorney General's investigation'. Having seen the documentation surrounding the meetings, I am satisfied that, beyond the assurance given by FCO, disclosure of the further information sought by Mr Evans and which is not covered by Exemption 4(c), would cause harm to the British Government's relations with Qatar. The internal papers I have seen, together with the internal advice from FCO, makes clear the importance of maintaining relations with Qatar and I am not persuaded that the public interest in the further release of information outweighs the similarly legitimate public interest in maintaining those bilateral relations. That being so, I find that FCO were entitled to rely on both Exemption 4(c) and 1(b) as a basis for denying Mr Evans access to the information. Since I consider that those exemptions apply to the information sought in its entirety, little purpose would be served by an assessment of whether Exemption 2, also cited by FCO, is likewise applicable.

Conclusion

14. While I have criticised FCO for the delay in conducting a review of their decision in Mr Evans' case, I am satisfied that they acted correctly in refusing to release the information that he sought.

Foreign and Commonwealth Office

Case No. A4/05

Refusal to provide copies of representations about detainees at Guantanamo Bay

Summary

Mr S asked for copies of all representations made to FCO about the status and conditions of detention of the people detained at Guantanamo Bay. FCO said that they were unable to provide the information and cited Exemptions 9 and 12 of the Code. They said that they had received over 1,700 letters about the detainees and that it would require an unreasonable diversion of resources to provide the information requested by Mr S. It was clear that most letters did specify whether the author would have any objections to their letter being made public, and in such cases FCO would need to contact the correspondents concerned, which would be an extremely time consuming task.

The Ombudsman accepted that, while the public had a right to information about subjects such as the detainees at Guantanamo Bay, a balance had to be drawn between that right and a department's need to protect their often limited resources. It was the Ombudsman's view that, given the volume and diversity of the representations made to FCO, it was unreasonable to expect them to examine every letter in order to determine whether the information contained in it was relevant to Mr S's request; and to then contact the author where appropriate. Futhermore, a considerable amount of information regarding concerns expressed about the detainees had already been published on the FCO website, and hard copies of those publications had been offered to Mr S. The Ombudsman did not, therefore, uphold the complaint.

1. Mr S complained that the Foreign and Commonwealth Office (FCO) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated but I am satisfied that no matter of significance has been overlooked. I should explain that since 1 January 2005 the Code has been superseded by the Freedom of Information Act 2000. As a result, references to the Code are couched in the past tense.

Background to the complaint

2. On 8 March 2004 Mr S wrote to FCO and asked, under the Code, for copies of all representations made to FCO by organisations and individuals in the United Kingdom and elsewhere, about the status and conditions of detention of the detainees at Guantanamo Bay. FCO replied on 19 March 2004. They said that they were unable to meet Mr S's request, citing Exemptions 9 (voluminous or vexatious complaints – the former in this case) and 12 (privacy of an individual) of the Code. They advised Mr S of his right, under the Code, to seek an internal review of their decision.

3. On 4 April 2004 Mr S wrote to FCO requesting a review of their decision. He said that he found the refusal to supply the information that he sought to be unacceptable. As regards Exemption 12, he considered that it would be possible to easily distinguish between those representations which could be made public and those that could not. In relation to Exemption 9, he considered that, if there had been a voluminous number of representations, there was even more reason to make them available as they showed the level of public concern about conditions at Guantanamo Bay. FCO responded on 7 May 2004. They said that they had reviewed the matter and had concluded that the correct decision had been made in response to Mr S's first request. They considered that it would require an unreasonable diversion of resources to check each individual letter received by FCO to see whether they contained an explicit statement about there being no objection to the contents and the author's name being made public. FCO believed that

Exemptions 9 and 12 of the Code had been correctly applied, and explained that those Exemptions did not require them to carry out a public interest test. FCO informed Mr S of his right to complain to the Ombudsman if he remained dissatisfied.

FCO's response to the Ombudsman

4. FCO said that, having reviewed the matter at a senior level, they were satisfied that the correct decision had been made in response to Mr S's request for information. They said that FCO had received over 1,700 letters about the issue of Guantanamo Bay detainees and it would require an unreasonable diversion of resources to provide the information requested by Mr S. FCO estimated that it would take one person at least two working weeks to read through all the letters and assess whether or not the authors would have any objections to their representations being made public. From a preliminary sift it was clear that most letters did not specifically say so. In such cases FCO would need to contact the correspondents concerned, which would be an extremely time consuming undertaking. FCO accepted that they did not explain the position fully enough in their correspondence with Mr S.

5. FCO said that, although they were not required by the Code to apply a public interest test to Exemption 9, they had nevertheless done so when Mr S asked them to consider the level of public concern when he requested a review. They considered at the time that the public interest was already considerable and well informed on the matter, and took the view that releasing copies of representations made to FCO would not add to public understanding so as to override the public interest in efficient use of resources.

6. FCO added that they had also applied Exemption 12 as they wished to protect the rights of the individual detainees and of the people writing to them. Furthermore, they believed that Exemption 15(a) (statutory restrictions – in this case the Data Protection Act) was also relevant although they did not cite it in either reply to Mr S. They said that they had a duty of care not to divulge correspondents' personal data to third parties unless they had their permission to do so, or if allowed to do so under the Data Protection Act (such as for the detection and prevention of crime). FCO provided details of various press releases, speeches and statements on the subject of the detainees which have been published on their website, and offered to supply Mr S with hard copies of these.

The Code of Practice on Access to Government Information

7. In refusing to provide the information sought by Mr S FCO cited Exemptions 9, 12 and 15(a) of the Code. Exemption 9 was headed 'Voluminous or vexatious requests' and read:

'Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.'

8. Exemption 12 was headed 'Privacy of an individual' and read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

9. Exemption 15 was headed 'Statutory and other restrictions' and read:

'(a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement

(b) ...'

Assessment

10. Before considering the substantive issue of whether or not the information sought by Mr S should be released, I shall first look at how FCO handled his request. Until the Freedom of Information Act 2000 came into force in January 2005, all requests for information should have been treated in accordance with the provisions of the Code. Information should have been provided as soon as practicable and the target date for responses to simple requests for information was 20 working days from the date of receipt. While this target could have been extended when significant search or collation of material was required, an explanation should have been given in all cases where information was not provided. It was also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they were relying in making that refusal. Moreover they should have made the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to the Ombudsman if, after the completion of the review process, they remained dissatisfied.

11. It is clear that FCO dealt with Mr S's request for information in full compliance with the Code. They dealt with the initial request well within the target time and cited the relevant exemptions as justification for withholding the information being sought. They also advised Mr S of his right to request a review, and then of his right to complain to the Ombudsman. They have accepted that they could have explained more fully the amount of resources that would be required to provide the information requested, and there is no doubt that such an explanation would have been helpful to Mr S. However, I consider that, in general, FCO's handling of the request was satisfactory.

12. I turn now to the question of the information sought by Mr S. In doing so I will look first at Exemption 9 as this was, in effect, an all-embracing exemption. FCO's argument is that to provide the information requested by Mr S would require an unreasonable diversion of resources. There were two strands to this exemption. The first related to the amount of information sought in a request, and the second to difficulties in identifying, locating or collating the information requested. In each case, the test was whether these factors would mean that meeting a request would have required an unreasonable diversion of resources or otherwise undermine the work of the Department. FCO have received over 1,700 letters on the subject of detainees at Guantanamo Bay and I have seen examples of those letters. Many of them deal with other subjects in addition to the issue of the detainees and none of those that I have seen make it clear whether or not the author would want his or her representations to be made public. Furthermore, some relate to individual named detainees. From the papers provided by FCO it is apparent that the representations received by them came from a number of different sources including individuals, Members of Parliament and other Governments, and were addressed to a number of different FCO locations in the UK and abroad.

13. While I acknowledge that the public have a right to information about subjects such as the detainees at Guantanamo Bay, I also accept that a balance has to be drawn between that right and a department's need to protect their often limited

resources. Given the volume and diversity of the representations made to FCO about detainees at Guantanamo Bay, in my view it would be unreasonable to expect FCO to examine every letter in order to determine whether the information contained within it is relevant to Mr S's request. Furthermore, given the potential relevance of other Code exemptions, it would almost certainly be necessary for FCO to contact many of the authors to determine whether they were willing for information about them to be made public. It might, of course, be possible to redact personal information contained in the letters, but having seen a sample of the letters, it is clear to me that this alone would be an extremely difficult and time consuming task. There is also the added complication that the information in question is held at a number of FCO sites. Consequently, after careful consideration, I believe that to provide the information that Mr S has requested would place an undue burden on FCO resources and I therefore uphold the use of Exemption 9 in this case. I also have in mind that a considerable amount of information about the detainees and the concerns that have been expressed about them has already been published on the FCO website, and hard copies of those publications have been offered to Mr S. I would add that Exemption 9 was absolute: there was no reference to harm or prejudice that would allow me to consider the argument as to whether or not the public interest in the information was sufficiently strong to outweigh the harm which would arise from its disclosure.

14. FCO have cited other exemptions in support of their decision not to provide Mr S with the information that he seeks. In addition to those exemptions cited, it seems to me that Exemption 14 (which related to information given in confidence) could also be cited in this case. Given that many of the representations in question contain personal information and information about third parties, it is clear that, in principle, much of the information sought is covered by these exemptions. However, in view of the applicability of Exemption 9, I do not think that anything would be gained by considering those exemptions in greater detail.

Conclusion

15. I am satisfied that the information requested by Mr S was correctly withheld by FCO under Exemption 9 of the Code. I do not therefore uphold the complaint.

Foreign and Commonwealth Office

Case No: A.16/05

Refusal to provide the date on which the Government first sought legal advice about the legality of military intervention in Iraq

Summary

Lord Lester asked to be told when the Government had first sought legal advice about the legality or otherwise of a possible invasion of Iraq. The Foreign and Commonwealth Office said that it was not their practice to disclose when or whether particular legal advice had been given and that information concerning government legal advice was exempt from disclosure under Exemptions 2 and 4(d) of the Code. After Lord Lester sought a review of their decision they maintained that Exemption 2 applied to the information sought, but said that they were no longer relying on Exemption 4(d). The Ombudsman found that Exemption 2 could not be applied to the date sought, but she accepted that, in principle, it could be applied to the additional information which would need to be released to put that date in context. However, having applied the harm test, she found that the public interest in disclosure outweighed the potential harm that might be caused by its release. The Ombudsman recommended that the information be released to Lord Lester and expressed her disappointment that the Foreign and Commonwealth Office felt unable to accept that recommendation.

1. Lord Lester complained that the Foreign and Commonwealth Office (the Department) had refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

The complaint

2. On 25 March 2004 Lord Lester asked, via a written question in the House of Lords, to be told when the Government had first sought legal advice about the legality or otherwise of a possible invasion of Iraq. In reply, the Minister of State for the Department said that it was not the practice to disclose when or whether particular legal advice had been given and that information concerning government legal advice was exempt from disclosure under Exemptions 2 and 4(d) of the Code. Lord Lester subsequently tabled three further questions, on 6 April 2004, which sought clarification of that answer, but the information sought remained unreleased. Following those responses Lord Lester wrote to the Minister of State on 20 April 2004, under the Code, to seek a review of the decision not to release the information. He reiterated that he was not asking to see the nature of the advice, merely to know when it had been sought: he added that he did not believe that either of the exemptions cited could justify a refusal to provide information relating solely to a date. Following a holding reply dated 25 May 2004, the Minister of State replied substantively on 18 June 2004. She apologised for the delay in replying and said that, on review, the Government now no longer sought to rely on Exemption 4(d) as justification for refusing to release the information requested. It remained, however, the Government's view that Exemption 2 did still apply as disclosure of the information could harm the frankness and candour of internal discussion, a view that had been reached in full consideration of any public interest there might be in having the information released. The Minister of State also said that disclosure of the date or fact of a request for legal advice might act as a disincentive to others to seek such advice in future because of the assumptions that might be drawn, whether correctly or otherwise, from

the fact of such advice having been sought. Following receipt of that reply the Member wrote to me on behalf of Lord Lester, on 7 July 2004, asking me to investigate his complaint. I issued my statement of complaint on 4 August 2004.

Department's comments on the complaint

3. In providing his comments on the complaint, in a letter dated 24 September 2004, the Permanent Secretary of the Department said that the issues raised by Lord Lester's request were complex and had required wide consultation and consideration. He said that, following the original refusal of the information, the matter had been considered again at review stage. It had then been decided that Exemption 4(d) could no longer be applied to the information but that Exemption 2 was still appropriate. The Permanent Secretary noted that the letter of 18 June 2004 had also drawn attention to the information already in the public domain, to the effect that the possibility of taking legal action as a way of enforcing Iraq's compliance with United Nations resolutions was already under consideration in the spring of 2002: it was not his view that the public interest required the release of anything more specific beyond that. He noted that the Butler report, which was published in July 2004, had, exceptionally, included a number of detailed references to Government legal advice in relation to the war but that the report had not covered the issue raised by Lord Lester. The Permanent Secretary went on to say that it would in fact be difficult to provide a straightforward answer to Lord Lester's question given that legal aspects of Iraq's position had been more or less continuously under consideration since the invasion of Kuwait in 1990. Having said that, it was in fact possibleto identify a particular date which, it could reasonably be argued, furnished an answer to the question raised. However, release of the date on its own would be misleading: it would be necessary to release other information in order to put that date into context. That information was covered by Exemption 2 and it was the Department's view that the release of that information would not be in the public interest. The Permanent Secretary reiterated the point made in the letter of 18 June 2004 to the effect that the release of information such as that sought by Lord Lester might well inhibit others from seeking timely legal advice in the future.

The Code

4. In the preamble to part II of the Code, under the heading 'Reasons for confidentiality', it states:

'The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

5. I have considered the following exemption in part II of the Code as part of my investigation of this complaint. Exemption 2 is headed 'Internal discussion and advice' and reads:

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

- proceedings of Cabinet and Cabinet committees;

- internal opinion, advice, recommendation, consultation and deliberation;

- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options;

- confidential communications between departments, public bodies and regulatory bodies.'

6. Although Exemption 4(d) was withdrawn by the Department at the review stage it might nevertheless be helpful for completeness to include it here. Exemption 4 is headed 'Law enforcement and legal proceedings' and part (d) covers:

'information covered by legal professional privilege.'

Assessment

7. I consider first the way in which this request was handled. Lord Lester's requests for the information he sought came initially through a series of Parliamentary Questions. Following his failure to obtain the information through those Parliamentary Questions, Lord Lester wrote to the Minister of State on 20 April 2004 to seek a review. The Minister of State sent a holding reply on 25 May 2004, in which she said that the review process had required extensive consultation and that it would not therefore be possible to respond within the twenty working day target. The Minister of State provided her substantive response on 18 June 2004. While this is well outside the recommended timescale, the Department did keep Lord Lester informed of the position: I recognise also that this was a far from straightforward request about which, I accept, substantial consultation would have been necessary. Thus, while an earlier reply would clearly have been preferable, I offer no criticism of the Department in this instance.

8. I now consider the information itself. In their response of 18 June 2004 the Department made it clear that they were no longer relying on the use of Exemption 4(d). This assessment therefore considers only Exemption 2. That exemption is specifically designed to protect information the disclosure of which would harm the frankness and candour of internal discussion: typically, internal opinion, advice and recommendation. The essential information sought in this case, however, does not fall into any of those categories: it is factual information, a date. The applicability or otherwise of Exemption 2 to factual information has formed a key element of a number of investigations carried out by my Office, most notably in the case on which my predecessor reported in November 2001 (*Access to Official Information: Declarations Made Under the Ministerial Code of Conduct,* HC 353). In that case, which dealt with information about the number of occasions on which Ministers in the Home Office had made declarations of interest in relation to various parts of the Ministerial Code of Conduct, my predecessor took the view that, while it might be possible to apply that exemption to the content of those discussions, it could not be applied to factual information in the form of a number. That view of Exemption 2 has been endorsed by my Office in subsequent investigations. I note that, in reply to one of Lord Lester's Parliamentary Questions, the Minister of State said:

'There is nothing in Exemption 2 of the Code of Practice on Access to Government Information which requires disclosure of the date of any information in cases where that information may itself be withheld.'

That, technically, may be the case. But, in this case, the information sought is the date itself: there is no wider information beyond the actual date that has been asked for. I do not therefore

find that Exemption 2 can be applied to the information sought.

9. However, the Department have gone on to argue that, even if they were to release the date, they could not do so without providing additional information in order to put that date into context and that any such additional information would fall within Exemption 2. They have also said that, were information of this kind to be released on a regular basis, it might have the effect of inhibiting the seeking of timely legal advice for fear that the fact that such advice had been asked for might find its way into the public domain. I need to consider these arguments. The information held by the Department which, they say, would have to be released in order to put the date into context consists of a press release and an internal minute. By definition, a press release is a public document so the question of an exemption does not apply. The internal minute contains, I accept, information covered in principle by Exemption 2. That, therefore, brings into play the public interest test. I think it is clear that there is a public interest in information relating to any aspect of the legality of the invasion of Iraq. Does that public interest, in this case, outweigh any harm that might be caused by the release of the information sought?

10. I think that it does. I do not propose to recommend the release of the information contained in the internal minute: in any event it has not been asked for. But I find it difficult to understand what harm might be caused by the Department, in releasing the date of this minute, saying that it had been written because statements made in a particular press release (the essential details of which, as they form part of a public document, could easily be repeated) suggested to them that it might be sensible to obtain legal advice in respect of those statements. That would be a perfectly natural, in fact an entirely responsible, judgment for a Department to make and I cannot see the seeking of legal advice in this context as anything other than a justifiable piece of precautionary administration. Nor do I believe that the release of such information would inhibit Ministers or officials from seeking such information in future cases. It seems to me implausible to suggest that legal advice would not be sought by Ministers or officials simply because of the possibility that the date on which it had been sought might be released into the public domain: that would seem to me to be a wholly disproportionate response to a recommendation, made by my Office in one specific case, that information relating to a date should be released. In saying that I perhaps need to emphasise that this recommendation is made in respect of the circumstances of this case only: it is not meant to be interpreted as a precedent for the release of similar information in the future. Each case, as I and my predecessors have often said before, must be judged on its individual merits. I therefore recommended that the Department release to Lord Lester the date on which, in their view, it would be most accurate to say that legal advice about invading Iraq had first been sought and to explain what had prompted the seeking of that advice. In reply, the Department said that they were unable to agree with this conclusion. They took the view that Exemption 2 could cover factual information, as disclosure of the information sought could in this case harm the frankness and candour of internal discussion. They went on to say that, even if they were to provide additional information in order to put the date into context, others might nevertheless draw different, and inaccurate, conclusions. Finally, they reiterated the point that the release of information of this nature might act as a deterrent to others seeking frank and timely legal advice in the future.

Conclusion

11. I have found that the Code exemption cited by the Department could not be applied to the information sought by Lord Lester. I therefore upheld his complaint and recommended that the information be released to him, with whatever other details might be necessary in order to put that information into context. I am disappointed that the Department have found themselves unable to accept this recommendation.

Department of Health

Case No. A.13/05

Refusal to provide a copy of a report into allegations about the General Osteopathic Council

Summary

Dr P, via Mr Roger Gale MP, asked the Department of Health to make public by placing in the House of Commons library a report of an investigation carried out by the Chief Medical Officer into allegations made about the General Osteopathic Council. The Department declined to do so, saying that the material it contained was confidential. In commenting on the complaint to the Ombudsman, the Department maintained that Exemptions 2, 8 and 12 of the Code applied to the information in the report. The Ombudsman found that the Department were entitled to rely on the exemptions cited to withhold most of the information in the report. However she concluded that, while Exemption 2 also applied to some of the remaining information, namely the Chief Medical Officer's comments on the effects of the registration process on osteopaths approaching retirement, the balance of the harm test operated in favour of releasing that information, and she recommended that it be provided to Dr P. The Ombudsman welcomed the Department's acceptance of that recommendation. She was, however, critical of the way in which the Department had handled Dr P's information request although she welcomed the measures that they had taken to ensure future compliance with the Freedom of Information Act.

1. Dr P complained that the Department of Health (the Department) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated but I am satisfied that no matter of significance has been overlooked. I should explain that since 1 January 2005 the Code has been superseded by the Freedom of Information Act 2000. As a result, references to the Code are couched in the past tense.

Background

2. On 14 August 2001 the Parliamentary Under Secretary of State for Health wrote to Mr Gale with the results of an investigation that had been held by the Department into a number of allegations made about the General Osteopathic Council (the Council). The main concerns were in relation to the fairness of the registration process for osteopaths; the appointment of the Council Chairman; and the choice of Council members. The Parliamentary Under Secretary said that her conclusions had been based on an investigation carried out by the Chief Medical Officer (CMO). On 10 September 2001 Mr Gale, acting on behalf of Dr P, asked for the report prepared by the CMO to be made public by being placed in the House of Commons Library. On 30 November 2001 the Department's Minister of State wrote to Mr Gale explaining that, because of the confidential nature of the material, he was unable to publish the report that he had asked to be placed in the Library.

The Chief Executive's response to the Ombudsman

3. The Chief Executive of the Department responded to the complaint on 21 October 2004. He said that he concurred with the earlier decision not to disclose the CMO's advice. He considered that Exemptions 2, 8 and 12 of the Code could be applied to the information sought by Dr P. He said that, in relation to Exemption 2, the CMO's report was clearly advice provided internally to Ministers and its disclosure would, in general terms, undermine the need for officials to be able to provide candid and frank advice and to ensure that full records of such advice are kept. He believed that there were particular conclusions reached in the CMO's advice which should not be subject to wider disclosure because they were based on judgments and interpretations which may be controversial, together with references to decisions made by the previous Government.

4. The Chief Executive said that Exemption 8 applied as the CMO's report included specific information about the process and terms by which an individual was appointed to a public office: the Chairmanship of the Council. He added that, as the report included information about the disability of the former Chairman; the circumstances in which it came about; and the effect it had on his life, Exemption 12 was also relevant. He believed that in this particular case, the force of the three grounds cited, taken together, outweighed the presumption to disclose the information.

The Code of Practice on Access to Government Information

5. In refusing to provide the information requested by Dr P the Department have cited Exemptions 2, 8 and 12 of the Code. Exemption 2 was headed 'Internal Discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options; and
- confidential communications between departments, public bodies and regulatory bodies.'

6. Exemption 8 was headed 'Public employment, public appointments and honours' and read:

'(a) Personnel records (relating to public appointments as well as employees of public authorities) including those relating to recruitment, promotion and security vetting.

(b) Information, opinions and assessments given in confidence in relation to public employment and public appointments made by Ministers of the Crown, by the Crown on the advice of Ministers or by statutory office holders.

(c) Information, opinions and assessments given in relation to recommendations for honours.'

7. Exemption 12 was headed 'Privacy of an individual' and read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

8. Exemption 2 was subject to the preamble to part II of the Code which stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

9. Before considering the substantive issue of whether or not the information sought by Dr P should be released, I shall first look at how the Department handled his request. Until the Freedom of Information Act 2000 came into force on 1 January 2005, all requests for information should have been treated as if made under the Code, irrespective of whether or not it was referred to by the applicant. Information should have been provided as soon as practicable and the target date for responses to simple requests for information was 20 working days from the date of receipt. While this target could have been extended when significant search or collation of material was required, an explanation should have been given in all cases where information was not provided. It was also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they were relying in making that refusal. Moreover, they should have made the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to the Ombudsman if, after the completion of the review process, they remained dissatisfied.

10. The written request for information was made on 10 September 2001 by Mr Gale, although it has been confirmed that he was, in effect, acting on behalf of Dr P. The response to the request from the Minister of State was sent on 30 November 2001. No Code exemptions were cited for the decision not to provide the information sought by Mr Gale; he was not offered the review to which he was entitled; and he was not informed of his right to complain to this Office. It is clear, therefore, that the Department failed to act in accordance with the Code and may well not have even considered that the request was subject to the provisions of the Code. Virtually none of the Code requirements were met and the time taken to respond was far in excess of the target time of 20 working days. I can appreciate, to an extent, why this was so: the request formed part of a letter from an MP to a Minister and was included in a number of other concerns raised about the results of the investigation. However, the fact remains that the Department should have recognised the request as being subject to the terms of the Code, and treated it as such. I am, therefore, critical of that failure. Although the Code is no longer in existence I asked the Chief Executive of the Department to remind his staff of the importance of adhering to the requirements of the Freedom of Information Act in all cases where relevant information is requested. In response the Chief Executive acknowledged that Dr P's request should have been dealt with under the Code and confirmed that all staff in the Department had already been alerted to the need to treat all relevant requests for information in accordance the provisions of the Freedom of Information Act, whether or not the Act is explicitly cited in the request.

11. I turn now to the question of the information sought by Dr P. I should stress at this point that the Code only gave an entitlement to information and not to the document in which the information is contained: it is on that basis that I have considered the complaint. Having seen the report provided by the CMO it is evident that a substantial amount of the information contained in it was included in the letter of 14 August 2001 from the Parliamentary Under Secretary to Mr Gale (paragraph 2). However, there was a certain amount of information that was not included in that letter and which I will now examine. That information falls into three main groups:
a) comments on the registration system in relation to osteopaths approaching retirement;
b) information relating to the appointment of the former Council Chairman, and his suitability for

office; and c) advice on steps that could be taken to avoid difficulties with the appointment of future Council Chairmen.

12. I shall consider at this point the applicability or otherwise of Exemption 2. The purpose of this exemption was to allow Government Departments the opportunity to discuss matters, particularly those that are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. I recognise the argument that disclosure of parts of the advice given by the CMO in this case could inhibit future ability to discuss internally issues that may be controversial. I am satisfied that this advice in relation to both a) and c) above can be withheld, in principle, under Exemption 2. However, that is not the end of the matter. The Code made it clear (paragraph 8) that, in those categories such as Exemption 2 which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. I therefore need to balance the harm that may be caused by disclosing this information against the public interest in making it available.

13. I will look first at a): the CMO's comments on the effects of the registration process on osteopaths approaching retirement. There is clearly considerable interest in the registration procedure, particularly within the profession; indeed, it was primarily for that reason that the investigation took place. The information in question comprises the CMO's views on whether the registration process disadvantages long-standing practitioners nearing retirement. While that information may be sensitive to a degree, I consider that any possible harm its disclosure would cause to future advice would be likely to be very limited and would not be sufficient to outweigh the legitimate interest of those affected by the advice. I therefore recommend to the Chief Executive that this information be released to Dr P.

14. As for c): future appointment of Council Chairmen, again, there is a certain amount of public interest in such information. However, the advice includes reference to arrangements with other Government Departments and discusses issues of policy including the feasibility of amending legislation. I accept the argument that future exercises of this kind may be hampered if those involved are unable to comment freely without worrying that their views could be made widely available. With this in mind, I do not consider that the public interest in having access to this information is strong enough to outweigh the potential harm to the frankness and objectivity of future advice that might result from its disclosure.

15. I will now look at the rest of the information that has been withheld, which relates to the appointment and suitability of the Council Chairman (item b). Having examined the relevant section of the report it seems to me that much of the information was included in the Parliamentary Under Secretary of State's letter of 14 August 2001. However, there is a small amount of information relating to the Chairman's background, his health and the circumstances of his appointment which has not been disclosed. The Department believe that Exemptions 8 and 12 apply to this information. The clear purpose of Exemption 12 was to protect personal information, the disclosure of which would, or could, facilitate an unwarranted invasion of privacy (paragraph 7). Cabinet Office guidance on the Interpretation of the Code listed the kind of information that the exemption was intended to protect. It included (for example) information relating to a person's education or employment history; their financial

affairs; their health or medical history; and the views of another individual about the person. I am satisfied that the information at issue here falls squarely within the categories covered by Exemption 12 and I therefore uphold its use in the Department's refusal to provide personal information about the Chairman. Also included in this section of the report is a very small amount of information about the reasons behind the decision to appoint the Chairman. It is clear to me that this information can reasonably be said to be covered by Exemption 8(b) (paragraph 6). I would add that Exemptions 8 and 12 were absolute exemptions: there was no reference to harm or prejudice that would allow me to consider the argument as to whether or not the public interest in the information was sufficiently strong to outweigh the harm which would have arisen from its disclosure.

16. How might the information recommended for disclosure in paragraph 13 best be presented to Dr P? As I explained in paragraph 11, the Code required the release of information rather than specific documents. However, successive Ombudsmen have taken the view that the release of actual documents is often the best and simplest way of making available information that is recommended for disclosure. In view of the fact that much of the information contained in the CMO's report has already been disclosed, I believe that it would be most helpful for Dr P to have an edited version of the report with the withheld information blocked out, and I so recommend. In reply the Chief Executive of the Department agreed to the release of an edited version of the CMO's advice to Ministers with the withheld information blanked out. The Chief Executive said that copies of the agreed version had been sent separately to Mr Gale and Dr P.

Conclusion

17. While I have criticised the way in which the Department dealt with the request for information, I welcome the measures that they have taken to ensure future compliance with the Freedom of Information Act. I see the release of a redacted version of the CMO's advice, together with the Chief Executive's assurances, as a satisfactory outcome to a partially justified complaint.

Department of Health

Case No: A.38/05

Refusal to provide information relating to allegations of malpractice

Summary

Mr X asked the Medicines and Healthcare products Regulatory Agency for information relating to earlier allegations of malpractice that he had made against his former employer. The Agency did not consider Mr X's communications to amount to requests for information and thus did not deal with them under the Code. Following further contact from Mr X the Agency said that his correspondence had become manifestly unreasonable and vexatious and declined to answer any further communications from him unless they raised substantive new issues. The Agency again failed to cite any specific Code exemptions, although their reasons for refusing to reply further to Mr X equated to Exemption 9. In a second information request, Mr X sought copies of specific correspondence. The Agency provided copies of the correspondence but edited out some of the information it contained, citing Exemption 12 of the Code. When Mr X sought a review the Agency again refused to provide the outstanding information, citing Exemption 9 of the Code.

The Ombudsman found that the Agency were not at fault in refusing to regard Mr X's first information request as a valid Code request. As to the second request, she concluded that the Agency had acted precipitately in citing Exemption 9 before conducting an internal review of their decision to cite Exemption 12. However, she considered that the Agency were entitled to rely on Exemption 12 and that they were justified in closing correspondence with Mr X under Exemption 9. She did not uphold the complaint.

1. Mr X complained that the Medicines and Healthcare products Regulatory Agency (the Agency), an executive agency of the Department of Health, had refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff, but I am satisfied that no matter of significance has been overlooked.

The Code of Practice on Access to Government Information

2. Until the Freedom on Information Act 2000 came fully into effect on 1 January 2005, all requests for government-held information should have been considered under the terms of the Code. As the Code has now been superseded by the statutory regime, I shall refer to the Code in the past tense throughout this report. Exemption 9 of the Code, which the Agency cited, was headed 'Voluminous or vexatious requests' and reads:

'Requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which (because of the amount of information to be processed or the need to retrieve information from files not in current use) would require unreasonable diversion of resources.'

3. Exemption 12, which was also cited by the Agency, was headed 'Privacy of an individual' and reads:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

Background events leading to the complaint

4. The background to Mr X's complaint is complex. It centres on an allegation of malpractice, made by him in 2000, against his former employer. That allegation was investigated by the Medicines Controls Agency (the current Agency's

predecessor) in July 2001 and an inspection of the company's working practices was undertaken. The Agency's handling of the allegation was subsequently reviewed by an independent complaints adviser in December 2001. While Mr X's allegation was found to be largely unjustified, it did result in the Agency implementing new procedures for dealing with industry whistleblowers. Since making his original allegation, Mr X has been in continual communication with the Agency and has made numerous requests for information. In 2002 Mr X complained to the Ombudsman about the Agency's alleged maladministration. The Ombudsman considered the matter but found no grounds to justify her intervention. However, it is with regard to two of Mr X's most recent requests for information, under the Code, about which he has now complained to the Ombudsman and it is those complaints that form the subject of this report. Mr X made the requests in 2004 but they were only the last in a long history of such requests. It has therefore been necessary to detail, briefly, the facts appertaining to that history of requests in order to make sense of what has since followed.

History of information requests

5. On 11 and 13 January 2002 Mr X e-mailed the Agency and requested information about licensing procedures for manufacturers. On 8 February 2002 the Agency provided some of the information requested but withheld information relating to Mr X's former employer under Exemption 4(c) of the Code and the Medicines Act 1968. They did, however, undertake to seek the company's consent to the release of the remaining information. On 18 February 2002 Mr X requested a review of the Agency's decision to refuse his information request. On 8 March 2002 the Agency wrote to Mr X explaining that they were not able to make a final decision on the information he had requested without first seeking the views of the company in question. They said, however, that such an approach could reveal Mr X's identity as the requester and they asked for his views on that before they approached the company. On 7 April 2002 Mr X informed the Agency that he did not wish any of his correspondence to be forwarded to the company. On 1 May 2002 the Agency wrote to Mr X and provided some of the requested information but refused to disclose some other material under the terms of the Code. The Agency advised Mr X of his right to an internal review and of his right to complain to the Ombudsman if he remained dissatisfied following that review. On 19 June 2002 the Agency replied to further e-mails from Mr X and cited Exemption 9 of the Code. They informed him that his right to an internal review had already been exercised through the independent review of their handling of his complaint (paragraph 4). The Agency informed Mr X of his right to complain to the Ombudsman.

6. On 24 July 2002 the Agency refused Mr X access to the inspection findings (paragraph 4) under Exemption 14 of the Code. On 9 August 2002 the Agency replied to a request from Mr X that they provide the professional body governing the company's practices with information concerning their malpractice. They explained that, as they had no concerns about the professional conduct of the company's employees, they would be unable to do so. The Agency also refused, under Exemptions 7(b) and 12 of the Code, to provide Mr X with copies of their correspondence with the professional body. On 4 December 2002 Mr X e-mailed the Agency with a further Code request. On 24 December 2002 the Agency replied to that request by providing some information and outlining Mr X's right of review with regard to the withheld information.

7. On 15 April 2003 the Agency conducted an internal review of their decision of 9 August 2002. They consequently maintained their refusal to provide the professional body with information of malpractice on the grounds that malpractice had not been found and therefore information relating to such did not exist. They found, however, that their decision letter should have explained that fact to Mr X. The Agency reversed their decision, under the Code, to withhold from Mr X information relating to their exchanges with the professional body, except for some text of a letter which they redacted under Exemption 12 of the Code (paragraph 3). Again, the Agency informed Mr X of his right to complain to the Ombudsman if he was unhappy with their decision. On 21 October 2004, ostensibly in response to further communications from Mr X, the Agency advised him that there was no possibility of them reviewing their internal review of 15 April 2003. They did, however, inform him of his right to complain to the Ombudsman. With regard to further correspondence received, the Agency reiterated Exemption 9 as the reason for not replying. On 23 October 2004 Mr X e-mailed the Agency to complain about their refusal to conduct a review.

Subject of the complaint

8. For ease of reference, I shall refer alternately to the two separate requests that form the subject of Mr X's complaint as his 'first' and 'second' Code requests.

First Code request

9. On 20 September 2004 Mr X wrote to the Agency requesting, under the Code, information concerning his earlier allegation of malpractice against his former employer. On 25 September 2004 he e-mailed the Agency with a further request for information on the same issue. His requests for information took the form of a series of questions. On 30 September 2004 the Agency replied and explained that they did not consider Mr X's communications to be requests for information but questions of 'interpretation and opinion' and, as such, were not a matter for consideration under the Code. They did not, therefore, cite any Code exemptions. The Agency explained to Mr X that, as his allegations and the circumstances pertaining to them had already been 'the subject of exhaustive correspondence and investigation', they would in future decline to answer future communications from him unless they raised new issues or evidence. The Agency told Mr X that, if he was dissatisfied with their reply, he could complain to the Ombudsman.

10. On 3 October 2004 Mr X e-mailed the Agency a list of revised questions and asked that they be handled under the Code. However, on 6 October 2004 he was met with a similar reply from the Agency. Moreover, the Agency said that they considered that his correspondence had 'become manifestly unreasonable and vexatious' and declined to answer any further communications from him unless they raised substantive new issues. Again, as the Agency did not consider the requests to be valid Code requests, they did not cite any Code exemptions. On 6 October 2004 Mr X e-mailed the Agency and asked why they had not outlined his right to a review of their decision. Moreover, he said that, if he were to request a review, he wanted it to be conducted by a different officer. On 7 October 2004 Mr X e-mailed the Agency asking that they review their decision to close their correspondence with him, claiming that he could find no reference in the Code to a blanket exemption such as that on which the Agency appeared to be relying in his case. Mr X continued to make repeated requests for the information, asking why no action had been taken on his request for a review. The Agency considered those requests internally but maintained their decision that they did not constitute Code

requests, that they had appropriately concluded that the requests were manifestly unreasonable and that unless further correspondence from Mr X raised substantive, fresh issues, they would not reply.

Second Code request

11. In the meantime, on 28 September 2004, Mr X had made a further request to the Agency, by e-mail, for information under the Code. He specifically requested copies of correspondence dated 22 August 2001; 17 September 2001; 3 November 2001 and 3 December 2002. On 6 October 2004 the Agency replied and enclosed copies of the correspondence in question but with some details edited out. They cited Exemption 12 of the Code as the reason for redacting the text. The Agency informed Mr X of his right to an internal review of that decision and, ultimately, of his right to complain to the Ombudsman. On 8 October 2004 Mr X requested a review of the decision to edit details from the correspondence. In particular, Mr X was unhappy that the name of the recipient of the letter of 3 November 2001 had been redacted, along with the identities of Agency staff mentioned in the letters of 3 December 2002 and 17 September 2001. On 20 October 2004 Mr X e-mailed the Agency to chase progress on the review.

12. On 21 October 2004 the Agency wrote to Mr X informing him that, with regard to the correspondence they had received from him since their internal review of their previous decision in August 2002 (paragraph 6), it was not now possible for them to further review the result of that earlier review. The Agency informed him of his right to complain to the Ombudsman but said that, in so far as they were concerned, they had come to the decision that his correspondence had become 'manifestly unreasonable and vexatious' and that there would be no purpose in continuing it. On 7 November 2004 Mr X e-mailed the Agency as he was unclear to which of his communications and requests the Agency was referring. On 12 November 2004 the Agency replied to Mr X and confirmed that their reply had been in relation to correspondence from him, which included his e-mail of 28 September 2004. The Agency explained that they were relying upon Exemption 9 of the Code (paragraph 2) to refuse to action his request any further.

The Agency's comments to the Ombudsman on the complaint

13. The Agency said that both they and their predecessor had been in regular correspondence with Mr X since March 2000. They said that they had many files dedicated to that correspondence, which included many Code requests, letters to and from Ministers and Members of Parliament, the internal investigation of the issues raised by Mr X and the consequent independent review. They explained that many staff hours had been spent both within the Agency and at the Department of Health investigating Mr X's complaints and allegations and responding to his 'numerous' letters and e-mails. The Agency said that they considered that they had dealt with Mr X in a thorough and fair manner but that, in September 2004, they had taken the decision that they could not justify spending any more time and resources on issues that had already been 'exhaustively addressed.'

Assessment

14. While Mr X's complaint centres on the Code requests he made in 2004, the grounds for the Agency's refusal to supply the information lie in the history of Mr X's correspondence with them and their predecessor concerning his allegation of malpractice. Therefore, in making an assessment of the issues in this case, and in order to understand why the Agency had cause to cite Exemption 9, it has been necessary for me to

examine the history of Mr X's correspondence with the Agency. While not detailing each and every letter or e-mail exchanged between the parties since 2000, paragraphs 4-7 of this report provide the necessary background to Mr X's specific requests for information.

15. I should first explain that it was an accepted procedure for dealing with requests for information under the Code that, if a department decided to refuse a request for information, they should identify the specific exemption(s) in part II of the Code on which they were relying. In addition, where information had been refused, the possibility of a review needed to be made known to the person who requested the information at the time of that refusal. The aim of the review was to ensure that the applicant had been fairly treated under the provisions of the Code and that any exemptions had been properly applied. The Guidance on the Interpretation of the Code (paragraph 90, part I) also said that it was good practice to allow for such a review to have been conducted by someone not involved in the initial decision. Once the review process was completed the requester should then have been advised of their right to make a complaint to the Ombudsman if they remained dissatisfied. Finally, the Code said that information would be provided as soon as practicable. The target for a response to a simple request for information was 20 working days from the date of receipt, although this target may have been extended when significant search or collation was required.

16. It is the actions concerning the Agency's handling of Mr X's information requests in 2004 that form the subject of this complaint. It is therefore to those actions that I turn and ask the question, how did the Agency perform in respect of the above requirements of the Code when processing those requests? First Code request: The Agency replied substantively within the 20 working days advocated by the Code. As they had decided that it was not a valid Code request, the Agency consequently did not cite a relevant Code exemption or outline the grounds for review under the Code. But was it reasonable of the Agency to decline to consider Mr X's request as a Code request? The Agency told Mr X that they did not consider his questions to be requests for information under the Code but that, in their view, they were questions of 'interpretation and opinion'. Having considered the content of Mr X's questions I must agree with the Agency that the vast majority of them were not specifically requests for information. The Guidance on the Interpretation of the Code (paragraphs 57 - 58, part I) says that the Code does not oblige departments to give an opinion on a particular matter unless there would be a reasonable expectation that it should do so in the normal course of business. In addition, the Code does not require answers to be given to hypothetical questions unless that would be a normal part of advice on, for example, a regulatory requirement. It is clear from the papers that the Agency had already provided Mr X with a substantial amount of information, provided in large part by way of answers to his questions and all relating to his allegation of malpractice. Having already, at that stage, conducted an investigation of Mr X's allegations and then instigated an independent review of their handling of it, I do not consider it unreasonable for the Agency to conclude that they had, by then, comprehensively dealt with the issues surrounding Mr X's allegations, and to have provided him with sufficient opinion and advice with regard to their regulatory function in the matter. Accordingly, I do not find fault with the Agency's decision at this point to decline to deal with Mr X's further questions as a valid Code request. The fact that the Agency proceeded to cite Exemption 9 of the Code in respect of this request is a matter to which I turn later (paragraph 19).

17. Second Code request: was it appropriate for the Agency to apply Exemption 12 of the Code to the redacted text of the correspondence they provided to Mr X in answer to this second Code request? I have considered the letters in question and the text that has been removed. The redacted text relates exclusively to the identity of one of the letter's recipients and to the identity of the source of a separate allegation against Company A. Exemption 12 of the Code relates to the 'Privacy of an individual' (paragraph 3). Paragraph 12.13 of the Guidance on the Interpretation of the Code details the type of personal information that, if disclosed to a third party, could be deemed to be an invasion of privacy. Among the types of information detailed are: 'correspondence from the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence; the personal opinions or views of the individual; and the views or opinions or another individual about the individual'. I consider that the individuals to whom the information relates gave the information they did in circumstances where there was a reasonable expectation or assumption of confidentiality and I do not see that there are sufficient public interest arguments in this case to warrant the overriding of those considerations of privacy.

18. Turning now to the Agency's general handling of this second Code request, it is clear that the Agency failed to review their decision to apply Exemption 12 of the Code, despite being requested to do so by Mr X. A possibility of such a review was, in any event, superseded by the Agency's citation of Exemption 9 of the Code, which effectively closed down any further communication with Mr X on the subject (more of which at paragraph 19), despite having earlier informed him of his right to such a review. It seems to me that the Agency acted precipitately in closing down their communications with Mr X before conducting a review of their earlier use of Exemption 12. Having applied the exemption to the withheld information, Mr X was entitled to a review of that decision. The Agency's letter of 21 October 2004, in which they informed Mr X that there was no possibility of a further review of their decision of August 2002 (which had then been the subject of an independent review in April 2003), claimed to be in reply to, among others, his request of 28 September 2004. That was again confirmed by the Agency in reply to an enquiry from Mr X in which he had asked precisely which of his communications had been considered in their earlier reply. However, having reviewed the papers, it is clear that the decision to disclose information in response to Mr X's request of 28 September 2004 had not been reviewed. As it post-dated the reviews in question, it could not possibly have formed part of the consideration behind the August 2002 decision. I therefore find that, despite having correctly applied Exemption 12, the Agency were wrong to refuse Mr X a review of their application of that exemption.

19. Applicability of Exemption 9 to both Code requests: I now turn to the substantive issue of whether or not the Agency were justified in using Exemption 9 of the Code in refusing to respond to any further enquiries from Mr X on the subject of his allegations of malpractice. Exemption 9 allows departments to refuse to respond to requests for information which are vexatious or manifestly unreasonable or are formulated in too general a manner, or which would require an unreasonable diversion of resources (paragraph 2). The Agency's position, as reflected in their correspondence with Mr X and their comments to the Ombudsman on the complaint, is that Mr X's correspondence had become 'vexatious' in that his persistent questions about one particular subject had become too much of a burden to

justify the diversion of resources from other areas of the Agency's work. Exemption 9 of the Code recognises that it might be reasonable to reject requests for information on such grounds. Paragraph 9.3 in part II of the Guidance on the Interpretation of the Code reads as follows:

'... it might still be reasonable to reject a voluminous application on the grounds that the opportunity cost of responding, in terms of diversion of staff resources from other work, was unreasonable. The same consideration might apply where repeated requests were made by the same person, which in total amounted to an unreasonable diversion of resources.'

20. It seems to me that the latter part of that statement accurately describes the situation in Mr X's case. I therefore accept that, in principle, Exemption 9 can be held to apply to situations of the kind we are looking at here. My role is to decide whether or not it was reasonable in this instance, and in the light of all the circumstances I have detailed, for the Agency to have closed correspondence with Mr X. That is ultimately a matter of judgement. It is clear from Mr X's correspondence that he still feels strongly about his original allegation of malpractice against his former employer. The Agency attempted to alleviate his concerns by instigating an investigation, then an independent review, and also by responding to his questions and providing a substantial amount of the information he requested. I have reviewed the papers in this case and, as I have noted, most of Mr X's communications included requests for a significant amount of information. I have seen the Agency's responses to those numerous requests and I have no doubt that a considerable amount of staff time and resources were required to respond to them. While I acknowledge that Mr X had a right to information about the Agency's actions taken in response to his allegation and any potential wider ramifications or consequences of such, I also believe that a balance has to be drawn between that right and a department or Agency's need to protect their often limited resources. In my view, after very careful consideration, there is a limit to the amount of correspondence that it is reasonable to ask the Agency to respond to and I believe that, in this case, that limit has been reached and, arguably, exceeded. I therefore uphold the Agency's use of Exemption 9.

Conclusion

21. I have found that, with regard to the first Code request, the Agency's decision to decline to treat it under the terms of the Code was reasonable. With regard to the second Code request, I believe that the Agency acted precipitately in citing Exemption 9 of the Code, prior to conducting an internal review of their decision to withhold information under Exemption 12. However, I consider that the Agency's decision to cite Exemption 12 was reasonable and that, ultimately, their decision to close correspondence with Mr X under Exemption 9 of the Code was justified. I have not, therefore, upheld Mr X's complaint.

Home Office

Case No: A.17/05

Refusal to provide information relating to the cost of insurance premiums for detention centres

Summary

In a Parliamentary Question Lord V asked the Government for information relating to the increase in premiums charged for insurance cover for detention centres. The Minister of State for Race Equality, Community and European and International Policy responded, declining to provide the information, saying that it was commercially confidential and was not therefore publicly available. Lord V sought a review of that decision. The Minister of State for Citizenship, Immigration and Nationality refused to release the information, citing Exemption 7 of the Code. The Ombudsman found that the Home Office were entitled to rely on Exemption 7(a) of the Code. She also found that the harm likely to be caused by the release of the information outweighed the public interest in its release. She did not uphold the complaint.

1. Lord V complained that the Home Office had refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff, but I am satisfied that no matter of significance has been overlooked. I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Code are couched in the past tense.

Background to the complaint

2. On 12 February 2003 Lord V received a written reply to a Parliamentary Question asking Her Majesty's Government: 'What has been the amount of the increase in premiums charged for insurance cover for each of theestablishments where asylum seekers are detained since 14 February 2002'. Lord Filkin, the then Minister of State for Race Equality, Community and European and International Policy, said: 'Insurance premiums generally have increased substantially since 11 September 2001 and premiums for detention centres are no exception. However, this information is commercially confidential and is therefore not publicly available'. (*Hansard,* House of Lords, Column WA120).

3. On 13 April 2004 Lord V wrote to Lord Filkin and again asked for the information he had requested previously. If unwilling to provide it, he asked him to cite the Code exemptions that were being relied on as the basis for withholding it. On 8 June 2004 the Minister of State for Citizenship, Immigration and Nationality wrote to Lord V and said that the information he had requested was exempt from disclosure under Exemption 7 of the Code. He said that the exemption applied because to release the information might prejudice the effective conduct of commercial or contractual activities. He went on to explain that within the Immigration and Nationality Directorate of the Home Office the cost of insurance was constantly being reviewed in order to take account of changes in activity, the size and shape of the estate and the need to balance risk and achieve best value for money.

The Code of Practice on Access to Government Information

4. Until the Freedom of Information Act 2000 came fully into effect on 1 January 2005, all requests for government-held information should have been considered under the terms of the Code. Exemption 7 of the Code, cited by the Home Office, was headed 'Effective management and operations of the public service' and part (a) read:

'Information whose disclosure could lead to improper gain or advantage or would prejudice:

- the competitive position of a department or other public body or authority;

- negotiations or the effective conduct of personnel management, or commercial or contractual activities;

- the awarding of discretionary grants.

5. Exemption 7 was subject to the preamble to Part II of the Code which stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

6. Before turning to the substantive issue of whether or not the information requested by Lord V should be released, I shall look first at how the Home Office handled his request for it. The Ombudsman has said that it was good practice, if departments refused information requests, for them to identify in their responses the specific exemption or exemptions in Part II of the Code on which they were relying. Moreover, the possibility of a review under the Code needed to be made known to the person who requested the information at the time of that refusal, as did the possibility of making a complaint to the Ombudsman if, after the completion of the review process, the requester remained dissatisfied. Finally, departments were expected to respond to requests for information within 20 working days, although the Code recognised that this target may have needed to be extended when significant search or collation of material was required.

7. From my examination of the papers, the Home Office's reply to Lord V's request of 13 April 2004 was clearly provided outside the requisite 20 working day time limit specified by the Code. Furthermore, although the Home Office specified the Code exemption under which they were withholding the information, they failed to advise him of his right, if he remained dissatisfied, to complain to the Ombudsman. That is disappointing. Lord V is experienced in the workings of the Code and was not disadvantaged by that oversight. However, that might not have been the case had the person seeking information been unfamiliar with the Code's provisions.

8. I turn now to the substance of the complaint. I have looked very carefully at the question of whether or not Lord V was entitled, under the Code, to the information he requested, recognising that the Code only gave an entitlement to information and not to the document in which the information was contained: it is on that basis that I have examined the complaint. The purpose of Exemption 7 of the Code was to protect information the disclosure of which would have impaired the effectiveness of the management and operations of the public service. The information sought by Lord V related to the individual insurance premium increases, since February 2002, for each of the establishments where asylum seekers were detained.

9. The internal documentation that the Home Office have provided explains why they considered disclosure under the Code to be inappropriate. It is clear to me, from the following explanation provided by the Home Office that it is the first part of Exemption 7, namely

Exemption 7(a), that they had in mind when citing it. It was the Home Office's view that, as insurance formed part of a contractor's total bid for the running of a particular establishment, disclosure of individual elements of a contractor's price could prejudice the department's commercial position. By way of further explanation, they said that the contracts between themselves and the contractors for the running of the detention centres allow for the contractor to approach the department to renegotiate the terms of the contract, either in the event that insurance becomes unavailable in the world-wide insurance market, or becomes severely restricted to a maximum cover which is lower than the centre's value. Renegotiations as a result of substantial increases to insurance premiums could occasionally result in the department agreeing to contribute financially to the operating fee of a particular centre. The Home Office has pointed out that while not all contractors have submitted claims for more than the agreed operating fee, others have so claimed. Their concern is that to disclose the amount of the premiums paid by individual contractors, and any respective increases, could potentially generate claims from fellow contractors. They say the potential for that particular scenario is increased because of the limited number of contractors and the relatively few sites involved. The Home Office is concerned that an increase in claims could, in turn, result in the requirement for them to pay increased contributions, to the ultimate detriment of the taxpayer.

10. I have carefully considered that argument, together with the supporting documentation received from the Home Office, and I am satisfied that the information sought by Lord V is covered, in principle, by Exemption 7(a) of the Code. That exemption concerned information whose disclosure could lead to improper gain or advantage or would prejudice the competitive position of a department or their negotiations, or commercial or contractual activities. Paragraph 7.4 of the Cabinet Office's guidance on the interpretation of Exemption 7(a) explained that information which was relevant to negotiations, for example internally agreed limits for payments, could be withheld if disclosure would prejudice the position of the department, or undermine effective management of dealing with contractors. That is clearly the consequence of disclosure envisaged by the Home Office and one that they are anxious to avoid. It appears to me that the information sought by Lord V falls squarely within the ambit of Exemption 7(a) and I do not see that the Home Office have acted unreasonably in seeking to safeguard their commercial position by citing that exemption.

11. But that is not the end of the matter. Exemption 7 incorporates a harm test (paragraph 5), which poses the question: would the harm that might be caused by disclosure of the protected information be outweighed by the public interest, if any, in making it available? The fact that insurance rates are increasing generally is a well-known fact and one to which Lord Filkin himself pointed in his reply to Lord V's Parliamentary Question, in which he explained that insurance for the establishments had been no exception to the general increase (paragraph 2). Consequently, the fact that insurance premiums for the establishments will generally have increased is a fact which is already in the public domain. What is not in the public domain is the amount of the insurance premiums and their relative increases, if any. While there is clearly a public interest in ensuring departments are accountable in terms of how they spend public money and in providing information to enable value for money to be assessed, the Home Office have argued that the public interest in disclosure in this case is outweighed by the harm that would be caused to the public interest and, ultimately the taxpayer, by

any resultant need for them to increase their financial contributions to contractors. On balance, I consider the Home Office's position to be a reasonable one. Arguments in favour of disclosure, namely to ensure taxpayers' money is spent wisely and achieves value for money, are undermined by the fact that those very performance specifications could themselves be compromised by the disclosure of the information. The information I have seen persuades me that the potential damage that would be caused to taxpayers' interests, through increased financial contributions by the department, outweighs the public interest in having the information in the public domain.

Conclusion

12. Minor handling issues aside, on the substantive issue of whether Lord V was entitled to specific information with regard to insurance premiums for detention centres, I found that the information could justifiably be withheld by the Home Office under Exemption 7(a) of the Code. I do not, therefore, uphold the complaint.

Home Office

Case No: A.26/05

Refusal to provide information about the failure of the Government to proscribe an organisation

Summary

Ms T asked the Home Office what steps the Government had taken to proscribe the organisation known as the al-Aqsa Martyrs' Brigade, and why they had not listed the organisation as a proscribed terrorist group. The Home Office refused to provide that information, on the basis that it was their policy not to comment on whether or not a particular organisation was being considered for proscription, or to give reasons for an organisation's absence from the list. Ms T sought a review, and the Home Office again declined to provide the information, citing Exemption 1 of the Code. The Ombudsman was critical of the way in which the Home Office had handled Ms T's information request. However, she found that the Home Office had correctly cited Exemption 1 and she concluded that, on balance, the potential harm caused by disclosure of the information sought by Ms T outweighed the public interest in its release. She did not uphold the complaint.

1. Ms T complained that the Home Office refused to supply her with information that should have been made available to her under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked. I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Information Code are couched in the past tense.

Background to the complaint

2. Under section 3(3) of the Terrorism Act 2000 the Home Secretary is able to recommend to Parliament the proscription of any organisation which is 'concerned in terrorism', as defined by that Act. In considering which international terrorist organisations should be subject to proscription, the Home Secretary takes the following five factors into account:

(i) the nature and scale of an organisation's activities;

(ii) the specific threat that it poses to the UK;

(iii) the specific threat that it poses to British nationals overseas;

(iv) the extent of the organisation's presence in the UK; and

(v) the need to support other members of the international community in the global fight against terrorism.

3. The al-Aqsa Martyrs' Brigade is an armed Palestinian group associated with the Fatah organisation, the political faction led by the, now deceased, former Palestinian leader Yasser Arafat. While the group initially vowed to target only Israeli soldiers and settlers in the West Bank and Gaza, since early 2002 the group has taken responsibility for a series of suicide attacks against civilians inside Israel. The al-Aqsa Martyrs' Brigade was added to the European Union's list of recognised terrorist groups in June 2002 and the United States recently designated the group as a 'Foreign Terrorist Organisation'. The group has not been proscribed as a terrorist organisation by the UK Government.

The complaint

4. On 17 February 2004 Ms T wrote to the Home Office and, citing the Code, asked what steps the Government had taken to proscribe the organisation known as the al-Aqsa Martyrs' Brigade. She also asked why the Government had not listed this organisation as a proscribed terrorist group. The Home Office acknowledged the request on 30 March 2004 and replied in full

on 27 April 2004. They said that the Government's list of proscribed organisations was kept under constant and active review. However, they said that it was their policy not to comment on whether or not a particular organisation was being considered for proscription, or upon the reasons for an organisation's absence from the list. They said that decisions to proscribe were, and would continue to be, taken only after the most careful consideration and on the basis of the best possible security advice. They said that that would remain the basis for all such decisions in the future.

5. On 28 April 2004 Ms T wrote again to the Home Office and appealed against the decision not to provide the information she was seeking. She said that, as she understood the Code, there were specific reasons why information could be withheld and that, if those reasons did not exist, the information should be provided. She believed that Exemption 1 of the Code was the only possible exemption that could be held to apply but, as the al-Aqsa Martyrs' Brigade was not a proscribed terrorist group, she did not see how it could apply.

6. The Home Office acknowledged Ms T's request for a review on 29 April 2004. Ms T asked for an update on her case on 19 July and 2 August 2004 and the Home Office replied in full on 5 August 2004. They said that the refusal to disclose the information she was seeking was correct because it fell within the scope of Exemption 1 of the Code. They said that this exemption protected information which, if disclosed, would prejudice the operations, sources and methods of the security and intelligence services and that the reasons for the proscription or non-proscription of a terrorist organisation fell into this category. Moreover, they said that the exemption included information whose disclosure would harm the conduct of international relations or affairs and where information had been received in confidence from foreign governments, foreign courts or international organisations. They said that, given the nature of intelligence flows and the multilateral co-operation involved in gaining this intelligence, information relating to the proscription or non-proscription of terrorist groups corresponded to all of the above criteria. The Home Office apologised for the length of time that it had taken to reply and said that they should have advised her of her right to seek a review at the time her request had been refused. They explained that, if she remained dissatisfied, she could now complain to my Office, through a Member of Parliament.

The Department's comments on the complaint

7. In providing his comments on the complaint, the Permanent Secretary of the Home Office repeated the reasons for non-disclosure that were given to Ms T on 5 August 2004 (paragraph 6). He said that they remained of the view that the information sought by Ms T could be withheld under Exemption 1 of the Code and that any public interest in disclosure was outweighed by the harm that would be caused by its release.

Exemptions of the Code

8. In the preamble to part II of the Code, under the heading 'Reasons for confidentiality', it states:

'The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it

should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

9. Exemption 1 is headed 'Defence, security and international relations' and reads as follows:

'(a) Information whose disclosure would harm national security or defence.

(b) Information whose disclosure would harm the conduct of international relations or affairs.

(c) Information received in confidence from foreign governments, foreign courts or international organisations.'

Assessment

10. Before turning to the substantive issue of whether or not the information sought by Ms T should be disclosed, I shall look first at how the Home Office handled her request. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005, all requests for information should have been treated as if made under the Code, irrespective of whether or not it was referred to by the applicant. Information should have been provided as soon as practicable and the target for responses to simple requests for information was 20 working days from the date of receipt. While this target could have been extended when significant search or collation of material was required, an explanation should have been given in all cases where information was not provided. It was also good practice in such cases for departments to have identified in their responses the specific exemptions in part II of the Code on which they were relying in making that refusal. Moreover, they should have made the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to me if, after the completion of the review process, they remained dissatisfied.

11. The Home Office's initial handling of Ms T's request was poor. Her request of 17 February 2004 (paragraph 4) was not identified as being one to be considered under the Code and the Home Office failed to either cite any exemptions of the Code as justification for refusing to provide the information requested or to advise Ms T of her right to seek an internal review. Instead, the only reason given for not disclosing the information sought by Ms T was that it was their policy not to comment on whether or not a particular organisation was being considered for proscription, or upon the reasons for an organisation's absence from the list. However, the Code did not recognise class exemptions: it required an assessment to be properly made in response to each individual information request and I am critical of the way that the Home Office relied on a blanket ban to withhold information of this kind without assessing its individual merits under the terms of the Code.

12. It was only when Ms T appealed against the initial decision, and specifically referred to the Code, that the Home Office began to comply with its provisions. They then reviewed the initial decision under the Code, explained in terms of the exemptions of the Code why the information could not be provided, and advised Ms T of her right to approach me if she remained dissatisfied. However, that process took 14 weeks, 50 working days longer than recommended by the Code. Moreover, that followed the ten weeks it took to respond to Ms T's initial request. I am critical of these failings and I recommended to the Permanent Secretary of the Home Office that he remind his staff of the importance of identifying requests for information at the earliest possible stage and then acting in accordance with the relevant requirements for handling such requests. While the Code has now been superseded by the Freedom of Information Act 2000, I believe that there are lessons that can and should be learnt

from this case. In reply, the Permanent Secretary said that the delays in handling the original request for information were indeed unfortunate. He said, however, that prior to the introduction of the Freedom of Information Act a bespoke training programme and awareness-raising campaign had been delivered across the organisation and he hoped that future requests for information would be handled much more appropriately.

13. I shall now look at the substantive question of whether or not the Home Office were justified in citing Exemption 1 of the Code as a basis for refusing to release the information requested by Ms T. That request was for the reasons why the al-Aqsa Martyrs' Brigade had not been listed in the UK as a proscribed terrorist organisation. In reaching a decision on whether or not that particular group should be subject to proscription, the Home Secretary needed to take account of the five factors that I have outlined above (paragraph 2). It will be quite clear to any member of the public, if they were asked to compare those five factors to the information that is publicly known about the group (paragraph 3), that the activities of the al-Aqsa Martyrs' Brigade do not fulfil some of the criteria that have been set. However, there are other factors that bear on the Home Secretary's decision not to proscribe that organisation and, in refusing to provide their reasons for non proscription, the Home Office have cited Exemption 1 of the Code and stated that the public interest in disclosure does not outweigh the potential harm identified by that exemption.

14. There are three parts to Exemption 1 (paragraph 9) and the Home Office believe that all three can be applied to the information sought by Ms T. Having had sight of the information in question, in my view the most relevant is the second part, Exemption 1(b). This exemption relates to information whose disclosure would harm the conduct of international relations or affairs and was designed to protect information which would impair the effectiveness of the conduct of international relations. The Cabinet Office Guidance on the Interpretation of the Code states that the harm or risk of harm caused by the disclosure of this type of information might include:

- disclosure which would impede negotiations, for example by revealing a negotiating or fall-back position, or weakening the Government's bargaining position;

- disclosure which would undermine frankness and candour in diplomatic communications, for example the appraisal of personalities or political situations; and

- disclosure which would impair confidential communications and candour between governments or international bodies.

15. Having looked very carefully at the information sought by Ms T I am satisfied that, in principle, it is information of the type that falls within the scope of Exemption 1(b). However, that is not the end of the matter: I need also to consider whether or not the potential harm caused by disclosure is outweighed by the public interest in making this information available (paragraph 8). I acknowledge that the issue of whether or not any one particular organisation should or should not be proscribed under section 3(3) of the Terrorism Act 2000 is clearly a subject that is of great public interest and that there is a strong argument that the release of the information sought by Ms T would help to inform debate in this area. However, weighed against this is the risk that such a disclosure could cause the type of harm that I have outlined above. On this occasion I consider that, on balance, the potential harm caused by

the disclosure of this information outweighs the public interest in its release. I therefore uphold the Home Office's decision to refuse Ms T's request for information. As such, I see no merit in going on to consider whether or not the other two parts of Exemption 1 could also be held to apply to the same information.

Conclusion

16. I found that the Home Office were justified in refusing to release the information sought by Ms T. However, I was critical of the way they handled her request for information and I welcome the steps the Home Office have taken to raise awareness about the procedures that should be followed when handling such requests under the Freedom of Information Act.

Home Office

Case No: A.29/05

Refusal to release full copies of applications for a licence to conduct animal experiments

Summary

The pressure group represented by Mr R asked the Home Office for copies of all project licence applications made under the Animals (Scientific Procedures) Act 1986 since 1 January 2002, and for the results of any animal experiments that had been passed to the Home Office during the same period. The Home Office eventually refused to provide the information, citing Exemption 9 of the Code. The pressure group narrowed their information request to include only the first five project licence applications received in both 2002 and 2003. Having sought the views of the applicants, the Home Office provided the pressure group with summaries of the relevant project licence applications. Following an enquiry by a member of the Ombudsman's staff, the Home Office confirmed that they were relying on section 24 of the 1986 Act and Exemptions 4, 12, 13 and 15 to withhold information covered by the pressure group's narrowed request, and had also considered Exemptions 10 and 14 of the Code.

The Ombudsman was highly critical of the Home Office's delay in citing Exemption 9 with regard to the pressure group's original information request, but made no findings as to its applicability since Mr R did not dispute that its use was appropriate. She was likewise critical of the Home Office for their further substantial delays in responding to the pressure group's revised information request. However, the Ombudsman commended the Home Office for their preparation of the narrative accounts of the project applications, although she criticised them for not informing the pressure group of the exemptions on which they were relying to withhold much of the information in those applications. The Ombudsman nevertheless upheld the Home Office's use of Exemptions 4 and 13 to withhold the outstanding information.

1. Mr R complained, on behalf of a leading anti-vivisection pressure group (the pressure group), that the Home Office mishandled their request for information in breach of the terms of the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked. I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Code are couched in the past tense.

Background to the complaint

The Animals (Scientific Procedures) Act 1986 (the 1986 Act)

2. The 1986 Act makes provision for the protection of animals used for experimental or other scientific purposes. Under the 1986 Act the Secretary of State can grant a project licence 'specifying a programme of work and authorising the application, as part of that programme, of specified regulated procedures to animals of specified descriptions at a specified place or specified places'. Section 24 of the 1986 Act reads as follows: -

'(1) A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence.

(2) A person guilty of an offence under this Section shall be liable -

(a) on conviction of indictment, to imprisonment for a term not exceeding two years or to a fine or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both.'

3. On 8 October 1998 the Home Office issued a Circular in which they said that, while they had previously viewed section 24 of the 1986 Act as a blanket ban on the disclosure of information in applications and licences, they now accepted, following legal advice in the face of a threatened judicial review, that decisions regarding requests for disclosure must be considered on a case by case basis.

The Code of Practice on Access to Government Information

4. Before the Freedom of Information Act 2000 came fully into force on 1 January 2005 all requests for government-held information should have been considered under the terms of the Code. The Ombudsman's role was to consider complaints that bodies within her jurisdiction had refused or mishandled a request for information. Refusal to supply information might have been justified if the information fell within one or more of the exemptions listed in part II of the Code (paragraph 23). The Code gave no right of access to documents: the right, subject to exemption, was only to information, although the Ombudsman and her predecessors took the view that the release of the actual documents was often the best way of making available information which they had recommended for disclosure.

5. Paragraph 8 in part I of the Code explained that, as the Code was non statutory, it could not override provisions contained in statutory rights of access to information or records, or statutory prohibitions on disclosure. This linked in with Exemption 15 of the Code (paragraph 29), which was intended to protect from disclosure information whose release was prohibited by or under any enactment, regulation, European law or international agreement. I am aware that section 24 of the 1986 Act provides such a prohibition on disclosure. However, there has clearly been some debate about how that section of the 1986 Act should be interpreted. The Home Office have not only accepted since 1998 that requests for information relating to project licence applications should be considered on a case by case basis (paragraph 3) but also that this was best achieved in practice by considering the merits of any particular request under the terms of the Code (paragraph 8). Against this background, the Home Office considered the pressure group's request for information under the terms of the Code and I have investigated Mr R's complaint on that basis.

Investigation

6. On 30 May 2002 the pressure group wrote to the Home Office and asked for copies of all project licence applications (in anonymised form and redacted where appropriate) made under the 1986 Act that they had received since 1 January 2002. the pressure group also asked, on the same anonymised basis, for the results of any animal experiments that had been passed to the Home Office during the same period.

7. An internal Home Office e-mail dated 6 June 2002 noted that they would need to consider the pressure group's request under the Code and said that, once they had established exactly how many applications they had received since 1 January 2002, they would need to decide whether or not there were grounds for refusing the request under Exemption 9 of the Code. On 7 June 2002 they calculated that they had received a total of 360 project licence applications since 1 January 2002. The Home Office acknowledged the pressure group's request on 20 June 2002. On 1 July 2002 they wrote to the pressure group to

say that, since 1998, they had accepted that not all information contained in project licence applications was necessarily confidential and that decisions on disclosure must be taken on a case by case basis. They said that they would not be able to provide a substantive response to the request within the 20 working day target set out under the Code. They said that they had received 360 project licence applications since 1 January 2002 and that, in considering what information should be released, they would need to consult the applicants and to consider how to process the request without diverting resources from other necessary work.

8. On 2 July 2002 the Home Office decided not to refuse the request at that stage but to take a single 'specimen' application through the process of deciding how much information within it could be disclosed to see what kind of problems might arise. On 15 August 2002 the Home Office wrote to the specimen applicant. They outlined the nature of the request they had received and referred to the Home Office Circular of 8 October 1998 (paragraph 3). They said that, against this background, they needed to consider the request under the terms of the Code. They enclosed a redacted version of the application, with information removed that they believed might identify places or persons, or might otherwise be of intellectual or commercial value. They asked the applicant to consider the redacted application and to comment on whether or not they believed that there was any more information that could be disclosed or if they believed that further information should be withheld. If so, they were asked to justify their comments in terms of the exemptions of the Code. They were told that their reply would inform the Home Office's decision on what information should be disclosed.

9. On 9 September 2002, following a meeting to discuss the request made by the pressure group, the Home Office set out their views on the interface between the Code and the 1986 Act, and how that affected their response to the pressure group. They highlighted paragraph 8 of the Code (paragraph 5) and said that the current view was that this paragraph and section 24 of the 1986 Act together safeguarded information that they had obtained exercising their statutory functions and which they had reasonable grounds for believing to have been given in confidence. They believed that 'reasonable grounds' had to be determined in the light of the terms of the Code and on a case by case basis. They highlighted information in the project licence application form that they believed could be released and analysed several exemptions in part II of the Code that they believed could be used to justify the non-disclosure of other parts of the form. The exemptions they considered included Exemptions 4(f), 7(b), 9, 13 and 14 and they concluded that, while it was unlikely that they would be able to disclose certain information in project licence applications, each one would have to be considered on its merits. On 2 October 2002 the Home Office asked the specimen applicant whether or not they had considered their letter of 15 August 2002 and when they might be in a position to reply.

10. On 4 October 2002 the pressure group asked the Home Office when they would be receiving a response to their request for information. On 11 October 2002 the specimen applicant said that they were making progress and hoped to send the Home Office something shortly. On 24 October 2002 the Home Office wrote to the pressure group to say that they were not yet able to say when they were likely to complete their assessment of what information could be disclosed but said that they would let them know as soon as they could. On 1 November 2002 the

specimen applicant proposed a meeting to discuss the request further. On 20 December 2002 the Home Office wrote to the pressure group to say that they were reaching the end of their consideration and hoped to be in a position to reply substantively by the end of January 2003.

11. On 21 January 2003 the specimen applicant provided the Home Office with an extract that they had prepared which they believed reflected the non confidential sections of the relevant project licence application. On 12 February 2003 the pressure group wrote to the Home Office to say that they hoped to hear from them as soon as possible. On 4 March 2003 the Home Office drafted a submission to the then Parliamentary Under-Secretary of State responsible for the regulation of animals in scientific procedures in which they proposed to refuse the pressure group's request for information on the grounds that to meet the request would require an unreasonable diversion of resources. On 5 March 2003 the Home Office told the pressure group that they were still not in a position to reply but hoped to be able to do so in the next few weeks. the pressure group replied on 17 March 2003 and expressed their disappointment with the time it was taking to respond to their request. On 26 March 2003 a submission was put to the then Parliamentary Under-Secretary of State proposing that the pressure group's request for information be refused under Exemption 9 of the Code. The submission said that they had estimated that to meet the pressure group's request in full would require about 4,500 Home Office man hours at a cost of £89,980 (calculated at 12.5 man hours of Home Office resources at £20 per hour per licence, less the first hour free). On 27 March 2003 the then Parliamentary Under-Secretary of State agreed with the proposal.

12. On 3 April 2003 the Home Office wrote to the pressure group providing a substantive response to their information request. They said that they would not be able to meet either of their requests for information on the grounds that to meet them would require an unreasonable diversion of resources. They cited Exemption 9 of the Code. As the decision had been taken after wide consultation and careful consideration, they said that an internal review would not be appropriate and they advised the pressure group of their right to complain, via a Member of Parliament, to the Ombudsman.

13. On 3 June 2003 the pressure group wrote to the Home Office to complain about the decision they had reached. They also narrowed their request for information to include only the first five project licence applications received in both 2002 and 2003. They asked for a response within 20 working days. The Home Office acknowledged the request on 9 June 2003 and, on 4 July 2003, they said that they would not be able to respond within 20 working days due to the need to consult the relevant applicants. On 10 July 2003 the pressure group asked the Home Office to confirm that, on this occasion, they were considering the disclosure of the applications in question. They also asked when they could expect to receive a substantive reply. On 17 July 2003 the Home Office confirmed that the request would be considered in accordance with the requirements of the Code and section 24 of the 1986 Act and, while they were unable to say at that stage when they would be in a position to respond substantively, they said that they would keep the pressure group informed of progress.

14. On 18 July 2003 the Home Office wrote to all ten applicants to explain the situation and to ask them whether or not they believed any of the information in their applications was exempt from disclosure under the Code. They said that they

would consider how to respond to the request in the light of the replies received. They asked for a response by 11 August 2003. On 22 August 2003 the Home Office wrote to the pressure group to say that their request remained under consideration and that they were unable to indicate when they would be in a position to respond. An internal Home Office note dated 11 September 2003 provided a breakdown of the responses received from the applicants, but noted that they had not received replies from all of the applicants. On 23 September 2003 the pressure group asked for a response as soon as possible. On 31 October 2003 the Home Office explained the current position and said that they would keep the pressure group informed of progress. On 4 November 2003 the pressure group expressed their surprise at the delay. On 3 December 2003 an internal e-mail mentioned the possibility of drafting a narrative description of the applications on the grounds that diligent attempts to redact the original applications had failed. The recipients of the e-mail were asked to comment on an enclosed draft narrative. On 5 December 2003 the Home Office wrote to the pressure group and explained that they were considering the possibility of disclosing the information requested in another format. They said that producing truly anonymised information posed significant problems and also that simply redacting applications to remove exempt material rendered the material that they might be able to disclose largely unintelligible. As a result, they said that they had set about trying to extract and present the information in another format that was both informative and in keeping with the provisions for disclosure of information. They said that they were awaiting advice as to whether or not this process was reasonable and that they would write again once they had received and considered that advice.

15. On 10 December 2003 the Home Office sought internal legal advice about how they proposed to respond to the pressure group's request for information. They said that most of the applicants had asked that all personal and technical data that might possibly identify them, their colleagues or their place of work should be removed before disclosure, although they said that some applicants had indicated that nothing should be disclosed. The Home Office said that the difficulty with redacting this type of information was that, because the work of many of the applicants was so specialized or unique, the entry of a few key words from the remaining technical information into an internet search engine readily revealed their names, places or work, and field of work or research. (They also noted that the redaction process produced material which was so fragmented and out of context that it was not really informative about what was requested or why). They sought advice as to whether or not it would be defensible to cite Exemption 12 of the Code (paragraph 26) as justification for refusing to disclose the request from the pressure group on the grounds that providing redacted applications could constitute or facilitate an unwarranted invasion of privacy. The Home Office also said that, in the light of the problems they had faced when redacting the applications, they had considered an alternative approach, which was to produce separate narrative accounts of the applications. They asked whether or not disclosing the information in this format, as an alternative to redacting the applications, was both reasonable and defensible.

16. On 7 January 2004 the Home Office received internal legal advice which said that the obligation to disclose information under the Code related to the information contained within the applications and not the applications themselves; that the difficulty in redacting the applications could not be used as a reason for not disclosing anything, if

there was discloseable information which could be presented in a different way; that each individual application needed to be considered against the exemptions of the Code; and that the objections of the applicants was only one factor to take into account when considering disclosure. On 2 February 2004 the Home Office wrote to the pressure group to say that they had been advised that their proposed approach was consistent with the Code and that they had begun collating the relevant information. On 4 February 2004 a member of the Home Office's staff sent an internal e-mail in which he said that he had prepared draft narrative descriptions of the applications. He said that the documents he had drafted included information which must/should/might be disclosed but not information that should not be disclosed either under the Code or section 24 of the 1986 Act. He said that he had not included information which he believed represented serious intellectual or academic property (specifically that which was entirely novel, of potential monetary or intellectual value, and known only to the applicant and the Home Office) or information that was already to be found in the public domain or had yet to be published. He also said that he had removed or concealed details that would allow the applicant or his place of work to be easily identified using the technical content and an internet search engine. On 4 March 2004 the Home Office wrote to the pressure group to say that the information had been prepared but was awaiting advice that it could be deemed to be consistent with their obligations under the Code and section 24 of the 1986 Act. On 10 March 2004 the pressure group said that the process had already taken far too long and that they could not understand why further advice was necessary. On 18 March 2004 the Home Office said that they regretted the time it was taking to deal with this issue.

17. On 14 April 2004 the Home Office wrote to the pressure group and provided a substantive response to their request for information. They provided summaries of the ten relevant project licence applications and said that, in so doing, they were mindful of the need to ensure that the information provided was both meaningful and truly anonymised, and also that the Code only required departments to provide information, not documents. On 18 May 2004 the pressure group asked the Home Office to reconsider their decision to provide summaries rather than redacted copies of the documents. They said that they had been advised that departments were obliged to provide the information in the form in which it was held, and not to provide a summary of that information. On 27 May 2004 the Home Office said that they had mistakenly referred to the material as summaries and that, in fact, the narratives supplied and gave context to the totality of what they believed was the discloseable information, with information only withheld in strict accordance with the exemptions in part II of the Code. The pressure group wrote to the Home Office again on 8 June 2004 and said that it was clear from the narratives that the information was not in the form originally supplied by licence applicants, but rather represented the Home Office's interpretation of it. They did not believe that this was permissible, however full and faithful to the original the interpretation might be. The Home Office responded on 9 June 2004 by saying that they had no further comment to make at that time.

The complaint

18. On 21 September 2004 the Ombudsman received a complaint from Mr R, referred by his Member of Parliament, against the Home Office. While Mr R did not dispute the use of Exemption 9 with regard to the pressure group's first request for information, he complained that the Home Office misled them into believing that the

information they requested would be provided. With regard to the pressure group's second request Mr R was aggrieved that, by providing summaries and not redacted versions of the project licence applications, the Home Office had not complied with their obligations under the terms and principles of the Code. Mr R also complained about the delay in responding to both requests for information. In a subsequent letter to the Ombudsman, Mr R also wanted to make it clear that, in relation to the second request for information, he was not only complaining about the way the information that had been disclosed was presented but also that the Home Office had withheld large amounts of information from him.

The Permanent Secretary's comments on the complaint

19. In responding to Mr R's complaint, the Permanent Secretary of the Home Office said that they had taken account of Exemption 9 of the Code when responding to the initial request for information and that they had undertaken detailed calculations in relation to the resources involved, which they believed justified the use of this exemption. He said that he was glad that Mr R had not disputed the use of Exemption 9.

20. In response to Mr R's complaint that the Home Office had misled the pressure group into believing that the information they had requested would be provided, the Permanent Secretary said that they did not believe that this was the case, and it was regrettable if this was the impression that was given.

21. As regards Mr R's complaint that their response did not comply with the Code, the Permanent Secretary said that the unit involved decided that it would be prudent, considering the nature of the request, to consult widely and produce narrative documents of applications setting out all of the information that could be disclosed under the Code. He said that he believed their files would demonstrate the lengths to which they went to meet their obligations under the Code, before deciding that such narrative accounts provided more meaningful accounts than redacted versions of documents. The Permanent Secretary said that the work involved in responding to the pressure group's request for information, and the associated consultation, all took a considerable amount of time.

22. The Permanent Secretary said that it had proved very difficult to respond to these requests for information and that it was inevitable that some parties would be unhappy with the outcome. He said that they were anxious to receive the Ombudsman's recommendations on the best practice in dealing with the request so that it could feed into any future plans for disclosure.

The Code of Practice on Access to Government Information

23. In response to an enquiry from a member of the Ombudsman's staff, the Home Office confirmed that, in withholding information from the pressure group, they were relying on section 24 of the 1986 Act and Exemptions 4, 12, 13, and 15 in part II of the Code. In addition, they also said that they considered issues relating to Exemptions 10 and 14 of the Code.

24. Exemption 4 of the Code was headed, 'Law enforcement and legal proceedings' and the parts relevant to the pressure group's request read as follows:

'(e) Information whose disclosure would harm public safety or public order, or would prejudice the security of any building or penal institution.

(f) Information whose disclosure could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes.'

25. Exemption 10 was headed, 'Publication and Prematurity in relation to a Planned or Potential Announcement or Publication' and read:

'Information which is or will soon be published, or whose disclosure, where the material relates to a planned or potential announcement or publication, could cause harm (for example of a physical or financial nature).'

26. Exemption 12 was headed, 'Privacy of an individual' and read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

27. Exemption 13 was headed, 'Third Party's Commercial Confidences' and read:

'Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.'

28. Exemption 14 was headed, 'Information given in Confidence' and read:

'(a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or
- was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure.

(b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information

(c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.'

29. Exemption 15 of the Code was headed 'Statutory and other restrictions' and read:

'(a) Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.

(b) Information whose release would constitute a breach of Parliamentary Privilege.'

30. In assessing the pressure group's request for information, the Home Office also referred to paragraph 8 in part I of the Code, the relevant parts of which read:

'This Code is non-statutory and cannot override provisions contained in statutory rights of access to information or records (nor can it override statutory prohibitions on disclosure). Where information could be sought under an existing statutory right, the terms of the right of access takes precedence over the Code.'

Assessment

31. The pressure group's request for information was in two parts: (i) their request of 30 May 2002 for copies of all project licence applications received since 1 January 2002; and (ii) their narrowed request of 3 June 2003 for copies of the first five project licence applications received in

both 2002 and 2003. I shall look first at the request of 30 May 2002. Mr R's complaint with regard to this request was not so much that the Home Office refused to provide the information under Exemption 9 of the Code, but rather that they delayed in citing it. He believes that the Home Office misled the pressure group by indicating that at least some of the information they had requested would be provided. As Mr R does not dispute the use of Exemption 9 I see no merit in assessing whether or not its use was justified, and I therefore make no finding on the matter. But why did it take the Home Office ten months to decide that the pressure group's request should be refused under Exemption 9? Within days of receipt of the request, the Home Office had identified that they had received approximately 360 project licence applications since 1 January 2002 and that Exemption 9 could be used to refuse the request (paragraph 7). However, rather than rely on that exemption at that time, the Home Office took the decision to take a specimen application through the process of deciding how much of it could be disclosed on the grounds that, by doing so, they would get a clearer picture of the difficulties that would arise should the pressure group narrow their request. I consider that decision to have been misconceived. The Code requires a response to requests for information to be given within 20 working days of receipt, although it recognises that this target may need to be extended when significant search or collation of material is required. By taking a specimen application through the process of deciding how much of it could reasonably be disclosed under the terms of the Code and section 28 of the 1986 Act, the Home Office took several months redacting a document that, realistically, they had no intention of disclosing. Had they cited Exemption 9 within 20 working days, which I believe they could and should have done, the pressure group would have been in a position to make their second, narrowed, request very much sooner. The Home Office could then have taken the ten applications then requested through the process of considering how much of the information within them should be released. In my view, the Home Office gained very little by taking the approach they did, while the pressure group were greatly inconvenienced by being denied the opportunity to narrow their request for information in the nine additional months they were kept waiting for a substantive response. Mr R believes the pressure group were misled into thinking that they would receive at least some of the information requested and, in the light of what followed, I believe that the Home Office's letter of 1 July 2002 was misleading, albeit perhaps not intentionally so. I fully appreciate Mr R's frustration at the excessive delay in reaching a decision that could have been taken within 20 working days and I am highly critical of the way the Home Office handled the pressure group's first request for information.

32. I shall now look at the pressure group's second request for information. In doing so, there are several issues that I need to assess: the delay by the Home Office in providing a substantive response; their decision to provide narrative accounts rather than redacted versions of the ten applications sought; and their decision to withhold large amounts of information in the project licence application forms. With regard to the time taken to reply, I have already criticised the Home Office for the delay in responding to the pressure group's first request for information. On that occasion it was clear to me, and also to the Home Office and Mr R, that Exemption 9 was relevant to the information requested. As such, the only consideration to be made by the Home Office was whether or not its use was reasonable and I do not consider that it should have taken ten months to reach a decision on that matter. In deciding how to respond to the pressure group's

second request for information, the Home Office needed to reach a decision on how much information in each of the ten applications could be disclosed. I accept that the decision making process in this regard was more complicated and inevitably more time-consuming. For example, there was a need to seek the opinions of the ten applicants concerned and I note that, although the Home Office asked for replies within a reasonable period, some of the responses were delayed. Moreover, the issues involved were not straightforward: the Home Office needed to decide not only how much information could be disclosed but also how best to present it. There was much internal deliberation with opinions being sought from various different sources. However, notwithstanding the difficulties faced by the Home Office in considering these issues, I believe that a decision could and should have been made sooner and I am critical of the ten months taken to respond to this second request, particularly as it followed a similar lengthy delay in responding to the pressure group's first request for information.

33. The pressure group were also highly critical of the way the Home Office decided to provide narrative accounts of the ten applications they had sought rather than redacted versions of those documents. In their view, the narrative accounts represented the Home Office's interpretation of the information provided by the applicants and they believed that the approach taken was against the principles of the Code. The papers provided by the Home Office show that their initial thoughts were to provide redacted versions of the ten project licence applications. However, once they had removed all of the material that they believed was exempt from disclosure under the Code, the resultant material was so fragmented and out of context that it was not informative. However, rather than simply refuse to provide any information to the pressure group, the Home Office then looked at how they might produce the information that was being sought in another way, which would allow much more information to be released than would have been achieved through the process of redaction. I commend that proactive approach to the release of information. The Code committed departments to provide information, not documents, and I note that the Cabinet Office guidance on the interpretation of the Code said that basing the Code on information rather than documents reflected the increasing variation of forms in which information is held, and emphasised the substance of what is in documents or other records, rather than the form in which they are written. Moreover, the overriding principle of the Code was to adopt a positive approach to the release of information and, in general, I consider that the Home Office's approach in this instance was fully in accordance with the aims of the Code. Of course, whether or not the Home Office were justified in adopting such an approach will largely depend on whether or not their judgement as to what information should be exempt from disclosure under the Code was justified. I shall now, therefore, go on to look more closely at the information that the Home Office refused to disclose to the pressure group and to assess the use of the exemptions they cited in support of their decision not to release it.

34. The pressure group requested copies of the first five project licence applications received by the Home Office in 2002 and 2003. Applications for project licences under the 1986 Act are made on a standard application form that can be found, along with some guidance notes on how to complete it, on the Home Office's website (http://www.homeoffice.gov.uk/comrace/animals/licensing.html). The application form is divided into 22 sections and the guidance notes give an outline of the type of information that the

applicant is asked to provide. In the first 13 sections the applicant is asked to provide information about themselves and the deputy project licence applicant (e.g. name, contact details, other personal/project licences held, experience relevant to the application), as well as details of the establishment where the research would be carried out. In section 14 the applicant is asked to state the permissible purpose of the project as listed in section 5(3) of the 1986 Act; in section 15 whether the project is one that needs to be referred to the Animal Procedures Committee; and section 16 the duration for which the project licence is required. In section 17 the applicant is asked to provide a summary of the background, objectives and potential benefits of the project and then to provide the same in more detail. Section 18 relates to the plan of work. The introductory subsection covers categories of work where there are specific requirements which need particular justification, while in section 18(a) the applicant is asked to justify the research methods that are proposed including, for example, the reasons why a particular species of animal is to be used. In section 18(b) applicants are asked to further justify the use of animals by outlining the consideration given to using non-sentient alternatives as well as the efforts made both to reduce the number of animals to be used and to refine the procedures to minimise suffering. Sections 18(c) and 18(d) relate to instances where the applicant proposes to either use non-human primates or to release animals to the wild in the course of the project. In section 19(a) the applicant is asked to provide an index of the protocols to be used, a protocol being the combination of regulated procedures applied to a protected animal, or group of animals, for a specific purpose. In most circumstances, a protocol covers all of the interventions applied from the time an animal is issued from stock until it is killed, or discharged from the controls of the 1986 Act at the end of the experiment. The applicant is asked to give a title to the protocol, to nominate a severity limit (mild, moderate, substantial or unclassified) and to provide details of the type, stage of development and number of animals that will be used. In section 19(b) the applicant is asked to provide more details about each of the protocols listed at 19(a), including a description of the procedure, possible adverse effects, and the proposed fate of the animals. In section 20 the applicant is asked to give an overall severity band for the project and, in section 21, to make a signed declaration. At section 22, the holder of the certificate of designation at the establishment proposed to be used by the applicant is also asked to make a signed declaration.

35. The ten applications requested by the pressure group are lengthy documents containing a large amount of, often detailed, information. The Home Office have disclosed some of that information. They decided that there was no reason under the Code why the information contained within sections 14, 15, 16 and 20 of the application form should not be disclosed (paragraph 9). However, they believed that it would be difficult to release any further information in the project licence applications, at least in the format in which it was written, without causing the type of harm envisaged by several of the exemptions in part II of the Code. Moreover, they believed that, if they were to redact the document in the light of those exemptions, it would render it unintelligible. I should note at this juncture that it has been difficult to assess exactly what exemptions of the Code the Home Office relied upon in refusing to disclose this information. While the internal Home Office papers clearly show that they took account of the Code when assessing the merits of the request, there is very little reference to the exact exemptions they were relying upon. More importantly, they failed to cite any exemptions of

the Code when informing the pressure group of their decision to withhold parts of the ten project licence applications they were seeking (paragraph 17). I am critical of that failing: the Ombudsman and her predecessors have repeatedly said that it was good practice in any cases where information was to be refused for departments to have identified in their responses the specific exemptions in part II of the Code on which they were relying in making that refusal.

36. So what exemptions of the Code do I need to consider when assessing the way the Home Office handled the pressure group's request for information? The Home Office have confirmed (paragraph 23) that they were relying on Exemptions 4, 12, 13, and 15 and also that they had considered issues relating to Exemptions 10 and 14. Exemption 15 was cited because of the statutory prohibition on disclosure that is afforded to information contained in project licence applications under the terms of the 1986 Act. While in many circumstances the use of that exemption would lead to the termination of the Ombudsman's intervention, I have already explained (paragraph 5) why, in this instance, there is a basis for a Code investigation.

37. The Home Office were particularly concerned about the disclosure of any detail of the applications that might lead to the identification of the applicant, or the establishment where the project was to take place. Exemption 4(e) is intended to protect information that, if disclosed, would harm public safety or public order, or would prejudice the security of any building or penal institution (paragraph 24). The Cabinet Office Guidance on the Interpretation of the Code gives as an example of information which might fall to be protected under this exemption as information about facilities in which animal research is conducted. Exemption 4(f) protects information that, if disclosed, could endanger the life or physical safety of any person, or identify the source of information or assistance given in confidence for law enforcement or security purposes (paragraph 24). Both of these exemptions are relevant to the pressure group's request for information. While the vast majority of anti-vivisection campaigners are peaceful and law abiding, there is a small minority of individuals who are involved in violent and unlawful activities against scientists and organisations who conduct experiments on animals. I have seen evidence in the background papers provided by the Home Office that the applicants were anxious that the disclosure of the applications might endanger the lives of themselves and their families. One applicant, for example, asked that his application be anonymised before disclosure and noted that, even then, the main body of the text would contain sufficient information that would 'easily' lead to the identification of him and others as having undertaken animal experimentation. Clearly, much of the personal details section of the application form contains information that would identify the applicant, the deputy applicant and the establishment where the project is due to take place. However, I also accept the Home Office's argument that disclosing too many details of the actual projects might also lead to the identity of the scientist, or the establishment where they work, becoming publicly known. The scientific community is not large and the projects for which a licence was requested were inevitably discrete pieces of work that were distinguishable from other projects in the same field. A simple search on the internet for a key word from one of the applications produced a number of responses, many of which identified the name of the applicant and the establishment where they worked. I am satisfied that there is information in these ten project licence applications that, if disclosed, could cause the type of harm envisaged by Exemptions 4(e) and 4(f). Moreover, in my view, the harm that

might be caused by such a disclosure outweighs the public interest in its release. I therefore uphold the use of these two parts of Exemption 4.

38. The Home Office also cited Exemption 13 of the Code, which relates to information, including commercial confidences, trade secrets or intellectual property, whose unwarranted disclosure would harm the competitive position of a third party. In assessing the Home Office's refusal to provide information under this exemption I need to establish: (i) whether the information sought by the pressure group can accurately be described as a commercial confidence, trade secret or intellectual property; and (ii) whether its disclosure would be likely to adversely affect those to whom the information relates. The project licence applications contain a detailed description of the project's background as well as details of the objectives and methodology of the intended research. It is clear to me that much of this information has a commercial or intellectual value, not just to the applicant but also to any scientific competitor. As such, I believe that the disclosure of this information could adversely affect the applicant and the research being undertaken. Moreover, I consider that the potential harm caused by the release of this information outweighs the public interest in its release. That being so, I uphold the Home Office's use of Exemption 13 of the Code.

39. While the Home Office also cited Exemption 12 of the Code I do not believe that there is any information in the project licence applications that would fall within the scope of that exemption that does not already fall within the ambit of Exemption 4. As I have already upheld the use of Exemption 4, I see no merit in going on to assess the applicability or otherwise of Exemption 12 to the same information. Likewise, I do not believe that there is any information that falls within either Exemption 10 or Exemption 14 that does not fall within the ambit of Exemptions 4 and 13, and I have not therefore assessed their use.

40. In conclusion, I have upheld the Home Office's use of Exemptions 4 and 13 to withhold certain parts of the ten project licence applications sought by the pressure group. I am satisfied that, by removing information that would cause the type of harm outlined by those two exemptions, the remaining document would be so fragmented as to be of very little use. I therefore consider that the Home Office's decision to provide narrative accounts of the applications was justified. Part of Mr R's argument against the provision of narrative accounts was that the information was not in the form originally supplied by licence applicants, but rather represented the Home Office's interpretation of it. That, I believe, is an inevitable outcome of producing such narrative accounts. While some of the information released has been transferred untouched, there is some information within the applications, including technical details of the project, which has been summarised and/or translated into a more understandable format. It clearly needed someone with some expertise in the relevant subject areas to produce the summaries and it would be difficult, from a lay person's perspective, to assess the way some of that information has been interpreted. However, I believe that the narrative summaries provide reasonable accounts of the discloseable information in the full project licence applications. Furthermore, I consider that providing information in this format was, on this occasion, an entirely reasonable way of disclosing information that might not otherwise have been released.

41. Notwithstanding the above, I have been highly critical of the delay by the Home Office in responding to both of the pressure group's requests for information (paragraphs 31 and 32) and their failure, when responding to the second

request, to cite any exemptions of the Code to justify withholding some of the information in the project licence applications (paragraph 35). In the light of my comments, I asked the Permanent Secretary of the Home Office to remind his staff of the need to adhere to the relevant requirements for handling requests for information. I believe that this is even more important now that the Code has been superseded by the statutory regime of the Freedom of Information Act 2000.

42. In reply, the Permanent Secretary said that he had noted my concerns about the Home Office's handling of the pressure group's requests for information. He said that delays in handling the original request for information were indeed unfortunate and with the benefit of hindsight probably misguided. He said that the Home Office had already undertaken a concerted awareness campaign across the organisation on the implications of the new Freedom of Information regime and he was confident that similar requests would, in future, be handled better.

Conclusion

43. While I was critical of several aspects of the way the Home Office handled the pressure group's two requests for information, I upheld their use of Exemptions 4 and 13 of the Code to withhold much of the information that had been requested. Moreover, I considered that the provision of narrative accounts of the project licence applications was a reasonable way of providing information that would not otherwise have been released.

Department of Trade and Industry

A.28/05

Refusal to provide information about the progress of an investigation into allegations of smuggling made against British American Tobacco

Summary

Mr Evans asked the Department of Trade and Industry (DTI) for copies of all of the documents they held relating to the progress of their investigation into allegations that British American Tobacco were implicated in smuggling. He emphasised that he was not requesting a copy of the report itself. DTI refused to provide the information, citing Exemptions 2, 4(c), 4(d), and 15(a) of the Code. When requesting a review Mr Evans also asked them for a schedule of the documents being withheld. In completing the review DTI maintained that the exemptions quoted applied to the information sought, but said that they were treating the request for a schedule as a fresh information request. They subsequently concluded that the information Mr Evans wished to have scheduled was covered by Exemptions 2 and 12, and in their comments on the complaint to the Ombudsman DTI also cited Exemption 4(c) as being relevant. The Ombudsman found that Exemption 4(c) applied to all of the information requested by Mr Evans, and that there was thus no need to go on to consider whether the other exemptions quoted by DTI were also relevant. She did not uphold the complaint.

1. Mr Evans complained that the Department of Trade and Industry (DTI) refused to provide him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff but I am satisfied that no matter of significance has been overlooked. I should explain that since 1 January 2005 the Code has been superseded by the Freedom of Information Act 2000. As a result, references to the Code are couched in the past tense.

The complaint

2. On 14 January 2004 Mr Evans e-mailed DTI, referring to their announcement on 30 October 2000 of the appointment of inspectors to look into allegations that British American Tobacco were implicated in smuggling. Citing the Code, he requested copies of all of the documents held by DTI which discussed the progress of the investigation and its likely completion date: he emphasised that he was not requesting a copy of the report itself. He asked for the information to be supplied to him within 20 working days as required by the Code.

3. On 3 February 2004 DTI replied to Mr Evans, declining to provide him with the information he sought. They cited four Code exemptions, Exemption 2 (relating to information whose disclosure would harm the frankness and candour of internal discussion); Exemption 4 (c) (information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings); Exemption 4(d) (information covered by legal professional privilege); and Exemption 15(a) (information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement). DTI said that enquiries had been finalised and that they would be considering with the Secretary of State what, if any, further action was necessary.

4. On 16 February 2004 Mr Evans e-mailed DTI seeking a review of their decision. He said that he believed that the public interest clearly outweighed the benefits of keeping the information secret. In the light of concern expressed over the time taken to complete the

investigation, he believed that the public should know more about why the inquiry had taken over three years to complete. He said that it was possible to release documents relating to the progress and completion of the report without releasing material about its substance. He asked DTI to consider releasing redacted documents. He also requested a schedule of the documents which DTI had withheld from him, to include the date of each document, its title and the sender and recipient.

5. On 25 March 2004 DTI replied to Mr Evans, saying that the Code related to information and did not constitute a right of access to documents or records; his request had therefore been interpreted as covering all of the information contained in the documents he had asked to see. DTI said that they were satisfied that that information fell within the exemptions quoted in their letter of 3 February 2004. They said that, in relation to Exemption 4(c), releasing information other than in court or as part of other appropriate proceedings could prejudice the effective operation of the body conducting operations and cause unjustified harm to the subject of an investigation; as to Exemption 4(d), they said that public authorities had the same right as anyone else to receive legal advice in confidence.

6. DTI went on to say that Exemption 15(a) applied because the investigation had been conducted under section 447 of the Companies Act 1985 (the Act): such investigations were confidential, and any unauthorised disclosure of material collected by the exercise of that power was a criminal offence. As to Exemption 2, the only exemption cited which was subject to the public interest test, DTI said that the justification for the confidentiality of internal opinion and advice was the need to ensure that matters could be discussed candidly and frankly within government. They said that, given that the information requested related to a confidential investigation under the Act, they were satisfied that the harm in disclosing it would outweigh the public interest in making it available. DTI said that if Mr Evans was unhappy with the outcome of his review application he had recourse to the Ombudsman via his Member of Parliament. As to Mr Evans' request for a schedule of the withheld documents, DTI said that they considered this to be a fresh information request under the Code and, now that the review had been conducted, he would shortly be hearing from them about that. DTI also commented on Mr Evans' concern about the length of time taken to complete the investigation, saying that it had been necessary for investigators to obtain and analyse a large amount of information; thousands of documents were examined and explanations of many of these were sought from various officers and employees of British American Tobacco, which process necessarily took time; and that once gathered the information then had to be marshalled and subject to rigorous analysis.

7. On 2 April 2004 DTI wrote to Mr Evans saying that the information he had asked to have scheduled fell wholly or partly within Exemptions 2 and 12; that, in relation to Exemption 2, the harm likely to arise from disclosure would outweigh the public interest in making the information available; and that they were not willing to provide Mr Evans with a schedule containing any of the details he had requested.

8. Following the reference of his complaint, Mr Evans made further representations to the Ombudsman, referring to articles which had appeared in the Guardian newspaper, which he contended amplified the public interest in the issues in this case. He also disputed DTI's treatment of his request for a schedule of the information they were withholding as a separate

information request, which he felt betrayed the spirit of open government.

DTI's comments on the complaint

9. In his comments of 11 November 2004 the Permanent Secretary of DTI said that they had treated Mr Evans' initial request for documents as a request for all of the substantive information contained in those documents. The Permanent Secretary said that DTI considered that the broad nature of Mr Evans' request encompassed a variety of documents, which they considered fell into five categories:

1. those contained in Ministers' Cases and Parliamentary Answers;

2. minutes from investigators appointed pursuant to section 447 of the Act to the Deputy Inspectors of Companies responsible for supervising the investigation;

3. minutes from the investigators to DTI's lawyers seeking legal advice, and the advice which was provided;

4. references to the investigation in Quarterly Reports from DTI's Companies Investigation Branch (CIB) to Ministers; and

5. a submission dated 23 February 2004 to the Secretary of State, and earlier drafts of that submission.

10. The Permanent Secretary discussed each set of documents in turn. In relation to those in paragraph (a), he said that they were either background notes from CIB which outlined in very broad terms the progress of the investigation, minutes from CIB or copies of the letters sent. He said that DTI had taken the view that answers given in Parliament were in the public domain and thus not covered by the Code. As far as the letters sent, he said that all of the information which they contained relating to the progress of the investigation was in the public domain (via Parliamentary Answers) save for the fact that the investigation had been completed, which they told Mr Evans when responding to his information request on 3 February 2004 (paragraph 3 above). As far as the CIB background notes and minutes were concerned he said that DTI considered that Exemption 2 (internal discussion and advice) covered all of the information contained in those documents, and that the harm to the frankness and candour on internal deliberations concerning confidential investigations under the Act would outweigh any public interest in making the information available. The Permanent Secretary said that it was essential that in the course of such investigations matters relating to them could be discussed candidly and frankly. If the content of those discussions were liable to be disclosed then the risk was that persons involved were likely to be less forthcoming, which risked frustrating not only the purpose of the investigation but also the propriety of any decisions made both during and following it. He said that good decision-making relied upon the frank exchange of internal views.

11. As to the documents listed at item (b), the Permanent Secretary said that DTI again considered that Exemption 2 applied to the information they contained, which (for the reasons set out in paragraph 10 above) should be withheld. He also said that those documents contained information that was obtained pursuant to section 447 of the Act, and its disclosure in the absence of a statutory gateway was a criminal offence under section 449 of the Act. He said that there was no statutory gateway for disclosure of section 447 information to Mr Evans, and thus Exemption 15(a) (Statutory and other restrictions) applied, which was not subject to the public interest test. As to the minutes

seeking legal advice, and the advice provided (item (c)), the Permanent Secretary said that the information in those documents was covered in its entirety by Exemption 4(d) (Information covered by legal professional privilege). He also said that much of the information in the documents was obtained pursuant to section 447 of the Act and, Exemption 15(a) would apply. He further considered that, Exemption 2 would apply to the information contained in the documents, for the reasons already given. The Permanent Secretary said that DTI considered that the extracts of references to the investigation in CIB's quarterly reports (item (d)) were likewise, covered by Exemption 2, for the same reasons. As to the submission to the Secretary of State (item (e)), the Permanent Secretary said that all of the information contained in the document and its earlier drafts was covered by Exemptions 15(a), 4(d), and 2.

12. The Permanent Secretary further said that they considered that all of the information contained in items (a) to (e) was covered by Exemption 4(c) (law enforcement and legal proceedings) because the investigation into British American Tobacco was a formal investigation which had been completed, which was one of the categories in that exemption.

13. As to Mr Evans' subsequent request for a schedule of the withheld documents, including the date of the documents, the title of the document and the details of the sender and recipient of each document the Permanent Secretary said DTI considered that Exemption 2 covered all of that information (for the reasons given in paragraph 10 above); further that Exemption 12, (privacy of an individual) applied to the names of the sender/recipient. The Permanent Secretary also said that, although not originally cited in connection with this aspect of Mr Evans' information request, DTI considered that Exemption 4(c) also applied to that information.

The Code of Practice on Access to Government Information

14. Exemption 2 of the Code was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy and information relating to rejected options;
- confidential communications between departments, public bodies and regulatory bodies.'

15. Exemption 4 was headed 'Law enforcement and legal proceedings' and the relevant sections read:

(a)-(b)...

(c) Information relating to legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigation which have been completed or terminated, or relating to investigations which have or might have resulted in proceedings.

(d) Information covered by legal professional privilege.

(e)-(g)...'

16. Exemption 12, headed 'Privacy of an individual', read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

17. Exemption 15 was headed 'Statutory and other restrictions'. Paragraph (a) read:

'Information whose disclosure is prohibited by or under any enactment, regulation, European Community law or international agreement.'

18. In the preamble to Part II of the Code, under the heading 'Reasons for confidentiality', it stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

Assessment

19. Before turning to the substantive issue of whether or not the information sought by Mr Evans should be released to him, I shall first look at how DTI handled his information request. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005, all requests for information should have been treated as if made under the Code. The Ombudsman and her predecessors have said that it was good practice, if departments refused information requests, for them to identify in their responses the specific exemptions in Part II of the Code on which they were relying in making that refusal. Also, where information had been refused, the possibility of a review under the Code needed to be made known to the person requesting the information at the time of the refusal, as did the possibility of making a complaint to the Ombudsman if, after the review process had been completed, the requester remained dissatisfied. Finally, departments were expected to respond to requests for information within 20 working days, although the Code recognised that the target might have needed to be extended when significant search or collation of material was required. DTI replied to Mr Evans' initial information request of 14 January 2004 on 3 February 2004, well within the time scale envisaged by the Code, for which I commend them. Although their response to his review request of 16 February 2004 took somewhat longer (until 25 March 2004 - paragraph 5), I do not consider that to be unreasonable, given the nature and extent of the paperwork under consideration.

20. Mr Evans has contended that DTI should not have treated his request for a schedule of the information being withheld by DTI as a separate information request. I have seen that he first asked for the schedule in his letter of 16 February 2004 requesting a review. DTI notified him of the outcome of the review on 25 March 2004. They provided him with their response to his request for a schedule on 2 April 2004. Whether or not they should have regarded the request for a schedule as being separate, it seems to me that DTI's doing so did not unduly delay their consideration of that

aspect of Mr Evans' information request, and he has not been disadvantaged. However, it would have been preferable if DTI had mentioned all of the exemptions on which they were relying to withhold the schedule in their letter to Mr Evans of 2 April 2004 (paragraph 12), in particular since they have for the most part handled Mr Evans' information request in accordance with the Code.

21. I now turn to the question of whether the information sought by Mr Evans should be released to him. I should first say that Paragraph 4 of Part 1 of the Code made it clear that the Code did not require departments to provide information which was already published. Thus, as DTI have said in relation to the responses to Parliamentary Questions and the Ministerial correspondence which reflected those responses (paragraph 10 above), since such material is in the public domain, they are nor required to release it under the Code. As to the remaining information requested by Mr Evans, while DTI have cited a number of different exemptions from the Code as applying to the various elements of that information, they have cited one exemption as applying to all of the information he sought, Exemption 4(c). I shall therefore first discuss whether they were correct to do so. The terms of Exemption 4(c) were very broad (paragraph 15) and, so far as is relevant to the present case, they enabled departments to withhold any information on the understanding that it related to a formal investigation which had been completed. In the papers provided by DTI I have seen that the section 447 investigation was completed by November 2003, well before Mr Evans made his initial information request on 14 January 2004 (paragraph 2). In my view it would be difficult to sustain the argument that information about the progress of the investigation and the delays in its completion did not relate to the investigation, even though it did not touch on the substance of the investigation. I therefore conclude that DTI were entitled to rely on Exemption 4(c) as a basis for withholding from Mr Evans the information he had sought, and the schedule of the documents containing the withheld information. I should say that Exemption 4(c) is an absolute exemption and as such it is not subject to the harm test set out in paragraph 17 above. I am not, therefore, able to consider any arguments as to whether or not the harm in releasing the information outweighs the public interest in its release.

22. Since I am satisfied that Exemption 4(c) applies to the information requested by Mr Evans, I consider that no useful purpose would be served by my going on to consider whether or not Exemptions 2, 4(d), 12 and 15 likewise apply to any part of that information.

Conclusion

23. I am satisfied that DTI acted correctly in refusing to release to Mr Evans the information he sought. I do not therefore uphold the complaint.

Department of Trade and Industry

Case No: A.35/05

Refusal to provide information relating to meetings between the Secretary of State for Trade and Industry and the chairman of British American Tobacco

Summary

Mr Evans asked DTI for copies of documents relating to a meeting held between the Secretary of State and the chairman of British American Tobacco. While DTI provided Mr Evans with a dossier of some of the information he sought, they also withheld part of it, citing Exemptions 2, 12, 13 and 14 of the Code. Following Mr Evans' request for a review, DTI released some further information and issued him with a revised dossier. They maintained that the exemptions they had quoted still applied to the remaining information. The Ombudsman found that DTI were entitled to rely on Exemptions 2, 12 and 13, and that (as regards Exemption 2 and 13) the balance of the harm test operated in favour of withholding the non-factual elements of the outstanding information. She nevertheless concluded that there was some factual information and information already in the public domain which should be released to Mr Evans, and she welcomed DTI's agreement to provide him with that information.

1. Mr Evans complained that the Department of Trade and Industry (DTI) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I should explain that the Code was superseded by the Freedom of Information Act 2000 on 1 January 2005. As a result, references to the Code are couched in the past tense.

Background to the complaint

2. On 15 October 2003 Mr Evans both wrote to and e-mailed DTI about a meeting on 11 May, in either 2000 or 2001, between Stephen Byers, the then Secretary of State for Trade and Industry, and the chairman of British-American Tobacco (BAT). (It subsequently transpired that the year of the meeting was 2000.) Mr Evans asked, citing the Code, for copies of the agenda and minutes of this meeting, and any and all papers, briefing material, documents, memos, telegrams, e-mails and memoranda of conversations which were prepared for or connected with the meeting, either before or after the event.

3. On 16 October 2003 DTI acknowledged receipt of Mr Evans' e-mail and, on 26 November 2003, they e-mailed Mr Evans explaining that they soon hoped to be able to respond to his request. On 10 February 2004 Mr Evans e-mailed DTI to say that, if he did not receive a reply within a week, he would refer his complaint to the Parliamentary Ombudsman. DTI acknowledged Mr Evans' e-mail the same day, apologised for the delay and explained that it had taken time to consult third parties and those with an interest in the case. On 19 February 2004 DTI e-mailed Mr Evans to say that they hoped to respond to his request by 26 February 2004.

4. On 23 July 2004 DTI wrote to Mr Evans in response to his request, enclosing a dossier of information, but withholding some material under Exemptions 2, 12, 13 and 14 of the Code. They informed Mr Evans of his right to seek an internal review of their decision. On 8 September 2004 Mr Evans wrote to DTI requesting a review. In his request, Mr Evans said that the purpose of the Code was to explain the actions of the government to the public and he felt that the information so far disclosed by DTI, particularly in the format provided, did little to shed light on those actions. He said that the summary of information with which DTI had provided him was confusing as it was unclear what type of document the information had originated from and how much of the original information had been redacted. He asked DTI to reconsider

whether the information could be released, given the time that had elapsed since the meeting in question. During September 2004 Mr Evans sought clarification from DTI as to the date and context of one of the edited extracts of information contained in the dossier. DTI replied, giving the date and purpose of the original source document from which the information had been extracted.

5. On 5 October 2004 DTI notified Mr Evans of their review decision. DTI explained that, while they believed that the original exemptions they had cited had been correctly applied, on further consideration they were prepared to release some additional information. That information took the form of correspondence, between the chairman of BAT and the Secretary of State for Trade and Industry, which had paved the way for the meeting on 11 May 2000. The information was disclosed to Mr Evans in its original document format. In addition, in response to Mr Evans' criticisms of the format of their earlier information dossier, DTI supplied Mr Evans with a 'revised dossier', which provided further details enabling the earlier information to be placed in context. With regard to Mr Evans' point concerning the time that had elapsed since the meeting, DTI were of the view that although the meeting had taken place over three years earlier, nothing had changed in the interim despite there being an increased focus in recent months on the use of tobacco and smoking in public places. They therefore considered their arguments against disclosure to be as relevant as they had been in 2000.

The Code of Practice on Access to Government Information

6. Until the Freedom of Information Act 2000 came fully into effect on 1 January 2005, all requests for government-held information should have been considered under the terms of the Code. In refusing to provide the information sought by Mr Evans, DTI cited Exemptions 2, 12, 13 and 14 of the Code. Exemption 2 of the Code was headed 'Internal discussion and advice' and read:

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

- proceedings of Cabinet and Cabinet Committees;
- internal opinion, advice, recommendation, consultation and deliberation;
- projections and assumptions relating to internal policy analysis; analysis of alternative policy options and information relating to rejected policy options; and
- confidential communications between departments, public bodies and regulatory bodies.'

7. Exemption 12 was headed 'Privacy of an individual' and read:

'Unwarranted disclosure to a third party of personal information about any person (including a deceased person) or any other disclosure which would constitute or could facilitate an unwarranted invasion of privacy.'

8. Exemption 13 was headed 'Third Party's Commercial Confidences' and read:

'Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party.'

9. Exemption 14 was headed 'Information given in Confidence' and read:

'(a) Information held in consequence of having been supplied in confidence by a person who:

- gave the information under a statutory guarantee that its confidentiality would be protected; or

- was not under any legal obligation, whether actual or implied, to supply it, and had not consented to its disclosure.

(b) Information whose disclosure without the consent of the supplier would prejudice the future supply of such information; and

(c) Medical information provided in confidence if disclosure to the subject would harm their physical or mental health, or should only be made by a medical practitioner.'

10. Exemptions 2, 13 and 14 were subject to the preamble to Part II of the Code which stated that:

'In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available.'

DTI's comments to the Ombudsman on the complaint

11. The then Permanent Secretary of DTI responded to the complaint on 10 January 2005. In relation to the Code exemptions cited, he provided the following explanations for their decision to withhold the information. In relation to Exemption 2 (paragraph 6), the Permanent Secretary said that it was usual for officials to gather and provide briefing prior to Ministerial meetings. He said it was also normal practice to take follow-up action where appropriate. The documents in this category were, he said, mainly considered under Exemption 2 and that Exemptions 13 and 14 (see below) also applied in cases where specific mention was made of BAT's position on regulatory issues. The Permanent Secretary said that the documents in question (and part thereof), which included routine communications between officials and provided advice (including lines to take), were withheld.

12. The Permanent Secretary said that the information had been withheld because DTI considered that disclosure would 'harm the frankness and candour of internal discussion', both then and in the future. He said that that decision had also been considered in relation to the 'harm -v- public interest test' (paragraph 10) and it was concluded that the harm arising from disclosure would outweigh the public interest in its disclosure. That said, the Permanent Secretary explained that DTI had looked closely at the briefing papers on specific issues and considered where information could be released to Mr Evans. He said that briefing covered a broad range of general issues, including monetary policy, economy, tax and trade, as well as the (more obvious) tobacco policy issues, but that they had

decided that some background information could be released, where the statements it contained were purely factual or where the information in question was now in the public domain.

13. In relation to Exemption 12 (paragraph 7), the Permanent Secretary said that a biographical note on BAT's chairman, prepared by officials as part of the briefing for the meeting, had been withheld under this exemption.

14. In relation to Exemption 13 (paragraph 8) and Exemption 14 (paragraph 9), the Permanent Secretary explained that one of DTI's functions was to form strong business relationships with key UK companies. He said that that agenda necessarily involved frank discussion with companies on their future strategy and investment of high value work of benefit to the UK. He said that it was their view that they should not disclose matters which had been raised by BAT in what were, essentially, confidential (either express or implied) communications with DTI. He said that, furthermore, there was no expectation on the part of companies, such as BAT, that the detail of such communications would be made publicly available. He said that were they to provide the information to Mr Evans, that disclosure could well adversely affect the openness of future relations and the supply of information. He commented that that would apply not just with BAT, but more generally with other businesses with which DTI had a managed (and trusted) relationship. He said that, in his view, disclosure would set an undesirable precedent as, if companies felt that commercially confidential information, which they shared with Government, was likely to be the subject of future disclosure, it would inhibit discussion and damage the Government's relationship with business.

15. By way of further explanation, the Permanent Secretary said that, although their initial response was to withhold all correspondence between DTI and BAT on the basis of such commercial confidences, they had decided at review stage that the correspondence leading up to the meeting could be released so as to provide Mr Evans with a clearer idea of the background to the meeting. He added that BAT had given their agreement to that disclosure.

16. In explaining their grounds for withholding the note of the meeting of 11 May 2000, the Permanent Secretary said that the note, made by the Secretary of State's Personal Secretary, recorded the elements of what constituted an open discussion between the Secretary of State and BAT, on a range of issues of legitimate concern to the business. He said he therefore believed that it had been correctly withheld under Exemptions 13 and 14 of the Code. He said that it was DTI's view that meeting notes were an internal record for the use of Ministers and officials (notes were not usually circulated to non-Government attendees), in order to help them in taking forward actions arising from the meeting. As such, he believed the minutes would also be covered by Exemption 2, and that the public interest in making the information available did not, in his opinion, outweigh the harm that would arise from the information's disclosure. With regard to the public interest test more generally (see paragraph 10), the Permanent Secretary concluded that, despite the nature of BAT's business and the interest that had more recently been taken in 'smoking issues,' none of the information contained in the withheld documents fell on the side of disclosure in this case.

17. With regard to their general handling of the request, the Permanent Secretary said that in their consideration of whether or not to disclose certain information they had had to consult with various other Government departments and senior officials, as well as BAT itself. They had also had to seek legal opinion on some of the issues raised by the request. He said it was regretted that all that took a considerable period of time.

Assessment

18. Before turning to the substantive issue of whether or not the information requested by Mr Evans should be released, I shall look first at how DTI handled his request for it. The Ombudsman has said that it was good practice, if departments refused information requests, for them to have identified in their responses the specific exemption or exemptions in Part II of the Code on which they were relying. Moreover, the possibility of a review under the Code needed to be made known to the person who requested the information at the time of that refusal, as did the possibility of making a complaint to the Ombudsman if, after the completion of the review process, the requester remained dissatisfied. Finally, departments were expected to respond to requests for information within 20 working days, although the Code recognised that this target may have needed to have been extended when significant search or collation of material was required.

19. In most respects DTI handled Mr Evans' request for information in full accordance with the requirements of the Code. That said, it took DTI some nine months to provide a substantive response to Mr Evans' request for information (see paragraphs 2-4). Despite an initial acknowledgement, and a further communication in November 2003 to say that they soon hoped to respond to his request, DTI failed to keep Mr Evans informed as to progress on his request. It was not until prompted by Mr Evans for an update in February 2004 that DTI apologised for the delay and explained that they had had to consult third parties and others with an interest in the case. At that stage they said they hoped to be able to provide a reply within a week. Regrettably, they failed to do so and it was a further five months before they were in a position to provide the substantive reply. I recognise that the views of third parties, and others affected, had to be obtained by DTI during their consideration of the request which, in turn, would have prevented them from replying within the timescales advocated by the Code. However, Mr Evans' information request was specific and the volume of the documentation involved was not great. Whilst I appreciate that the issues behind disclosure were not straightforward, I do not see that those considerations justified a delay as significant as the one experienced by Mr Evans. Certainly, the above factors did not appear to delay DTI's response to his request for a review, which was progressed within the requisite timescales. Furthermore, I see that DTI's failure to keep Mr Evans updated as to progress on his request only exacerbated his frustration at not receiving a definitive reply. I therefore consider DTI's handling of Mr Evans' request to have been not entirely without fault.

20. Moving on from the general handling issues, I turn to the substance of the complaint: whether or not Mr Evans is entitled, under the Code, to the information he has requested. In doing so, I should emphasise that the Code only gave entitlement to information and not to the document in which the information is contained, and it is on that basis that I have examined the complaint. In response to Mr Evans' request for information, DTI released a dossier of information pertaining to arrangements for the meeting between DTI and BAT: letters of confirmation, requests for briefings and also some of the

background, purely factual information or information which was already in the public domain, which those internal briefings contained. In refusing to provide the remaining information sought by Mr Evans, DTI cited Exemptions 2, 12, 13 and 14 of the Code.

21. I turn first to Exemption 12, which DTI have applied to a small amount of information relating to the chairman of BAT. The information in question is mainly a brief history of the chairman's employment, although it also refers to his marital status and one of his hobbies. This is precisely information of the kind that is protected by Exemption 12 and, while it seems to me that much of this information is likely to be already in the public domain, to the extent that it is not, I consider that DTI were justified in withholding it.

22. Exemption 2 applies to internal discussion and advice, the disclosure of which would harm the frankness and candour of internal discussion. Under this exemption DTI withheld documents containing internal advice and opinion with regard to DTI's relations with BAT and, more specifically, briefings for, and a subsequent record of, the May 2000 meeting. The purpose of Exemption 2 was to allow departments the opportunity to discuss matters, particularly those which are sensitive or contentious, on the understanding that their thinking will not be exposed in such a way as to fetter their deliberations or inhibit the frankness and candour of future discussion. I recognise the strength of that argument and I am satisfied that, in principle at least, Exemption 2 can be held to apply to much of the information withheld from Mr Evans.

23. DTI also believed that there was information in the documents, such as correspondence from BAT outlining its position in relation to a number of issues, that could be withheld under Exemption 13 of the Code, which relates to third party's commercial confidences. Having looked closely at this material I accept that there is information in the relevant documents that, if disclosed, could cause harm to the competitive position of BAT and would thus fall, in principle, within the scope of Exemption 13.

24. However, that is not the end of the matter. Both Exemptions 2 and 13 incorporate a harm test which, as I outlined in paragraph 10 above, is a test of whether or not any harm likely to arise from the disclosure of the information requested would be outweighed by the public interest in making it available. I have given very careful consideration to the documents in question, the information they contain and also to the arguments for disclosure made by Mr Evans in his letter of 8 September 2004. Moreover, I have also taken account of the fact that a note of the May 2000 meeting, prepared by BAT, is already in the public domain, although I should say that one person's version of a meeting is often quite different from another's. Clearly, there is a real and growing public interest in smoking-related issues and, consequently, any discussions between the Government, its officials and representatives of the tobacco industry are of interest to the public. But does that legitimate interest outweigh the harm, if any, that might be caused by disclosure of the information? Firstly, it is the increasing interest in the issue which, in my opinion, negates Mr Evans' argument that, owing to the lapse of time since the meeting in question, any potential harm caused by disclosure is diminished. I am not persuaded of that. Secondly, having seen the documents at the heart of Mr Evans' information request, it is clear to me that the information they contain would, if released, be likely to either harm the frankness and candour of internal discussion within departments and between Ministers and their officials, or harm the competitive position of a third party; in this case, BAT. With regard to the

latter, DTI have argued that disclosure would also have a knock-on, adverse effect upon their future dealings with business which, they have said, depends on openness between parties for the supply of information. Having had sight of the information in question, I am persuaded of that as a potential consequence, were the information to be released. Companies such as BAT need to be confident that the Government will apply its general commitment to openness in a way which does not damage their legitimate interests or undermine the trust they have placed in Government. On balance, therefore, I find that DTI were entitled to rely on Exemptions 2 and 13, as well as Exemption 12, as a basis for denying Mr Evans access to much of the remaining information he was seeking. As such I see no merit in going on to assess the applicability or otherwise of Exemption 14 to the same information.

25. Notwithstanding the above, however, I believe that there is information in the documents I have seen, mostly factual information and information that is already in the public domain, that can be released to Mr Evans without causing the type of harm envisaged by the several exemptions of the Code cited by DTI. I therefore recommended to the Permanent Secretary of DTI that this further information be disclosed to Mr Evans. In response, the Permanent Secretary said that she had considered the information in question and was content for it to be disclosed to Mr Evans.

Conclusion

26. While I have criticised DTI for their failure to action Mr Evans' initial information request in a timely manner and for failing to keep him informed of progress on his request, I am satisfied that the information DTI refused to disclose to Mr Evans was largely correctly withheld under Exemptions 2, 12 and 13 of the Code. There was, however, a small amount of information that I believed could be released to Mr Evans without causing the type of harm envisaged by the exemptions in part II of the Code and I regard DTI's willingness to disclose that information in accordance with my recommendation to be a satisfactory outcome to a partially justified complaint.

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
C5 179466 05/05 308065

Millbank Tower
Millbank
London SW1P 4QP

Switchboard: 020 7217 3000
Fax: 020 7217 4000

Email: phso.enquiries@ombudsman.org.uk

www.ombudsman.org.uk

Published by TSO
(The Stationery Office)
and available from:

Online
www.tso.co.uk/bookshop

Mail, Telephone, Fax & E-mail
TSO
PO Box 29
Norwich NR3 1GN

Telephone orders/General enquiries
0870 600 5522

Fax orders
0870 600 5533

Order through the Parliamentary Hotline
Lo-call 0845 7 023474

Email
book.orders@tso.co.uk

Textphone
0870 240 3701

TSO Shops

London
123 Kingsway
London WC2B 6PQ
Telephone 020 7242 6393
Fax 020 7242 6394

Birmingham
68-69 Bull Street
Birmingham B4 6AD
Telephone 0121 236 9696
Fax 0121 236 9699

Manchester
9-21 Princess Street
Manchester M60 8AS
Telephone 0161 834 7201
Fax 0161 833 0634

Belfast
16 Arthur Street
Belfast BT1 4GD
Telephone 028 9023 8451
Fax 028 9023 5401

Cardiff
18-19 High Street
Cardiff CF10 1PT
Telephone 029 2039 5548
Fax 029 2038 4347

Edinburgh
71 Lothian Road
Edinburgh EH3 9AZ
Telephone 0870 606 5566
Fax 0870 606 5588

The Parliamentary Bookshop
12 Bridge Street
Parliament Square
London SW1A 2JX

Telephone orders/General enquiries
020 7219 3890

Fax orders 020 7219 3866

TSO Accredited Agents
(See Yellow Pages)

and through good booksellers