THE PARLIAMENTARY
OMBUDSMAN

ACCESS TO OFFICIAL INFORMATION

Investigations Completed

April – December 2000

HC 126 London : The Stationery Office

Parliamentary Commissioner for Administration

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Volume One

ACCESS TO OFFICIAL INFORMATION

1st REPORT – SESSION 2000-2001

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Parliamentary Commissioner Act

I lay before Parliament, in accordance with section 10(4) of the Parliamentary Commissioner Act 1967, the attached eight reports of investigations into complaints of breaches of the Code of Practice on Access to Government Information (the Code). Those reports were issued by members of my staff under authority delegated by me. The reports of two other investigations completed during this period (A18/01 and A19/01) have not been included, as they deal with the same subject as that covered by report A17/01 and the conclusions reached are identical. I also discontinued one investigation when it became clear that the relevant matters fell outside my jurisdiction.

Since my last report in May 2000 there has been a modest increase in the number of requests to my Office for Code investigations. Those requests cover, as the reports in this volume show, a wide range of information. The reports also show that, while some departments have clear and efficient procedures for the processing of information requests, others still fail even to identify the need to deal with such requests under the Code. Given that the Code has now been in existence for nearly seven years, there can be no excuse for this. The reports also continue to illustrate an occasional tendency for departments to cite exemptions under which they wish to withhold information very late in the process, sometimes quoting new exemptions only on receipt of my draft report. While not wishing to invite departments to apply to information any exemption they think might stand a chance of being accepted (a practice criticised by both my predecessor and myself) I do encourage departments, as part of their routine handling of information requests, to think through this aspect very thoroughly from the beginning whenever where they are minded to refuse a request.

As the reports show, it is possible, with a creative and imaginative approach, to release useful information by means of methods such as anonymisation and summaries without breaching confidentiality, thereby following the spirit of the Code. I hope that departments will continue to look positively to releasing information in ways which are helpful to the seeker of the information, while recognising relevant sensitivities appropriately.

MICHAEL BUCKLEY
Parliamentary Commissioner For Administration
(the Ombudsman)

January 2001

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Benefits Agency

Case No. A.19/00

Refusal to provide a definition of a medical term

Mr A, acting for a pressure group representing people incapacitated by illness and/or disability, asked BA for a definition of the term fibromyalgia and whether or not a sufferer from it would be exempt from the Incapacity Benefit all work test. BA said that they were unable to supply definitions of medical conditions because they were not a health service body. Mr A repeated his request and received a similar response. Following submission of his complaint to the Independent Complaints Committee (and also to this Office), BA replied. They apologised for not fully understanding the nature of Mr A's complaint and said that, while they were unable to give an opinion on the illness, they were able to confirm that fibromyalgia was not one of the exempt categories. The Ombudsman found that BA had not addressed the issue of a definition of fibromyalgia and invited BA to provide Mr A with such a definition. BA responded by providing Mr A with the relevant definition. The Ombudsman was satisfied that BA had provided Mr A with all the information he sought but criticised the way in which they had handled his request. The Ombudsman upheld the complaint.

1.1 Mr A, acting for an incapacity pressure group, complained that the Benefits Agency (BA), an agency of the Department of Social Security (DSS), refused to supply him with information which should have been made available under the Code of Practice on Access to Government Information (the Code). My investigation began after I had received comments from the Permanent Secretary at the DSS, following the Member's referral of the complaint to the Parliamentary Ombudsman. 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.

General Background

1.2 Incapacity benefit (IB), which is administered by BA, is paid to those who cannot work because of illness or disability and who, if employed, are not entitled to statutory sick pay from an employer. Short term IB is paid at a lower rate for up to 28 weeks. If a person is still sick after 28 weeks he or she may get short term IB at a higher rate. The long term rate is payable after 52 weeks.

1.3 To be entitled to IB a claimant who has not been in paid work for more than 8 of the 21 weeks preceding the incapacity must satisfy the All Work Test (AWT). This is a test of the extent to which the claimant's illness or disability impairs their performance of certain physical and mental functions. Initially the claimant completes a questionnaire about the effects of their medical condition. An adjudication officer considers whether the information provided in the questionnaire is sufficient to determine a claim to IB or whether the papers need to be referred to a doctor appointed by BA. The doctor may advise the adjudication officer on the evidence available, or decide that further evidence is required from the claimant's own doctor, or recommend that the claimant needs to undergo a medical examination by a doctor appointed by BA. The AWT is treated as satisfied until the claimant has been assessed. However, the AWT cannot be

treated as satisfied if, within the preceding six months, an adjudication officer or tribunal (where the claimant appealed before 21 May 1998) determined that the claimant was capable of work and his or her incapacity has not changed or significantly worsened. A person is automatically treated as being incapable of work on any day he or she is an in-patient in a hospital or similar institution.

1.4 Where the AWT applies, the person may be exempt if they satisfy certain conditions. Reg 10, Social Security (Incapacity for Work) (General) Regulations 1995, paragraph (1) states:

'...Where the all work test applies, a person shall be treated as incapable of work on any day in respect of which any of the circumstances set out in paragraph (2) apply to him...'

Paragraph 2e states the following;

'...that he is suffering from any of the following conditions, and there exists medical evidence that he is suffering from any of them-.....

(iii) an active and progressive form of inflammatory polyarthritis...'

1.5 Fibromyalgia, (also known as fibrositis), is a descriptive term for a collection of symptoms, including aches and pains, tenderness at pressure points and sleep disorder, without any underlying and identifiable disease process. Fibromyalgia does not come into the category of conditions known as polyarthropathies, conditions which cause inflammation of the joints.

Background

1.6 On 5 October 1999 Mr A, acting on behalf of a client at the IAG, sent a fax to the Customer Service Manager (CSM) at the BA Office, Wallsend, explaining that his client had been diagnosed as suffering from fibromyalgia. Mr A asked whether such a condition was classified as a polyarthritis and, if so, whether a sufferer would therefore be exempt from the IB AWT. Mr A sent another fax on 11 October, broadly repeating his earlier question and asking for a response within 48 hours. This fax began : 'Per Definition of Medical Term Fibromyalgia.' When this fax failed to elicit a response, Mr A sent a further fax on 14 October, again asking if fibromyalgia was considered to be a form of polyarthritis and whether or not a sufferer would be exempt from the test.

1.7 BA replied on 19 October. In their response, they said;

"...as the Agency is not a health service body, I am sorry but I am unable to supply definitions relating to medical conditions..."

1.8 On 21 October, in direct response to BA's answer, Mr A repeated his request, this time citing the Code, in particular, Part 1 Section 3 (iii). BA replied on 28 October by saying;

"...As I previously advised in my letter of 19 October 1999, I am unable to supply medical definitions..."

1.9 On 30 October Mr A wrote again to BA, explaining the difficulties he had experienced and complaining that BA had failed to meet their obligations either under the Code or in line with the department's undertaking as set out in BA leaflet IB202. He also (incorrectly) told BA that he had already referred the matter to the Parliamentary Ombudsman. (This letter was not included in the Member's submission to this Office.)

1.10 On 1 November Mr A referred the matter to the Member for submission to the Ombudsman. On the same day Mr A also referred the matter to the Independent Complaints Committee (ICC), an independent body which considers BA complaints. On 3 November, in response to this complaint, the CSM replied. He apologised for not fully understanding Mr A's original enquiry regarding fibromyalgia which, once Mr A had made reference to leaflet IB202, had been clarified. He said that while he was unable to give an opinion on the illness, he was able to state that it was not one of the exempt categories for the

AWT as fibromyalgia is not linked to polyarthritis.

The Chief Executive's comments

1.11 Commenting on the actual complaint, the Chief Executive of BA (the Chief Executive) said that his staff had explained to Mr A that BA was not a health service body and was therefore unable to provide medical definitions. When Mr A quoted the relevant paragraphs from BA leaflet IB202, the CSM confirmed that he was unable to give Mr A an opinion on the actual illness itself but could advise him that fibromyalgia was not an exempt category for the AWT. The Chief Executive added that his staff had considered that Part 1 Section 3 (iii) of the Code, which advises Departments to give reasons for administrative decisions to those affected and had been quoted by Mr A, was inappropriate in this instance.

1.12 The Chief Executive said that, when assessing the AWT, BA is provided with a list of the most common causes of incapacity in a guide called the Incapacity Reference Guide. This guide advises what action should be taken when the AWT is due, including examples of incapacities that have definite and possible exemption and those that have none. Both fibromyalgia and polyarthritis are listed in the guide. Fibromyalgia is not exempt and a questionnaire to the customer is therefore considered appropriate whereas polyarthritis is *potentially* exempt and as a result a questionnaire is sent to the customer's GP. The Chief Executive said that, regardless of the nature of the incapacity, a suitably qualified doctor, approved by the Secretary of State, would examine all relevant documentation concerning the customer's medical condition and, when appropriate, would examine the customer and form a judgement on his or her ability to perform certain work-related activities.

1.13 The Chief Executive admitted that Mr A's complaint had not been correctly handled at the outset and said that he had written to him to apologise for that oversight.

Investigation

1.14 Having received the Chief Executive's comments and examined the full correspondence between Mr A and BA, I suggested to the Chief Executive that his response had not addressed the issue of a definition of fibromyalgia. While I accept that a request for such a definition may not have been made fully explicit by Mr A during his correspondence with BA I considered that it was, nonetheless, clearly implicit in his overall information request. I invited the Agency to consider, in consultation with its medical advisers, providing Mr A with such a definition. In response, the Agency wrote to Mr A and provided him with definitions of both fibromyalgia and polyarthritis.

Assessment

1.15 BA have now provided Mr A with an explanation of whether a person suffering from fibromyalgia would be exempt from the AWT and, secondly, with a definition of both fibromyalgia and polyarthritis. I am therefore satisfied that the information requested by Mr A has now been made available to him.

1.16 Unfortunately, BA failed to cite the Code in any of their responses to Mr A although Mr A himself referred to it in his faxed letter of 21 October. In their early replies, BA said that they were unable to provide Mr A with the information requested because BA was not considered to be a health service body. Even if this may in a technical sense be correct, it is clear that BA have access to specialist medical advice as they could not otherwise have provided the definitions they subsequently did provide. In any event this was not a satisfactory response in Code terms. All requests for information should be treated as requests under the Code and I criticise BA for their failure to cite it. Indeed, not only should they have cited the Code but, had they been minded to refuse the request (as at that stage they were) they should have done so in relation to one or more Code exemptions: not, as they did when the Code was eventually considered, by taking the view that the request was not covered by that section of Part I of the Code quoted by Mr A.

1.17 BA have also argued that the reason for their delay in responding to Mr A's question was due to uncertainty about the nature of his request and that the matter was only clarified when Mr A drew their attention to certain relevant extracts from the leaflet IB202. I am slightly surprised that, even allowing for the economical style of Mr A's faxes, BA did not immediately perceive the purpose of his questions: once they did, however, they provided the information in respect of the AWT very quickly. I note also that this reply was sent on 3 November, only 22 working days from the date of Mr A's first fax (5 October). Part 1 paragraph 5 of the Code says;

"...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..."

In the light of this and the evident confusion that arose about the nature of Mr A's request, I do not think the time taken by BA to be particularly unreasonable. Even so, I reminded the Chief Executive of the need to treat all requests for information as Code requests and the need to answer all requests for information as soon as possible. In reply he agreed that all requests for information should be dealt with in line with the Code, and provided evidence to show that his staff were being made aware of their responsibilities under the Code.

Conclusion

1.18 BA have now provided Mr A with the information he sought. I see this as a satisfactory outcome to a justified complaint.

Total screening and investigation time - 24 weeks

Department of the Environment, Transport and the Regions

Case No. A.2/01

Refusal to release information about a London Transport project

Mr D asked for the data that was available to DETR Ministers when making their decision to award the Prestige contract to an international consortium of companies known as TranSys. In particular, Mr D wanted the data that had been used in the evaluation that is known as the public sector comparator (PSC). DETR said that Prestige was a contract between London Transport and TranSys and DETR's role was solely to consent to the deal. In so doing, they did not consider detailed information on the PSC, which they therefore had no reason to see, but only advice from officials on the value for money aspect of the deal. They judged that information to fall within Exemption 2 of the Code. The Ombudsman accepted that DETR did not possess the raw data requested by Mr D. He also accepted that Exemption 2 had been correctly applied to the information that was available to DETR. However, having applied the harm test, he concluded that any harm to the frankness and candour of internal discussion that might be caused by the release of this information was outweighed by the public interest in making it available. He therefore proposed that the information should be released. DETR then provided further reasons for not releasing the information requested and cited three more exemptions: Exemptions 7, 13 and 14. The Ombudsman agreed that Exemption 13 applied to the information in question but criticised DETR for not citing earlier all the exemptions on which they were relying. However, he welcomed DETR's decision to provide Mr D with two documents, prepared by London Underground, that explained the reasons for the contract award. The Ombudsman saw this as a satisfactory outcome to a partially justified complaint.

2.1 Mr D complained that the Government Office for London, part of the Department of the Environment, Transport and the Regions (DETR), refused to supply him with information which should have been made available 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.

2.2 Mr D's complaint is specifically against the London Transport Division of the Government Office for London. That Division was transferred from the Government Office for London to DETR on 1 May 2000. To avoid confusion, throughout this report I therefore refer to the body complained against as DETR.

Background

2.3 The London Transport Prestige project (Prestige) was commissioned to modernise the ticketing and revenue collection systems for both London Underground and the bus services provided on behalf of London Transport Buses. The key element of the project was the introduction of a smart-card ticketing system which would allow quicker, easier and more flexible travel in London. The contract for Prestige was subject to an evaluation known as the Public Sector Comparator (PSC). PSCs are used to appraise most projects under the government's Private Finance Initiative (PFI). They act as benchmarks against which value for money in undertaking such projects can be assessed. The private sector companies bidding for any particular public sector contract have to demonstrate that

their bid represents better value for money than a traditional, publicly funded approach. In circumstances where there is limited competition in the procurement process, as in the case of Prestige (which proceeded to a single-bidder situation at an early stage), the PSC, in the absence of competition, becomes in effect the yardstick. On 14 August 1998 the Prestige contract was awarded to TranSys, an international consortium of companies who will develop, manage and install the advanced system.

The complaint

2.4 On 15 November 1999, Mr D wrote to DETR to ask for information about Prestige. He said that the contract for the project had been subject to a PSC evaluation and he asked to be provided with the data that had been made available to the Secretary of State of DETR and his advisers when deciding to award the Prestige contract to TranSys. He quoted the Code and asked for a response within 20 working days. DETR replied on 16 December. They said that Mr D's request fell under Exemption 2 of the Code, specifically that part of it relating to 'internal opinion, advice, recommendation, consultation and deliberation', on the basis that release of the information would harm the frankness and candour of internal discussions. The information was not therefore released. In accordance with their complaints procedure, DETR explained that Mr D could choose to have this decision reviewed.

2.5 Mr D wrote to DETR on 17 December to appeal against their decision not to provide the information requested. He argued that Exemption 2 did not apply because the data he sought was neutral and capable of more than one interpretation or projection. He did not seek the disclosure of the advice to Ministers on whether the TranSys bid represented value for money, and argued that the release of the data alone would not harm the frankness and candour of internal discussions. DETR replied on 28 January 2000. They quoted the third part of Exemption 2 of the Code, which covers 'projections and assumptions relating to internal policy analysis; analysis of alternative policy options'. They said that PSCs were developed on the basis of such information and to enable such internal analysis to take place. They concluded, therefore, that the data Mr D requested fell within this category and was thus exempt under the Code. They told Mr D that if he remained dissatisfied with the decision he could complain, through an MP, to the Ombudsman.

The Permanent Secretary's comments

2.6 Commenting on the complaint in a letter dated 23 May 2000, the Permanent Secretary of DETR said that the Prestige PFI deal was a contract between London Transport and the private sector TranSys consortium: neither the government nor DETR were party to it. DETR's role regarding Prestige was to give consent under the London Regional Transport Act 1984 to London Transport entering into the contract with TranSys. In giving their consent, DETR Ministers took account of official advice on the value for money aspects of the deal but did not themselves consider detailed information on the PSC. The PSC used was created and owned by London Underground and its detail was not shared in full by London Transport with DETR and its detail was not therefore within DETR's control. The information used to advise Ministers at DETR was based on a variety of key reports made to or shared with the department. These reports did not set out the detailed data used in the PSC exercise but reported on the results of the comparison of the bid with the public sector comparator. Most of the key elements of this information were provided to officials on a "confidential" basis and were not raw data. It was on that basis that the information was judged to fall into the third category of Exemption 2 of the Code and therefore not made available to Mr D.

Exemption 2

2.7 Exemption 2 of the Code 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.'*

Exemption 2 is subject to the harm test in the preamble to Part II of the Code:

'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.'

London Transport

2.8 On 29 June 1984 the London Regional Transport Act 1984 transferred political and financial control of London Transport from the Greater London Council back to central government. London Transport is technically a statutory corporation but it is more commonly described as a nationalised industry. For the sake of completeness, I should make clear that in July 2000 all of London Transport's functions, except London Underground, were transferred to Transport for London, the new executive body under the London Mayor, which will deal with transport issues in the Capital.

Section 4(6) of the Parliamentary Commissioner Act 1967 reads:

'No entry shall be made in respect of a corporation or body operating in an exclusively or predominantly commercial manner or a corporation carrying on under national ownership an industry or undertaking or part of an industry or undertaking.'

The Ombudsman can only investigate those government departments or bodies that are listed in Schedule 2 to the Parliamentary Commissioner Act 1967. As a nationalised industry, London Transport is not listed in Schedule 2 and is not therefore within the Ombudsman's jurisdiction. As such, I cannot comment on the actions of London Transport.

Investigation

2.9 The Permanent Secretary, when commenting on this complaint, enclosed several extracts of documents relating to the PSC and the value for money aspects of Prestige. To obtain a clearer understanding of exactly what information was available to DETR when giving their consent to the Prestige project, the Ombudsman's staff asked them to provide copies of all the documents they had relating to this issue.

2.10 It was apparent from a summary of correspondence prepared by DETR that Mr D had communicated with them on several occasions before 15 November 1999, the date of the earliest of the letters forwarded by Mr D to this Office. During the investigation the Ombudsman's staff also obtained copies of this material.

Assessment

2.11 In assessing this complaint there are two aspects I have to consider: the general handling of Mr D's complaint, and the substantive issue of whether or not the information requested should be released. I turn first to the way in which DETR handled this complaint. I am pleased to note that all of Mr D's letters requesting information were answered reasonably promptly. Following DETR's decision of 16 December 1999 to refuse to provide the information requested, Mr D was advised of his right to have that decision internally reviewed. Having maintained their refusal following this review, DETR then advised Mr D of his right, if he remained dissatisfied with that reply, to submit a complaint, through a Member of Parliament, to this Office. It is clear to me that DETR handled this matter in full accordance with the requirements of the Code, and for this I commend them.

2.12 I turn now to the question of the information sought by Mr D. The Code gives an entitlement only to information, not to documents (although the Ombudsman's own experience has shown that the simplest way in which to meet a request for information is often to release the actual document concerned), and it is on that basis that Mr D's complaint has been examined.

2.13 DETR's role with regard to Prestige is described in paragraph 2.6. In fulfilling that role they saw a substantial amount of information about the project: this was mainly supplied by London Transport. Mr D's request was for the data that was made available to the Secretary of State to enable him to reach the decision to award the Prestige contract to TranSys. He subsequently explained that he was seeking only the "bare data" which was neutral and capable of more than one interpretation or projection.

2.14 DETR's argument for withholding that information was that the key reports provided by London Transport to DETR in support of their submission do not contain the raw data from the PSC but report only on the results of the comparison of the PSC with the bid. The raw data used during the PSC evaluation was not provided to DETR officials and it was not therefore possible to provide Mr D with it. The Code is clear that government departments are not obliged to provide information that they do not possess. I have looked very carefully at the documents held by DETR (see paragraph 2.17). The information contained in those documents reports on the outcome of the comparison between the TranSys bid and the PSC and draws conclusions about the value for money aspects of the project, based on certain specific assumptions. I am satisfied that this is not raw data of the kind requested by Mr D, i.e. data that is neutral and capable of more than one interpretation or projection.

2.15 I note that, in their letter of 16 December 1999, DETR told Mr D to contact London Transport if he required detailed information about the project and gave him the name and address of the relevant person to approach. I consider DETR's advice to Mr D to have been the correct approach in this instance. (I understand that Mr D did ask London Transport for information about the PSC but that they refused to provide it on the grounds of commercial confidentiality. However, as stated in paragraph 2.8, I cannot comment on the actions of London Transport.)

2.16 In light of the above, I consider that it was entirely reasonable for DETR to tell Mr D that they could not provide him with the detailed information about the PSC itself. What I do not find to be reasonable, however, is DETR's failure to say why they could not provide the raw data that he sought. If they did not have that information, as they have now told the Ombudsman, then they should have explained that to Mr D rather than saying that they were withholding the information under Exemption 2 of the Code. Reasons for refusal of information need to be given in enough detail to explain the decision adequately, and I criticise DETR for their failure to do so in this case.

2.17 Having accepted that the detailed data in the PSC itself was not available to DETR to give to Mr D, I now turn to the question of whether or not DETR have correctly withheld from him the information about the value for money aspects of the Prestige project which they do possess. This information is contained in three different documents;

- Prestige Project Appraisal No. 3 dated July 1997. This document was produced by London Transport to explain the latest TranSys proposal and help the London Transport Board Sub-Committee decide whether or not to proceed towards detailed negotiations with TranSys. The document contains two sections and two appendices which concern the value for money aspects of the project. These include assumptions and projections about the financial benefits of the deal as well as the results of the comparison between the TranSys bid and the PSC.
- A submission to DETR from London

Transport dated 24 December 1997. This document provides an update on negotiations with TranSys and contains a section entitled "Financial Analysis". This includes an updated value for money comparison between the TranSys bid and the PSC.

- A submission dated 3 August 1998 seeking the consent of the Secretary of State and the Parliamentary Under Secretary of State to London Transport entering into the Prestige contract with TranSys. This document includes advice on the value for money aspects of the deal.

2.18 How much, if any, of this information is already known to Mr D? I have seen all the correspondence between DETR and Mr D (see paragraph 2.10). Within that correspondence there are references to the PSC and value for money aspects of Prestige. In their letter to Mr D of 26 November 1998, DETR said that, "as part of the contract, ticket gates will be installed at all Underground stations - greatly reducing ticket fraud, freeing up more money for investment in other projects. Smartcard ticketing will also create opportunities to raise additional revenue for LT through commercial agreements with third parties." In their letter of 16 December 1998, DETR told Mr D that; (i) the cost of Prestige is broadly equivalent to that which London Transport would have had to pay to achieve the same result in-house; and, (ii) the deal represents better value overall when other factors such as the accelerated timescale for the new investment are taken into account.

2.19 I now need to decide whether Mr D should be allowed access to the more detailed information related to the value for money aspects of the Prestige project, which is contained in the documents listed in paragraph 2.17. That information is, as far as I am aware, not known to Mr D. In refusing to disclose that information, DETR relied on Exemption 2 of the Code. In response to Mr D's first information request, DETR quoted the second part of that exemption. However, when Mr D asked them to review that decision, and he explained in more detail the information he was seeking, DETR quoted the third part of Exemption 2. Having now seen the information requested by Mr D, I believe that the second part of the exemption can be held to apply to the advice on value for money in the Ministerial submission, which Mr D accepts should remain confidential. The information in the first two documents consists largely of projections and assumptions relating to the financial aspects of the deal. The third part of Exemption 2 is clearly more applicable to this information and I have therefore considered whether the material was correctly withheld by DETR under that part of the Code.

2.20 Paragraph 3(i) of Part I of the Code commits departments;

'to publish the facts and analysis of the facts which the government considers relevant and important in framing major policy proposals and decisions; such information will normally be made available when policies and decisions are announced.'

The assumption here is that the factual and evaluative information which formed the basis for Ministerial decisions should be shared with Parliament and the public. This would indicate that there is a presumption in favour of releasing the sort of information requested by Mr D. However, the Code does not commit departments to the disclosure of all internal analysis, projections and assumptions; it is recognised that departments need to be able to assess options or proposals which are not their preferred options, and to do so objectively and dispassionately. Wide disclosure of such information could limit the analysis of policy options within government.

2.21 How does this relate to Mr D's complaint? The information he requested consists largely of projections and assumptions based on a comparison of the TranSys bid with the PSC. Ministers used that information (as well as other aspects of the proposed deal) to decide whether or not to consent to London Transport entering into

a contract with TranSys. As such, the information requested by Mr D relates to an analysis of alternative policy options and I accept the argument that the value of such an analysis, which depends upon candour for its effectiveness, would be substantially less if it were thought that it would be made available to a wider audience. To that extent, I agree that any projections and assumptions relating to the scheme that were discussed before reaching the decision to award the Prestige contract to TranSys, and which come within the ambit of Mr D's request, were correctly identified as falling within Exemption 2 of the Code.

2.22 In some circumstances, however, it may be in the public interest to disclose an analysis of alternative and rejected options and Exemption 2 incorporates a harm test which must be applied: would the harm that might be caused by disclosure of the protected information be outweighed by the public interest? There is a very strong public interest in any matters relating to public transport in London. Prestige, as London Transport and the government have been keen to affirm, is likely to revolutionise travelling for the public in the capital. I am of the opinion that the release of information of this kind can therefore only aid debate and facilitate public understanding of the government's decision on Prestige. It also seemed to me that the sensitivity of information of this nature would have reduced over the 2 years since the announcement of the contract for Prestige in August 1998.

2.23 I also note that HM Treasury's guidance about the release of information relating to PFI projects ('PFI Projects: disclosure of information and consultation with staff and other interested parties' - Taskforce Policy Statement No. 4) refers to the importance of satisfying public accountability and assisting in the development of PFI. Section 4.4.1 of the guidance recommends that government departments provide a post-contract explanation of the decision to award any such contract. It recommends that the explanation should include the final assumptions used in the PSC, the estimated savings from using PFI and the benefits of any risk transfer. That is very much the type of information sought by Mr D.

2.24 Having taken all these matters into account I concluded that any harm to the frankness and candour of internal discussion that might be caused by the release of this information was outweighed by the public interest in making it available. I saw no reason, therefore, why the information sought by Mr D should not be disclosed, the simplest way being to release the relevant extracts of the documents to him. I so recommended to the Permanent Secretary.

Further developments

2.25 In reply, the Permanent Secretary said that although he accepted the need to provide as much information as possible on public transport issues in London, much of the provision of that transport was secured through contracts with the private sector. He said that if their commercial confidentiality in bidding for such contracts could not be assured, DETR would be hindered in the exercise of its sponsorship function in relation to bodies providing such services. He took the view that the material that was supplied in confidence to DETR could be exempt from disclosure under Exemptions 7 and 14 of the Code, which bear respectively on the department's ability to conduct its business efficiently and on the release of information supplied in confidence. He also said that some of the information recommended for release to Mr D was taken directly from TranSys's bid and protected by a confidentiality clause. London Transport believed they would be exposed to an action for breach of contract if this information were released to Mr D.

2.26 The Permanent Secretary went on to say that the purpose of the confidentiality clause was to prevent the release of commercially-sensitive information into a buoyant market for transport smart-cards in which TranSys were one of the competing companies. TranSys were currently pursuing similar contracts, both in the UK and abroad, and DETR understood that they were recycling some of the bid material from their Prestige

bid into these new ventures. The Permanent Secretary said that he had been advised that the release of the information proposed, comprising pricing and technical material from TranSys's Prestige bid, could therefore significantly disadvantage TranSys in the market. For that reason he felt that the information recommended for release could also be exempt from disclosure under Exemption 13 of the Code, which relates to information that could harm the competitive position of third parties.

2.27 The Permanent Secretary accepted, however, a requirement on London Transport to comply with the terms of HM Treasury's guidance (see paragraph 2.23). He therefore asked London Transport to prepare a paper in accordance with that guidance, which would provide information on the PSC at the time the contract was signed.

Further Assessment

2.28 In the light of the further explanation now provided by the Permanent Secretary, I believe that the three additional Code exemptions cited by DETR are potentially relevant to the information sought. I turn first to Exemption 13, which is headed 'Third party's commercial confidences' and reads:

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

Exemption 13 is intended to protect from disclosure sensitive commercial information which would adversely affect those to whom that information relates. The Cabinet Office's guidance on the Code states that companies will 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 the basis that TranSys is competing for similar contracts relating to transport smart-cards in both the United Kingdom and abroad, I accept that the release of the information proposed could materially disadvantage them in that market. This information, which includes pricing and technical material obtained directly from TranSys's bid, could be useful to a competitor and could thus harm the competitive position of TranSys. I consider, therefore, that the information concerned is covered by Exemption 13.

2.29 However, Exemption 13 also has a harm test. I therefore also need to decide whether or not the public interest in disclosing this information, as outlined in paragraph 2.22 above, outweighs the potential harm to the competitive position of TranSys. On balance, I do not consider that it does. It is clear from what the Permanent Secretary has said (in his later comments) that the information concerned still remains sensitive and, while I continue to believe that there is a very strong public interest in all matters relating to public transport in London, I accept that it is outweighed on this occasion by the potential harm that could be caused to TranSys's present and future competitive position if that information were to be disclosed. I consider therefore that Exemption 13 can be held to apply to that information. As such, I see no merit in going on to consider whether or not Exemption 7 and Exemption 14 can also be held to apply to that information.

2.30 However, as indicated by the Permanent Secretary in his reply, DETR have forwarded to this Office two papers prepared by London Underground in accordance with the requirements of HM Treasury's guidance on the release of information relating to PFI contracts. The first of the papers is made up of four sections: an explanation of the reasons for the contract award, the final assumptions used in the PSC, the estimated savings from using PFI and the approach to risk transfer. The second paper gives a summary of the key provisions in the Prestige contract. These papers were not available to DETR at the time Mr D made his requests for information. I therefore make no comment on their content in the context of this complaint other than to say that I believe they contain the type of information sought by Mr D. I very much welcome the Permanent Secretary's initiative in having these documents prepared by London

Underground and providing them to him.

2.31 I have already (paragraph 2.16) criticised DETR for the inadequacy of their earlier explanation to Mr D to justify withholding the information that he sought. I also note that, at a late stage, DETR have quoted three additional exemptions in order to support their case. If a department is relying on a number of exemptions in order to justify non-disclosure, I should emphasise that it is essential that these are all cited as early as possible.

Conclusion

2.32 I found that DETR were justified in refusing to disclose the information sought by Mr D but that their explanation for not releasing that information was inadequate. DETR have however agreed to provide Mr D with two papers containing information relating to the Prestige contract relevant to his concerns and to the PSC. This seems to me to be a satisfactory outcome to a partially justified complaint.

Total screening and investigation time - 30 weeks

Driving Standards Agency

Case No. A.17/01

Refusal to release a pre-publication copy of a report

Mrs F complained that the Driving Standards Agency (DSA) refused to provide her with a pre-publication copy of a report, produced by Ross Silcock Limited, entitled "Raising the Standards of ADIs: Review of requirements for training and qualification as an Approved Driving Instructor". In response to Mrs F's requests for the report, DSA told her that a pre-release copy of the report was being circulated to the recognised consultative bodies to be checked for technical accuracy before being formatted for publication. As the report was due to be published, they said that the terms of the Code did not apply. On another occasion she was told that since the report belonged to Ross Silcock Limited, who had undertaken the research, and not to DSA, they could not meet her request. In his comments on the complaint, the Permanent Secretary of DETR said that DSA had been entitled, at the time the request was originally made, to refuse to release information that was soon to be published under Exemption 10 of the Code. The Ombudsman closely examined both the published report and the pre-publication report and found that, apart from three minor differences, the two reports were essentially the same. The publication of the report overlapped the Ombudsman's investigation and, as the report by then was in the public domain and the differences between the two reports were minimal, the Ombudsman recommended the release of the pre-publication report to Mrs F. The Ombudsman was, however, critical of the manner in which DSA had handled Mrs F's complaint and recommended that steps be taken to ensure that there was a commitment to dealing with all requests for information by reference to the Code. The Ombudsman upheld the complaint.

3.1 Mrs F complains that the Driving Standards Agency (DSA), an executive agency of the Department of the Environment, Transport and the Regions (DETR), refused to provide her with information which she believes she is entitled to under the Code of Practice on Access to Government Information (the Code). Although the complaint was made to DSA the information requested by Mrs F was contained in a report commissioned by DETR. My investigation therefore began in September 2000 after I had received the comments of the Permanent Secretary of DETR. 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

3.2 DETR's road safety strategy, published in March 2000 and entitled "Tomorrow's Roads - Safer for Everyone", identified driver training and testing as key areas requiring further attention. Chapter 3 of the strategy included a number of proposals designed to ensure that new drivers possessed better skills and driving behaviour before they undertook their driving test. To this end, DETR have sought to raise the standard of tuition provided by approved driving instructors (ADIs) and, as a result, research has been carried out into the way ADIs are themselves trained, tested and supervised. The department made a commitment to publish the findings of this research in 2000.

3.3 This research, which was commissioned in 1998 to review the training and qualification requirements of ADIs, is one of several projects being monitored by the Advisory Group on Driver Training and Testing (AGDTT). This group, consisting of

representatives from DETR, DSA and organisations representing the driving instruction profession, was set up in 1997 to provide DETR with advice and comment on relevant research projects. This project was undertaken by Ross Silcock Limited and a pre-publication version of the report, which is entitled "Raising the Standards of ADIs: Review of Requirements for Training and Qualification as an Approved Driving Instructor" was sent to AGDTT in May for consideration. In the light of comments made by members of the group, some minor technical changes were made to the final version of the report, which was subsequently published in September.

3.4 On 12 June 2000 Mrs F e-mailed DSA Customer Services to ask them to provide her with a copy of the pre-publication report. DSA replied on 13 June. They said that the report was being circulated to the recognised consultative groups and being checked for technical accuracy before being formatted for publication. They said that both DSA and DETR were committed to early publication of the report and therefore, as the report was due to be published shortly, the terms of the Code did not apply.

3.5 On 13 June Mrs F repeated her request. DSA replied on 14 June. They said that, as Mrs F was not a member of the AGDTT, and that the pre-publication report actually belonged to Ross Silcock Ltd and not to DSA, they could not send her a copy. DSA suggested that Mrs F take up her request with Ross Silcock Ltd instead.

3.6 On 14 June Mrs F again e-mailed DSA. DSA replied on the same day and maintained their refusal to provide her with a copy of the pre-publication report. DSA said that because the report was external, and was due to be published shortly anyway, the terms of the Code did not apply.

Permanent Secretary's Comments

3.7 The Permanent Secretary outlined the background to Mrs F's complaint. He said that he recognised that ADIs were anxious to know the results of the research project since any recommendations accepted by the government could have a significant impact on their profession. The Permanent Secretary said that the report had now been prepared for publication and copies would be available on request, as well as being available on the Department's web-site from 5 September. He also said that the Department had been entitled, at the time the request was originally made, to refuse under Exemption 10 of the Code to release information which was soon to be published.

The Code of Practice on Access to Government Information

3.8 Exemption 10 of the Code, which concerns 'Publication and prematurity in relation to publication', covers:

'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)'.

Investigation

3.9 During the investigation, my staff obtained copies of both the draft report and the final, published report - both of which are entitled "Raising the Standards of ADIs: Review of Requirements for Training and Qualification as an Approved Driving Instructor". On examination, the only differences in content between the two documents (as opposed to minor presentational differences) appear to be restricted to just three paragraphs. These differences, which essentially concern matters of technical detail, were found in paragraphs 28 and 33 of the Executive Summary and paragraph 7.2.9. (Evidence of Prior Training) in the main body of the report.

Assessment

3.10 My assessment is concerned primarily with the refusal to release the pre-publication report. In this context it is perhaps timely to remember that the Code gives an entitlement only to information, not to documents (although the Ombudsman's experience has shown that the simplest way in which to meet a request for information is

often by releasing the actual document concerned). It is on this basis that Mrs F's complaint has been examined.

3.11 In his response to me the Permanent Secretary said that his Department had been entitled to withhold the pre-publication report under Exemption 10 of the Code since the report was due to be published shortly. As the report is now in the public domain, Exemption 10 clearly no longer applies and I therefore offer no comment on the applicability or otherwise of the exemption prior to the publication of the report. Should DETR then now release the information contained in the earlier document? Since the differences between the two reports are simply minor factual discrepancies that have now been amended, and the report is now in the public domain, there seems to be no legitimate reason why the information cannot now be disclosed to Mrs F, the simplest way being by the release of the pre-publication report in its entirety. I so recommend. In response the Permanent Secretary said that, without prejudice to their position under the Code, the Department had no objection in this particular case to making the pre-publication report available now that the final version of the report had been published.

3.12 My other concern is with the failings in DSA's handling of the information request. First of all, all requests for information should be treated as requests made under the Code irrespective of whether or not the Code itself is referred to. The Ombudsman has also said that it is good practice, if departments refuse requests for information, for them to identify in their responses the specific exemptions in Part II of the Code on which they are relying. Finally, where information has been refused, 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 review process, the requester is still dissatisfied. In these respects I find DSA's handling of the request to be both inaccurate and inadequate.

3.13 In making this point, I have in mind a number of aspects of DSA's handling. In their responses to Mrs F, DSA said on two occasions that the terms of the Code did not apply to her information request. This statement is misleading. Paragraph 10.4 in Part II of the Cabinet Office guidance to the Code says;

"...Information which is soon to be published need not be provided under the Code of Practice..."

This does not however mean that the Code does not apply. Any information held by a Government Department listed in Schedule 2 of the Parliamentary Commissioner Act 1967 (which includes both DETR and DSA) comes potentially within the Ombudsman's jurisdiction since that information will, by virtue of this fact, also be covered by the Code. However, such information may be exempt should it fall within one or more of the exemptions listed in Part II of the Code and, clearly, DSA had a responsibility to explain to Mrs F precisely which exemption they believe applied in this instance. In his response to me the Permanent Secretary explained that Exemption 10 applied to the information requested by Mrs F. That is what DSA should have explained to Mrs F in the first instance, rather than tell her (incorrectly) that the Code did not apply.

3.14 Having failed to identify that Mrs F's request was indeed covered by the Code, Mrs F was therefore not informed of the opportunity to have her information request reviewed. I am particularly critical of DSA for these failings, not least because DSA's poor handling of a Code request formed part of an earlier complaint investigated by this Office (A5/00, Investigations Completed April - October 1999, Access to Official Information, HC21.) I suggested to the Permanent Secretary that steps should again be taken within DSA to ensure that there was a commitment to dealing with all requests for information by reference to the procedures of the Code. In response, he said that the Chief Executive of DSA had written to all staff to remind them that all requests for information should be treated as requests made under the Code and that

where requests for information were declined, the relevant exemptions should be cited and attention drawn to the review process. He added that a referral point on Code matters for staff and enquirers had now been created in DSA's Customer Services Unit, and that this had been drawn to the attention of both staff and customers.

Conclusion

3.15 DETR have agreed to make available the pre-publication report and staff in DSA have been reminded of the importance of dealing with information requests in accordance with the requirements of the Code. I see this as a satisfactory outcome to a partially justified complaint.

Total screening and investigation time - 19 weeks

Driving Standards Agency

Case No. A.13/01

Refusal to release copies of Appeal Board reports

Mr I complained that DSA refused to provide him with copies of 16 Appeal Board reports relating to 'Fit and Proper' appeals against either the refusal of registration on to the ADI register or removal from it. He also complained that DSA had refused to provide him with a copy of an Appeal Board report, relating to one particular ADI, which had been disclosed to an MP. In their comments on the complaint, DSA quoted parts of Paragraph 10 in Part I of the Code and Exemption 12 in Part II of the Code. The Ombudsman discounted paragraph 10 because he considered the reports to be government-held information, not court documents; they therefore fell within the ambit of the Code. The Ombudsman considered that Exemption 12 was potentially relevant to the information sought but suggested to DSA that the reports could be disclosed to Mr I, while maintaining the privacy of the individuals concerned, by releasing them in a suitably anonymised form. As regards the report that had been disclosed to an MP, the Ombudsman noted that the report had already been released into the public domain by way of a House of Commons debate. He saw no reason, therefore, why that report could not be released to Mr I in its entirety. DSA agreed to release anonymised versions of the 16 Appeal Board reports but expressed concern that if the other report were released in its entirety, the people named in the report might complain that DSA had breached their confidentiality. The Ombudsman, therefore, accepted that it would be appropriate, on this occasion, to release that report in an anonymised form also. He criticised DSA for the way they handled Mr I's request for information, particularly their failure to cite the Code in any of their correspondence with him. DSA apologised for their handling of the case and said that advice about the Code had been re-issued to their staff. The Ombudsman upheld the complaint.

4.1 Mr I complained that the Driving Standards Agency (DSA), an executive agency of the Department of the Environment, Transport and the Regions, refused to supply him with information which should have been made available 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

4.2 Under the Road Traffic Act 1988 it is illegal for any person to charge for instruction in driving a motor car unless their name is on the Approved Driving Instructor (ADI) register or they hold a trainee licence to give instruction issued by the Registrar. When deciding whether to allow a person to join, or to be removed from, the ADI register the Registrar considers a person's driving and instructional ability and conduct. Any person who does not accept a decision made by the Registrar may appeal to the Secretary of State in the following circumstances:

Those seeking to qualify as ADIs can appeal when the Registrar has decided to:

- refuse to accept an application for ADI registration;
- refuse an application for a trainee licence; or
- revoke a trainee licence.

Those on the register can appeal when the Registrar has decided to:

- refuse to retain a person's name on the register; or

- remove a person's name from the register.

Appeal cases are heard by an independent Appeal Board, which is chaired by a person with a legal background who is approved by the Lord Chancellor's Department. The Appeal Board makes recommendations to the Secretary of State through the Chief Executive of the DSA. In practice the Chief Executive has delegated responsibility to determine appeal cases without reference to Ministers when there is no intention to depart from the Appeal Board's recommendations.

4.3 All ADIs must undergo periodic checks of their instructional ability. These checks, which are commonly known as check-tests, are conducted by DSA examiners who will either observe an ADI giving a lesson to a pupil or 'role-play' as a pupil. ADI's taking check-tests are given an overall grade which determines how quickly they should be check-tested again. Those awarded a Grade 4 are seen every year, Grades 5 and 6 every 4 years. If an ADI fails the check-test they will be given a Grade 1,2 or 3. They will then be re-tested once or twice more depending on their grade and removed from the register if the result remains unsatisfactory.

4.4 Mr I qualified as an ADI in 1994. He was removed from the ADI register in 1997 after failing three consecutive check-tests. Mr I appealed against the Registrar's decision. The Appeal Board dismissed his appeal and, in line with normal practice, he was sent a copy of the Appeal Board report. In December 1998, Mr I was convicted of 11 counts of illegal instruction. On 16 September 1999, Mr I applied to re-qualify as an ADI. The Registrar refused the application on the grounds that he was not a 'Fit and Proper' person to have his name entered on the register. Mr I appealed against that decision.

The complaint

4.5 On 20 January 2000, Mr I wrote to DSA and asked them to forward all cases relating to 'Fit and Proper' ADI appeals which had been won following removal by DSA from the ADI register. He also asked to see all appeal cases over the same period where the Registrar had refused an application for registration on 'Fit and Proper' grounds. DSA replied on 16 February and provided Mr I with statistical information showing the yearly totals of 'Fit and Proper' appeals against the removal and refusal of ADI registration. The information included the number of successful appeals and covered the period between 1996 and 1999. Mr I wrote to DSA on 18 February to say that he had not asked for statistical information about appeals but the actual cases themselves. He wanted to see recorded details, minutes and judgements of all 'Fit and Proper' appeals during the 1996 to 1999 period. In addition, he asked for the appeal details of an individual who had appealed against the removal from the ADI register following an alleged sexual assault on a pupil. The Appeal Board report of that case had already been provided to the pupil's constituency MP, Mr X.

4.6 DSA replied on 9 March. They said that all requests for information were considered in accordance with the requirements of the Data Protection Act and they felt that they had answered all of Mr I's letters fully. They gave Mr I a list of the 16 appeals against the Registrar's decision to refuse an application for registration on 'Fit and Proper' grounds, including the outcome of the appeal and a brief explanation of the type of conviction or offence that led to the decision. However, they said that they were unable to provide the names of the individuals concerned under the terms of the Data Protection Act. DSA also said that appeal hearings were not normally minuted and as Appeal Board reports contained information of a personal and sometimes sensitive nature pertaining to the individuals concerned, they were unable to allow Mr I to have sight of any such reports. This also applied to the case of the ADI specifically named by Mr I.

4.7 Mr I wrote to DSA on 15 March and again on 16 March. He repeated his request for copies of the previous appeal judgements. He said that DSA had interpreted the Data Protection Act incorrectly, particularly as an

MP had been provided with a copy of an earlier judgement that had been denied to him. He also suggested that the names of the appellants could be removed if DSA chose to do so. DSA replied on 27 March. They said that although the Data Protection Act had been mentioned in their earlier letter, it had not been their intention to imply that it was this legislation that was preventing Mr I from having access to the papers he had requested. They again said that Mr I could not have sight of the reports because they contained information of a personal and sometimes sensitive nature.

4.8 On 22 March, Mr I wrote to the Member describing the difficulties he was experiencing with DSA and the Member referred the matter to the Minister of State for Transport on 24 March. The Parliamentary Under Secretary of State replied on 18 April and referred to the reply that had already been sent to Mr I on 27 March. Mr I wrote again to the Member in an undated letter. The Member referred that letter to DSA on 13 April and requested copies of the documents his constituent was seeking. Mr I was aggrieved that DSA had not provided him with the information requested and he then complained, through the Member, to the Ombudsman.

Further Correspondence

4.9 When commenting on the complaint (see paragraph 4.10), DSA enclosed copies of further correspondence which had not been previously seen by the Ombudsman. DSA replied to the letter of 13 April from the Member on 25 May. In their letter DSA said that they had discussed the issues raised by Mr I at a meeting with officials from the Office of the Data Protection Commissioner. The minutes of the meeting show that that Office advised DSA that the Data Protection Act 1984 did not apply to the reports sought by Mr I because the DSA held only paper copies. Nor did the Data Protection Act 1998 apply because the transitional exemptions of that Act did not extend its application to paper records until 24 October 2001. However, they said that, as the reports contained personal information relating to other individuals, it would be prudent if DSA obtained their consent before releasing the information to a third party. However, DSA did not propose to pursue that course of action because the nature of the cases meant that it was unlikely that appellants would agree to release the reports to a third party. DSA said that they might consider publishing an anonymised synopsis of cases in its Annual Report and Accounts. With regard to the report relating to the ADI specifically named by Mr I, DSA said that that report had been released to Mr X MP because the appellant and the aggrieved were both his constituents. They considered that there was therefore no disclosure of reports relating to third parties.

Departmental reasons for refusing access

4.10 In their comments on the complaint, DSA repeated their reasons for not providing Mr I with the Appeal Board reports as stated above. They noted that Mr I believed he was entitled to copies of Appeal Board reports relating to other ADIs under the terms of the Code. They argued, however, that the Code allows confidentiality where disclosure to a third party would constitute an unwarranted invasion of privacy. They said that it also provides for an exemption to information held by Courts (including tribunals). They concluded that Mr I had been kept fully informed of the appeals procedure and case facts relating to him. He had also been provided with the Registrar's statement detailing the reasons for his decision. Mr I was free to put his case to the Appeal Board appointed to hear his latest appeal as he saw fit. DSA considered that, in the current circumstances, it had a duty to respect individuals' legitimate expectations that information provided to an Appeal Board remained confidential.

The Code of Practice on Access to Government Information

4.11 DSA have not specifically cited any exemptions of the Code as justification for not releasing the information sought by Mr I. However, in their comments on the complaint, DSA have quoted parts of Paragraph 10 in Part I of the Code as well as Exemption 12 in Part II of the Code. Paragraph 10 is headed 'Jurisdiction of

courts, tribunals or inquiries' and reads:

'The Code only applies to Government-held information. It does not apply to or affect information held by courts or contained in court documents. ("Court" includes tribunals, inquiries and the Northern Ireland Enforcement of Judgements Office). The present practice covering disclosure of information before courts, tribunals and inquiries will continue to apply'.

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 could facilitate an unwarranted invasion of privacy'.

Assessment

4.12 In considering this complaint I have examined the question of whether or not Mr I is entitled, under the Code, to the information he has requested. It should be noted that the Code gives an entitlement only to information, not to documents, and it is on that basis that the complaint has been examined.

4.13 In assessing this complaint there are two aspects I have to consider: the substantive issue of whether or not information should be released and the general handling of Mr I's complaint. I turn first to the way DSA handled the request for information. Under the Code, it is good practice, if departments refuse requests for information, for them to identify in their responses the specific exemptions in Part II of the Code on which they are relying. Furthermore, where information is refused, 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 review process, the requester is still dissatisfied. It is clear to me that DSA failed to consider Mr I's requests for information under the terms of the Code. There is no mention of the Code in any of their correspondence with Mr I. Furthermore, DSA only raised the Code as an issue in their comments on the complaint in response to Mr I's belief that he was entitled to the information under the Code. Even then, DSA failed to directly cite any of the exemptions in Part II of the Code as justification for failing to disclose the information sought. I criticise DSA for their failure in this regard. It is of particular concern in light of the Ombudsman's criticism of DSA on the same issue in a previous report (A.5/00 - see Access to Official Information - Investigations Completed April - October 1999 - The Stationery Office HC21). On that occasion the Chief Executive of DSA said that measures would be taken to remind staff of the requirement to treat all information requests as Code requests and, in cases where information is to be withheld, to do so in accordance with Code requirements. I believe that it is necessary to ask the Chief Executive to repeat this message to his staff.

4.14 I turn now to the question of the information sought. Mr I's complaint is that DSA refused to provide him with copies of 16 Appeal Board reports. He also complained that they refused to provide him with a copy of an Appeal Board report relating to one particular ADI. In commenting on the complaint, DSA said that the Code provided an exemption to information held by Courts (including tribunals). Paragraph 10 in Part I of the Code (see paragraph 4.11) applies to information held by courts and contained in court documents. It is intended to ensure that the Code does not override or disturb arrangements for disclosure of documents in legal proceedings of various kinds, including courts, tribunals and inquiries. I accept that the DSA Appeal Board can be viewed as an inquiry for the purposes of Paragraph 10. However, I do not consider that the reports prepared by the Appeal Board can be viewed as court documents. The reports are not reports of the Appeal Board hearings *per se* but are prepared by the Chairman for the purpose of informing the Secretary of State (or the Chief Executive of the DSA under delegated authority) about the details of the case, the

arguments put forward and the Appeal Board's assessment and recommendation. As such, I consider these reports to be government-held information, not court documents, and thus they fall within the ambit of the Code.

4.15 I now need to decide whether any of the exemptions in Part II of the Code should apply to that information. In refusing to provide Mr I with that information, DSA have not specifically cited any exemptions but state in their comments on the complaint that the Code allows confidentiality where disclosure to a third party would constitute an unwarranted invasion of privacy. This clearly relates to Exemption 12 and I believe that this exemption is potentially relevant to the information sought. Exemption 12 is intended to protect the privacy of an individual and I accept that the information contained in the 16 reports is of a personal and sometimes sensitive nature. I should emphasise, however, that the Cabinet Office's Guidance on Interpretation of the Code says in relation to Exemption 12 that information may be provided by government departments where the subject of the information has given consent to its disclosure.

4.16 I note that, during a meeting between DSA and staff of the Data Protection Commissioner on 9 May 2000, DSA were advised that if they were to consider releasing the Appeal Board reports they should seek the appellants' consent and allow the appellants the opportunity to refuse the release. The minutes of the meeting record the view of DSA that, given the nature of "fit and proper" cases and the likelihood that appellants would not agree to release to a third party, they did not propose to seek their consent. I criticise that approach as being inconsistent with the Code. The Code states that the approach to release of information should in all cases be based on the assumption that information should be released except where disclosure would not be in the public interest. DSA should therefore have considered seeking the consent of the appellants, or an alternative approach which would allow the reports to be released, while safeguarding privacy.

4.17 I recognise that contacting each of the 16 appellants and asking whether they would consent to the release of the reports would be time consuming. I believe a simpler and more cost-effective solution to the problem would be to release the reports in a suitably anonymised form. Such an approach would protect the privacy of the individual concerned and Exemption 12 would therefore not apply. I note from the minutes of their meeting with officials of the Data Protection Commissioner (see paragraph 4.16) that DSA said they might consider publishing an anonymised synopsis of cases in their Annual Report and Accounts. Furthermore, in the letter of 25 May to the Member, DSA said that publishing Appeal Board reports could form part of their efforts to modernise the regulation of driver training. They said that more information about ADI standards should be put in the public domain so that the public was better informed. I welcome these comments. The publication of anonymised reports is common practice within many government departments and indeed this Office periodically publishes anonymised versions of cases investigated by the Ombudsman. Mr I has indicated that he would be satisfied with receiving anonymised versions of the reports and, by providing such reports, DSA would maintain the privacy of the appellants. This would appear to be a satisfactory solution to Mr I's complaint and I therefore recommend that DSA release the information contained in the 16 Appeal Board reports in a suitably anonymised form.

4.18 Mr I also asked to be provided with the Appeal Board report of a particular ADI. This individual was charged with indecent assault upon a pupil during the course of a lesson. He admitted the offence and received a caution from the police. DSA removed him from the register but he was reinstated following a successful appeal before the Appeal Board. Mr X MP was concerned about the Appeal Board's decision and as the constituent MP of the pupil who was indecently assaulted, he asked DSA for a copy of the Appeal Board

report. His request was initially refused, but the report was later released to him. Mr X used this report as a basis for a House of Commons debate about Driving Instruction Appeals (Hansard, 15 December 1999, columns 96WH to 103WH). Mr I complained that, as that report had been released to a Member of Parliament, there should be no reason why it could not also be released to him. DSA's view was that, since the appellant and the aggrieved in this case were both Mr X's own constituents, there was no disclosure of reports relating to third parties.

4.19 I now need to decide whether DSA correctly withheld that information from Mr I. Much of the information contained in this particular Appeal Board report has already been disclosed by way of the debate in the House of Commons on 15 December 1999. I have looked carefully at this Appeal Board report and compared it to the information which was disclosed during that debate by Mr X and the Parliamentary Under-Secretary of State for the Environment, Transport and the Regions. The information provided included the names of the appellant and his pupil, details of the alleged offence, evidence provided by the appellant, and the Appeal Board's assessment and recommendations; on several occasions during the debate, Mr X quoted directly from the report. I therefore saw no reason why that information, and the remaining small amount of undisclosed information, should not now be released to Mr I, in the form of the actual Appeal Board report.

4.20 DSA were however concerned that, if the Appeal Board report given to Mr X MP were released to Mr I in its entirety, the people who were named in the report might complain that DSA had breached their confidentiality. They suggested, therefore, that the report, like the other 16 Appeal Board reports requested by Mr I, be sent to him in a suitably anonymised form. As I see it, any breach of confidentiality occurred when the information was first disclosed into the public domain by way of the House of Commons debate on 15 December 1999. However, in the light of the sensitivity of the issues concerned, I accept that it would be appropriate on this occasion to release this report to Mr I in an anonymised form.

4.21 As regards the handling of the complaint, DSA have expressed regret that Mr I was not told which part of the Code was being relied upon when they declined access to sensitive personal information which had been supplied and held in confidence. They said that advice had been re-issued to DSA staff reminding them that all requests for information should be treated as requests made under the Code and that where requests for information are to be declined, the relevant exemption(s) should be cited and attention drawn to the review process.

Conclusion

4.22 DSA have now made available to Mr I anonymised copies of the Appeal Board reports that he requested. I regard this as a satisfactory outcome to a justified complaint.

Total screening and investigation time - 32 weeks

Export Credits Guarantee Department

Case No. A.31/00

Refusal to release a copy of an application for export credit support

Mr E, legal adviser to an interest group, complained that ECGD failed to provide him with copies of the export credit support application and supporting documents, submitted by Company X in relation to the Ilisu Dam project in Turkey. ECGD said that the application and its supporting documents could be withheld under Exemptions 13 and 14a of the Code, and that the information was also protected by the law of confidence. The Ombudsman widened the scope of the investigation to include all correspondence between ECGD and Company X, including an Environmental Impact Assessment Report (EIAR) submitted by them in support of their application. However, the EIAR had already been the subject of another request to ECGD by the interest group, which ECGD had refused under the Environmental Information Regulations 1992. The Ombudsman said that he could not consider the EIAR under the Code since it had already been dealt with under the 1992 Regulations, which took precedence. Turning to the remaining information, the Ombudsman accepted that Exemption 13 was relevant to the type of information sought by Mr E but that, if the matter were being considered solely in terms of the Code, he believed that the wider public interest should override the provisions of Exemption 13. However, the Code cannot set aside statutory or other restrictions on disclosure. The Ombudsman noted legal advice obtained by ECGD that, if they disclosed the information sought by Mr E without the consent of Company X, a court would be likely to conclude that ECGD had unlawfully disclosed confidential information. The Ombudsman concluded that ECGD were justified in refusing to supply the specific information sought by Mr E. Consideration of the applicability of Exemption 14(a) was therefore unnecessary. ECGD did agree to provide Mr E with a separate paper detailing, in general terms, the type of information included in the application for export credit support and the considerations that Company X would need to address in order to satisfy ECGD's requirements. The Ombudsman saw this as a reasonable response to the request for information.

5.1 Mr E, legal adviser to an interest group, complains that the Export Credits Guarantee Department (ECGD) has failed to provide him with information which he believes he is entitled to under the Code of Practice on Access to Government Information (the Code). My investigation began in May 2000 when I received the comments of the Chief Executive of ECGD. 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.

Background

5.2 On 11 February 2000, Mr E wrote to the Minister for Trade at the Department of Trade and Industry (DTI) about a reply the Minister had made to a Parliamentary Question on 9 February. The question concerned an application for export credit support that had been made by Company X, a major power, engineering, and construction company, in respect of the Ilisu Dam project in Turkey. In his reply to the Question, the Minister said that the application had been made under Section 1 of the Export and Investment Guarantees Act 1991 (the Act), and that he was unable to place copies of the application and its supporting documents in the House of Commons library because they were classified as "Third Party's Commercial

Confidence", and were therefore exempt under Exemption 13 of the Code. In his letter to the Minister, Mr E argued that the Code had not been applied correctly, and asked for copies of the application and all supporting documents in accordance with the Code's requirements.

5.3 The Minister for Trade replied on 23 February. He noted Mr E's views in respect of Exemption 13, but said that his officials had reviewed the matter and that he and they still remained of the opinion that Exemption 13 applied. He added that the contract for the project was still under negotiation and that there was a risk that disclosure might harm the competitive position of the applicant, their consortium partners, and any potential sub-contractors. The Minister also said that when the applicants became aware that a Parliamentary Question was due to be asked, they had contacted his officials and asked that their application should continue to be treated as 'Commercial in Confidence'. The Minister said that, in considering disclosure, he had weighed the risk of potential harm against the public interest in the information in the application form and had concluded that Exemption 13 still applied. In addition, he said that Exemption 14 (a) also applied to the information sought. He concluded by saying that some information on the environmental aspects of the dam project was already in the public domain and that more was to be made available.

The Chief Executive's comments

5.4 Commenting on the complaint, the Chief Executive of ECGD said that he knew that the Ilisu Dam project had aroused strong feelings in a number of quarters, including the interest group, who were arguing that the government should withhold support for it. He said that ECGD *had* published information where they were able to do so. For example, in December 1999, two reports commissioned by DTI Ministers had been published ("Stakeholders' Attitudes to Involuntary Resettlement in the Context of the Ilisu Dam Project in Turkey" and "Environmental Review of Ilisu Dam Project: Desk Review of EIA and Associated Documents"). The Chief Executive went on to say that ECGD had to consider the interests of those parties with whom they undertook business and whose rights were protected by English law, the Code, and the Environmental Information Regulations 1992 (the Regulations). As a result, they had turned down an earlier request by the interest group for a copy of the Environmental Impact Assessment Report (EIAR) produced by the project's main contractor, a decision the Interest Group had not challenged.

5.5 With regard to the interest group's current complaint, the Chief Executive said that Company X's application for export credit support should not be disclosed under Exemptions 13 and 14(a) of the Code, and that the information was also protected by the law of confidence. The contract had still not been awarded. He considered therefore that the disclosure of information on pricing and sourcing matters could prejudice the position of Company X, their consortium partners and potential subcontractors and, as such, fell within the requirements of Exemption 13 of the Code. He noted that when notice had been received of the Member's Parliamentary Question, Company X confirmed to ECGD that they wished their application to be treated as confidential. He went on to say that in April Company X again confirmed to ECGD their expectation that their application would be treated as commercially confidential, and ECGD took the view that this fulfilled the requirements of Exemption 14(a) of the Code. He concluded by saying that ECGD owed a duty of confidence to commercial parties outside government, and that there was a substantial likelihood that this would be breached if they complied with the Interest Group's request.

The Code of Practice on Access to Government Information

5.6 Exemption 13, which concerns a 'Third party's commercial confidences', covers:

'Information including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure

would harm the competitive position of a third party'

In this context it should be noted that the second paragraph of Part II of the Code contains the following general paragraph:

'...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...'

5.7 Exemption 14 is headed 'Information given in Confidence'. Exemption 14(a) covers:

'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.'

5.8 The Code does not set aside statutory or other legal restrictions on disclosure. The latter category covers restrictions on disclosure imposed by the law of confidence which has been developed by the courts. A claim for breach of confidence may be brought where the information concerned has the necessary quality of confidence, the information was communicated in confidence and the defendant is using the information in an unauthorised way. Disclosure is not prohibited where the information is already in the public domain or where there is a public interest in disclosing it which outweighs the interest in maintaining the confidence. However, the determination of the public interest in individual cases is a matter for the Courts.

Statutory Background

5.9 Section 1 of the Export and Investment Guarantees Act 1991 states:

(1) The Secretary of State may make arrangements under this section with a view to facilitating, directly or indirectly, supplies by persons carrying on business in the United Kingdom of goods or services to persons carrying on business outside the United Kingdom.

(2) The Secretary of State may make arrangements under this section for the purpose of rendering economic assistance to countries outside the United Kingdom.

(3) The Secretary of State may make arrangements under this section with a view to facilitating -

a) the performance of obligations created or arising, directly or indirectly, in connection with matters as to which he has exercised his powers under this section or section 2 of this Act, or

(b) the reduction or avoidance of losses arising in connection with any failure to perform such obligations.

(4) The arrangements that may be made under this section are arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business; and the facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans.

Regulation 4 of The Environmental Information Regulations 1992 reads;

'Exceptions to right to information

(3) For the purposes of these Regulations information must be treated as confidential if, and only if, in the case of any request made to a relevant person under regulation 3 above-.....

(c) the information is held by the relevant person in

consequence of having been supplied by a person who

(iii) has not consented to its disclosure;'

Export Credits Guarantee Department

5.10 ECGD's primary aim is to help exporters of UK goods and services to win business, and UK firms to invest overseas, by providing guarantees, insurance and reinsurance against loss. It is responsible to the Secretary of State for Trade and Industry. As the world's first Export Credit Agency, ECGD was established in 1919 to help British exporters re-establish their trade after the First World War. ECGD's main function has always been to provide insurance cover or guarantees for commercial transactions. Export credit insurance cover protects against the risk that British exporters (or banks who finance loans in favour of British exporters) will not be paid by overseas banks or borrowers. Under their Overseas Investment Insurance scheme, ECGD also insure investors against the risk that a range of political events may adversely affect their overseas investments. ECGD charges its customers a premium when they take on risk. If a borrower or buyer defaults on repayments, ECGD pays (valid) claims under the policy or guarantee. It makes recoveries, if it can, of amounts paid out in claims in the same way as any ordinary insurer would.

The Interest Group

5.11 The interest group is one of the leading environmental pressure groups in the United Kingdom and forms part of the largest international network of environmental groups in the world, represented in 61 countries.

General Background - The dam at Ilisu

5.12 The Turkish Government has for many years been developing plans for hydro-electric power generation in South Eastern Anatolia (the "GAP" project). As a result of an increased demand for electricity following greater urbanisation and industrial and commercial development, those plans are now being implemented. A large dam is planned at Ilisu on the River Tigris, 65 kms upstream from the borders with Iraq and Syria. In 1997 the Turkish Government invited Company Y of Switzerland to form a consortium to build a power plant there, on the understanding that a 100% debt financing package would be arranged by the consortium and its banking advisers. The export credit agencies of the main countries represented in the consortium have been approached for credits.

5.13 Once construction starts, it is expected that the project will take at least seven years to complete. The sponsors of the project are the Turkish Government, through the Agency for State Hydraulic Works (Devlet Su Isleri or "DSI"). The total cost is likely to be around $2 billion, half of which would be for imported elements. Company X are to lead the civil works element of the project. Although prices have yet to be finalised, their potential share of the contract value is estimated at around $315million: $215million from the UK and $100million from a US subsidiary. Much of the $215 million will be spent on equipment and services to be exported from the UK.

5.14 Company X first formally approached ECGD with details of the proposed venture in January 1998. A preliminary application for export credit was made in June 1998, and a formal application in October of the same year. In April and May 1999, Ministers commissioned two reports through ECGD; an independent evaluation by a firm of environmental consultants of the environmental components of the EIAR commissioned earlier; and a report on resettlement issues conducted by an academic from the University of Bradford. On 21 December 1999, in a press release, the Secretary of State released the two reports and announced that he was;

"...minded to grant export credit conditional on the Turkish authorities agreeing to address the concerns we have about the environmental and social impact of the project..."

Those concerns, identified as areas where

changes would be required before the British Government could consider export credit support, were: a) the need to draw up a resettlement programme which reflected internationally accepted practice and included independent monitoring; b) provision being made for upstream water treatment plants capable of ensuring the maintenance of water quality; c) an assurance that adequate downstream water flows would be maintained at all times; and d) the production of a detailed plan to preserve as much of the archaeological heritage of the historical town of Hasenkeyf as possible.

Investigation

5.15 The complaint as put to this Office by the interest group requested copies of the application by Company X and all supporting documents. The Code gives no right of access to documents: the right, subject to any relevant exemption, is only to information. Both the present Ombudsman and his predecessor have, however, taken the view that the release of actual documents is often the best way of making available information we are recommending for disclosure. With that in mind, my initial consideration was therefore to establish what this request could be interpreted as covering in terms of information sought. In response to the complaint, ECGD provided this Office with a copy of Company X's formal application for Buyer Credit Finance and their covering letter, both dated 9 October 1998. The covering letter sets out the background to the application. The application itself, which is marked "Restricted - Commercial" and consists of nine pages, includes information about the composition of the joint venture, details of the buyer and borrower, and a summary of the project (including an estimate of costs). In addition, details are provided of the extent of the suppliers' and buyers' contractual responsibilities. ECGD also provided a copy of the Council of Ministers' Decree, accompanied by a translation provided by Company Y to Company X on 5 December 1997. Finally, a copy of a letter from the Director General of DSI to the German Government demonstrating the importance of the Ilisu dam to Turkey was also attached, since this had been referred to in Company X's covering letter.

5.16 While these papers can fairly be regarded as 'the application and all supporting documents' in a narrow interpretation of those words, I took the view that this Office's investigation should range more widely. I therefore decided that the investigation should also consider other relevant documentation, and include any relevant papers leading to the application and any subsequent correspondence serving to clarify or support the application after its submission. To this end, my staff examined in detail 38 files of documentation before narrowing the focus of the investigation to the correspondence (in which I also include facsimile messages and e-mail printouts) between Company X and ECGD since the company's initial approach in January 1998. I have excluded internal memoranda and communications between government departments as these did not feature in the information request.

5.17 The papers examined include two draft Buyer Credit Finance applications to ECGD before the formal application was submitted in October 1998. Other correspondence I have examined seeks to clarify issues such as export insurance policy cover rates quoted by ECGD, and changes to the composition of the original application brought about by a variety of factors (e.g. the identification of the need to purchase additional equipment from other countries not previously involved). An important document identified during the examination of ECGD's files is a Preliminary Costing Indication from ECGD dated 3 July 1998, which sets out a range of conditions that Company X would be required to meet if their application for export credit were to be approved. One of the criteria set out in the Preliminary Costing Indication was the need for careful consideration of the environmental aspects of the project. To this end, ECGD asked to be furnished with a copy of the original EIAR commissioned by Company Y. This was provided by Company X on 14 August 1998.

5.18 It is because ECGD clearly thought they

needed to see it, that I have decided that the *original* EIAR should also be considered as a relevant supporting document. I have therefore considered whether or not the EIAR is a document which falls within the ambit of the Environmental Information Regulations 1992 (the Regulations). This is an important consideration since the Code (as a non-statutory document) cannot take precedence over a statutory prohibition or requirement. Consequently, if the EIAR is covered by the Regulations it would not be covered by the Code and would therefore fall outside my jurisdiction.

5.19 This matter was considered very carefully by ECGD when the interest group requested from them a copy of the EIAR. Their view was that, as Company Y wished ECGD to treat the EIAR as confidential, Regulation 4(3)(c) prevented them providing the interest group with a copy: these regulations govern the question of consent to disclosure. This decision was not subsequently challenged by the interest group. On that basis, the question of the disclosability or otherwise of the EIAR under the Code becomes immaterial: I cannot consider it as the matter has already been dealt with under the Regulations, which take precedence.

Assessment

5.20 I now therefore consider the applicability or otherwise of the Code to all the information contained in Company X's process of application (less the EIAR) and how the Code exemptions ECGD have cited apply to that information. ECGD have argued that Exemption 13 is the key applicable exemption. They have said that, as the contract has still not been awarded, the disclosure of information on pricing and sourcing could prejudice the position of Company X, their consortium partners, and their potential sub-contractors. Exemption 13 deals with the need to protect sensitive commercial information from disclosure in circumstances that would adversely affect those to whom the information relates; and no distinction is drawn between whether the information was provided under a statutory obligation or provided voluntarily.

5.21 It is entirely understandable that any company providing information to government on a confidential basis (as was the case here) would need to be sure that the government would not apply its general commitment to openness in such a way as to damage the company's legitimate interests or to undermine the trust they had placed in the government. In that context, I note that Company X continue to take the line that the information they have provided should remain confidential. They argue that they are still engaged in contractual negotiations with the buyer and that the documents contain information which could prejudice the consortium's negotiating position with the Turkish authorities.

5.22 Exemption 13, however, also incorporates a harm test; that is, a test whether any harm likely to arise from the disclosure of the information requested would be outweighed by the public interest in making the information available. In this instance, the harm referred to is the damage disclosure would do to the negotiating position of Company X and to the other elements of the civil works joint venture led by them. In considering whether the public interest in this particular project outweighs the potential harm that Company X may face if the information contained in their application (and any documents which I believe should be classified as supporting that application) were to be released, I have taken into account the following considerations.

5.23 There is no doubt that the Ilisu Dam project has generated a good deal of public debate. Those in favour of the project, and those against it, have had their views reported widely in the media; and information about the project can be obtained from many sources including a range of internet websites. Much information about the project is therefore already in the public domain. The matter has been the subject of Parliamentary Questions and debated in the House of Commons; it has also been considered by both the House of Commons Trade and Industry Select Committee and the International Development Select Committee, whose

reports have been published. This shows that the Ilisu Dam project is regarded by both the government and Parliament as a matter of legitimate public interest: it also seems to me reasonable to suppose that proper debate cannot take place without the wide availability of all relevant information. In my view, this is a case where the wider public interest in the release of the majority of the information sought should override the provisions of Exemption 13, if the matter were to be considered solely in terms of the Code.

5.24 However, I have noted earlier (paragraph 5.8) that the Code does not set aside statutory or other restrictions on disclosure. I am therefore obliged to have regard to the possibility that the release of the information provided to ECGD by Company X could found an action for breach of confidence, if it were to be revealed without the latter's consent. Company X have been consulted by ECGD and have maintained their view that they regard all the material as provided in confidence and that they do not consent to its release. In this context, I took note of the legal advice provided to ECGD (and passed on to this Office) that, if they disclosed the information sought in the absence of such consent, a court would be likely to conclude that ECGD would thereby be unlawfully disclosing confidential information.

5.25 ECGD have also sought to rely on Exemption 14(a) of the Code. However, as will be seen in the preceding paragraph, all the information supplied to ECGD by Company X was supplied in confidence and would be protected from disclosure by ECGD by the law of confidence. I have not therefore considered the question of whether or not ECGD are entitled to rely on Exemption 14(a).

Conclusion

5.26 While I recognise that there is a strong public interest in the release of information about this controversial project, I am unable to recommend the release of information which could found an action for breach of confidence. I have however agreed a proposal by ECGD that they should provide the interest group with a separate paper detailing in general terms the type of information included in the application for ECGD cover and the considerations which Company X would need to address in order to satisfy ECGD's requirements.

5.27 I conclude that ECGD were justified in refusing to disclose the specific information sought by the interest group on the basis that its release, in the absence of consent by Company X, could found a legal action for breach of confidence. However, I consider the decision of ECGD to release a separate paper providing general information on the application to be a reasonable response to this information request. I note also that it has been agreed that the revised EIAR will be made publicly available before any final decision is taken.

Total screening and investigation time - 34 weeks

Medical Devices Agency

Case No. A.25/00

Refusal to provide the names and addresses of specialists

Ms B was a member of an advisory group charged with taking forward recommendations on patient information concerning breast implants. Ms B asked MDA to provide her with details of the specialists referred to in the minutes of the advisory group's first meeting so that she could communicate with them. Substantial correspondence took place between Ms B and MDA on this issue, with MDA maintaining that since no formal discussions had taken place, there were no details of any relevance to Ms B. The information was not released. MDA told the Ombudsman that it was their practice to treat all dealings with external experts as confidential and that their names would not be divulged without permission. They said that without such mutual assurance, MDA would experience difficulties working with independent experts, and this would seriously hinder the effective operation of their business. MDA added that they had also been concerned that disclosing the names of the specialists might expose them (the specialists) to unwelcome intrusion in the form of correspondence from Ms B. MDA cited Exemption 12 and Exemption 14 (b) in support of their decision. The Ombudsman identified the issue of consent as being central to both MDA's policy and to the two exemptions cited. Since there was no evidence that MDA had sought to gain the consent or otherwise of the specialists before notifying Ms B that their details would be refused, the Ombudsman invited MDA to now do so. As a result, two of the three specialists agreed that their details could be released while the third agreed to the release of his name only. The Ombudsman criticised MDA for failing to refer to the Code in their correspondence with Ms B and, while he recognised the reasons given by MDA for not wishing to release the details to her, he said that if the Code had been correctly applied in the first instance, and the matter of consent addressed, the concerns expressed by MDA would not have arisen. The Ombudsman upheld the complaint.

6.1 Ms B complains that the Medical Devices Agency (MDA), an Executive Agency of the Department of Health (DOH), refused to provide her with information which she believes she is entitled to under the Code of Practice on Access to Government Information (the Code). My investigation began in February 2000 after I had received the comments of the Permanent Secretary of DOH. 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

6.2 MDA were established in September 1994 to replace the Medical Devices Directorate of the DOH. MDA's aim is to protect public health by ensuring that medical devices (a term which includes breast implants) meet appropriate standards of safety, quality and performance, and that they comply with relevant European Union directives.

6.3 The National Breast Implant Registry (NBIR) was set up in 1993 on the advice of the Independent Expert Advisory Group (IEAG) created by DOH to review data on purported links between silicone gel breast implants and connective tissue disease. The remit of the registry was to establish a patient cohort as a basis for any future studies of breast implantation and associated effects. The aim was to collect information on both

the short and long-term outcomes from a large proportion of the breast implant procedures carried out in both the public and private sector in the UK. MDA's intention had been to use registry data to analyse the independently collected data in a manner which might reveal any health effects associated with breast implants and possibilities of doing this were discussed by the IEAG in 1992. Such analysis could not sensibly take place until five years of data had been collected to ensure that any results would be valid. As a result, it was considered that the earliest time such a study could have begun would have been in late 1998 or 1999.

6.4 In preparation for this study MDA staff started to discuss possible research strategies, in the first instance with members of the IEAG. The development of a study using the NBIR data was subsequently considered in more detail by MDA and, as part of the groundwork in planning such a study, MDA staff held a number of informal discussions with relevant specialists. Following the general election in May 1997, the then Minister for Health asked the Chief Medical Officer to carry out a further review of the circumstances surrounding the safety and use of silicone gel breast implants. An Independent Review Group (the IRG) was appointed to look at the evidence relating to the possible health risks associated with silicone gel breast implants and to examine the issues relating to the adequacy of preoperative patient information. All matters relating to the NBIR (including data analysis) fell within the scope of this review: as a result other possible arrangements for the analysis of this data were put on hold pending the outcome.

6.5 The IRG report, in July 1998, contained recommendations in relation to both the NBIR and the subject of patient information. The complainant, Ms B, was subsequently appointed as a member of a committee (the Breast Implants Patient Information Advisory Group - BIPIAG) which was charged with taking forward the IRG's recommendations on patient information. At the initial meeting of BIPIAG on 22 March 1999, the Medical Director of MDA (who had attended as an observer) referred to these earlier discussions that had taken place on plans for a registry analysis. The minutes of that meeting quote the Medical Director as saying that: 'In 1997 an epidemiologist and a statistician were discussing research but this was postponed to avoid overlap with the work of the Independent Review Group.'

6.6 On 12 April, Ms B wrote to MDA and asked them to provide her with the details of the epidemiologist and the statistician who had been referred to by the Medical Director at this meeting so that she could communicate with them. MDA replied on 5 May. They explained that at no stage had any individual researchers been approached to design or perform the study nor had any study protocol been developed. Ms B replied to this letter on 7 May by annotating the MDA letter, repeating her request for the 'names and contact' of the epidemiologist and the statistician concerned. MDA replied on 25 May, confirming their previous advice. They said that any discussions that had occurred were of an entirely informal and preliminary nature and no particular experts had been identified who might have been suitable to carry out such a study. There were therefore no details available of relevance to Ms B's question.

6.7 Following further correspondence MDA wrote to Ms B on 25 June saying that they saw no purpose in further discussion. Ms B responded on 9 July, asking again for the names of the epidemiologist and statistician referred to by the Medical Director. On 9 August MDA replied to Ms B, drawing a distinction between informal discussions and the formal appointment of personnel to undertake a specific project. The names of the specialists were not provided. Ms B wrote again on 12 August, repeating her request for the two names, and pointing out that her original request had not referred to the appointment of individuals. As MDA continued to withhold the details of the specialists concerned, she referred the matter to the Member.

Permanent Secretary's Comments

6.8 The Permanent Secretary said that MDA officials had explained the situation to Ms B both accurately and consistently. He explained that it had been necessary in their replies to draw a distinction between any formal contractual appointments, which MDA *would* (my italics) have disclosed, and the informal discussions that actually took place. The Permanent Secretary said:

"...it is MDA's practice, when obtaining external advice, to ask the experts involved to treat all dealings with MDA as confidential. In return, MDA does not divulge their names without their permission, in order to defend their integrity and independence. Without such mutual assurance, MDA would find it difficult to work with independent experts, and this would seriously hinder the effective operation of its business."

6.9 He went on to say that MDA had sought advice from DOH solicitors regarding the nature of some of the letters they had received from Ms B. They were concerned, from experience, that disclosing the names of the specialists might expose them (the specialists) to unwelcome intrusion in the form of correspondence from Ms B. It was thought that such disclosure might deter others from assisting MDA in the future, with adverse effects on the development of Departmental policy. The Permanent Secretary cited the Code in specific terms to justify this approach and said:

"I understand that, where information has come from a private source an exemption to the Code of Practice on Access to Government Information may apply. It is my view that revealing the source of informal expert opinion would prejudice the future supply of similar information and would thus compromise the proper and efficient operation of a regulatory body. Moreover, I am satisfied that there is a reasonable expectation that identification of individuals in this case would facilitate an unwarranted invasion of their privacy. I therefore conclude that the likely harm and prejudice arising from disclosure of the requested information would not be in the public interest and that it should be regarded as exempt under either category 14 (b) or category 12."

The Permanent Secretary went on to say that the matter had been reviewed and he was satisfied that the original decision not to disclose the identities of the specialists was the correct one.

6.10 The Permanent Secretary also said that, while it had been clearly explained to Ms B that she was not entitled to the information, he also accepted that MDA could have explained to her why the information she sought was considered to be exempt under the Code. However, he understood why MDA had been reluctant to do this, as such an explanation would appear to be critical of Ms B. In such circumstances, he felt that it had been justifiable for MDA to follow this particular course of action.

The Code of Practice on Access to Government Information

6.11 Exemption 14(b) of the Code, which concerns 'Information given in confidence', covers:

"Information whose disclosure without the consent of the supplier would prejudice the future supply of such information"

6.12 Exemption 12 of the Code, which is headed 'Privacy of an individual' covers:

"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"

Investigation

6.13 In paragraph 6.8 of this report I quoted what the Permanent Secretary said in respect of MDA's policy when obtaining expert external advice. The Permanent Secretary also said that MDA had relied

upon Exemption 14 (b) in support of their decision not to disclose the relevant names to Ms B. This exemption is concerned with information given in confidence, and refers to "...Information whose disclosure *without the consent of the supplier* would prejudice the future supply of such information...". It seemed to me that central to both this exemption and Exemption 12 was the issue of the consent of the individual concerned. Unfortunately there was no evidence in the papers that my staff examined to show that MDA had sought to gain the consent or otherwise of the specialists before notifying Ms B that their details would not be disclosed. In the light of this, I invited MDA to write to the specialists concerned in order to see if they had any objection to their details being disclosed to Ms B.

6.14 It became clear from the responses I subsequently received from MDA that the description of the early informal discussions in the minutes of the first BIPIAG meeting did not provide the full picture. Following further enquiries, my officers established that, while an epidemiologist and a statistician were indeed consulted, other people had also been invited to contribute to these discussions. It eventually appeared that three principal specialists were consulted; an epidemiologist (who also has an expertise in the field of statistics); a rheumatologist with extensive experience in epidemiological studies similar in nature to the one being proposed by MDA; and a statistician, who was invited to contribute to the discussions by the rheumatologist.

6.15 At the request of this Office, MDA contacted the three specialists concerned. Both the rheumatologist and the statistician were content for their names and addresses to be released to Ms B. Only the epidemiologist showed any reservation about his details being disclosed and, while he was happy for his name to be made known to Ms B, he was reluctant for his current address, telephone number and e-mail address to be disclosed.

Assessment

6.16 In his comments to me, the Permanent Secretary said that MDA had sought legal advice about how to respond to Ms B. He said that MDA had been concerned about the nature of Ms B's letters, and felt that releasing the details she had requested might ultimately expose the individuals concerned to unwarranted intrusion in the form of extended correspondence from Ms B. He also considered that such a disclosure might deter other individuals from assisting MDA in the future. I recognise the strength of these arguments. However I also consider that, ultimately, it is for the individuals concerned to decide whether or not they wish their details to be disclosed. Indeed, the Permanent Secretary said in his response that it was MDA's practice not to divulge an individual's name without their permission. In this particular instance, no such permission was sought in the first instance and I am therefore critical of MDA for failing to approach the individuals concerned before replying to Ms B, however understandable their motive.

6.17 The individuals (with one reservation) have now consented to their names and addresses being disclosed. In considering this matter, it is clear to me that the three specialists concerned were consulted by MDA on an informal, non-contractual basis. I accept that access to such informal specialist advice is inherently important to the way organisations such as MDA operate, and that the flow of such information could be hindered in the future should information of the kind sought by Ms B be disclosed without the consent of the specialists concerned. On this basis, and his opinion having been sought, I accept that the current address details of the epidemiologist may be withheld in accordance with the requirements of the Code. However, his name, and the names and addresses of the two other specialists can now be released.

6.18 I am also critical of MDA for failing to refer to the Code in their correspondence with Ms B. In his response to me, the Permanent Secretary said that although Ms B had been told that she was not entitled to the information she had requested;

"...it might have been useful if MDA had given an explanation of why the information was considered to be exempt from the Code of Practice...".

He continued by saying that he could understand MDA's reluctance to be explicit in this instance;

"...since any explanation would inevitably appear critical of Mrs B..."

I recognise that MDA were concerned that any attempt to explain the justification for not releasing the information to Ms B would appear to be critical of her. However, it appears to me that if the Code had been correctly applied in the first instance, and the matter of consent addressed, the question of appearing critical of Ms B might well not have arisen. I invited the Permanent Secretary to release the information identified in this report and reminded him of the importance of treating every request for information as a request under the Code. In response, the Permanent Secretary said that he agreed with the findings of the report and he accepted that MDA ought to have approached the individuals concerned before replying to Ms B. He also accepted that MDA should have referred to the Code in their correspondence with Ms B. He said that the Department had written to Ms B, informing her of the names of the relevant specialists with expertise in epidemiology and statistics.

Conclusion

6.19 MDA agreed to make available the names and, in two cases, the addresses of the relevant specialists to Ms B. I see that as a satisfactory outcome to a justified complaint.

Total screening and investigation time - 23 weeks

Medicines Control Agency

Case No. A.16/01

Refusal to release information about direct-to-consumer advertising

Mr J asked MCA for any information they held relating to the topic of direct-to-consumer advertising. MCA said that a discussion paper had been prepared for the Medicines Commission to highlight the issues surrounding the subject but quoted Exemption 2 as justification for not releasing the information contained in the paper. At Mr J's request, MCA reviewed that decision. They concluded that although it was reasonable to withhold the original document under Exemption 2 (and also Exemption 10), Mr J could be provided with information about the content of the paper without harming the frankness and candour of MCA's consultations with the Medicines Commission. MCA therefore provided Mr J with an outline of the paper. Mr J was not satisfied with the amount of information provided or the way in which his request had been handled. The Ombudsman accepted that Exemption 2 applied to the opinion and comment contained in the discussion paper but said that the remaining amount of unreleased information was essentially factual and could be released. The Ombudsman considered that the easiest way to release the information would be to provide an edited version of the paper, which MCA agreed to do. The Ombudsman also criticised MCA for the time taken to reply to Mr J's request for information. The Ombudsman partially upheld the complaint.

7.1 Mr J complains that the Medicines Control Agency (MCA), an executive agency of the Department of Health, refused to supply him with information which should have been made available under the Code of Practice on Access to Government Information (the Code). He also complains about the way MCA handled his request for information. 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.

Statutory background

7.2 The Medicines Commission (the Commission) was established under Section 2 of the Medicines Act 1968. Its purpose, which is set out in Section 3(1) of the 1968 Act, is to advise Ministers:

'.....on matters relating to the execution of this Act or the exercise of any powers conferred by it, or otherwise relating to medicinal products, where either the Commission consider it expedient, or they are requested by the Minister or Ministers in question, to do so.'

7.3 The Commission is an advisory non-departmental public body. It provides advice to the licensing authority. (The licensing authority for human medicines in the UK consists of certain government ministers, one of whom is the Secretary of State for Health. The MCA is the executive arm of the licensing authority.) Unlike the MCA, the Commission does not fall within the Ombudsman's jurisdiction. This means that the Commission is not obliged to follow the government's commitment in the Code to make certain information publicly available; and I have no powers to investigate a refusal by it to release information. Since the Commission was established, a basis of confidentiality has been attached to its discussions and advice, and reminders are issued by the Chairman at the start of each meeting.

7.4 Section 118 of the 1968 Act contains a restriction on the disclosure of information obtained or provided in pursuance of its provision. Section 118(1) states:

'(1) If any person discloses to any other person-

(a) any information with respect to any manufacturing process or trade secret obtained by him in premises which he has entered by virtue of section 111 of this Act, or

(b) any information obtained by or furnished to him in pursuance of this Act,

he shall, unless the disclosure was made in the performance of his duty, be guilty of an offence.'

7.5 In a previous investigation (A.13/99 - see Access to Official Information - Investigations Completed April - October 1999 - The Stationery Office HC21) the Ombudsman's staff asked MCA to comment on how they interpreted section 118 of the Act in relation to requests for access to official information. MCA said that in their view, while that section clearly imposed a restriction on the disclosure of information obtained or supplied under the Act, that restriction did not apply where the disclosure was made in the performance of a duty. MCA, as a body coming within the jurisdiction of the Ombudsman, consider that their commitment, to release the kind of information identified in Part I of the Code, to be just such a duty. This meant that they were obliged to consider releasing information they held, including information which did not originate from them.

General background

7.6 Direct-to-consumer advertising (DTCA) is the practice of advertising prescription-only medicines directly to the public. DTCA has been an established feature of medicine in the United States since 1997 but at present only New Zealand has followed the American lead in permitting DTCA. However, other countries are following the American experience closely and the issue is under discussion in both Canada and the European Union (EU). It is currently prohibited under UK and EU law. The Medicines (Advertising) Regulations 1994 and the Medicines (Monitoring of Advertising) Regulations 1994, as amended, implement Directive 92/28/EC on the advertising of medicines for human use into UK law. The Regulations make it an offence for any person to issue an advertisement which is likely to lead to the use of a prescription-only medicine. MCA have recently become concerned that some pharmaceutical companies in the United Kingdom have been testing the boundaries of existing law. Moreover, the European Commission has established a consultation group to discuss DTCA, which may in time lead to changes in European legislation.

The complaint

7.7 Mr J wrote to MCA on 25 February 2000 and asked whether any attempt had been made to assess the possible impacts (including benefits, risks and costs) that might result from a change in the law that currently prohibits DTCA. He asked for any information that MCA were able to provide, including citations to any data not generated by MCA but used by them. He quoted the Code. MCA wrote to Mr J on 16 March to say that it would not be possible to respond within the 20 working days recommended under the Code but that a reply would be sent as soon as possible. On 20 April MCA replied to Mr J's request for information. They said that they had not made any detailed assessment of the benefits, risks and costs that might follow should the current law be changed but that earlier in the year the Commission had asked MCA to highlight the issues surrounding DTCA. The resultant paper contained no costings or conclusions and was intended to provide the Commission with a basis for subsequent discussion. That discussion, and any advice the Commission might decide to give Ministers, had not yet been completed. On that basis, MCA were not prepared to provide any further information and quoted Exemption 2 of the Code, specifically that part of it relating to 'internal opinion, advice, recommendation, consultation and deliberation'. MCA informed Mr J that he could request an internal review of the decision.

7.8 Mr J wrote to MCA on 12 May and asked for an internal review of their decision. He also asked several other questions about the

paper to which MCA referred in their letter of 20 April. MCA replied on 6 June to say that a full internal review should be completed by 26 June. On 29 June, MCA wrote to Mr J enclosing a report of the internal review dated 15 June. The report concluded that it was reasonable for MCA to withhold the original document under Exemption 2 and also Exemption 10 but that Mr J could be provided with information about the content of the paper without harming the frankness and candour of MCA's consultations with the Medicines Commission. In their letter of 29 June, MCA therefore provided an outline of the paper and replied to the further points Mr J had raised in his letter of 12 May. They also reminded Mr J that he could make a complaint through an MP to the Ombudsman if he remained dissatisfied with their decision.

The Permanent Secretary's comments

7.9 Commenting on the complaint in a letter dated 10 August, the then Permanent Secretary of the Department of Health said that DTCA was a current and sensitive issue on which legal and policy opinion was evolving. He said that MCA's policy under the Code was to release as much information as possible subject to legitimate confidentialities and the proper timing of disclosures. The decision not to provide further information to Mr J following his first request was based on the need for the Commissioners to have an opportunity to discuss such issues at their own pace and privately to enable them to reach reliable decisions on which to formulate advice to the licensing authority. MCA's view was that that responsibility could not be discharged properly if they were put into the position of having to release documents or details of discussions before final recommendations were made and before any advice had been considered by the licensing authority. The subsequent recommendation following the internal review to provide Mr J with an outline of the relevant paper was intended to provide the right balance between the necessity for the Commission (and the medicines advisory bodies) to debate matters in private and the presumption in the Code that as much information as possible should be made available. He added that as time went by and as discussion of DTCA crystallised, it would be possible to release more information - possibly the document (edited if necessary) itself - as MCA had done with the November 1999 paper which first raised the issue with the Commission.

7.10 The then Permanent Secretary continued by saying that MCA did not dispute that it took longer than 20 working days to reply to Mr J's original letter, although he noted that an interim reply was sent. He also said that, although it was outside the remit of the complaint, Mr J's request should be considered in the context of his extensive correspondence with MCA. As Mr J's requests related to important public health and policy issues MCA have not sought to classify his requests as vexatious (on the basis of Exemption 9 of the Code, which relates to voluminous or vexatious requests). However, given the volume and range of information he sought, which involved resources from across MCA, the Permanent Secretary said it was possible that MCA would continue to have difficulty in routinely providing full replies to Mr J within the recommended 20 days.

Exemptions

7.11 Exemption 2 of the Code 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.*

7.12 Exemption 10 is headed, 'Publication and prematurity in relation to publication' and reads;-

'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).'

Exemptions 2 and 10 are subject to the harm test in the preamble to Part II:

'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

7.13 In assessing this complaint there are two aspects I have to consider: the substantive matter of the information requested by Mr J and the general handling of his request by MCA. I turn first to the information sought by Mr J. That information is contained in a discussion paper dated 11 February 2000. The paper sets out the statutory background to DTCA, recent developments in this field, and arguments for and against a change in the current arrangements. While I welcome MCA's decision to release an outline of the discussion paper to Mr J, it is not clear to me what process was used to determine what and how much information should be released to him. Following the internal review of the initial decision not to release information in the discussion paper, MCA decided that although Exemption 2 and Exemption 10 did apply to the information in question, an outline of the paper could be released without harming the frankness and candour of MCA's consultations with the Commission or pre-empting any planned announcements or publications. I have carefully examined the original discussion paper and compared it to the letter of 29 June, which provided Mr J with an outline of the paper. Although the letter of 29 June provided a fairly accurate representation of its contents there is a significant amount of information in the discussion paper that was not provided to Mr J. It is not clear to me on what basis MCA have withheld that information from Mr J, and I criticise them for not explaining the process or the criteria used to decide what information to include in the letter of 29 June and what information to withhold.

7.14 I now need to decide whether the remaining undisclosed information in the paper should be released to Mr J. The remaining information consists of the following: the pharmaceutical industry's argument for a change in the law, examples of recent disease awareness campaigns by pharmaceutical companies, and comment and opinion on the present situation with regard to DTCA. The comment and opinion is potentially covered by Exemption 2 of the Code. The purpose of Exemption 2 is to allow departments the opportunity to consider matters, particularly those which are likely to prove contentious, on the understanding that their thinking will not be exposed in such a way as to restrict their deliberations by inhibiting the frank expression of opinion. I recognise the strength of the Permanent Secretary's argument that there is a need for the Commission to discuss issues at their own pace and privately to enable them to reach reliable decisions on which to formulate advice to the licensing authority. As I see it, MCA must be allowed to discuss these types of issues without having to worry that their opinions would be made available to a wider audience. I am therefore of the view that the comment and opinion contained in the discussion paper can be covered, in principle, by Exemption 2.

7.15 Exemption 2 does, however, incorporate a harm test: would the harm that might be caused by disclosure of the protected information be outweighed by the public interest in making it available? I do not believe it would. As the Permanent Secretary said, DTCA is currently a sensitive

issue and one on which government policy is very much evolving. MCA have provided Mr J with an outline of the discussion paper and I do not consider that the public interest in having access to the additional information, which contains comment and opinion, is strong enough to outweigh the potential harm to the frankness and candour of future discussion were that material to be released. I accept therefore that Exemption 2 can be applied to that part of the information containing opinion and comment that was not released to Mr J in the letter of 29 June.

7.16 Exemption 2 is intended to protect opinion or advice, not factual information. The remaining information, which includes the pharmaceutical industry's argument for a change in the law and examples of advertising campaigns, is largely factual information. Exemption 2 does not apply to this information and I do not consider that Exemption 10 or any of the other exemptions in Part II of the Code can be applied to this information either. I conclude therefore that all the remaining undisclosed information other than that which can reasonably be withheld under Exemption 2 should be released to Mr J.

7.17 How should that information be released to Mr J? MCA have correctly stated that the Code requires the release of information rather than specific documents. The Ombudsman's experience has shown, however, that the simplest way in which to meet a request for information is often to release the actual document concerned. In this instance I believe that it would be helpful if MCA were now to release to Mr J a copy of the original discussion paper with any exempt material edited out. Indeed I believe it would have been easier for MCA, and more helpful to Mr J, if an edited version of the discussion paper had been provided in response to this request for information rather than providing an outline of the discussion paper. In any event, I see no reason why MCA should not now release such an edited version of the paper. Information which can be reasonably withheld under Exemption 2 could be excluded from that version. I so recommend.

7.18 I now turn to the way MCA handled Mr J's request for information. I am disappointed to note that MCA took nearly twice as long as recommended by the Code to reply to Mr J's first request for information and almost as long to reply to his request to have their initial decision reviewed. This is particularly unfortunate in light of the criticism MCA received on the same issue in a previous report by the Ombudsman (A.16/99 - see Access to Official Information - Investigations Completed April - October 1999 - The Stationery Office HC21). The previous Permanent Secretary admitted in his letter of 10 August that they were outside the 20 working days recommended by the Code but said that Mr J's request for information should be considered within the context of his extensive correspondence with MCA. He said that the volume and range of Mr J's requests for information put a strain on MCA's resources. In making his complaint to the Ombudsman Mr J also asked the Ombudsman to consider his complaint within the context of MCA's response to several other requests for information. He said he was frustrated with the way MCA handled this and other requests for information and said that if this complaint were reviewed strictly in isolation, without regard to context, problems would seem likely to continue.

7.19 The previous Permanent Secretary recognised the importance of the type of information held by MCA being released into the public domain and I am pleased that MCA have not sought to classify Mr J's requests as voluminous or vexatious. I recognise the validity of MCA's argument that the volume and range of information sought by Mr J places pressure on limited resources from across the agency and Mr J should take account of the demands placed on MCA by his requests for information.

7.20 However, I can also sympathise with the frustration felt by Mr J in gaining access to the information he seeks and I am concerned by the previous Permanent Secretary's comment that it was possible that MCA would continue to have difficulty in providing full replies to Mr J within the recommended 20 working days. I should

stress that the Ombudsman considers each complaint about a refusal of information on its individual merits and it would be inappropriate for me to criticise MCA in this report for their approach in handling other requests for information under the Code that have not been referred to him. However, in light of the criticisms made in this and a previous report it would be unfortunate if MCA continued to fail to meet the targets recommended under the Code. I would advise MCA, therefore, to look carefully at the way they deal with requests for information under the Code, and the processes used to decide what information can be released and in what format. In reply, the present Permanent Secretary said that the MCA would review its internal procedures for handling requests under the Code as I had suggested.

Conclusion

7.21 I found that MCA were justified in refusing to disclose information containing opinion and comment to Mr J. However, I am pleased that they have accepted my recommendation that an edited version of the discussion paper can now be released, and that they have sent a copy to Mr J. I also welcome the steps MCA are taking to review their internal procedures for handling requests under the Code.

Total screening and investigation time - 24 weeks

Vehicle Inspectorate

Case No. A.29/00

Refusal to release a copy of an engineer's report

Mr C, a solicitor, was instructed by a vehicle testing station (VTS) to appeal against a Vehicle Inspectorate (VI) decision to withdraw their VTS status. As part of the appeal, a VI engineer was asked to undertake an assessment of the technical evidence that had contributed to the decision. The engineer's report concluded that the technical evidence did not justify withdrawal and the appeal was subsequently allowed. When Mr C asked for a copy of the engineer's report VI refused to provide it, citing Exemption 2 of the Code and stating that the salient points of the report had been conveyed to the VTS in the decision letter allowing the appeal. The Ombudsman found that, although VI had correctly applied Exemption 2 to the opinion and advice contained in the report, there was no reason why the factual information, and those parts of the report containing opinion and advice that had already been given to Mr C, should not be disclosed. The Ombudsman therefore recommended that VI provide Mr C with an edited version of the report, which they did. The Ombudsman partially upheld the complaint.

8.1 Mr C complained that the Vehicle Inspectorate (VI), an executive agency of the Department of the Environment, Transport and the Regions (DETR), refused to supply him with information which should have been made available 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

8.2 On 30 September 1998, a Vehicle Examiner from VI witnessed what he considered to be a substandard incognito MOT test at a Vehicle Testing Station (VTS). (An incognito check is one in which the Vehicle Examiner presents a vehicle for test without revealing that he is an Examiner). After giving consideration to the representations made by the VTS in response to this assessment, and taking into account two final warnings previously issued to the VTS in August 1994 and August 1997 respectively, a Senior Vehicle Examiner concluded that MOT authorisation should be withdrawn from the VTS. Authorisation was formally withdrawn from the VTS on 5 February 1999. The owners of the VTS instructed Mr C, a solicitor, to appeal against the decision to withdraw authorisation.

8.3 The power to determine statutory appeals against a withdrawal of authorisation is delegated to VI's Chief Executive. The appeals are handled by the MOT Appeals Branch, a small team within the Chief Executive's Office, who are independent of the operational part of the organisation which makes the original decision to withdraw an authorisation. As part of the appeal, the Appeals' Branch automotive engineer (the engineer) was asked to undertake an assessment of all the technical evidence in relation to the two final warnings and the incognito check of 30 September 1998 which had contributed to the decision to withdraw authorisation. In a report dated 22 March 1999, the engineer concluded that the technical evidence available on file did not support the issue of the two final warnings, nor was it sufficiently robust with regard to the incognito check of 30 September 1998 to justify withdrawal. The Chief Executive subsequently concluded that the appeal should be allowed. The MOT authorisation was reinstated in a letter dated 20 April 1999.

8.4 On 22 April 1999 Mr C wrote to VI and asked for a copy of the internal report prepared by the engineer. He cited the Code. VI replied on 23 April. They said that the Code conferred no rights in relation to internal advice documents and that the salient points in the assessment prepared by the engineer had been fully conveyed to the owners of the VTS in the decision letter of 20 April.

8.5 Mr C wrote again to VI on 5 May, repeating his request for a copy of the engineer's report. The Chief Executive of VI replied on 27 July. He said that if they were to release the engineer's report it would adversely affect the accuracy and frankness of the contents of such reports in the future and thereby compromise the effectiveness of the appeals process itself. Mr C's request for a copy of the engineer's report was therefore refused under Exemption 2 of the Code, which was cited. The Chief Executive went on to say that any information from the engineer's report which was relevant to the determination of the appeal was contained in the decision letter of 20 April. Mr C was informed that, if he was unhappy with VI's decision not to release the information, he could make a complaint to the Ombudsman: in due course Mr C sought the Ombudsman's intervention. Following receipt of Mr C's complaint, I wrote to the Permanent Secretary of DETR to ask for his comments.

Departmental reasons for refusing access

8.6 When giving me his comments on behalf of the Permanent Secretary, the Chief Executive of VI said that the case had been referred to DETR's Legal Adviser who considered that the information fell within Exemption 2 of the Code on the grounds that the release of the technical assessment was likely to adversely affect the accuracy and efficiency of the appeal process.

8.7 The Chief Executive considered that the frankness and candour of the advice given by the engineer would be affected if the report were to be released externally. In his view, the engineer had to be allowed to look objectively at a case and comment freely, even critically, on action taken by VI staff in Area Offices unfettered by the possibility that his comments and opinion would be made available outside the organisation. The Chief Executive went on to say that if the engineer's report was made available to the authorised examiners or their representatives, the engineer would feel constrained to be less critical of any previous action taken by VI staff in the Area Offices. This would devalue the advice given by the engineer to the Chief Executive, and could jeopardise the effectiveness of the appeal process.

8.8 The Chief Executive also noted that the Code obliges departments and bodies to release information, not documents. He reiterated the point that the information from the engineer's report which was relevant to the determination of the appeal had been provided in the letter of 20 April 1999. That information included a summary of the engineer's review and his findings, which concluded that the two final warnings and the technical evidence in the incognito check did not support withdrawal of authorisation. The Chief Executive considered that VI had therefore met its obligations under the Code.

The Code of Practice

8.9 Exemption 2 of the Code, which was cited by VI, is headed 'Internal discussion and advice' and reads as follows:

'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.'

Exemption 2 is subject to the harm test in the preamble to Part II:

'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

8.10 Before considering the substantive matter of the information requested by Mr C, I shall look first at how VI handled this complaint. In response to Mr C's request for information (made on 22 April 1999), VI responded on 23 April 1999, indicating that the engineer's report would be withheld and citing that part of the Code exemption under which they proposed to withhold it. That was a creditably brisk response. Mr C wrote back on 5 May 1999 and asked VI to review their decision. On 27 July 1999, VI responded on a similar basis, maintaining their refusal while providing a fuller explanation for it. They also advised Mr C of his right, if he remained dissatisfied, to submit a complaint to this Office. The delay in responding to Mr C's letter of 5 May 1999, which I bring to the Chief Executive's attention, was unfortunate (particularly after the way in which they handled the initial request) but it is clear to me that VI dealt with the matter in general accordance with the requirements of the Code, and for this I commend them.

8.11 I turn now to the substance of the complaint. I have looked very carefully at the question of whether or not Mr C is entitled, under the Code, to the information he has requested recognising, as I must, that he has no entitlement to the document in which the information is contained. I have examined the report produced by the engineer. It deals with three main topics: the final warning of 16 August 1994; the final warning of 8 August 1997, and the incognito test of 30 September 1998. The report sets out the factual background of each incident, provides details of the vehicle examination and of the mitigation put forward by the VTS's authorised examiner. It then comments on all of the available evidence and concludes by giving an opinion as to whether or not the decision taken in each case was justified.

8.12 What information from this report has already been made available to Mr C? The letter of 20 April, in which the outcome of the appeal was contained, devotes a paragraph to each of the three topics covered by the report (see previous paragraph). In relation to the first incident, the letter states that the final warning given to the VTS was harsh and that no response was given to the mitigation offered by them. In relation to the second incident, the engineer took the view that the technical file evidence did not support the issuing of a final warning and that reasonable doubt existed about other key matters of the case, doubts which should have been exercised in favour of the VTS. With the third incident, the report concluded that, having now set aside the two previous final warnings, the shortcomings identified in the testing procedures were not such as to warrant formal disciplinary action. It therefore appears to me that the letter of 20 April, while not incorporating all the advice and comment contained in the engineer's report, nevertheless constituted a fair and accurate representation of its contents.

8.13 In denying to Mr C the remainder of the information contained in the engineer's report, VI have relied upon Exemption 2, in particular that part of the exemption which refers to information whose disclosure 'would harm the frankness and candour of internal discussion'. How should Exemption 2 be applied to that information? It is first of all important to emphasise that this exemption is intended to protect advice, not factual information. I need, therefore, to distinguish between the factual information which is contained in this report and the comment, opinion and advice which is offered in relation to it. The factual information in this report is, I imagine, already known to Mr C. However, to the extent that there is such information that is not known to him, I see no reason now why it should not be released. The report also includes comment upon that information,

plus opinion and advice in relation to it. What I need to consider is whether or not that part of the report which constitutes advice and opinion should still be afforded protection under this exemption.

8.14 The purpose of Exemption 2 is to allow departments the opportunity to consider matters, particularly those which are likely to prove contentious, on the understanding that their thinking will not be exposed in such a way as to fetter their deliberations by inhibiting the frank expression of opinion. In his comments on the case, the Chief Executive noted that the engineer had expressed his views very strongly in the report. I agree with that assessment. The Chief Executive went on to argue that, if it were known that an engineer's report were to be issued as it stood to the authorised examiners or their representatives, the engineer would feel constrained to be less critical of previous action taken, thus devaluing any advice he or she might give. The question in this case, therefore, is whether the release in full of the information contained in the engineer's report would affect the frankness and candour of the advice offered in future cases and, indirectly, jeopardise the effectiveness of the appeal process. I have to say that I believe it would. I accept the strength of the argument that the value of such advice, which depends upon candour for its effectiveness, would be substantially less if it were thought that it would be made available to a wider audience. To my mind the engineer must be allowed to provide an objective assessment of a case without having to worry that his report would be made available to a wider audience. I am therefore of the view that the comment and advice contained in the engineer's report is covered, in principle, by Exemption 2.

8.15 Exemption 2 does, however, incorporate a harm test 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? That, in any given case, is a matter of judgement. It may be argued that, because the appeal process is now over and the decision made, no harm can be caused by making available information relating to the wider deliberative process by which this appeal was decided. I do recognise, however, that all decisions of this nature involve sensitivities, both on the part of the organisation whose appeal is being considered, and the Appeals Branch itself. It is also clear that, although the appeal process may have concluded, the complainant is still considering other possible avenues arising out of the successful appeal. In addition, in their letter dated 20 April 1999, VI provided an accurate outline of the reasoning behind the appeal decision which incorporated a fairly full precis of the engineer's report. With this in mind, I do not consider that the public interest in having access to the additional amount of information in the engineer's report is strong enough to outweigh the potential harm to the frankness and objectivity of future advice, which might result from its disclosure, nor do I consider that non-disclosure will cause any injustice to the complainants. I accept, therefore, that Exemption 2 should in principle apply to those parts of the report containing opinion and advice and that the majority of that information may be withheld. However, I see no reason why the factual elements of the report, and those parts of the report containing opinion and advice which have already been disclosed to Mr C, cannot be released to him without undermining the effectiveness of VI's internal considerative process. I so recommend.

8.16 I have considered carefully how this information might best be presented to Mr C. VI correctly stated that the Code requires the release of information rather than specific documents. The Ombudsman's experience has shown, however, that the simplest way in which to meet a request for information is often to release the actual document concerned. In this case, I believe it would be most helpful for the complainant to have an edited version of the engineer's report with the withheld information simply blocked out and I so recommended to VI. In reply the Chief Executive expressed his concern that the release of an edited version of the engineer's report could set a precedent which could complicate other

MOT Appeal cases. However, the Code makes it clear that every request for information should be treated on its individual merits. The recommendation in this case to provide an edited version of the engineer's report was suggested solely in light of the circumstances of this particular complaint: the Ombudsman would not necessarily make the same recommendation if a similar complaint arose. Having considered this point I am pleased to say that the Chief Executive agreed to release an edited version of the engineer's report to Mr C.

Conclusion

8.17 I found that Exemption 2 of the Code could only be correctly applied to those sections of the engineer's report containing opinion and advice. I am pleased that VI have now agreed to provide Mr C with an edited version of the engineer's report which excludes those sections covered by Exemption 2, thus leaving the factual information and those parts of the report containing opinion and advice that have already been disclosed to Mr C. I see this as a satisfactory outcome to a partially justified complaint.

Total screening and investigation time - 22 weeks

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