Parliamentary and Health Service Ombudsman

Access to Official Information

Investigations Completed

July 2004 to March 2005

Part One

HC 63-I

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Contents

Foreword

I lay before Parliament, in accordance with section 10(4) of the Parliamentary Commissioner Act 1967, the attached two volumes of 40 reports into complaints of breaches of the Code of Practice on Access to Government Information (the Code).

These are the final volumes of such investigations that my Office will publish. On 1 January 2005 the Code ceased to have effect and the Freedom of Information Act 2000 (the Act) came into force: that Act, of course, is monitored by the Information Commissioner. In my foreword to the last volume of Code investigations issued by my Office (HC 701, June 2004) I said that I would be working with the Information Commissioner to ensure a smooth transition between the Code and the Act. That transition meant that, in order to ensure that no-one who had had a Code request refused was left without a remedy, a number of my investigations were still uncompleted when the Act came into effect. I am pleased to say that all of those outstanding investigations (of which there were 25) were fully completed by 31 March 2005. This only occurred as a result of a sustained effort by the small unit in my Office investigating such cases and I congratulate them here for the excellence of that performance.

The last volume also contained an interim report of the impact of the Memorandum of Understanding (MoU) issued jointly with the Cabinet Office in July 2003. This report includes an updated version of that report, up to the end of March 2005. In general the situation I reported a year ago, that the MoU was being broadly adhered to, remained the same: there were failures to respond within the prescribed times and the cases in which that happened can be found in these volumes. As before, and unsurprisingly, those cases tended to be the ones with the highest degree of political sensitivity.

In my last foreword I also referred to my intention to produce a report setting out my reflections on the work that my Office has done in monitoring both this Code, and the equivalent NHS Code, since 1994. That report is published simultaneously with this one.

I would therefore direct those interested in seeing our more detailed perspective on the impact of the Codes, and of the work the Office has done in investigating complaints made under them, to that volume. Hopefully it will prove interesting not only as a document of record but, along with the reports of the cases we have investigated, of at least some help to those now fully involved in the Act.

Finally, I would like to pay tribute to the work done by my predecessors and by all the staff who have contributed to this specialised area of work since 1994. Although Code cases formed a very small part of the Office's annual workload, they created a much larger proportion of the Office's annual publicity: many of the cases involved issues of very considerable political sensitivity and required the exercise of careful judgement. I am proud of the body of work that our investigations represent and I believe that, through the decisions my Office has reached, much of the basic groundwork has now been done that will enable FOI to take off in what is now a much more receptive climate for freedom of information than was the case when we started 11 years ago.

Ann Abraham
Parliamentary and Health Service Ombudsman
May 2005

A review of departmental performance against the requirements of the Memorandum of Understanding published by the Cabinet Office on 22 July 2003

In my last volume of completed investigations I included a review of the first nine months of departmental performance against the criteria set out in the Memorandum of Understanding (MoU) that was published by the Cabinet Office on 22 July 2003. While I was encouraged to note that the requirements of the MoU had been broadly adhered to, I said that I would continue to monitor the performance of departments against those requirements up until my role in considering complaints under the Code of Practice on Access to Government Information (the Code) came to an end.

The MoU was the result of discussions with both the Cabinet Office and the Department for Constitutional Affairs that I had initiated in an attempt to resolve a few difficulties I had been experiencing when considering complaints referred to me under the Code. The MoU was intended to be a reminder of how departments should deal with requests for information made under the Code and also of how they were required to respond to my Office once I had initiated an investigation into a Code complaint.

For the 19 months that the MoU was in operation it was the standard against which I monitored the performance of Government departments on all Code complaints that were referred to me. In particular, I monitored the performance of departments against the following timescales and procedures that were set out in the MoU:

- To respond in full within three weeks of receipt of my statement of complaint;
- To reply to the draft report of my investigation within three weeks;
- To contact my Office as soon as possible if any delays were anticipated in replying within the above timescales;
- To provide all relevant papers as quickly as possible;
- To avoid citing new exemptions following receipt of my draft report.

Between 1 September 2003 and 31 March 2005 I monitored the performance of 23 separate Government departments and bodies with regard to the way in which they responded to 64 complaints that I decided to investigate under the Code. Those investigations are now complete and the reports of my findings can be found in this publication and its predecessor (HC 701).

I concluded in the previous review that, with occasional exceptions, the requirements set out in the MoU had been, in the main, adhered to. Of the 34 investigations that I had monitored at that stage, the departments had responded to 23 of them in full accordance with the requirements of the Code. Over the whole 19-month period, that ratio of approximately 2:1 was maintained: the departments responded to 41 of the 64 investigations that I investigated in full accordance with the terms of the MoU. Of the 23 cases that did not adhere to the requirements of the MoU, six were complaints against the Cabinet Office, four were against the Ministry of Defence and three were against the Department of Health. There were also two each against both the Department of Trade and Industry and the Home Office and one each against six other departments.

As before, the main problem was one of delay: not just in providing a response to the statement of complaint or to the draft report, but also in

providing the papers necessary for me to see in order to pursue my investigation. I recognise that many of the complaints that I investigated involved sensitive information that required some degree of consultation, and I was often happy to countenance short extensions to allow for departments to seek legal advice, to consult previous Ministers, or to seek the views of other departments and officials. However, I do not believe it was reasonable that my investigations were held up because of the pressure of work, a breakdown in internal communications, or because the liaison point in a department was on annual leave, which were all reasons provided by departments to explain why there would be a delay in responding to my Office.

In the previous review I highlighted some of the particular problems that I had encountered. These included the failure to notify my Office where a delay in responding was anticipated, lengthy delays in providing the papers necessary for me to pursue my investigation, and confusion over my right to see that information. These are themes that I continued to see over the remaining ten months of the operation of the MoU. It was regrettable, for example, that I had to again explain my powers under the Parliamentary Commissioner Act 1967 before the Home Office agreed to provide me with access to papers (A.26/05). As I have said before, delay in securing information often deprives it of value, and my aim was therefore to investigate complaints under the Code as quickly and efficiently as possible. Due to the Home Office's confusion in this case, the start of my investigation was delayed by twelve weeks.

Of particular disappointment to me were the difficulties I faced on several complaints that I investigated against the Cabinet Office, particularly as they were the joint authors of the MoU. In one case (A.19/05), I had to wait 19 weeks before the Cabinet Office felt able to reply to my statement of complaint and a further ten weeks to reply to my request to gain access to the Prime Minister's diary. In another case (A.16/03), which also involved the Department for Constitutional Affairs, the Cabinet Office took 15 weeks to respond to my draft report and then failed to provide any substantive comments on my recommendations. In both cases the delays were unacceptable and my views are set out in more detail in the relevant reports.

In general, however, the MoU was broadly adhered to over the 19 months of its existence. Departments often replied well before the prescribed timescale and there was increased contact with members of my staff when departments needed clarification or assurance, or believed that they might fail to meet the deadline for responding. The MoU was intended to highlight within departments the procedures for dealing with my Office in respect of Code investigations, and I am satisfied that departmental performance improved as a result. More generally, the MoU highlighted important issues regarding the way requests for information should be handled and, in this regard, I hope that it helped to facilitate the transfer from the Code to the Freedom of Information Act.

I believe that the MoU was a useful tool in reminding central Government departments of their responsibilities with regard to dealing with my Office. As a result it helped to ensure that I was able to complete my investigations of complaints referred to me under the Code as quickly and as efficiently as possible.

ANN ABRAHAM
Parliamentary and Health Service Ombudsman
May 2005

Cabinet Office

Case No: A.7/04

Refusal to provide information about those whom the Prime Minister had entertained or otherwise met on official business at Chequers

Summary

Mr Lamb asked the Prime Minister for a list of those he had entertained or otherwise met at Chequers on official business. In refusing to provide the information the Cabinet Office cited Exemptions 2, 7, 9 and 12 of the Code. The Ombudsman accepted that Exemption 9 applied to the details of those who the Prime Minister had met on official business, but she did not accept that the remaining three exemptions applied to the details of those who had been entertained at Chequers. She welcomed the Cabinet Office's agreement to release that information to Mr Lamb. However, the Ombudsman criticised the Cabinet Office for the delays in resolving the case. She also criticised them for various aspects of the way in which they had handled Mr Lamb's request for information.

1. Mr Lamb complained that the Cabinet Office had refused to provide him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by my staff, but I am satisfied that no matter of significance has been overlooked.

The Code and the role of the Ombudsman

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

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

Exemptions

4. 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.'

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

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

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

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

- the awarding of discretionary grants.

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

6. Exemption 9 is headed 'Voluminous or vexatious requests' and reads:

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

7. Exemption 12, headed 'Privacy of an individual' reads:

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

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

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

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

Background to the complaint

9. In a Parliamentary Question on 8 April 2003, Mr Lamb asked the Prime Minister if he would provide a list of the people who had been entertained on official business at Chequers since January 2002. In response, the Prime Minister said that he had had meetings with a wide range of organisations and individuals and that, as with previous administrations, it was not the Government's practice to provide details of all such meetings, under Exemptions 2 and 7 of the Code.

10. On 8 May 2003 Mr Lamb wrote to the Prime Minister saying that, having read the Code and the exemptions cited, he did not consider that there was any justification for withholding the names of those individuals who had been entertained at Chequers on official business. He referred to the preamble to Part II of the Code and pointed out that there was a presumption that information should be disclosed, unless the harm likely to arise from disclosure outweighed the public interest in making the information available. He said that he did not consider that providing a list of individuals whom the Prime Minister had met on official business at Chequers could be said to harm the frankness and candour of internal discussion (Exemption 2 of the Code – paragraph 4 above). He emphasised that he had not asked for details of what had been discussed. As for Exemption 7, which relates to the effective management and operations of the public service (paragraph 5 above), Mr Lamb said that disclosure of the information for which he had asked could not in any way lead to improper gain or advantage, nor would it prejudice any of the principles set out in the exemption; further, disclosure would not harm the proper and efficient conduct of the operations of a department or any other public or regulatory body. Mr Lamb then repeated his request for information, this time asking for a list of all of the people the Prime Minister had met at Chequers on official business since 8 June 2001 – rather than January 2002 – and also asking for details of everyone who had visited Chequers on an unofficial basis from the same date.

11. On 29 May 2003 the Prime Minister replied, declining to provide Mr Lamb with the information he sought. His reply said that the Government's position on the disclosure of details of meetings remained as set out in their response to the Sixth Report of the Committee on Standards in Public Life, which was that Ministers and civil servants meet many people as part of the process of policy development and analysis. Some of these discussions would take place on a confidential basis and it would not be the normal practice to release details relating to them.

12. On 18 June 2003 Mr Lamb wrote asking me to investigate the refusal to provide him with a list of people entertained on official business at Chequers. He went on to say, among other things, that providing a list of individuals the Prime Minister had met on official business at Chequers could not be said to harm the frankness and candour of internal discussion as he had not asked for any information as to what had been discussed. His complaint was formally referred to me on 1 July 2003. On 11 July 2003 my staff sought the views of the Permanent Secretary of the Cabinet Office.

Departmental comments on the complaint

13. The Permanent Secretary responded on 7 August 2003, enclosing papers relevant to the complaint. These were primarily lists of dinner invitations and seating plans for events held at Chequers. He confirmed that Mr Lamb had asked for a list of people entertained on official business at Chequers since January 2002 and said that the justification for the non-disclosure of that information remained as set out in the Prime Minister's previous answers (paragraphs 9 and 11 above). He went on to say that some of the people entertained on official business were Ministers and civil servants and that to disclose their names could harm the frankness and candour of internal discussions on the grounds that it could lead to the disclosure of such discussions. He said that the Government needed to be able to protect the confidentiality of the internal decision-making process, and it remained the Cabinet Office's view that Exemption 2 applied. He said that Exemption 7(b)

was also relevant as the disclosure of such information could prompt speculation about why certain individuals were meeting the Prime Minister and what was said at those meetings, speculation that he felt could be harmful and only serve to distract the department from their core business. The Permanent Secretary said that there was also an issue about the privacy of the individual and that the disclosure of the names of individuals – both in and outside Government – could be an unwarranted invasion of those individuals' privacy. Exemption 12 therefore also applied.

Investigation

14. When providing comments on this complaint, the Cabinet Office provided my Office with details of those people who had been entertained officially at Chequers since January 2002, primarily at official dinners. My staff contacted the Cabinet Office to seek further clarification of their position as, in Mr Lamb's request for a review of the refusal to provide him with information, he had asked for details of those whom the Prime Minister had met at Chequers on official business from 8 June 2001. A meeting between myself, members of my staff and the Managing Director of, and officials from, the Cabinet Office, to discuss this further was held on 6 February 2004. As a result of that meeting, it was agreed that my staff would visit the Prime Minister's Office to examine relevant documents and to assess the feasibility of extracting from entries in official diaries the names of those whom the Prime Minister had met on official business at Chequers on or after the relevant date. At that meeting, which took place on 2 April 2004, my staff were shown the Prime Minister's diaries and other relevant documents. The practical difficulties of providing the information covered by Mr Lamb's expanded request were apparent to my staff – the diary entries do not record the purpose or location of meetings (see paragraph 15 and 19 below). Following that meeting, I wrote to the Managing Director of the Cabinet Office on 26 April 2004 to set out our understanding of the Cabinet Office's position in relation to the availability of the information sought by Mr Lamb. I also requested information about those entertained officially at Chequers between 8 June 2001 and 31 December 2001, which had not been provided with the Cabinet Office's original comments on the complaint.

15. I received the Cabinet Office's comments and the information I had requested on 7 July 2004. The Managing Director confirmed that the Cabinet Office's position was as set out in my letter of 26 April 2004. He said that, as Chequers was held in trust for the use of the Prime Minister of the day for both his private and official business, the only way of identifying the occasions on which the Prime Minister was at Chequers on official business would be through a manual trawl of the historical diaries. That would require a considerable amount of work involving disproportionate cost.

Assessment

16. Before turning to the substantive issue of whether or not the information requested by Mr Lamb should be released to him, I shall look first at how his information request was handled. When departments refuse requests for information, it is good practice for them to identify the specific exemptions in Part II of the Code on which they are relying to support that refusal. Also, where information has been refused, the possibility of a review under the Code should be made known to the person requesting the information at the time of that refusal, as should the possibility of making a complaint to my Office if, after the review process has been completed, the person requesting the information remains dissatisfied. Finally, departments are expected to respond to requests for information

within 20 working days, although the Code recognises that this target may need to be extended when significant search and collation of material is necessary.

17. Mr Lamb made his initial request for information on 8 April 2003 by means of a Parliamentary Question. In his answer the Prime Minister declined to provide the information sought, citing Exemptions 2 and 7 of the Code. On 8 May 2003 Mr Lamb wrote to the Cabinet Office requesting, in effect, a review of the refusal to provide him with information. On 29 May 2003 Mr Lamb received a reply, signed by the Prime Minister (paragraph 11), maintaining the refusal to give Mr Lamb the information he sought. While that response was commendably prompt, it did not mention either the Code or the possibility of Mr Lamb making a complaint to my Office if he remained dissatisfied. These failings merit my criticism.

18. I now turn to the information sought by Mr Lamb. In doing so I should first clarify what information I consider to be included in my investigation. While, in his Parliamentary Question of April 2003, Mr Lamb asked for details of those entertained on official business at Chequers since January 2002, he subsequently expanded that request to include those whom the Prime Minister had met on official business at Chequers since 8 June 2001. It is that expanded request that has been the subject of my investigation.

19. The Cabinet Office have been able to provide me with lists of those who have been entertained officially at Chequers since 8 June 2001, primarily at official dinners. However, they have been unable to provide me with similar details of all those whom the Prime Minister has met officially at Chequers since that date, as his diaries are not constructed and maintained in such a way as to make this information readily available. The Cabinet Office's arguments against their producing such information equates in practice to their having cited Exemption 9 of the Code (paragraph 6 above) which can apply, among other things, where the search for the information requested would require an unreasonable diversion of resources. My staff have examined examples of entries in the Prime Minister's diaries. I am satisfied that the structure and format of the diaries would render it impossible for a manual trawl to establish, with any degree of accuracy, which of the diary entries recorded therein were related to official business conducted at Chequers and which were private or political meetings. That being so, I consider that for the staff in the Prime Minister's Office to be required to make such a trawl with no real likelihood of success would be an unreasonable diversion of resources. I therefore consider that the Cabinet Office were entitled to rely on Exemption 9 in relation to the details of those whom the Prime Minister had met officially at Chequers since June 2001. It would have been helpful if that exemption had been cited specifically by the Cabinet Office at the outset, rather than at a relatively advanced stage of my investigation.

20. As to those who were entertained officially at Chequers since that date, the basis for the Cabinet Office's response to Mr Lamb's request for this information is that the Government's policy in this area was set out in its response to the Sixth Report of the Committee on Standards in Public Life (Cm 4817, July 2000). This said that it was not the Government's normal practice to release details of meetings with private individuals or companies; that Ministers and civil servants meet many people as part of the process of policy development and analysis; and that some of these discussions would take place on a confidential basis. I accept that some discussions

between Ministers and private individuals or representatives may indeed be confidential. However, a request for information should not be refused using a blanket approach solely on the grounds that it is not the Government's normal practice to release a particular class of information: the Code does not recognise classes and requires an assessment to be made in response to each individual information request. In that context, I now go on to assess the merits of the exemptions cited by the Cabinet Office as a basis for withholding the information sought by Mr Lamb.

21. I shall first consider the applicability or otherwise of Exemption 2 to that information (paragraph 4). The Permanent Secretary of the Cabinet Office has argued in particular that to release the names of any Ministers and civil servants who were among those who received such entertainment could harm the frankness and candour of internal discussions. However, the names of those who were entertained on official business at Chequers is a matter of fact and, as I and my predecessors have noted in reports of other investigations, the purpose of Exemption 2 is not to protect purely factual information. The Cabinet Office are not, therefore, entitled to rely on Exemption 2 as a basis for withholding the information relating to those entertained officially at Chequers.

22. The Cabinet Office have also cited Exemption 7(b) (paragraph 5). This exemption is intended to prevent the disclosure of information where such disclosure would be damaging to the work of the department concerned. The Cabinet Office have said that to provide the details sought by Mr Lamb could prompt speculation as to why certain individuals were meeting the Prime Minister and the content of the discussions they had with him. They considered that such speculation could be harmful and only serve to distract the department from its core business. I do not find this persuasive. Exemption 7(b) relates to information whose disclosure would harm the proper and efficient conduct of the operations of a department. The Cabinet Office have said to provide the information sought by Mr Lamb could prompt speculation about the purpose behind such meetings, which could be harmful, but this is in itself no more than speculation. The Cabinet Office have not explained in any more specific way how disclosure would damage their work, and I am unable to see any basis for concluding that Exemption 7(b) applies to the information.

23. I now turn to Exemption 12 (paragraph 7), noting as I do so that this exemption was not cited in either of the responses to Mr Lamb's information requests. The Cabinet Office have argued that the disclosure of the names of individuals, both inside and outside Government, could be an unwarranted invasion of those individuals' privacy. However, the Cabinet Office have offered no explanation for reaching these conclusions. Moreover, there is undoubtedly a strong public interest in how public money is spent and, since funding for official entertainment at Chequers comes from the public purse, I do not see that it would be an unwarranted invasion of the privacy of individuals to let it be known that they were the recipients of such entertainment. I do not, therefore, consider that the Cabinet Office are entitled to rely on Exemption 12 as the basis for withholding these names.

24. That said, while I recognise that Mr Lamb has sought more comprehensive information, which my investigation has shown is not readily available, I consider it reasonable to make available to him what information there is.

25. On the basis of the documents my staff have seen, I do not consider that the Cabinet Office would be able to establish whether they hold all of the information sought by Mr Lamb without disproportionate effort and cost. However, I do not think that they were justified under the terms of the Code in withholding what information they do have related to the names of those who have been entertained officially, primarily at dinner engagements, at Chequers since 8 June 2001. I therefore recommended to the Managing Director of the Cabinet Office that they now provide Mr Lamb with that information. I invited the Managing Director, when considering his response, to have regard to the recommendations that information should be released made in two comparable complaints (our references A.21/03 and A.15/04 – see Access to Official Information: *Investigations Completed July 2003 – June 2004* – HC 701). In reply, the Managing Director agreed to provide Mr Lamb with the names of those who had attended official engagements at Chequers within the period cited.

Conclusion

26. Although I am disappointed at the excessive length of time it has taken to resolve this case, and I have been critical of some aspects of the way in which the Cabinet Office have handled Mr Lamb's request for information, I am nevertheless pleased that they have now agreed to release to him the identifiable information he sought. I consider that agreement to be a satisfactory outcome to Mr Lamb's complaint.

Charity Commission

Case No: A.46/04

Refusal to provide information relating to the production and distribution of a CD

Summary

Mr D asked the Charity Commission for information they had received from a charity relating to the production and distribution of a CD. The Charity Commission refused to provide the information sought by Mr D, citing Exemptions 4(a) and 14 of the Code. Following the Ombudsman's intervention the Charity Commission agreed to release the information in full to Mr D. The Ombudsman welcomed the Charity Commission's decision. She was however critical of several aspects of the way in which they had handled Mr D's information request.

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

Background to the complaint

2. On 28 September 2001 Mr D wrote to the Commission to complain about the actions of a charity, of which he was a member (the Charity). His complaint concerned the Charity's production and distribution of a CD whose title track was based on a poem written by Mr D. On 9 January 2002 Mr D wrote to the Charity and requested copies of the full minutes of meetings at which the production and distribution of the CD were discussed (the minutes). On 15 January 2002 the Commission wrote to the Charity and requested copies of the minutes and any other correspondence where the production and distribution of the CD had been discussed. On 22 January 2002 the Charity wrote to Mr D and said that he was free to view the minutes by appointment, although they could not sanction the removal or copying of the full minutes. However, they said that they had extracted from the minutes all of the entries concerning the CD and enclosed them with their letter. They said that the enclosures included a list of all the persons referred to in them. On 23 January 2002 the Charity telephoned the Commission to discuss the case, during which the Commission made a brief manuscript note of the conversation. On 28 January 2002 the Commission wrote to the Charity to again request copies of the minutes. On 4 February 2002 the Charity wrote to the Commission enclosing copies of the minutes.

3. On 26 February 2002 Mr D telephoned the Commission and requested a copy of the Charity's explanation of the circumstances surrounding the production of the CD. On 11 March 2002 Mr D telephoned the Commission again and reiterated his request for details of the Charity's explanation of the situation, in particular the minutes of meetings. On 14 March 2002 the Commission wrote to Mr D and said that the purpose of correspondence with any party (particularly the trustees of a charity) was to satisfy themselves on issues that had arisen in relation to the protection of charity funds and assets. They said that they were not entitled to disclose information submitted to them in that context without the consent of those who had submitted it. They said that the Charity were not under any legal obligation, ordinarily, to disclose minutes of their meetings and it would not therefore be their intention to request that they be allowed to disclose minutes to a third party if the trustees had already decided not to do so.

4. On 20 March 2002 Mr D telephoned the Commission to express his dissatisfaction with the way in which they had handled his complaint, including their refusal to provide the information that he had requested. He referred to the Freedom of Information Act 2000 and said that, if the Commission maintained their refusal to provide him with the information he had

requested, he wanted them to send him forms so that he could make a complaint against that decision. He also asked for advice on what other procedures he could take in order to obtain the minutes. On 26 March 2002 the Commission wrote to Mr D to say that they had referred the case to their legal division for consideration. In a memorandum to the Commission's legal division dated 2 April 2002 the case officer referred to the Commission's guidance on open government, in particular that relating to Exemptions 4(a) and 14 of the Code. She noted that, with regard to the minutes, they might not contain any more information than that to which Mr D had already been offered access. With regard to the correspondence they had on file with the Charity, she noted that it did not appear to be particularly confidential and that, in fact, some of it had already been sent by the trustees to Mr D. The Commission's legal division provided their advice on 16 April 2002. They noted that Mr D had indicated that he required copies of the Charity's minutes in order to determine authorship and that it was not unreasonable, therefore, to accept the possibility that Mr D could commence proceedings for ownership of the copyright. As such, they believed that Exemption 4(a) was relevant because 'disclosure is likely to be addressed in the context of such proceedings'. They believed that this exemption could be cited in addition to Exemption 14 of the Code.

5. On 24 April 2002 the Commission provided Mr D with extracts from their policy on open government and said that, in their opinion, the information he had requested fell under the two exemptions that they had highlighted. The Commission also enclosed a copy of their complaints procedure. On 1 May 2002 Mr D telephoned the Commission to express his dissatisfaction with the way in which they had handled his case. On the same day the Commission sent Mr D details of how to make a complaint about their decision, or the way in which it had been handled, and advised Mr D to address any such complaint to their Customer Service Manager.

6. On 9 May 2002 Mr D telephoned the Customer Service Manager and said that he wished to make a formal complaint about the way the Commission had handled his case. On 21 May 2002 the Customer Service Manager met Mr D to discuss his complaint. On 14 June 2002 the Customer Service Manager wrote to Mr D with a report of his findings. While he found that the Commission could have handled his case better in parts he did not uphold Mr D's complaint. In the background to the complaint the Customer Service Manager noted that there was an 'indication, albeit a brief one on Commission files, that the [Charity's Company Secretary] rang the Commission on 23 January 2002'. With regard to his request for information, the Customer Service Manager believed that the Commission's letter of 24 April 2002 should have contained the offer of a review by the Departmental Records Officer. The Customer Service Manager said that Mr D could write to the Head of the Commission's Regional Operations within one month if he remained dissatisfied. Mr D wrote to the Head of Regional Operations on 24 June 2002, who replied on 16 July 2002. He agreed with the Customer Service Manager's conclusions and said that, if Mr D remained dissatisfied, he could approach the Independent Complaints Reviewer.

7. On 24 June 2002 Mr D also wrote to the Commission to make a formal complaint against the Charity's Company Secretary, whom he believed had made unfounded allegations about his conduct. The Commission replied on 3 July 2002, saying that the issues he was pursuing were essentially the same as those that the Commission had previously considered but directed more specifically at a named individual

rather than the trustees collectively. They said that, if he believed that the Company Secretary's comments were defamatory, he should pursue this matter through his own legal advisers. On 20 July 2002 Mr D wrote to the Commission and, in response to their suggestion that he take legal advice, said that he could not respond to the allegations until they had been set out clearly. Accordingly, he asked for a transcript of the telephone call made to the Commission by the Charity's Company Secretary on 23 January 2002 (paragraph 6). He also asked for copies of any letters relating to this matter that had been sent to the Commission by the Company Secretary, or by other trustees on his behalf.

8. The Commission responded to Mr D on 5 August 2002. They said that they noted that he was requesting copies of the correspondence between the Charity and Radio Merseyside but that, as they were not party to any such correspondence, he should take up his request with the parties involved. As for the remainder of his complaint they said that, as previously advised, he should approach the Independent Complaints Reviewer. On 24 August 2002 Mr D wrote again to the Commission and repeated his request for a copy of the 'brief recording' of the telephone conversation between the Charity's Company Secretary and the Commission on 23 January 2002. He also asked for copies of correspondence between the Charity and the Commission. He said that he needed these items before he could take legal advice on this matter, as he had been advised to do by the Commission. He asked the Commission to send him their 'rules of disclosure' if they maintained their decision not to allow him access to this information. On 10 September 2002 the Commission responded to Mr D. They said that the brief record of the telephone conversation that he referred to was a written note and that it would, therefore, fall into the same category as the 'correspondence between the Charity and the Commission'. They said that, while their letter of 24 April 2002 had set out their position with regard to disclosing such correspondence, they noted that the Customer Service Manager's report had identified that they could have offered a review by their Departmental Records Officer. They said that his request had, therefore, been referred to that Officer.

9. An internal Commission memorandum dated 23 September 2002 outlined Mr D's request for information and the previous decision that had been relayed to him on 24 April 2002. The memorandum concluded that the case officer's refusal to disclose the requested correspondence, following legal advice on the interpretation of both the complainant's request and their open government guidance, was properly given and that the information requested fell within categories that were exempt from the duty to disclose (Exemptions 4(a) and 14). On 1 October 2002 the Commission's Departmental Records Officer wrote to Mr D to say that he had reviewed the decision to refuse him access to the information he had requested but that, after due consideration, he considered that the original decision had been correct. He said that the information provided by the trustees had been supplied in confidence and was, therefore, exempt from disclosure. He advised Mr D of his right to complain to the Ombudsman, via a Member of Parliament, if he was not satisfied with the response or the way in which his request had been handled.

The Commission's comments on the complaint

10. In providing his comments on the complaint, the Commission's Customer Service Manager said that he had examined their files and obtained the comments of the Departmental Records Officer. He said that Mr D had first contacted the Commission in September 2001 to express his

concern about the administration of the Charity and its treatment of him personally. He was dissatisfied with the Commission's response and entered the Commission's formal complaints procedure. His complaint was considered by the Commission's Customer Service Manager who concluded that, while the complaint should not be upheld, Mr D should have been offered a review by their Departmental Records Officer, having earlier been denied access to Commission records. He said that Mr D subsequently took his complaint to the second stage of the Commission's procedure: consideration by the Regional Head of Operations, who wrote to Mr D on 16 July 2002, concurring with the view taken by the Customer Service Manager. He said that Mr D had also been signposted to the third, and final, stage of the Commission's complaints procedure, investigation by the Independent Complaints Reviewer, but said that there was no indication that Mr D had taken this course of action. (Note: Mr D has told me that he did write to the Independent Complaints Reviewer but that, when he approached her subsequently, her Office denied having received any correspondence from him.) Finally, the Customer Service Manager said that the Commission's Departmental Records Officer had written to Mr D on 1 October 2002 and informed him of the appropriate remedy should he be dissatisfied with that response.

Exemptions of the Code

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

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

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

12. Exemption 4 is headed 'Law enforcement and legal proceedings' and part (a) reads as follows:

'(a) Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.'

13. Exemption 14 of the Code is headed 'Information given in confidence' and reads as follows:

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

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

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

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

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

Investigation

14. Mr D's request for information was for copies of: (i) the minutes; and (ii) correspondence between the Charity and the Commission, including a copy of a brief note of a telephone conversation that took place on 23 January 2002. Having looked very carefully through the Commission's files the only minutes held on them were those provided by the Charity on 4 February 2002 (paragraph 2). It seemed to me that there was a strong likelihood that these minutes were the same as those already disclosed to Mr D by the Charity on 22 January 2002 (paragraph 2). I therefore asked the Commission to clarify with the Charity whether or not this was the case. In reply, the Commission said that they had contacted the Charity and could confirm that all of the minutes they held on their files were the same as those disclosed to Mr D on 22 January 2002. As such, the Charity had no objection to the Commission disclosing those minutes to Mr D, and the Commission agreed to do so.

15. I also noted that, although Mr D had requested copies of the correspondence between the Commission and the Charity, there was no indication on their files that the Commission had asked the Charity whether or not they had any objections to that information being disclosed to Mr D. I therefore asked the Commission, when contacting the Charity, to also ask them if they would consent to that information being disclosed to him. In reply, the Commission enclosed a letter from the Charity in which they said that they had no objections to their correspondence being forwarded to Mr D. The Commission latterly agreed to also disclose those letters that they had written to the Charity, as well as a copy of the note of the telephone conversation that took place on 23 January 2002.

Assessment

16. My role is to investigate the way the Commission handled Mr D's request for information and to decide whether or not they were justified in refusing to disclose that information under the terms of the Code. I shall not comment on the way the Commission handled Mr D's complaint against the Charity and I refer to such matters in this report only to set in context the way the Commission handled his information request. I should also say, given the reference that has been made by both Mr D and the Commission to the Freedom of Information Act 2000, that until that Act comes fully into force on 1 January 2005 all requests for Government-held information should be considered under the terms of the Code.

17. As far as the information sought is concerned the Commission have now agreed to provide Mr D with all of the information that he requested from them. I very much welcome that decision and, in the light of that development, I see no merit in considering whether or not Exemptions 4(a) and 14 could have been successfully applied to the information requested had the Commission continued to withhold it. I therefore make no finding on this matter.

18. In the light of the difficulties faced by Mr D in obtaining the information he was seeking, however, I believe I should consider the way in which the Charity handled his request for information. The Code requires departments to provide information as soon as practicable and sets the target for responding to simple requests for information at 20 working days from the date of receipt. While this target may be extended when significant search or collation of material is

required, an explanation should be given in all cases where information cannot be provided. It is also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they are relying in making that refusal. Moreover, they should make the requester aware of the possibility of a review under the Code, which in all cases should be a single stage process. The aim of the review is to ensure that the applicant has been fairly treated under the provisions of the Code and that any exemptions have been properly applied. It is good practice for such reviews to be conducted by someone not involved in the initial decision. Finally, the department should make the requester aware of the possibility of making a complaint to the Ombudsman if, after the completion of the review process, they remain dissatisfied.

19. I am pleased to see that all of these requirements are clearly set out in the Commission's operational guidance about 'Open Government', and that this guidance is also available on their website. The guidance describes how Commission staff are expected to deal with requests for information under the Code and includes information about the exemptions in part II of the Code, the procedures for undertaking internal reviews and some examples of how to respond to various types of request for information. However, despite this guidance, the Commission's handling of Mr D's request for information was particularly poor. In responding to his first and second requests for information they failed to either consider its disclosure under the terms of the Code or advise him of his right to seek a review (paragraph 3). Mr D then expressed his dissatisfaction and sought advice on how to complain about their decision (paragraph 4). In response, the case officer sought legal advice, provided a copy of the relevant guidance on the Code and maintained the refusal to provide the information under two of the exemptions in part II. However, the Commission again failed to advise Mr D of his right to either seek a review of the decision or of his right to complain to the Ombudsman (paragraph 5). Instead, when Mr D again expressed his dissatisfaction with the decision, he was advised to complain to the Customer Service Manager. While that might have been the appropriate course of action for his substantive complaint about the way the Commission had handled his complaint against the Charity, it was not the correct avenue of complaint against the Commission's refusal to provide him with information.

20. Moreover, even when the Customer Service Manager said in his report that Mr D should have been offered a review of the decision to refuse him information (paragraph 6), nothing was done about it, even after the Head of the Regional Office subsequently reviewed the case. Indeed, no action was taken to review the information aspect of his complaint until Mr D made a further request for information. The Commission initially misinterpreted this request as being a request for correspondence between the Charity and Radio Merseyside (paragraph 8). It was only when Mr D reiterated his request and again sought advice about the Commission's 'rules on disclosure' that they referred his request to the Departmental Records Officer. That Officer finally reviewed the matter, cited the relevant exemptions of the Code and advised Mr D of his right to complain to the Ombudsman if he remained dissatisfied (paragraph 9).

21. I recognise that Mr D's request for information was interwoven with his substantive complaint about the actions of the Charity. However, the requests for information themselves were not complicated and I can fully understand Mr D's sense of frustration at the lengths to which he had to go before he received a proper and full

response to his requests. As I have said, the Commission have now agreed to disclose the minutes and the correspondence to Mr D. While I welcome that decision, it is also frustrating to note that the Commission came close to releasing this information over two years ago. In her analysis of the case on 2 April 2002 (paragraph 4) the case officer noted that it appeared that Mr D might already have seen all of the minutes that they had on file and that there was nothing in the correspondence between the Charity and the Commission that was particularly confidential. I must emphasise that the approach to the release of information under the Code is essentially positive and based on the presumption that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. If the Commission had adopted this approach when considering Mr D's request in 2002 it seems likely to me that it would have resulted in at least a partial disclosure of the information he was seeking.

22. The Commission could and should have considered Mr D's requests for information more positively, and certainly more quickly, than they did. I am critical of the failures in the way the Commission handled Mr D's complaint and, in the light of my comments, I recommended to the Commission that they take steps to ensure a commitment to dealing with all future requests for information with reference to the requirements of the Code and, from 1 January 2005, with reference to the statutory requirements of the Freedom of Information Act 2000.

23. In reply, the Chair of the Commission said that they had now provided Mr D with the information he had requested. She agreed that Mr D had not received a standard of service that he could reasonably have expected and she accepted that his requests for information could have been dealt with far quicker and with a greater degree of openness than they had been. The Chair said that the Commission took its commitments to dealing with requests for information very seriously, both with reference to the Code and to the statutory requirements of the Freedom of Information Act 2000. She said that she had asked the Commission's Head of Customer Service to consider how best they should take this forward in respect of staff training and awareness.

Conclusion

24. While I am pleased that the Commission have now decided to release the information sought by Mr D I have been critical of several aspects of the way in which they handled his request for information. The Commission are taking steps to remind their staff of the procedures for handling requests for information and I see that, and the release of the information requested, as a satisfactory outcome to a justified complaint.

Ministry of Defence

Case No: A.9/04

Refusal to provide information relating to vehicles suspected of involvement in the production of weapons of mass destruction

Summary

Lord K asked the Ministry of Defence (MoD) for information about two vehicles located in Iraq which were believed to have been involved in the production of weapons of mass destruction. He requested details of the components of British origin in the vehicles and asked which companies produced them. MoD refused to provide the information, citing Exemption 1(c) of the Code. In response to Lord K's request for a review of that decision, MoD also cited Exemption 1(b) as a further basis for withholding the information. The Ombudsman considered the public interest in disclosure, but concluded that on balance it was outweighed by the harm that might be caused by release of the information. She found that MoD were entitled to rely on Exemptions 1(b) and (c) and she did not uphold the complaint.

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

Background to the complaint

2. In the spring of 2003 two vehicles were located in Iraq which were suspected of possible involvement in the production of weapons of mass destruction. On 16 July 2003 Lord K asked, via a Parliamentary Question in the House of Lords:

'whether either of the two vehicles suspected of involvement in the production of weapons of mass destruction in Iraq was purchased or obtained from the United Kingdom or the United States'. (HL 3435)

The Minister for Defence Procurement (the Minister), in his answer of the same day said:

'We currently assess that the vehicles were built in Iraq using Iraqi components and standard industrial components that had been obtained from several different countries including the United Kingdom. The components of British origin would not have been restricted under the sanctions regime. Our investigations into the vehicles continue.'

3. On 8 September 2003, again by Parliamentary Question, Lord K pursued the matter further. He asked:

'In relation to the two vehicles found in Iraq and suspected of being involved in the production of weapons of mass destruction, what were (a) the components of British manufacture and (b) the companies that produced them.' (HL 4186)

The Minister, in his answer of the same day, said:

'The investigations into these two vehicles were continuing and we will take as long as necessary to conduct a thorough examination. I am withholding details of the components and companies under Exemption 1(c) of the Code of Practice on Access to Government Information, which relates to information received in confidence from foreign governments.'

On the same day Lord K asked, and had answered, a further question about how long the investigation into the two vehicles might take and whether the report of the investigation would be published.

4. Following a further exchange in the House of Lords on 15 September 2003, during which the

Minister defended the use of Exemption 1(c), Lord K wrote to the Minister on 16 September 2003. He said that the public had the right to know whether or not British components had been used in the manufacture of weapons of mass destruction: if the vehicles had not, in the event, been used for that purpose, then the information was harmless anyway. Given that it had already been admitted that British components had been found, he saw no reason not to release the additional information sought. He asked MoD to review their use of Exemption 1(c). On 9 October 2003 the Minister replied. He said that, in accordance with the requirements of the Code, he had decided that the matter should be reviewed. He told Lord K that the review had already begun and that he hoped to conclude the matter as quickly as possible. On 30 October 2003 the Minister wrote to Lord K to say that, as a result of difficulties that had arisen during the course of the review, it would not now be possible to complete it within twenty working days but that every effort was being made to resolve matters speedily.

5. On 20 November 2003 MoD's Director of Information (Exploitation) (the Director) wrote to Lord K with the results of the review. He said that he had confirmed that the information sought by Lord K had been provided by another government: it was in fact contained in a report on work undertaken by a US Task Force to examine a suspect vehicle and had been provided on the understanding that its contents would not be divulged further. The Director said that he had sought to establish whether or not this seal of confidentiality applied to all parts of the report and had found that it did. He remained of the view, therefore, that Exemption 1(c) continued to be applicable, although he noted Lord K's view that there was a public interest in the disclosure of the information. He also said that, as disclosure of the information would undermine the bilateral defence relationship, he believed that Exemption 1(b) ('Information whose disclosure would harm the conduct of international relations or affairs') was also applicable. He invited Lord K to apply to my Office if he was dissatisfied with the outcome of the review process.

Departmental comments on the complaint

6. The Permanent Secretary of MoD, in his reply, confirmed the sequence of events as set out above. In respect of the handling of the request he accepted that Lord K had not received a reply to his review request within the twenty working days that they had been aiming for but said that the primary cause of this delay was that MoD had questioned the initial advice from the originators of the information that all of it was in fact confidential. He therefore thought the delay justifiable.

7. In respect of the information itself the Permanent Secretary confirmed that, although he understood and appreciated the public interest argument put forward by Lord K, he remained of the view that the information should continue to be withheld under Exemptions 1(b) and 1(c). He said that information generated between the UK and the USA on matters relating to military intelligence is protected from further disclosure unless the organisation providing the information consents to its release. In this case the USA, the provider of the information, had made it clear that they were not willing to give that consent. On that basis the Permanent Secretary took the view that it remained correct to continue to withhold the information under the Exemptions cited.

The Code of Practice on Access to Government Information

8. Exemption 1 of the Code is headed 'Defence, security and international relations' and reads:

'(a) ...

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

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

9. In respect of the matter of harm the wording of the prologue to Part II of the Code should be noted:

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

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

Assessment

10. I look first at how MoD handled this Code request. MoD first indicated that they were intending to withhold the information sought under Exemption 1(c) of the Code in the Minister's response to Lord K in the House of Lords on 8 September 2003. In his letter to the Minister of 16 September 2003 Lord K sought a review of that decision. The Minister informed Lord K, in his letter of 9 October 2003, that the review was underway and wrote to him again on 30 October 2003 when it became apparent that the review would not be completed as quickly as had been hoped. It did not, in fact, prove possible to complete the review until 20 November 2003, when the Director wrote to inform Lord K that the decision to withhold the information under Exemption 1(c) had been upheld: he also told Lord K that, on further consideration, he believed Exemption 1(b) to be applicable to the information as well. The Director told Lord K that he now had the right to take the matter to my Office.

11. In general MoD have handled the processing of this information request very well. From the papers I have seen it is clear that MoD sought clarification from the USA, the originators of the information, on more than one occasion as to whether or not they believed that any of the information sought by Lord K could be released and it was this that had led to the delay in responding to Lord K's review request. MoD informed Lord K that there would be a delay when this became apparent and apologised for that fact. I do not think MoD could have done more, for which I commend them.

12. I turn now to the heart of the request – can any of this information be released? In doing this I should first of all say that I have established that the document containing the information sought by Lord K does include a small number of sections incorporating unclassified material.

13. MoD cited two parts of Exemption 1 to justify not releasing this information and I turn first to Exemption 1(c) as this was the exemption originally cited. This exemption covers information received in confidence from a foreign government. I have examined the information at issue. First, it was provided by a foreign government (the USA). Secondly, it was quite clearly provided on the understanding that it should be treated in confidence. There is therefore no doubt that the information sought by Lord K falls, in principle, within this exemption.

14. Exemption 1(c) does not use the words harm or prejudice. It therefore seems to me that, as the information falls clearly within the scope of this part of the exemption, I could simply say that the exemption applies. However, the Guidance on Interpretation of the Code does make reference to these words in discussing this exemption. I am also fully aware that this is a matter of great public interest: in addition Exemption 1(b), cited as well by MoD, does use the word harm. I feel therefore that the harm argument must be considered. There is no doubt whatever that there is a substantial public interest in the matter of the vehicles found in Iraq and whether they may or may not have been involved in the production of weapons of mass destruction. And, in such cases, given the general expectation that information should be disclosed rather than not, that would make a strong argument in favour of disclosure in this instance. However, I am aware that the provenance of these vehicles and their possible use remains as yet an unresolved and highly sensitive matter. It is also evident from the papers I have seen that the originators of the material are unequivocal in their view that the material ought not be released and that this view extends even to those few sections of the report containing unclassified material. While fully recognising, therefore, the strength of the public interest argument, I do not think that in this case I can support the release of the information in the face of a clear indication from the originators of it, conveyed on more than one occasion, that this is not their wish. I note, with particular reference to that last point, that the Guidance on Interpretation of the Code states that one of the areas for consideration of possible harm under Exemption 1(b) is 'disclosure which would impair confidential communications between governments or international bodies'.

Conclusion

15. There is a strong, and understandable, argument for the release of this information on public interest grounds. But in this case I believe that the harm that might be caused by release of this information, on balance, outweighs the public interest argument. I therefore uphold the use of Exemptions 1(b) and 1(c). I do not uphold the complaint.

Ministry of Defence

Case No: A.33/04

Refusal to supply information relating to allegations of corruption

Summary

Mr Evans complained that the Ministry of Defence (MoD) refused to supply him with papers relating to a meeting between MoD and US State Department officials, which contained details of a discussion about alleged corrupt practices in the Czech Republic by the company BAE Systems. MoD had withheld all but one paper relating to the meeting under Exemptions 1(b) and 2 of the Code, and they had maintained that decision following an internal review. In responding to the complaint, the Permanent Secretary of MoD said that he considered that the information sought by Mr Evans fell squarely within Exemptions 1(b) and 2 and that its disclosure would harm the bilateral defence relationship which existed between the UK and the US. The Ombudsman found that the public interest in having the information in the public domain failed to outweigh the harm that its disclosure would cause to MoD's ability to conduct international relations effectively, particularly as the issues involved remained highly sensitive. The Ombudsman did not uphold the complaint.

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

Background to the complaint

2. On 6 August 2003 Mr Evans both wrote to and e-mailed MoD about a meeting in July 2002 between the Permanent Secretary of MoD and the Assistant Secretary, Bureau of Economic and Business Affairs, of the US State Department. Mr Evans said that he understood that, during this meeting, there had been a discussion about allegations of corrupt practice in the Czech Republic by the company BAE Systems. Mr Evans asked, citing the Code, for copies of the minutes of this meeting, the agenda, and any and all papers, briefing material, documents, memos, telegrams, e-mails, memoranda of conversations and telephone logs which were prepared for or connected with this meeting, either before or after the event. Mr Evans also asked, again citing the Code, for copies of all correspondence between MoD and the US State Department following this meeting.

3. On 6 August 2003 MoD acknowledged receipt of Mr Evans' e-mail and, on 29 August 2003, an official from the Defence Export Services Organisation (DESO) responded substantively to his request. DESO said that a review had been conducted of the appropriate files and records held by MoD and, as a result, they were enclosing a copy of a briefing note produced earlier in the year on the subject of the allegations raised in 2002. DESO said that certain parts of this note had been blocked out in accordance with the provisions of the Data Protection Act 1998, and also under Exemption 1(b) of the Code. DESO said that, in addition, they were withholding a small amount of material in its entirety under Exemption 1(b) of the Code.

4. On 3 September 2003 Mr Evans both wrote to and e-mailed MoD asking them to review their decision not to release the information he had requested. He argued that there was a clear public interest in making the withheld information available. On 5 September 2003 MoD e-mailed an acknowledgement to Mr Evans and, on 30 September 2003, they wrote to him explaining that, regrettably, the review process would take longer than the target time of 20 working days. On 13 November 2003 Mr Evans wrote to MoD chasing a substantive response to his review request. On 17 November 2003 MoD wrote to

Mr Evans to apologise for the delay. They said that everything was being done to ensure that the review was finished as soon as possible and that they would write again once the process was complete.

5. On 16 January 2004 MoD wrote to Mr Evans with the results of their internal review. They supported the earlier decision to redact the briefing note under the provisions of both the Data Protection Act 1998 and Exemption 1(b) of the Code. They said that they also believed it appropriate for other documentation on the subject to be withheld under Exemption 1(b) and took the view that Exemption 2 could also be cited to withhold some of the information. MoD apologised to Mr Evans for the time it had taken them to complete the review and for not, in their original response, explaining as fully as they might have done why they thought that Exemption 1(b) applied to the withheld material.

MoD's comments to the Ombudsman on the complaint

6. The Permanent Secretary of MoD responded on 8 March 2004. He outlined the background to Mr Evans' complaint and provided all the relevant papers, including all of the information sought by Mr Evans. The Permanent Secretary accepted that it had taken longer than the requisite 20 working days to provide a substantive response to Mr Evans' request for review but he thought that, in general, Mr Evans' request for information and subsequent review had been handled efficiently by MoD. He pointed out that a substantive reply to Mr Evans' initial request was sent within the Code's 20 working day guideline and that this had provided some of the information Mr Evans had requested, with the relevant Code exemption cited where information had been withheld.

7. The Permanent Secretary said that MoD had informed Mr Evans of his right to a review and that he had been sent a prompt initial acknowledgement of his review request. They had also told Mr Evans when it became apparent that it would not be possible to conclude the process within 20 working days. He said that, thereafter, MoD had kept Mr Evans regularly informed of the progress of the internal review. The Permanent Secretary said that, while he regretted that it had taken significantly longer than the guideline target to provide a substantive response to Mr Evans, he felt it important to recognise that this was not due to inactivity on the part of MoD. He added that the case had raised difficult issues that had been the subject of in-depth consideration both within MoD and more widely.

8. In respect of the substance of the information sought by Mr Evans, the Permanent Secretary said that the degree of disclosure involved had given him some concern. It was necessary for him to take a broader perspective beyond that of the specific information requested and it was his view that the public interest would be best served by not releasing any further information. He said that his particular concern was to avoid the risk of harm to the bilateral defence relationship, a matter which was of paramount importance to the UK. He noted that the Cabinet Office Guidance on Interpretation of the Code stated that the purpose of Exemption 1(b) was to protect information which would impair the effectiveness of the conduct of international relations, and he cited the following areas of potential harm (taken from the guidance) which he saw as pertinent to this particular case (the Permanent Secretary's emphasis):

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

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

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

The Permanent Secretary said that he remained convinced that the internal review was correct in applying Exemptions 1(b) and 2 to the documentation and that no further information should therefore be released to Mr Evans on the subject.

The Code of Practice on Access to Government Information

9. In refusing to provide the information sought by Mr Evans, MoD cited Exemptions 1(b) and 2 of the Code (and the Data Protection Act with regard to the redacted text of the briefing note). Exemption 1(b) of the Code is headed 'Defence, security and international relations' and reads:

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

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

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

- proceedings of Cabinet and Cabinet committees;

- internal opinion, advice, recommendation, consultation and 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.'

10. Exemptions 1 and 2 are subject to the preamble to Part II of the Code which states that:

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

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

Assessment

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

requests for information within 20 working days, although the Code recognises that this target may need to be extended when significant search or collation of material is required.

12. From my examination of the papers MoD appear to have handled Mr Evans' initial request for information in full accordance with the requirements of the Code. However, when Mr Evans requested a review in September 2003 of MoD's refusal to disclose elements of the information sought, they were slow to act. They initially wrote to Mr Evans informing him that the review would take longer than the target time of 20 working days and when, in November 2003, Mr Evans chased progress, MoD apologised for the delay and told him that the review would be completed as soon as possible. That said, it was not in fact until January 2004 that they were able to notify Mr Evans of the outcome of their review. Nevertheless, I accept the comments of the Permanent Secretary that the case was not a straightforward one and that the issues involved required very careful consideration. Consequently, while it was unfortunate and frustrating, I think it would be unreasonable to be over-critical of MoD for their delay. In all other respects, I find that MoD dealt with Mr Evans' request for a review in a proper and timely manner, explaining to him both the law and the Code exemptions under which information was being withheld, and outlining the right of review open to him.

13. I turn now to the substance of the complaint. I have looked very carefully at the question of whether or not Mr Evans is entitled, under the Code, to the information he has requested, recognising that the Code only gives an entitlement to information and not to the document in which the information is contained: it is on that basis that I have examined the complaint. I deal first of all with the matter of the Data Protection Act, which MoD have cited as grounds for withholding personal data in documents that relate to third parties. Any dispute Mr Evans may have about the non-disclosure of that information is not for the Ombudsman. It is for the Information Commissioner's Office, or for the courts, to interpret data protection legislation and its applicability in individual cases. I, therefore, am confining my observations only to matters that fall outside the data protection remit but within the Code. With regard to the Code, MoD have cited Exemptions 1(b) and 2 as the basis on which they have withheld certain information. The purpose of Exemption 1(b) is to protect information the disclosure of which would impair the effectiveness of the conduct of international relations and the purpose of Exemption 2 is to safeguard the exchange of internal advice in relation to policy analysis and formation. The information which has been withheld by MoD consists of: the unredacted version of the briefing note that was originally disclosed to Mr Evans, further internal memoranda and drafts, and external correspondence.

14. I therefore turn now to the applicability of Exemption 1(b) to that material. The purpose of Exemption 1(b) is to protect from disclosure information that would impair the effectiveness of the conduct of international relations. I have carefully considered the information contained in the documents in question. The internal papers I have seen, reflect in part, an account of the matter under discussion and also the internal dialogue that took place within MoD as to what should be the appropriate response to the allegations of corruption. It is clear to me that Exemption 1(b) can be correctly applied to the information they contain as that information impinges directly on the relationship between this country and the United States of America. The external correspondence sets out the results of that internal deliberation following the provision of the advice and discussion contained within the

above documents. I am satisfied that this information falls squarely within Exemption 1(b). I am also satisfied that the essence of the factual information contained in these papers has already been conveyed to Mr Evans through the information provided to him earlier.

15. Exemption 1(b) does, however, contain a harm test. This requires me to consider whether or not the public interest in releasing the information outweighs the harm that would be caused if the information were to enter the public domain. Mr Evans has argued that there is a clear public interest in information about allegations relating to possible corruption by one of this country's major companies. I accept that. MoD have, equally, argued that disclosing any information beyond that which they have already disclosed would affect their ability to conduct international relations effectively and affect their ability also to make assessments of situations such as this with the requisite degree of candour and frankness. The potential to cause harm by releasing information of this kind does, of course, tend to diminish as time passes. However, it is my perception that this particular case, and others related to it, remain highly sensitive issues under which lines have by no means been drawn. I also recognise the significance of the broader picture referred to by the Permanent Secretary. On this basis, I think that the balance of the argument in this instance lies against making any further disclosures and that the harm test in Exemption 1(b) therefore was correctly applied.

Conclusion

16. It is for those reasons that I am satisfied that the undisclosed information requested by Mr Evans was correctly withheld by MoD, in its entirety, under Exemption 1(b) of the Code. As such, I see no merit in considering the applicability or otherwise of Exemption 2 to that same information. Consequently, I do not uphold the complaint.

Ministry of Defence

Case No: A.40/04

Refusal to provide information about allegations of fraud concerning a sub-contractor of BAE Systems

Summary

Mr Evans asked the Ministry of Defence (MoD) for any information they held regarding allegations of fraud that had been made against Robert Lee International, a sub-contractor of BAE Systems. MoD said that they had previously released some information to another journalist and refused to provide any further information under Exemptions 2 and 4(c). However, following a request for them to review their decision, MoD released a redacted version of one document and cited Exemptions 1(a), 1(b), 2 and 7(a) as justification for withholding certain information within that document as well as information in two further documents. The Ombudsman upheld the use of Exemptions 1(a) and 1(b) and saw no merit in also considering whether or not Exemptions 2 and 7(a) could be held to apply to the same information. However, the Ombudsman saw no reason under the Code why some of the withheld information should not be released. MoD agreed to do so although they believed that a small amount of that information could be withheld under Exemption 13 of the Code. The Ombudsman accepted that argument and welcomed MoD's agreement to release the remainder of the information. The complaint was partially upheld.

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

The complaint

2. On 17 September 2003 Mr Evans wrote to MoD and asked, under the Code, for information relating to allegations of fraud concerning Robert Lee International, a sub-contractor of BAE Systems. He said that the allegations which had been made by Mr Edward Cunningham, a former employee of Robert Lee International, had been reported in the Guardian newspaper on 11, 12, 13 and 15 September 2003. Mr Evans asked, under the Code, for the following information to be made available to him:

- complete copies of all correspondence sent by MoD to the Serious Fraud Office and any other relevant authorities regarding the allegations; and

- complete copies of any other documents held by MoD regarding the allegations. He said that he assumed that this part of his request would cover briefing materials, e-mails, minutes of meetings and associated papers, notes of telephone conversations, memoranda, and any other such papers.

3. MoD replied on 15 October 2003. They said that subsequent to Mr Evans' request for information MoD had released several documents to another Guardian reporter about the allegations concerning BAE Systems and Robert Lee International. (Note: the documents that were disclosed consisted of a letter dated 8 March 2001 from the Serious Fraud Office to the Permanent Secretary of MoD and two letters, dated 24 May 2001 and 12 September 2003, from the Permanent Secretary in response). MoD said that they had made enquiries within the department but that no further material was available for release. They said that information was being withheld under Exemption 2 and Exemption 4(c) of the Code. They advised Mr Evans that he could seek an internal review of their decision if he was not satisfied with their response and that he could complain to the Ombudsman if he remained dissatisfied following that review.

4. On 24 October 2003 Mr Evans wrote to MoD and asked them to reconsider their decision to withhold the information he was seeking. He argued that the public interest in this case clearly outweighed the benefits of keeping the information secret. He also questioned whether Exemption 4(c) was applicable in this instance because it had been alleged that no proper investigation had actually been conducted. He said that MoD would be aware from articles in the Guardian newspaper on 13 and 14 October 2003 that it had been alleged that the action they had taken following the allegations of fraud had amounted to little more than a cursory inquiry and could not be described as a proper investigation by, for example, MoD Police. Mr Evans also asked for a schedule of the documents that had been withheld from him, including the date and title of the document and the sender/recipient in each case.

5. On 19 November 2003 MoD wrote to Mr Evans to apologise for the fact that they would not be able to complete the internal review process within 20 working days. On 19 December 2003 MoD again apologised for the delay in completing the review process. They replied substantively on 28 January 2004, apologising again for the time taken to do so. They said that the majority of the information held on this matter had been provided in confidence by the Serious Fraud Office, including various documents provided by Mr Cunningham. MoD said that they were satisfied that those documents came within the scope of Exemption 4(c) of the Code as they related to an investigation that had been terminated. They cited a paragraph of the Cabinet Office guidance on the interpretation of the Code in support of this decision.

6. MoD said that they held very few other documents on the subject of the allegations. However, they had concluded that it would be appropriate to release a Business Questions Briefing, which had been prepared to brief Ministers in the event of Parliamentary Questions on the allegation that MoD had been involved in covering up fraud by BAE Systems. They enclosed a copy of the document and in doing so clarified what should have been said in one section and updated what was said in another. They said that certain sections of the document had been redacted in line with Exemptions 1(a) and 1(b), and Exemptions 1(b) and 7(a) of the Code. The information withheld under Exemptions 1(a) and 1(b) related to the location of MoD military and civilian personnel, their contractors and their Saudi counterparts within the UK and Saudi Arabia. MoD said that, given the current security situation, disclosure of this information could endanger the personnel involved and they were satisfied that there was no overriding public interest in disclosure. MoD said that the information withheld under Exemptions 1(b) and 7(a) concerned details of the contractual arrangements for the Al Yamamah programme. They said that there was a real possibility that disclosure of this information would cause harm to current and future relations between the United Kingdom and Saudi Arabia and that they remained satisfied that the reasons for withholding this information were not outweighed by the public interest in disclosure. MoD also said that, for the same reasons, a second briefing document was being withheld in its entirety under Exemptions 1(b) and 7(a).

7. MoD also said that they now believed it to have been inappropriate for Exemption 2 to have been cited when the information in the Business Questions Briefing was originally withheld from Mr Evans. Finally, they advised Mr Evans that he could complain to the Ombudsman, via an MP, if he was dissatisfied with the outcome of the internal review.

8. On 2 March 2004 the Ombudsman received a letter from Mr Evans, referred to this Office by his Member of Parliament, in which he outlined his complaint against MoD. He also said that, in the light of MoD's comment that the majority of the information they held was provided by the Serious Fraud Office, he wanted to clarify that he was not seeking copies of any documents which had been supplied to the Serious Fraud Office by Mr Cunningham.

Department's comments on the complaint

9. In providing his comments on the complaint the Permanent Secretary of MoD said that, although it had taken longer than 20 working days to provide a substantive response to Mr Evans' request for a review, he thought that in general both his request for information and the subsequent appeal had been handled efficiently. A substantive reply to the initial request had been sent within the Code's 20 working day guideline and Mr Evans had been informed when it had first become apparent that it would not be possible to conclude the internal review process within 20 working days. Thereafter he was kept regularly informed of the progress of the review. The Permanent Secretary said that, while he regretted that it had taken significantly longer than the guideline target to provide a substantive response, this had not been due to inactivity. He said that the case had raised difficult issues which were the subject of in-depth consideration: the redacted document that was finally provided to Mr Evans was advice prepared for Ministers on the Al Yamamah project and there was a legitimate concern that it may not have been in the public interest to divulge this document, taking into account both the need to maintain the frankness and candour of internal advice and the intrinsic sensitivity of the Al Yamamah project. The Permanent Secretary said that the Ombudsman had recently recognised the validity of such concerns in the report of her investigation into the decision to withhold the 1992 National Audit Office report into Al Yamamah (Case Number: A.10/04 – Access to Official Information – Investigations Completed, July 2003 – June 2004 HC701).

10. The Permanent Secretary also referred to the fact that Mr Evans was not seeking copies of any of the documents that were supplied to the Serious Fraud Office by Mr Cunningham. He said that the Serious Fraud Office had copied documents to him in 2001 and that he had then passed them to those officers in the MoD Police who dealt with allegations of fraud. He said that MoD Police had confirmed that the papers they held relevant to this case had all been supplied to the Serious Fraud Office by Mr Cunningham. The Permanent Secretary said that, apart from those documents, the majority of the remainder were generated as a result of press inquiries about the allegations made by Mr Cunningham in August 2003 and the subsequent Code requests from Mr Evans and his colleague at the Guardian newspaper: as such, they were concerned with handling the enquiries rather than with the allegations themselves. He said that the exceptions were the following three documents:

(a) A Loose Minute dated 15 March 2001 that was sent to the Permanent Secretary by the Chief of Defence Procurement's private secretary. The document set out the financial arrangements for the Al Yamamah project. The Permanent Secretary said that he believed that Exemptions 1(b), 2 and 7(a) were all relevant to this document as it was a frank and candid appraisal of information that was commercially confidential. He said that release of this information would breach the terms of MoD's Memorandum of Understanding with the Government of Saudi Arabia and would harm the competitive position of the MoD to the detriment of the UK taxpayer.

(b) A complete version of the Business Question Briefing, a redacted version of which was provided to Mr Evans following the internal review of his information request. The Permanent Secretary said that he had considered the disclosure of this information and upheld the decision to redact the text under Exemptions 1(a), 1(b) and 7(a).

(c) An internal brief covering similar grounds to the Business Question Briefing but differing in some respects from the final version. The Permanent Secretary said, however, that the brief contained no further substantive information that could be disclosed. Again, he believed that Exemptions 1(a), 1(b) and 7(a) were relevant.

11. Finally, the Permanent Secretary said that he would like to record that MoD did not hold a copy of the report of the investigation conducted by BAE Systems into the allegations made by Mr Cunningham. As the final paragraph of his letter of 12 September 2003 to the Serious Fraud Office (paragraph 3) had mentioned such an investigation, the Permanent Secretary said that officials in the relevant branches had conducted a thorough search of MoD files. However, this had drawn a blank.

Exemptions of the Code

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

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

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

13. Exemption 1 is headed 'Defence, security and international relations' and the parts cited by MoD read as follow:

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

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

14. Exemption 2 is headed 'Internal discussion and advice' and reads:

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

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

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

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

16. Exemption 7 is headed 'Effective management and operations of the public service' and part (a) reads:

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

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

Assessment

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

18. So how did MoD's handling of Mr Evans' request comply with these provisions? I am pleased to note that in most respects MoD handled this request for information in full compliance with the requirements of the Code. The only blemish was the length of time taken to respond to Mr Evans' request for an internal review, which took 70 working days. While the Code does not set a target for responding to requests for an internal review most government departments, including MoD, aim to complete such reviews within 20 working days. The delay in reviewing Mr Evans' request is therefore disappointing. However, I note that MoD wrote to Mr Evans in the interim on more than one occasion to apologise for the delay and I accept the Permanent Secretary's comments that the request raised difficult issues that required detailed consideration. Moreover, I welcome the way in which the internal review process was conducted and the conclusion that was reached, which was to release a redacted version of a document (the Business Question Briefing) that had previously been withheld. Whether or not MoD were justified in withholding the remainder of that document, and the other information that they have refused to disclose, is something that I shall now go on to consider.

19. I think I should first clarify the scope of the information that I have considered as part of my investigation. In his comments on the complaint the Permanent Secretary said that the papers held by MoD Police relevant to this case had all been supplied to the Serious Fraud Office by Mr Cunningham. As Mr Evans has made it clear

that his request does not include any of that information I have not considered it, or MoD's use of Exemption 4(c) to protect it from disclosure, as part of my investigation. As I see it, therefore, the information that I need to consider is that contained within the three documents highlighted by the Permanent Secretary in his comments on the complaint (paragraph 10). In refusing to release that information, MoD have cited Exemptions 1(a), 1(b), 2 and 7(a) of the Code, and I shall now look more closely at those exemptions.

20. The purpose of Exemption 1(b) is to protect information that would impair the effectiveness of the conduct of international relations. The Cabinet Office guidance on the interpretation of the Code (paragraph 1.5, part II) gives several instances of the potential harm that might be caused by disclosure; for example, the risk that disclosure would impede negotiations, undermine frankness and candour in diplomatic communications, and impair confidential communications and candour between governments or international bodies. In his comments on the complaint (paragraph 9), the Permanent Secretary referred to another of the Ombudsman's investigations (A.10/04) in which she had upheld MoD's decision to withhold information relating to the Al Yamamah project, including the 1992 National Audit Office report. In that case the Ombudsman was persuaded by the arguments put forward by MoD (and the Foreign and Commonwealth Office) that the release of information about the Al Yamamah project would have a detrimental effect on the relationship between the United Kingdom and Saudi Arabian Governments and that the public interest in disclosure was outweighed by the harm that such a disclosure could cause. She therefore upheld the use of Exemption 1(b).

21. In this instance, much of the information withheld from Mr Evans is also related to the Al Yamamah project and is similar in content to that considered by the Ombudsman in A.10/04. The Loose Minute of 15 March 2001 provides an outline of the financial arrangements of the Al Yamamah project, particularly the contractual relationship between the Saudi Arabian Government, BAE Systems and MoD. There is also information in the two other documents relating to these financial arrangements. As in A.10/04, in reaching a decision on whether or not MoD were justified in citing Exemption 1(b) of the Code in this case, I have taken particular account of the Memorandum of Understanding that was signed by both the Saudi Arabian and United Kingdom Governments in 1986, and which is still in effect today. This agreement not only contains an explicit undertaking by both Governments not to communicate classified information to a third party but also commits the United Kingdom Government to ensuring that their responsibilities as specified in the Memorandum of Understanding would be carried out. I accept the argument that a breach of these commitments would cause harm to international relations. I have also taken account of the fact that the Al Yamamah project is very much an ongoing concern, which has unarguable and significant benefits to the United Kingdom economy. I fully recognise that there exists, in relation to this project, a public interest that needs acknowledgement. However, in the light of all of these factors, I am satisfied not only that the use of Exemption 1(b) of the Code was justified but also that, on balance, the public interest in disclosure is outweighed by the potential harm that could be caused to international relations by the release of this information.

22. I shall now look at MoD's refusal to disclose a small amount of information under Exemption 1(a)

of the Code. That information relates to the location of MoD military and civilian personnel, their contractors and their Saudi counterparts within the United Kingdom and Saudi Arabia. MoD believe that the disclosure of this information could endanger the personnel involved, particularly in the light of the current security situation, and they are satisfied that there is no overriding public interest in its disclosure. The Cabinet Office guidance on the interpretation of the Code states that one of the purposes of Exemption 1(a) is to protect information whose disclosure would put at risk servicemen and their civilian support staff, including those of friendly forces, and those under their protection (paragraph 1.2, part II). It goes on to state (paragraph 1.3, part II) that this exemption is intended to protect information whose disclosure would harm national security, including information which could be of assistance to those engaged in espionage, sabotage, subversion or terrorism. Having considered the information that has been withheld under this exemption I am satisfied that its release could prejudice the safety of personnel working at those locations and that MoD therefore had good grounds for citing Exemption 1(a) to justify its non-disclosure. Moreover, I do not believe in this case that the public interest in disclosing the information outweighs the potential harm that could be caused by its release. I therefore uphold MoD's decision to withhold this particular information. As I have upheld the use of Exemptions 1(a) and 1(b) of the Code I see no merit in also considering the applicability or otherwise of Exemptions 2 and 7(a) to the same information.

23. There is, however, some information that I believe can be released to Mr Evans without causing the type of harm envisaged by any of the exemptions cited by MoD. While I am satisfied that there is information within the internal briefing (paragraph 10, part (c)) that falls within the scope of Exemptions 1(a) and 1(b) of the Code, most of the document is largely a reiteration of information contained within the Business Questions Briefing that has already been disclosed to Mr Evans. To the extent that there is information in the document that is not known to Mr Evans, and in keeping with the guiding principle of the Code that the approach to the release of information should be positive (the Cabinet Office guidance on interpretation of the Code, paragraph 1), I therefore recommended to the Permanent Secretary that he release that information to Mr Evans.

24. In reply, the Permanent Secretary referred to a statement made in an earlier, as yet unpublished, report by the Ombudsman that 'the Code only gives an entitlement to information and not to the document in which the information is contained'. He said that he was mindful, therefore, that releasing a document would not always be the most appropriate way of responding to a request for information. In this case, however, the Permanent Secretary said that he was prepared to accept my recommendation that a redacted document should be released, although he asked that two further minor redactions be made to it under Exemption 13 of the Code and under the Data Protection Act 1998 respectively.

25. It is not the role of the Ombudsman to consider whether or not a department or body have acted in accordance with the terms and principles of the Data Protection Act 1998 and I can offer no comment on MoD's decision to withhold information under this Act other than to confirm that, in my opinion, they are not falsely claiming that the information requested falls within the ambit of that Act. As for the information being withheld under Exemption 13, I am satisfied that its disclosure might adversely affect those to whom it relates and that there is

a genuine risk that its release might harm their competitive position. Moreover, I do not see that the public interest overrides the potential harm that would be caused by its release. I therefore accept the Permanent Secretary's reasons for withholding this further small amount of information.

Conclusion

26. I welcome the Permanent Secretary's agreement to release a redacted version of a further document, which may provide Mr Evans with a small amount of additional information. However, I found that MoD were largely justified in refusing to release the information requested by Mr Evans and I have not upheld his complaint.

Ministry of Defence

Case No: A.2/05

Refusal to provide background briefing notes prepared in response to Parliamentary Questions about a National Audit Office report on the Al Yamamah project

Summary

Mrs W asked the Ministry of Defence (MoD) for copies of background briefing notes prepared in response to two Parliamentary Questions she had raised about access to a copy of a National Audit Office report on the Al Yamamah project. MoD provided her with much of the information sought, but withheld the remainder citing Exemptions 1(a) and (b), 2, 7(a), 13 and 15(a). The Ombudsman found that MoD were entitled to withhold the majority of the outstanding information under Exemptions 1(a) and (b), 2 and 7(a), but that there was still a small amount of information which should be disclosed and she recommended that it be released. She welcomed MoD's acceptance of the recommendation. The complaint was partially upheld.

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

The complaint

2. On 12 February 2003, the Minister of State for Armed Forces (the Minister) replied to a Parliamentary Question by Mrs W, in which she had asked when the 1992 National Audit Office report into the Al Yamamah project (the NAO report) would be published (*Hansard,* column: 735W). The Minister said that the report referred to confidential arrangements between the Governments of the United Kingdom and Saudi Arabia on a programme that was of great significance for British jobs and exports. He said that the report had not been published because to do so would breach that pledge of confidentiality. He said that the report had therefore been withheld under Exemption 1 of the Code. On 21 January 2004 the Minister replied to a further Parliamentary Question from Mrs W in which she again asked if he would publish the NAO report (*Hansard,* column: 1244W). The Minister referred Mrs W to his previous answer.

3. On 22 January 2004 Mrs W wrote to MoD and requested an internal review of the decision to withhold the NAO report under Exemption 1 of the Code. In addition, she requested copies of the background briefing notes that had been prepared in relation to her two Parliamentary Questions.

4. On 22 February 2004 the Minister wrote to Mrs W to say that it would take a little longer before he could respond to her request. He replied in full on 24 March 2004. In relation to the first part of her request the Minister said that, following a request by another applicant for the NAO report to be released, MoD had conducted an internal review under the Code in April 2003, which had concluded that it should continue to be withheld under Exemption 1. He said that the applicant had subsequently complained to my Office but that I had not yet released the findings of my investigation. As such, the Minister said that it would be inappropriate for him to comment at that stage. However, he said that Mrs W's request for a copy of the background briefing notes had been considered as a request under the Code. He said that both briefing notes referred to confidential arrangements between the Governments of the United Kingdom and Saudi Arabia and that full disclosure would be seen as a breach of that confidentiality. However, in line with the Government's policy to introduce more transparency into the mechanisms of Government, they had decided to disclose redacted copies of the two briefing notes.

(Note: due to an oversight the redacted notes were not enclosed with the Minister's letter and MoD did not in fact send them to Mrs W until 20 April 2004.) The Minister said that some details in the briefing notes had been withheld under a number of Code exemptions, in particular Exemptions 1(a), 1(b), 2, 7(a), 13 and 15(a). (Note: this last relates to the terms of the Data Protection Act 1998.) The Minister said that he was satisfied that MoD had met their obligation to be as open as possible but that, if Mrs W was unhappy with the decision to withhold information, she could ask a fellow MP to take up the case with my Office.

5. I should make it clear at this juncture that my investigation is concerned solely with MoD's decision not to disclose the background briefing notes relating to Mrs W's two Parliamentary Questions. The non-disclosure of the NAO report was the subject of an investigation by my Office in the early part of this year and I wrote to Mrs W on 26 April 2004 to explain why I saw no merit in conducting another investigation into the non-disclosure of that information.

The Department's comments on the complaint

6. In providing his comments on the complaint, the Permanent Secretary of MoD said that Mrs W's letter of 22 January 2004 had constituted both a Code request (for the background notes to the Parliamentary Questions) and an appeal (for the release of the NAO report). He said that this unusual situation was complicated by the fact that the release of the NAO report was already the subject of an ongoing investigation by my Office. In the circumstances, it was decided that Mrs W's letter would be handled jointly by staff involved with the Al Yamamah project as well as those with policy responsibility for the Code. It was recognised that this would make it impractical to conduct an independent review in the event of any appeal by Mrs W in relation to the background notes, and they therefore advised her to appeal to me if she was dissatisfied with the response.

7. The Permanent Secretary said that, although it had taken longer than 20 working days to provide a substantive response to Mrs W's letter of 22 January 2004, he thought that in general her request was handled efficiently and in accordance with the Code. Mrs W was informed of the delay and, when a substantive reply was sent, it provided the documents she had requested. Some redactions were made to specific sections of the text and the relevant exemptions were identified. He said that the delay to the response was caused by internal deliberation over the balance of public interest in releasing documents that were prepared as advice to Ministers on a sensitive area of international relations. He said that, while it was unfortunate that the redacted background notes were omitted from the letter sent to Mrs W, this had been a simple clerical oversight.

8. The Permanent Secretary said that much of the information removed from the background notes was similar to that which I had reviewed in connection with a complaint by another applicant about the decision by both MoD and the Foreign and Commonwealth Office to withhold the NAO report. He noted that my investigation of that case (Case Number: A.10/04 – Access to Official Information – *Investigations Completed July 2003 – June 2004) had recognised that:*

'The benefits of the Al Yamamah project to the United Kingdom economy are unarguably significant and I accept that there is a risk that any disclosure of information that may harm relations with Saudi Arabia could prejudice those benefits.'

The Permanent Secretary said that he believed the current case to be a direct parallel. He said that the information withheld under

Exemption 1(a) concerned the number of expatriates working on the Al Yamamah programme in Saudi Arabia. He believed that disclosing information about these personnel in the current political climate could undermine their safety and he was therefore satisfied that withholding this information was in the public interest. He said that information had been withheld under Exemption 1(b), either because its release would be in breach of the 1986 Memorandum of Understanding between the United Kingdom and Saudi Arabia on Al Yamamah, or because it would otherwise offend Saudi sensitivities. He said that the legitimacy of both of these concerns had been recognised in my earlier report.

9. The Permanent Secretary said that Exemption 2 had been cited in order to withhold specific sections of the background notes where it was considered that the release would harm the future ability of officials to offer frank and candid advice to Ministers, to the detriment of good government. Again, he was satisfied that these reasons were sound, and that it would not be in the public interest to release this information. As for Exemption 7(a), the Permanent Secretary said that the information withheld was identical to that considered in paragraph 11 of the report of my earlier investigation. He believed that the release of this sensitive commercial information would be to the detriment of both MoD's competitive position and the United Kingdom economy, and therefore not in the public interest.

10. The Permanent Secretary said that Exemption 13 was used to support the non-disclosure of information whose release would not only either breach the Memorandum of Understanding between the United Kingdom and Saudi Arabia or endanger the safety of expatriate workers but would, in so doing, also harm the competitive position of the prime contractor, BAE Systems. Again, he was satisfied that the balance of public interest was against disclosure.

Exemptions of the Code

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

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

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

12. Exemption 1 is headed 'Defence, security and international relations' and the parts cited by MoD read as follows:

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

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

13. Exemption 2 is headed 'Internal discussion and advice' and reads:

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

- proceedings of Cabinet and Cabinet committees;

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

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

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

14. Exemption 7 is headed 'Effective management and operations of the public service' and part (a) reads:

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

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

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

- the awarding of discretionary grants.'

15. Exemption 13 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.'

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

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

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

Assessment

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

18. In most respects, MoD handled Mrs W's request for information in full compliance with the requirements of the Code. They cited several exemptions in part II of the Code as justification for withholding some of the information being sought, and advised Mrs W of her right to make a complaint to my Office if she remained dissatisfied with their decision. The department

would usually be expected first to offer to internally review their decision. However, as the decision in this case was made at the highest levels within MoD, I accept that there was no requirement to have conducted such a review in this instance. The only blemish with regard to the handling of Mrs W's request for information was that it took over twice the length of time to respond to her request than that recommended by the Code. However, the Permanent Secretary wrote to Mrs W in the interim to apologise for the delay and I accept that the situation was slightly unusual as Mrs W's letter of 22 January 2004 constituted not only a request for copies of the background briefings, but also an appeal against MoD's decision not to disclose the NAO report. Moreover, I am reluctant to criticise MoD for a relatively short delay, much of which was caused by internal deliberation that ultimately resulted in the release of much of the information being sought by Mrs W. I have very often seen departments refusing to release entire documents solely on the basis that there was a small amount of information within them that was exempt from disclosure under the Code. MoD are clearly aware that the Code related to information, not to documents, and I welcome a decision-making process resulting in the release of redacted versions of the documents sought. Whether or not MoD were justified in withholding the remaining information contained in those documents is something that I shall now go on to consider.

19. In refusing to release complete copies of the two background briefings sought by Mrs W, MoD cited Exemptions 1(a), 1(b), 2, 7(a), 13 and 15 of the Code. They also cited the Data Protection Act 1998 (the Act). However, in respect of the latter, it is not my role to decide whether or not a department has correctly applied the terms of the Act and, if Mrs W wishes to complain about the non-disclosure of this particular information, I can only suggest that she approach the Information Commissioner who is responsible for deciding whether or not there is likely to have been a breach of the Act. My role in such cases is limited to confirming that a department is not erroneously claiming that the information requested comes within the area covered by the statutory prohibition and, in this instance, I am happy to give such an assurance.

20. In his comments on the complaint (paragraph 8), the Permanent Secretary referred to another of my investigations (A.10/04) in which I upheld MoD's decision to withhold information relating to the Al Yamamah project, including the NAO report. In that case I was persuaded by the arguments put forward by MoD (and by the Foreign and Commonwealth Office) that the release of information about the Al Yamamah project would have a detrimental effect on the relationship between the United Kingdom and Saudi Arabian Governments, and that the public interest in disclosure was outweighed by the harm that such a disclosure could cause. The Permanent Secretary believes that my decision in that case has a direct impact on my consideration of MoD's decision not to disclose the information sought by Mrs W. I agree.

21. Mrs W's two Parliamentary Questions concerned the non-disclosure of the NAO report and it was inevitable, therefore, that the background briefing notes would contain information about the Al Yamamah project. They include details of the financial arrangements of the project, as well as details of other aspects of the contractual relationship between the Saudi Arabian Government, MoD and BAE Systems. Exemption 1(b) of the Code is designed to protect information that, if released, would impair the effectiveness of the conduct of international relations. The Cabinet Office guidance on the interpretation of the Code (paragraph 1.5, part II)

gives several examples of the potential harm that might be caused by disclosure; for example, the risk that disclosure would impede negotiations, undermine frankness and candour in diplomatic communications, and impair confidential communications and candour between governments or international bodies. I am satisfied that much of the information redacted from the two background briefing notes falls within the ambit of Exemption 1(b) as there is a risk that its disclosure would cause the type of harm outlined above.

22. But that is not the end of the matter. Exemption 1(b) makes reference to harm or prejudice and I am obliged, therefore, also to consider whether or not the potential harm caused by disclosure is outweighed by the public interest in making this information available (paragraph 11). As in my previous investigation (A.10/04), in reaching a decision on this issue, I have taken particular account of the Memorandum of Understanding that was signed by both the Saudi Arabian and United Kingdom Governments in 1986, and which is still in effect today. This agreement not only contains an explicit undertaking by both Governments not to communicate classified information to a third party, but also commits the United Kingdom Government to ensuring that its responsibilities as specified in the Memorandum of Understanding would be carried out. I accept the argument that a breach of these commitments would cause harm to international relations. I have also taken account of the fact that the Al Yamamah project is very much an ongoing concern, which has unarguable and significant benefits to the United Kingdom economy. In the light of all of these factors I am satisfied not only that the use of Exemption 1(b) of the Code is justified but also that, on balance, the public interest in disclosure is outweighed by the potential harm that could be caused to international relations by the release of this information. I therefore uphold MoD's decision to withhold some of the information in the background briefings under Exemption 1(b) of the Code. I do, however, believe that the second half of the second sentence of paragraph 1 of the February 2003 background note contains information that would not in any way cause harm to international relations were it to be released. I so recommended. In reply, the Permanent Secretary said that he had reviewed the likely impact of these words in today's circumstances and, while he continued to feel that it would be preferable not to disclose this information, he accepted that the grounds for refusal were not overwhelming. He was therefore content to accept my recommendation.

23. MoD also cited Exemption 7(a) of the Code, not only to support the non-disclosure of the information that I have already agreed can justifiably be withheld under Exemption 1(b), but also to withhold a small amount of information related to management fees and departmental expenses. Exemption 7(a) is designed to protect information which, if disclosed, could harm a department's competitive position. The Permanent Secretary said that the information withheld under this exemption was identical to that which was considered in paragraph 11 of the report of my earlier investigation. He believed that the release of this sensitive commercial information would be to the detriment of MoD's competitive position and the United Kingdom economy, and therefore not in the public interest. Having seen the information being withheld, I consider that there is a risk that its disclosure could damage MoD's competitive position. In balancing the public interest in disclosing this information against the potential harm caused by its release, I have again taken account of the ongoing nature of the Al Yamamah project and the risk that the disclosure of this information could cause to the

United Kingdom economy. In that light, I also uphold MoD's decision to cite Exemption 7(a) of the Code. As I have upheld MoD's use of Exemptions 1(b) and 7(a) to withhold much of the information sought by Mrs W, I see no need to consider the applicability or otherwise of the further exemptions they cited in relation to that same information.

24. I shall now look at MoD's refusal to disclose a small amount of information under Exemption 1(a) of the Code. That information relates to the number of expatriate posts in Saudi Arabia that are sustained by the continuance of the Al Yamamah agreement. The Permanent Secretary said that MoD believed that disclosing information about these personnel in the current political climate could undermine their safety, and he therefore considered that withholding this information was in the public interest. The Cabinet Office guidance on the interpretation of the Code states that one of the purposes of Exemption 1(a) is to protect information whose disclosure would put at risk servicemen and their civilian support staff, including those of friendly forces, and those under their protection (paragraph 1.2, part II). It goes on to state (paragraph 1.3, part II) that this exemption is intended to protect information whose disclosure would harm national security, including information which could be of assistance to those engaged in espionage, sabotage, subversion or terrorism. Having considered the information that has been withheld under this exemption, I am satisfied that there is a risk that its release could prejudice the safety of the personnel working at these locations and that MoD were, therefore, justified in citing Exemption 1(a) when withholding it. Moreover, I too do not believe that the public interest in disclosing this information outweighs the potential harm that could be caused by its release. I therefore uphold MoD's decision to withhold this particular information.

25. Finally, MoD have withheld the last paragraph of the first background briefing note under Exemption 2 of the Code. The general purpose of Exemption 2 is to allow government departments the opportunity to consider matters, particularly those which are likely to prove complex and contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. However, an important feature of this exemption is that it is intended to protect comment and advice, not factual information. The information in the last paragraph of the first background briefing is largely factual information and I do not, therefore, consider that Exemption 2 can be used to protect it from disclosure. I therefore recommended to the Permanent Secretary that this small amount of information be disclosed to Mrs W. In reply, the Permanent Secretary said that this paragraph had been withheld because it concerned confidential communications with the NAO. However, following further consultation with the NAO, he was now content for it to be released to Mrs W.

Conclusion

26. I found that MoD were largely justified in refusing to release the information sought by Mrs W. However, I recommended that they disclose a small amount of information to her and I welcome the Permanent Secretary's agreement to release that information. I was also pleased with the way MoD handled Mrs W's request for information under the Code, which should stand them in good stead for handling similar requests under the Freedom of Information Act 2000.

Ministry of Defence

Case No: A.3/05

Refusal to supply information about the provision of military training assistance to Colombia

Summary

Mr Bowcott complained that the Ministry of Defence (MoD) refused to supply him with information relating to military training assistance provided to Colombia by MoD and UK Armed Forces between 2000 and 2003. MoD had provided him with a summary of the military training assistance that had been provided to Colombia, giving the dates, purpose and cost of liaison visits that had taken place. They also provided details of the training received by Colombian officials in the UK, for the period in question, and details of the Foreign and Commonwealth Office's support of a related project. All remaining material, however, was withheld by MoD under Exemption 1(a) and 1(b) of the Code. In responding to the complaint, the Permanent Secretary of MoD said that Mr Bowcott's request had prompted them to review their policy on disclosure of information relating to the subject of military assistance to Colombia and that additional information, not requested by Mr Bowcott, had been provided to him in order to give a fuller picture of UK support for Colombia. That said, the Permanent Secretary maintained that the remaining information withheld by MoD was confidential to both UK and Colombian Governments, was sensitive and, if disclosed, could put at risk the safety of UK personnel in Colombia. Consequently, he was of the view that the withheld information fell squarely within Exemptions 1(a) and 1(b). The Ombudsman found that MoD had provided Mr Bowcott with a substantial amount of information, but that the public interest in disclosing the withheld information was outweighed by the harm its disclosure would cause to the security of UK personnel in Colombia and the damage it would cause to the relationship between the UK and Colombia. The Ombudsman did not uphold the complaint.

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

Background to the complaint

2. On 24 July 2003 Mr Bowcott wrote to and e-mailed MoD requesting information relating to the military training assistance provided to Colombia by MoD and UK Armed Forces between 2000 and 2003. Mr Bowcott asked, citing the Code, for details of the training itself and the dates on which it had been given. In addition, he asked how many liaison teams had been sent to Colombia during the period in question, what their functions were and the dates on which they had been sent. Finally, he asked for details of the cost of the assistance given for each financial year from 2000 to 2003.

3. On 25 July 2003 MoD acknowledged receipt of Mr Bowcott's e-mail and, on 20 August 2003, an official from the MoD Overseas Secretariat responded substantively. In their reply, MoD provided a summary of the military training assistance provided from 2000 to 2003, giving the dates, purpose and overall cost of the liaison visits that had taken place. MoD also provided details, including dates and purpose, of the training received by Colombian officials in the UK during the same period, together with details of the Foreign and Commonwealth Office's support of a related project. MoD said that they were withholding the remaining material, which related to other aspects of advice and assistance provided to Colombia, under Exemption 1 of the Code.

4. On 2 September 2003 Mr Bowcott wrote to MoD asking them to review their decision not to release the information withheld under Exemption 1 on the grounds that there was a clear public interest in making that information available. Mr Bowcott also asked that MoD provide him with a breakdown of the cost of the assistance into individual financial years for the relevant period, as previously requested.

5. On 24 September 2003 MoD wrote to Mr Bowcott with the results of their internal review. First, MoD provided the requested breakdown by financial year of the costs of the assistance detailed in their earlier reply. Secondly, with regard to their refusal to release the remaining material under Exemption 1 of the Code, MoD said that the information about military training assistance provided by the UK to Colombia contained details which were confidential to both Governments or which could put at risk both servicemen and civilian support staff. Consequently, MoD believed that disclosure would have an adverse effect on defence, security and international relations and that the application of Exemption 1 to the information was therefore appropriate.

MoD's comments to the Ombudsman on the complaint

6. The Permanent Secretary of MoD responded on 11 June 2004. He outlined the background to Mr Bowcott's complaint and provided a number of relevant papers: others were subsequently examined in situ. The Permanent Secretary expressed his view that, in handling Mr Bowcott's request for information, MoD had met both the spirit and the letter of the Code, adding that MoD had gone to the length of reviewing their policy on the disclosure of information relating to the subject of military assistance to Colombia. He said that this review had been prompted by recognition of public interest in the subject. Following that review MoD had judged that, while the risk to UK personnel in Colombia remained, it was a manageable risk, given the arguments in favour of greater transparency. The outcome of the policy review had been the release of substantially more information than would have been the case previously. The Permanent Secretary said that some additional information, not requested by Mr Bowcott, had been provided to him in order to give a fuller picture of UK support for Colombia.

7. The Permanent Secretary also said that in his view MoD's handling of Mr Bowcott's request had been in accordance with the Code. He noted that the response to Mr Bowcott's original request was sent within 20 working days and that it had summarised the training assistance provided between 2000 and 2003, giving the dates, purpose and overall cost of the liaison visits which had taken place. He said that the reply to Mr Bowcott had also explained that some information was being withheld and that the relevant Code exemption had been cited. He noted that when Mr Bowcott subsequently appealed against the use of the Code exemption, MoD's decision to withhold some information was reviewed in a timely manner and a response despatched in 16 working days. The Permanent Secretary said that this response provided a substantial amount of additional detail on costs, as requested by Mr Bowcott in his appeal, had explained the rationale for upholding the decision to withhold information, and had informed Mr Bowcott of his right to take his complaint to the Ombudsman. He said that the only respect in which MoD's handling of the request fell short of the requirements of the Code was that in their original reply to Mr Bowcott they did not inform him of his right to appeal (review).

8. With regard to the substance of the unreleased information sought by Mr Bowcott, the Permanent Secretary said that the information was confidential to both UK and Colombian Governments and was of a sensitivity which, if disclosed, could put at risk the safety of UK personnel based in Colombia. He explained that the rationale for withholding this other information about the military assistance provided by the UK to Colombia was that its provision could have the following consequences:

(a) It would cause damage to the relationship between the UK and Colombian Governments. The information concerned was confidential in nature and releasing it would cause a breach of trust with consequent harm to bilateral relations. Exemption 1(b) of the Code 'information whose disclosure would harm the conduct of international relations or affairs' was therefore relevant.

(b) It would cause harm to the personal security of UK personnel in Colombia. Exemption 1(a) of the Code 'information whose disclosure would harm national security or defence' was therefore relevant.

The Code of Practice on Access to Government Information

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

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

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

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

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

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

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

Assessment

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

12. From my examination of the papers MoD appear to have handled Mr Bowcott's request for information in full accordance with the requirements of the Code. They cited the relevant exemptions under which information was being withheld and reviewed and revised their disclosure policy on the subject of military training assistance to Colombia as a result of Mr Bowcott's request: that review resulted in a more substantial disclosure than would previously have been the case (although MoD did not specifically draw Mr Bowcott's attention to the policy review). However, that policy review did not prevent MoD from complying with the 20 day target time for replying to Mr Bowcott. Similarly, MoD actioned Mr Bowcott's request for a review of their decision in a timely manner, with the review resulting in additional information being disclosed to Mr Bowcott. As the Permanent Secretary himself has noted, the only respect in which MoD's handling of Mr Bowcott's request fell short of the requirements of the Code was in their failure to inform Mr Bowcott of his right to request a review of their decision not to disclose the information. In all other respects, however, I find that MoD dealt with Mr Bowcott's request for information in a proper and timely manner.

13. I turn now to the substance of the complaint. I have looked very carefully at the question of whether or not Mr Bowcott is entitled, under the Code, to the information he has requested, recognising that the Code only gives an entitlement to information and not to the documents in which the information is contained: it is on that basis that I have examined the complaint. MoD have cited Exemptions 1(a) and 1(b) as the basis on which they have withheld further information relating to UK assistance to Colombia. The purpose of Exemption 1(a) is to protect information disclosure of which would harm national security or defence and the purpose of Exemption 1(b) is to protect information which, if disclosed, would harm the conduct of international relations or affairs. The information which has been withheld by MoD relates to certain aspects of UK assistance to Colombia.

14. In considering the applicability of Exemption 1(a) and Exemption 1(b) to the withheld material, it has been necessary for me to give very careful consideration to the information contained in the documents that have been withheld. The papers I have seen reflect a range of internal considerations within MoD relating to those aspects of the assistance given to the Colombian Government, including an outline of the background as to why it was considered appropriate and making recommendations as to the form it should take. In detailing the precise nature of that assistance, specifically what, when, where and by whom, I am satisfied that disclosure of such specific information would harm national security and defence because, as MoD explained to Mr Bowcott, it would put UK personnel based in Colombia at an increased risk of terrorist action from anti-Government forces. It is consequently clear to me that Exemption 1(a) has been correctly applied to a large part of the more specific information contained within the documents withheld by MoD.

15. Turning now to Exemption 1(b), which was additionally cited by MoD, it appears to me that the subject matter of the documents, concerning the nature of the assistance to be provided and the detailed background as to why it was considered appropriate in Colombia's case, has a direct bearing on the relationship between this country and Colombia. The Cabinet Office guidance on the interpretation of the Code (paragraph 1.5, part II) gives several examples of the potential harm that might be caused by disclosure; for example, the risk that disclosure would impede negotiations, undermine frankness

and candour in diplomatic communications, and impair confidential communications and candour between governments or international bodies. Having examined the papers provided by MoD, I have no reason to doubt the Permanent Secretary's view that the release of this further information about the assistance provided to Colombia by the UK would have a detrimental effect on the relationship between the UK and Colombian Governments. I am therefore equally satisfied that the information contained within the documents correctly falls within Exemption 1(b).

16. However, that is not the end of the matter. The Code makes it clear (paragraph 10) that in those categories, such as Exemption 1, which refer to harm or prejudice, consideration must be given as to whether or not any harm arising from disclosure is outweighed by the public interest in making information available. Mr Bowcott has argued that there is a clear public interest in information about the nature of the UK Government's help to Colombia and 'the question of human rights abuses'. MoD have acknowledged the public interest in the subject of UK assistance to Colombia. Having considered the information already disclosed by MoD to Mr Bowcott it seems to me that he has already been provided with a relatively large and detailed amount of information about the training support provided by the UK Government to Colombia, including dates, costings and outline reasons for the training. Having had sight of the information contained in the withheld documentation it is my view that the public interest in its disclosure is outweighed by the harm (outlined in paragraphs 8 and 14) that would be caused by making it available. In coming to that conclusion, I have borne in mind that disclosure of the information could also damage the future relationship with Colombia and compromise any further assistance. I therefore consider that MoD have gone as far as they could reasonably have been expected to go in terms of balancing the risks in the disclosure of specific information with the desire for greater transparency. Consequently, I uphold the use of Exemption 1 for the information that remains withheld.

Conclusion

17. It is for those reasons that I am satisfied that the undisclosed information requested by Mr Bowcott was correctly withheld by MoD under Exemptions 1(a) and 1(b) of the Code. I do not, therefore, uphold the complaint.

Export Credits Guarantee Department

Case No: A.36/04

Refusal to provide information about allegations of corruption

Summary

Dr Hawley asked the Export Credit Guarantee Department (ECGD) for information, including reports, documents, memos and other correspondence, relating to allegations of corruption against BAE Systems in South Africa. ECGD refused to provide much of the information requested, citing Exemptions 2, 4, 7, 13 and 14 of the Code. Dr Hawley sought a review, but ECGD still maintained that those exemptions were appropriate. While the Ombudsman criticised ECGD for their failure to consider the harm test in relation to each relevant document to which they believed Exemption 2 applied, she nevertheless accepted that ECGD were justified in withholding the bulk of the information sought by Dr Hawley under Exemptions 2, 7(b) and 13. She welcomed ECGD's agreement to release to Dr Hawley the remainder of that information. The complaint was partially upheld.

1. Dr Hawley complained that the Export Credits Guarantee Department (ECGD) had refused to provide her with information that should have been made available to her under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated by the Ombudsman's staff but I am satisfied that no matter of significance has been overlooked.

The complaint

2. On 9 September 2003 Dr Hawley sent an e-mail to ask ECGD, under the Code, to provide information (including reports, documents, memos and correspondence) relating to corruption allegations involving BAE Systems in South Africa. ECGD declined to provide much of the information requested, citing Exemptions 2, 4, 7, 13 and 14 of the Code (relating, respectively, to internal discussion and advice; enforcement and legal proceedings; effective management and operations of the public service; third party's commercial confidences; and information given in confidence).

3. On 24 October 2003 Dr Hawley wrote to ECGD asking them to review their refusal to provide her with all of the information she had sought. Among other things, she said that ECGD had failed to give any reasons for their conclusion that Exemptions 2, 4, 7, 13 and 14 applied to the information requested. She said that the Ombudsman had criticised government departments for failing to explain why they had used particular exemptions. She also said that, given the fact that ECGD was a government department backed by taxpayers' money and, given the potential for corruption to undermine the integrity and effectiveness of a particular contract, it was clearly in the public interest to know what internal assessments ECGD made of corruption allegations in relation to contracts it had supported; what measures it had taken to monitor, assess and act upon those allegations; and what co-operation it had either sought or offered to other government departments, the South African authorities, BAE Systems and law enforcement authorities in connection with the allegations. She asked ECGD to again consider releasing, within 20 working days:

(a) the written no bribery warranty from BAE Systems in connection with the South African contract;

(b) internal informal assessments and post-issue management reports of the corruption allegations involving BAE Systems in South Africa;

(c) correspondence between ECGD and other UK government departments including law enforcement agencies, the South African Authorities and BAE Systems concerning the

corruption allegations;

(d) ECGD's written due diligence procedures, especially with regard to corruption, agents and commission payments; and

(e) the percentage level of agency commission in relation to contract price underwritten by ECGD on the contract between BAE Systems and the South African government.

4. On 17 December 2003 ECGD replied to Dr Hawley. They maintained their refusal to provide her with the information, saying that:

(a) the documents requested related to internal discussions between ECGD and other government departments; ECGD had informed Dr Hawley of the steps that they had taken in relation to the allegations, but release of the actual documents would prevent ECGD from carrying out future discussions with the necessary candour (Exemption 2);

(b) release of the documents would prejudice any future legal proceedings; ECGD might not disclose information that could undermine the effectiveness of law enforcement processes (Exemption 4);

(c) release of the documents would harm and/or undermine the effectiveness of the management of the due diligence system (Exemption 7); the disclosure of ECGD's methods in this respect would prejudice the attainment of the objectives of due diligence; and

(d) the documents were of a commercially sensitive nature and/or were given to ECGD in confidence; the information that BAE Systems had provided to them was either commercially confidential and/or was provided on the basis that it was commercially confidential and that it would continue to remain so (Exemptions 13 and 14).

5. ECGD said they felt that they had provided explanations for their reliance on particular exemptions as far as was possible, except where the provision of such an explanation would have meant having to disclose the very information they had decided could not be disclosed. They pointed out that the Code did not give a right of access to documents, only to information, and said that they also felt that in this case the reasons for non-disclosure of the information outweighed the public interest in disclosure. They told Dr Hawley that, if she remained dissatisfied, she could complain to the Ombudsman.

Departmental comments on the complaint

6. The Chief Executive of ECGD said that they had not refused to provide Dr Hawley with information except where that information was exempt. He said that ECGD appreciated the Ombudsman's general recommendation that, where practical, the provision of documents was the best way of making information available but that in this case the documents contained information over and above what they had provided to Dr Hawley and this information was exempt. The Chief Executive said that ECGD's business involved handling a range of sensitive material, including political, economic and commercial information, and that where ECGD had been unable to release information they had indicated which exemptions applied. He said that ECGD were clear in their view that Dr Hawley was not entitled, under the Code, to the requested documents, and that they were not obliged under the Code to release any documents, as the Code gave an entitlement only to information, not documents.

The Code of Practice on Access to Government Information

7. Before the Freedom of Information Act 2000 came fully into force on 1 January 2005 the Ombudsman was able to consider complaints that, in breach of the Code, bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as being within her jurisdiction, had refused to provide information which was held by them. Refusal to supply information might have been justified if the information fell within one or more of the exemptions listed in part II of the Code (see paragraphs 8 to 13). The Code gave no right of access to documents: the right, subject to exemption, was only to information. Both of the Ombudsman's predecessors, however, took the view that the release of the actual documents was often the best way of making available information which was recommended for disclosure.

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

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

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

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

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

- proceedings of Cabinet and Cabinet committees;
- internal opinion and 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.'

10. Exemption 4 was headed 'Law enforcement and legal proceedings' and the parts that appear to be relevant to the consideration of this particular case read as follows:

'(a) information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public inquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings;

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

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

(d) ...

(g) ...'

11. Exemption 7 was headed 'Effective management and operations of the public service'. Paragraph (b) read:

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

12. Exemption 13 was headed 'Third party's commercial confidences' and read:

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

13. Exemption 14 was headed 'Information given in confidence'. Paragraph (a) read:

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

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

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

Assessment

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

15. Did ECGD's handling of Dr Hawley's request comply with these provisions? Dr Hawley made her information request on 9 September 2003, and ECGD replied on 15 October 2003. While that is slightly outside the 20 working days for reply envisaged by the Code, the information requested by Dr Hawley was not straightforward and I consider it to be not unreasonable for ECGD to have taken a little longer than the target time to reply to her. However, ECGD did not respond to Dr Hawley's review request, made on 24 October 2003, until 17 December 2003. Although the Code lays down no specific timescale for carrying out a review, this clearly took longer than it should have done. That was a little disappointing, in particular since in all other

respects ECGD complied fully with the handling requirements of the Code, for which I commend them.

16. I now turn to the question of the information sought by Dr Hawley, and it may be helpful if I first describe in brief the type of information withheld by ECGD. The information comprises some 40 or so documents. It consists of various communications within ECGD, and external communications with/from other government departments, such as the Foreign and Commonwealth Office, the Ministry of Defence and the Department of Trade and Industry and other interested parties, as well as from the British High Commission in Pretoria and BAE Systems. Those communications include letters, e-mails, telexes, briefing and Parliamentary Questions. The information also includes ECGD's due diligence procedures.

17. ECGD have cited a number of exemptions from the Code as a basis for withholding the information sought by Dr Hawley. However, they have mostly not related those exemptions to specific documents or to particular pieces of information: rather they have simply applied five Code exemptions to the entirety of the information sought by Dr Hawley. With the information contained in over 40 documents at issue, it is clearly not going to be the case that all five exemptions will apply across the board, and it would have been helpful if a more selective approach could have been taken. In particular, it is not clear to me which part or parts of Exemption 4 ECGD intended should apply to the information, which causes difficulty in that some parts of that exemption require the application of a harm test and others do not. For that reason, I have decided not to consider the applicability of Exemption 4 to the disputed information.

18. I shall therefore begin by considering the applicability of Exemption 7(b). This exemption was intended to prevent the disclosure of information where such disclosure would be damaging to the work of the department concerned, and ECGD have cited this exemption in particular in the context of their due diligence procedures. They have said that these procedures were designed to minimise the occurrence of fraud in ECGD-supported business and contend that making them public would alert potential fraudsters to the kind of checks ECGD carry out, and thus prejudice the attainment of the objectives of due diligence. Dr Hawley, however, has expressed the view that, if ECGD's due diligence procedures were appropriately rigorous and companies realised what was expected of them in terms of corporate governance, that created a strong argument for saying that disclosing those procedures would be likely to help decrease fraud and even improve corporate compliance. I have seen the procedures in question and note that they contain, among other things, risk indicators and possible sources of information for detecting and/or checking such indicators in respect of particular transactions for which ECGD are being asked to provide cover: having seen those procedures I can sympathise with the argument that to make more widely available details of those checks and balances which ECGD have in place to prevent risks such as fraud occurring would be to undermine their effectiveness. I therefore accept that, in principle, Exemption 7(b) can be applied to ECGD's due diligence procedures. However, Exemption 7(b) is also subject to the harm test outlined in paragraph 8 above, and I need to consider whether the public interest in releasing the information outweighs the harm that would be caused if the information were to be released into the public domain. This is a finely balanced argument because it seems to me that these procedures are precisely the kind of internal

guidance that the Code envisaged, in paragraph 3(ii) of Part I, as being made more widely available in order to enhance public understanding. However, that paragraph also makes it clear that such guidance should not be released if release could prejudice any matters of the kind that should properly be kept confidential under Part II of the Code. On balance, I consider that releasing the information would do more harm than good. While it is clearly in the public interest for it to be known that ECGD has such procedures in place, I recognise the strength of the case that releasing the detail of the procedures would allow those who wish to circumvent them to have a much better understanding of what would be likely to set alarm bells ringing. Accordingly, I am satisfied that ECGD were entitled to withhold the details of the due diligence procedures under Exemption 7(b).

19. A small amount of information contained in the documents was provided to ECGD direct by BAE Systems. It is clear from my examination of that information that it was provided on the understanding that it was confidential and that it would not be released. All of that information relates in broad terms to BAE Systems' commercial practices. Having considered that information I am satisfied that Exemption 13 can be applied to it, and that release of it could potentially cause harm to that company's commercial position. I do not therefore recommend its release. In these circumstances I see no need to consider also the applicability of Exemption 14 to that material, although I note in passing that ECGD were again unspecific about which part of Exemption 14 they thought applied.

20. I shall now look at whether or not the remaining exemption cited by ECGD, Exemption 2, which relates to internal discussion and advice, can be applied to the information in the documents (in practice the bulk of it) that has not already been discussed in this report. That information largely comprises briefing prepared by ECGD, correspondence between ECGD and other government departments, and other internal and external communications (and external communications not covered by Exemption 4(c)) containing deliberation and discussion relating to the South Africa Defence Package. I should start by emphasising that Exemption 2 does not afford any protection to purely factual information, of which these documents contain a good deal. That being so, I consider that ECGD are unable to rely on that exemption as a ground for denying Dr Hawley any such information that might be contained in those documents, and I therefore recommended that it should be released to her. In reply, the Deputy Chief Executive of ECGD agreed.

21. The general purpose of Exemption 2 is to allow government departments the opportunity to consider matters, particularly those which are likely to prove sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. I recognise the strength of the argument that advice and recommendations of the kind contained in the documents in question depend on candour for their effectiveness, and that the value of this advice could be substantially reduced if it were thought that it would be made available to a wider audience. I am satisfied, therefore, that such advice and recommendations are covered, in principle, by Exemption 2.

22. However, that is not the end of the matter. As I explained above in relation to Exemption 7(b) (paragraph 18), the Code makes it clear that, where exemptions refer to harm or prejudice, the presumption remains that information should be disclosed, unless the harm likely to arise from disclosure would outweigh the public interest in

making the information available. I should at this point reiterate that I have seen nothing in the papers to suggest that ECGD have considered the harm test on an individual basis in relation to each of the documents to which they believed Exemption 2 applied, which warrants my criticism.

23. Against this background I have carefully considered the undisclosed material. Dr Hawley has argued that ECGD is a government department backed by taxpayers' money and that, given the potential for corruption to undermine the integrity of a particular contract, it is clearly in the public interest for the information she seeks to be placed in the public domain. ECGD have said that to release any more information to Dr Hawley than they already had would prevent them from carrying out future discussions with the necessary candour. In sensitive cases such as this, where the issues are very much live, it is particularly important for officials to be able to hold discussions with complete frankness, without fearing that their thinking will be exposed to the public gaze. That being so, I do not consider that the public interest in having access to all of the remaining non-factual information in these documents is strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. I accept, therefore, that in practice, Exemption 2 can be applied to much of the non-factual information contained in the documents and that this should be withheld. Nonetheless, there remains some information, the release of which seems to me to be unlikely to harm the quality of any future advice, and I recommend that it be made available to Dr Hawley. In making this recommendation I should draw attention to the fact that, in parallel to this investigation, I have been investigating a very similar complaint by Dr Hawley against the Foreign and Commonwealth Office (FCO). Some of the material is common to both departments and I have come across information that FCO have released but which ECGD, when they were asked for it, withheld. It seems to me that, even though it may result in a degree of duplication, ECGD should also release that information to Dr Hawley. In response, the Deputy Chief Executive of ECGD said that in the particular circumstances of this case ECGD were prepared to comply with that recommendation.

24. While I recognise that the Code requires the release of information rather than specific documents, my experience, and that of my predecessors, has shown that the simplest way in which to meet a request for information is often by releasing the actual documents concerned. In this case, I consider that it would be most helpful for Dr Hawley to have an edited version of the documents in question with any withheld information simply blocked out, and I so recommended to ECGD. In reply, the Chief Executive of ECGD agreed that most of the information would be released by means of edited versions of the relevant documents, except for information originating from FCO which would be provided in narrative format at their request.

Conclusion

25. I found that ECGD were justified in withholding much of the information sought by Dr Hawley under Exemptions 2, 7(b) and 13 of the Code. I welcome ECGD's acceptance of my recommendation to release the remainder of the information to Dr Hawley, and regard that as a satisfactory outcome to this complaint.

Foreign and Commonwealth Office

Case No: A.39/04

Refusal to provide copies of internal correspondence relating to allegations of corruption

Summary

Dr Hawley asked the Foreign and Commonwealth Office (FCO) for copies of cables sent to them by the British High Commission in South Africa referring to allegations of corruption, bribery or malpractice by BAE Systems in connection with the sale of arms to the South African Government. While FCO provided Dr Hawley with some of the information contained in the cable, they withheld most of it, citing Exemptions 1(b), 2 and 15 of the Code. They provided Dr Hawley with some further information after she sought a review, but maintained that Exemptions 1(b) and 2 applied to the remainder. The Ombudsman accepted that Exemptions 1(b) and 2 applied to the majority of the information in question, but she found that there remained a small amount of information which should be released to Dr Hawley. She welcomed FCO's agreement to do so. The complaint was partially upheld.

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

The complaint

2. On 10 September 2003 Dr Hawley asked FCO, under the Code, to provide complete copies of any cables sent by the High Commission in South Africa to London referring to allegations of corruption, bribery or malpractice by BAE Systems in connection with the sale of arms equipment to the South African government. On 7 October 2003 FCO told Dr Hawley that they hoped to reply to her by 24 October. They then wrote to her on 23 October 2003 saying that they would not be able to meet that deadline but that they were continuing to work on her information request and would reply shortly. They replied substantively on 30 October 2003, apologising for the delay which they said had been caused by the amount of research that had been required. They said that the Code did not oblige government departments to make available any pre-existing document (as distinct from information). FCO declined to provide much of the information requested by Dr Hawley, citing Exemptions 1(b), 2 and 15 of the Code (relating, respectively, to information whose disclosure would harm the conduct of international relations; internal discussion and advice; and statutory and other restrictions). FCO said that, as regards Exemptions 1(b) and 2, they were satisfied that the public interest in disclosure did not outweigh the harm that would arise from disclosure. Nevertheless, they provided her with details of their response in July 2003 to a Parliamentary Question about the allegations. FCO went on to provide a further account, incorporating information reported by the British High Commission in Pretoria which fell within the scope of Dr Hawley's request and which they believed could be released.

3. On 10 November 2003 Dr Hawley wrote to FCO asking them to review their refusal to release all of the information she had sought. She said, in relation to exemptions 1(b) and 2, that the Guidance on Interpretation of the Code said that "the public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue subject to current national debate, or improve the transparency and accountability of a particular function of government'. She contended that the response of government departments to allegations of corruption on major overseas contracts by British companies was very much the subject of current national debate, and a very real

test of their commitment to implementing the OECD Convention on Combating Bribery. She believed that there was a very strong public interest argument in FCO disclosing much greater information about the allegations of bribery that they had received in relation to BAE Systems in South Africa and what actions they had taken in response to those allegations. In relation to Exemption 1(b), Dr Hawley said that FCO did not explain what harm or risk of harm could be caused to the conduct of international relations by disclosure of the information requested. As to Exemption 15, she noted that FCO had not provided any details of the legislation that prohibited disclosure of the information she sought. She also said that allegations had been aired in the press in June 2003 which were of a substantially new and different nature to the earlier allegations. She asked if FCO had forwarded the new allegations to the National Criminal Intelligence Service. She sought a response within 20 working days.

4. On 5 December 2003 FCO wrote to Dr Hawley saying that they hoped to let her have a substantive reply by 17 December 2003. They then wrote to her on that date to say that they were unable at that time to let her have a substantive response but hoped to do so before Christmas.

5. FCO sent Dr Hawley a full reply on 18 December 2003. They said that, apart from information exempt from disclosure, the letter of 30 October 2003 had provided an accurate account of the information requested, with one exception – through an oversight, they had omitted Pretoria's reporting on events in January 2001: this they now included. They said that the Code did not require the release of documents and, because some of the information in the documents was exempt from disclosure, they had provided her with the information that was not exempt rather than the documents themselves. The documents requested by Dr Hawley contained reporting on information already in the public domain, conversations with South African Government Ministers or officials and internal advice to UK Ministers or officials. As to the assessment of the public interest in disclosure FCO said that the allegations of corruption relating to the defence procurement package, on which the British High Commission in Pretoria had reported, were already in the public domain, having been debated in the South African Parliament or investigated by the South African Parliamentary Select Committees and aired in the South African media. FCO said that they were satisfied that their response on receiving allegations against BAE Systems was correct and consistent with their obligations under the OECD Convention on Combating Bribery.

6. As to the exemptions they had cited, FCO said that they had applied Exemption 1(b) (relating to information whose disclosure would harm the conduct of international relations or affairs) as disclosure would damage future candour between the UK and South African governments. They went on to say that the UK was committed to compliance with the OECD Convention on Combating Bribery, but that they did not consider that it included an obligation to release sensitive information into the public domain, other than in the context of any investigation or prosecution: the release of such information could harm the chances of a successful prosecution and could hinder other investigations by damaging candid communication between the UK and other States. FCO said that they also considered Exemption 2 (relating to information whose disclosure would harm the frankness and candour of internal discussion) applied because internal opinion, advice and recommendations had been made:

these should, in the future, be proffered freely and a full record kept, even where the harm likely to arise from disclosure would outweigh the public interest in disclosing it. FCO said that they were no longer relying on Exemption 15 (relating to statutory and other restrictions). They also said that they had referred to the appropriate investigating agency the fresh allegations made in the Press in June 2003.

FCO's comments to the Ombudsman on the complaint

7. The Permanent Secretary of FCO outlined the background to Dr Hawley's complaint and provided copies of all the relevant papers, including the information requested by Dr Hawley. The Permanent Secretary said that BAE had signed an agreement with the South African government in December 1999 to supply Hawk and, in a joint venture with Saab of Sweden, Gripen aircraft. He said that the British High Commission in Pretoria had sent FCO in London a number of telegrams since September 1999 reporting the debate in South Africa surrounding the South African government's decision to go ahead with a substantial defence procurement package. FCO considered that some of those telegrams fell within the scope of Dr Hawley's request: those that contained factual information, details of conversations with South African Ministers or officials and internal advice to FCO. They had disclosed to Dr Hawley the information contained in those documents which was not covered by exemptions. The delay in doing so resulted from the need to consult Posts in South Africa and to assess the relevant information. The internal review had been undertaken by a senior civil servant who had not been involved in South Africa or with BAE interests there.

8. The Permanent Secretary went on to say that FCO considered that Exemption 1(b) would apply to conversations between the South African Ministers and the High Commissioner, because they took place on the understanding that their content would not be released into the public domain, and that to release the information would damage the relationship of trust between the UK and South African governments. He said that, as a general principle, the effective conduct of international relations depended on governments being able to share information freely with each other in the expectation that confidentiality would be respected. He said that, in this specific case, FCO believed that disclosure would impede confidential government discussion. As to Exemption 2, the Permanent Secretary said that the High Commission's analysis, their view of BAE's commercial performance, and their advice on any action to be taken, was proffered on the understanding that such comment came within the definition of internal opinion and internal recommendation, and that to release it would damage future openness between FCO and their network of Posts overseas. He said that FCO had sought to meet as much of Dr Hawley's request for information as they could but that, as regards the information in the telegrams to which the above exemptions applied, in each case FCO considered that the harm likely to arise from disclosure would outweigh the public interest in making the information available.

The Code of Practice on Access to Government Information

9. Since the Code came into force in April 1994 the Ombudsman has been able to consider complaints that, in breach of the Code, bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as being within her jurisdiction have refused to provide information which is held by them. Refusal to supply information might be justified if the information falls within one or more of the exemptions listed in part II of the Code (see

paragraphs 11 to 12). The Code gives no right of access to documents: the right, subject to exemption, is only to information. Both of the Ombudsman's predecessors, however, took the view that the release of the actual documents was often the best way of making available information which was recommended for disclosure.

10. In the preamble to Part II of the Code, under the heading 'Reasons for confidentiality', it states that:

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

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

11. Exemption 1 is headed 'Defence, security and international relations'. Exemption 1(b) reads:

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

12. Exemption 2, headed 'Internal discussion and advice', 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.'

Assessment

13. Before turning to the substantive issue of whether or not the information requested by Dr Hawley should be released to her, I shall look first at how FCO handled her request. Until the Freedom of Information Act 2000 comes fully into force on 1 January 2005 all requests for information should be treated as if made under the Code, irrespective of whether or not it is referred to by the applicant. Information should be provided as soon as practicable and the target for responses to simple requests for information is 20 working days from the date of receipt. While this target may be extended when significant search or collation of material is required, an explanation should be given in all cases where information cannot be provided. It is also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they are relying in making that refusal. Further, they should make the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to the Ombudsman if, after completion of the review process, they remain dissatisfied.

14. Did FCO's handling of Dr Hawley's request comply with these provisions? Dr Hawley made her information request on 10 September 2003, and FCO replied on 30 October 2003 (paragraph 2). While that is outside the 20 working days for reply envisaged by the Code, the information requested was not straightforward and FCO were required to consult Posts in South Africa before responding. In those circumstances I do not consider it unreasonable for FCO to have taken longer than 20 working days to reply. As to Dr Hawley's review request of 10 November 2003, FCO replied substantively on 18 December 2003. Again, given the nature of the information sought, I consider the time taken for the review to have been reasonable. In all other respects it seems to me that FCO have handled Dr Hawley's request for information in accordance with the requirements of the Code, for which I commend them.

15. I now turn to the substance of the complaint. I have looked very carefully at the question of whether Dr Hawley is entitled, under the Code, to the information she has sought, recognising that the Code only gives entitlement to information and not to the documents in which the information is contained. It is on that basis that I have examined the complaint.

16. While FCO have provided Dr Hawley with some of the information contained in the telegrams which she had asked to see, they have cited Exemptions 1(b) and 2 as the basis for withholding certain other information. As to Exemption 1(b), paragraph 1.5 of part II of the Cabinet Office Guidance on Interpretation of the Code states that the intention of this part of Exemption 1 is to protect information where there is a risk that its disclosure would undermine frankness and candour in diplomatic communications, and impair confidential communications and candour between governments or international bodies. Having examined the telegrams requested by Dr Hawley, I note that most are clearly marked 'restricted', indicating that the information they contain was only intended for a limited readership. In my view the content of the telegrams impinges on the relationship between the UK and South Africa and I am satisfied that, in principle, Exemption 1(b) could be said to apply to much of the withheld information.

17. I shall look now at whether or not there is information within the telegrams which falls within the scope of 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 sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. It is clear that the telegrams contain analysis and opinion from the High Commission relating both to developments with the defence package and the allegations against BAE. I recognise the strength of FCO's argument that the value of advice of this kind, reliant as it is on candour for its effectiveness, would be substantially reduced if it were thought that it might be made available to a wider audience. I am therefore of the view that the comment and advice that does not fall within Exemption 1(b) is covered, in principle, by Exemption 2.

18. However, that is not the end of the matter. The Code also makes it clear (see paragraph 10 above) that, in those categories such as Exemption 1 and 2 which refer to harm or prejudice, there is a presumption that information should be disclosed unless the harm likely to arise from such disclosure would outweigh the public interest in making the information available. In her letter of 10 November 2003 to FCO Dr Hawley set out her

reasons for believing there to be a strong public interest in releasing the information in the telegrams (paragraph 3). While I accept that there is indeed a clear public interest in information about allegations relating to possible corruption by one of the UK's major companies, FCO have equally argued that releasing any information from the telegrams beyond that which they have already disclosed would affect their ability to conduct international relations effectively and would also damage their ability to discuss and assess situations such as this with the necessary degree of candour and openness. Having carefully considered the telegrams in relation to the harm test I believe that, on balance, much of the information sought by Dr Hawley was correctly withheld under Exemptions 1 and 2 of the Code. Nevertheless, I consider that there is a small amount of information in the documents that can be released to her without causing harm of the kind envisaged by those exemptions. I therefore recommended to the Permanent Secretary of FCO that this information be made available to Dr Hawley. In response, the Permanent Secretary said that FCO were happy to comply with my recommendation.

19. How then should that information be provided to Dr Hawley? I note from the papers that FCO have already provided her with some extracts from the telegrams in narrative form in their letters of 30 October 2003 and 18 December 2003. Since the Code gives entitlement to information and not to documents, I see no reason why the information now to be released should not be provided by the same means or in whatever other format seems most appropriate. In reply, the Permanent Secretary agreed that FCO would release the information to Dr Hawley in the form of a letter.

Conclusion

20. I found that FCO were justified in withholding much of the information sought by Dr Hawley under Exemptions 1 and 2 of the Code. I welcome FCO's acceptance of my recommendation to release the remainder of the information to Dr Hawley, and regard that as a satisfactory outcome to this complaint.

Department of Health

Case No: A.31/04

Refusal to provide information about the establishment of NHS Foundation Trust Hospitals

Summary

Ms F asked the Department of Health for information about the development of policy on Foundation Trusts and for details of the assessment of the first wave of preliminary and preparatory stage applications for Foundation Trust status. The Department of Health declined to provide her with the information sought, initially citing Exemptions 2 and 10 of the Code as the basis for withholding the information. Following enquiries from the Ombudsman's staff, they also cited Exemption 9 as being relevant to Ms F's request for information about the development of policy. The Ombudsman found that the Department of Health were entitled to withhold the information requested by Ms F under Exemptions 9 and 10. She was, however, highly critical of their handling of Ms F's information request and of their failure to cite Exemption 9 at the outset, which had left her without the opportunity to make a more focussed request for information. The Ombudsman also commented that part of the problem in identifying and locating the information sought by Ms F appeared to be due to poor file management, and she welcomed the Department of Health's agreement to take action to ensure that all relevant information was stored in a structured format as soon as possible.

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

Background to the complaint: NHS Foundation Trusts

2. In July 2000 the Department published 'The NHS Plan', which outlined the way in which the NHS would develop over the following ten years. Chapter 6 of that document discussed the development of new systems, including the idea of greater autonomy for some hospitals. In January 2002 the then Secretary of State for Health said that the form of devolution they were considering was the establishment of NHS Foundation Trusts. In December 2002 the Department published their policy framework document *A Guide to NHS Foundation Trusts,* which set out the policy and timetable for the establishment of Foundation Trusts, and invited three-star NHS acute and specialist Trusts to submit preliminary applications on or before 28 February 2003. The Trusts were required to hold a three-star rating on the point of application and to retain this status throughout the application process. Those NHS Trusts that met the assessment criteria were then invited to submit preparatory phase applications to the Department by 14 December 2003. The Secretary of State for Health (the Secretary of State) then considered whether or not each of the applications was ready to go forward for consideration by the Independent Regulator of NHS Foundation Trusts (the Regulator). On 16 January 2004 the Secretary of State announced that he would support 24 NHS Trusts in their bid to become the first wave of NHS Foundation Trusts. On 31 March 2004 the Regulator announced that ten NHS Trusts would be established as the first NHS Foundation Trusts, from 1 April 2004. The Regulator agreed to a request by two of the NHS Trusts to have their applications deferred until they could undertake further work in support of their application, while the remaining NHS Trusts which had applied would be considered for authorisation from 1 July 2004, subject to the assessment criteria

being met. On 1 July 2004 the Regulator announced that ten further NHS Trusts would be established as Foundation Trusts. Two of the applications to the Regulator were deferred, while one was refused.

The complaint

3. On 6 August 2003 Ms F wrote to the Secretary of State and asked for information about the development of the policy on Foundation Trusts and for details of the assessment of the first wave of preliminary and preparatory stage applications. She asked for the following information to be made available to her under the terms of the Code: -

(a) Copies of documents, facts and analysis used by the Department to decide that the Government's policy on Foundation Trusts was appropriate for NHS acute Trusts, particularly its effect on the quality of primary care and acute care and incidence of health inequalities.

(b) A copy of the risk assessment conducted by the Department to address 'the risk of introducing greater autonomy and higher powered incentives into health systems'.

(c) Copies of the Department's assessments of the preliminary and preparatory stage applications (both successful and unsuccessful) submitted by individual London Trusts for Foundation Trust status.

(d) Copies of the documents used to support the above applications.

4. The Head of the NHS Foundation Trusts Unit (the Unit Head) replied on 8 September 2003. In response to (a) she enclosed a copy of Volume II of the Health Select Committee's Report into NHS Foundation Trusts, which she said would provide Ms F with a comprehensive analysis of the policy on NHS Foundation Trusts. In response to (b) she said that there was no formal document that set out the risks surrounding the policy. She said, however, that the potential risks and benefits of each element of the policy, and the impact of one area on another, was a continual consideration throughout the development of the policy. As regards (c) the Unit Head said that the preliminary application formed part of the process of continuous assessment of proposals for Foundation Trust status and that the Department would not receive the second stage applications (the preparatory phase) until December 2003. However, she said that the Department would make available a summary of the assessment of each application shortly after the Secretary of State decided whether or not to support applicants in submitting a formal application to the Regulator. She said that, for first wave applicants, this was likely to be in early 2004. She said that this approach was consistent with Exemption 10 of the Code. Finally, in response to (d), the Unit Head said that this information was already available (with regard to the preliminary applications) or would soon become available (when the preparatory applications were submitted) and that Ms F could obtain copies of the relevant documents from the NHS Trusts in question.

5. Ms F wrote to the Unit Head on 21 October 2003 and asked her to reconsider her decision to refuse to respond fully to her request for information. She said that she was not satisfied with the response to (a) and said that the implication of that response was that there were:

- no minuted meetings within the Department, or between the Department and its advisory organisations (such as the New Economics Foundation), to discuss this policy and its ramifications for the NHS;

- no moduling of how the transition to Foundation Trust status would affect a Trust's services or those within the same or adjacent health economies, including primary care;

- no analysis of how the introduction of borrowing freedoms for Foundation Trusts would impact on the availability of capital for the rest of the NHS;

- no analysis of how the retention of capital proceeds and income surpluses would affect non-Foundation Trusts and existing health inequalities; and

- no feasibility study on the availability of individuals to become members or governors nor estimation of the costs of supporting and training them.

Ms F said that this level of detail was not covered in the Health Select Committee's report into Foundation Trusts and she repeated her original request for information, saying that she would be surprised if the sort of analysis she was seeking had not been undertaken.

6. Ms F noted that the information she had requested at (b) was not available but asked whether this omission would now be rectified. As regards (c), Ms F clarified the type of information she was seeking and queried the use of Exemption 10. She argued that, by refusing to release the grounds for the decisions made on the applications until after they were made, the Government was locking the public interest out of the Foundation Trust process.

7. In her reply of 18 November 2003 the Unit Head said that the detailed information Ms F was seeking at (a) formed part of the process by which a policy had been reached and was therefore exempt from disclosure under Exemption 2 of the Code. She said that the Department had, in any event, already provided her with an explanation of the basis of the policy. With regard to (b), the Unit Head repeated and expanded on her previous explanation of the way the Department had assessed the potential risks of each element of the Foundation Trust policy. In response to Ms F's comments about (c), the Unit Head said that any internal discussion about applications or information about meetings held with applicants formed part of the internal advice and opinion given to Ministers to enable them to make a decision about the preliminary applications, and could therefore be withheld under Exemption 2 of the Code. The Unit Head maintained her use of Exemption 10 to refuse to disclose a summary of the assessment of each application until shortly after the Secretary of State made his decision. She pointed out that the Secretary of State did not make the final decision on an application: that was a matter for the Regulator.

Department's comments on the complaint

8. In providing his comments on the complaint, the Chief Executive of the Department said that their position remained unchanged with regard to the disclosure of information relating to the process by which the policy on Foundation Trusts was reached. He said that they had declined to disclose the detailed information requested by Ms F under Exemption 2 of the Code, which allows for material to be withheld where disclosure would harm the frankness and candour of internal discussion. He said that he was satisfied that the information already provided by the Department to Ms F gave a full explanation of the basis of the policy. The Chief Executive said that the Department had also declined to disclose information on applicants under Exemption 10 of the Code because they were due to publish summaries of their assessment of each application shortly.

9. The Chief Executive said that he had arranged for the documents relevant to the complaint to be forwarded to my Office. However, he said that papers on the development of the policy on Foundation Trusts were not enclosed because development of the policy was an iterative process that had taken place over the course of two years, in the context of wider policy on NHS reform. He said that they did not, therefore, think that it was possible to identify a paper, or set of papers, which gave a coherent overview of the development of policy. Similarly, as the original response to Ms F's request explained, he said that there was no formal document that set out the risks surrounding the policy.

The Code

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

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

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

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

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

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

12. Exemption 9 is headed 'Voluminous or vexatious requests' and reads:

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

13. Exemption 10 is headed 'Publication and Prematurity in relation to a Planned or Potential Announcement or 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).'

Investigation

14. In his response to the complaint, the Chief Executive said that the Department did not think that it was possible to identify a paper, or set of papers, which gave a coherent overview of the development of policy on Foundation Trusts. In order to assess whether or not a department is justified in refusing to release the information sought by an applicant I need to see the information to which the exemptions cited have been applied. A member of my staff, therefore, asked the Department to clarify their statement with regard to the information they possessed, in particular that relating to the effect that the creation of a NHS Foundation Trust might have on the quality of primary and acute care and the incidence of health inequalities. For example, had the Department conducted any studies or analyses of the impact of Foundation Trusts on patient care?

15. In response, the Department said that they did not hold any information arising from formal analyses or studies undertaken on the impact of Foundation Trusts on patient care. They said that volume II of the Health Select Committee's Report into Foundation Trusts, which was provided to Ms F, included a comprehensive analysis and explanation of the development of the policy. However, they said that there were several key points that they would like to make with regard to Ms F's request for information in this area and, for the sake of completeness, I set these out below:

- The policy on Foundation Trusts takes forward the Government's proposals to give greater operational freedom to NHS organisations as set out in 'The NHS Plan' and 'Delivering the NHS Plan'. The Government believes that the current uniform system of NHS provision has not provided equality of health outcomes, trying to have a uniform health service for every community – owned and controlled by Ministers – makes it more difficult to tailor local health services to address health inequalities. There is experience across public services that different ways of providing services will better meet people's specific needs rather than a uniform service;

- National standards and the introduction of a nationally set tariff for care provided in the NHS means that hospitals will not be able to compete on price. The freedoms being made available to Foundation Trusts are therefore about encouraging innovation and the best use of assets to improve NHS care. Foundation Trusts also have a duty in law to co-operate with other local partners using their freedoms in ways that fit with NHS principles and are consistent with the needs of other local NHS organisations;

- The Government wish to see sustainable improvement in the delivery of NHS services leading to more services being provided outside of hospital settings. This can be more cost-effective, more convenient for patients and contribute to shorter waiting times for diagnosis and treatment. However, it is also important to continue to modernise and increase capacity in secondary care services. With the additional investment the Government is putting into the NHS, the expectation is to see improvements in both primary and secondary care, not one at the expense of the other.

16. Following receipt of the Department's response, a member of my staff highlighted the type of information Ms F was seeking, as set out in her letter of 21 October 2003 (paragraph 5), and asked the Department to clarify whether or not they possessed information of that kind. While the Department had said that they had not

undertaken any formal analyses or studies on the impact of Foundation Trusts on patient care, he also asked them to clarify if any informal studies had been undertaken. Moreover, he highlighted the Department's letter of 18 November 2003 (paragraph 7), in which they had said that any information about individual discussions with applicants, where it had occurred, formed part of the internal advice and opinion given to Ministers and was therefore exempt from disclosure under Exemption 2 of the Code; he asked the Department to clarify whether or not any discussions had been held with regard to applications from London Trusts.

17. In reply, the Department said that the detailed information behind the development of the Foundation Trust policy framework spanned a prolonged period from December 2001, through December 2002 (when the Department published *A Guide to NHS Foundation Trusts*) and beyond (i.e. when the Health and Social Care Act 2003 came into force), and they provided a chronology summarising the key stages of policy development. They said that, throughout this process, consultation with Chief Executives from applicant NHS Trusts had been one of the most important drivers in shaping policy development, with the Department hosting a number of key events from prospective wave 1 applicants. They said that each event had formed part of a series that began in December 2001, where they explored thinking on policy development, through to events whose purpose it was to support wave 1 applicants through the entirety of the Department's application process. The Department also provided action notes from four key meetings that had been held with wave 1 Trusts as examples of the type of issues that had been discussed.

18. The Department confirmed that, throughout the policy development stage, they had not undertaken any substantial formal or informal analyses or studies on the impact of Foundation Trusts on patient care, and that they did not therefore possess the type of information that Ms F had highlighted in her letter of 21 October 2003. They said that the process of discussing and developing the policy involved an extraordinarily large amount of brainstorming, paperwork and dialogue between officials (including secondees from the private sector), and also between officials and Ministers. They said that progress in policy development had been largely dependent on the Department's knowledge base and by seeking expert advice, rather than through undertaking or commissioning detailed analyses or modelling. Throughout the policy development phase, they said that there had been a very large number of meetings within the Department and between the Department and external organisations. Some of these were minuted for the purpose of recording discussions; a number were not. They said that the task of identifying all minuted meetings within the Department or between the Department and their advisory organisations to discuss the policy and its ramifications for the NHS, would be a task of inordinate proportion. The same would apply to details of discussions held between the Department and applicant Trusts. They said that communication with applicants had been through a variety of means, such as Trust site visits, phone conversations and e-mail exchange, all of which formed the basis of internal advice and opinion given to Ministers. The Department said that to attempt to bring together every aspect of the policy's development into a coherent package would be a substantial project in itself, involving several months of intensive work for a team of about five people. They said that, at one point, the Foundation Trust unit comprised around 50 people working 12 – 15 hours per day. During that period, in any one day, the Unit Head and other Branch Heads would typically receive in the range of 100 e-mails. Although all their substantive

papers were filed electronically, a lot of the contribution work was contained within e-mail systems. They said that there were now ten members of staff in the Foundation Trust unit and sorting through the papers, including e-mail accounts, would be a mammoth task. The Department concluded, therefore, that they would not be able to provide the level of information requested by Ms F in accordance with Exemption 9 of the Code. They offered to meet my staff to take them through their files to confirm the scale of the task.

19. A member of my staff therefore visited the Foundation Trust unit at Quarry House in Leeds on 15 September 2004. He met several members of the unit and saw, at first hand, the amount of information held there. He established that all of the information that remained from the main period of policy development, which was between March and December 2002, was held in electronic form, either on the Department's database or within the inboxes of individuals' e-mail accounts. For example, on the day of the visit, the Unit Head had 23,459 e-mails in her inbox, all of which related to Foundation Trusts. 4,541 of those e-mails were received in 2002 and, on a day picked at random, she received 38 e-mails. The Foundation Trust unit said that all relevant information held in individuals' inboxes would eventually be put onto the Department's database. On the day of the visit that database contained 1,471 files and 41,447 documents related to Foundation Trusts. My member of staff saw no evidence that there were any specific files relating to the development of policy and, while the database included a fairly detailed 'search' facility, it would have taken a great deal of time and effort, even for an experienced member of the unit's staff, to have identified information that might have been of relevance to Ms F's request. Moreover, the information contained on the database was clearly not complete: a large amount of information was still retained on individuals' e-mail accounts, a fact which, in itself, would have made the task of responding to Ms F's request much more difficult.

Assessment

20. Before considering the substantive matter of the information sought by Ms F, I shall look first at how the Department handled her request. Until the Freedom of Information Act 2000 comes fully into force on 1 January 2005 all requests for information should be treated as if made under the Code, irrespective of whether or not it is referred to by the applicant. Information should be provided as soon as practicable and the target for responses to simple requests for information is 20 working days from the date of receipt. While this target may be extended when significant search or collation of material is required, an explanation should be given in all cases where information cannot be provided. It is also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they are relying in making that refusal. Moreover, they should make the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to me if, after the completion of the review process, they remain dissatisfied.

21. The Department's response to Ms F's request was poor. Although they replied to both of her letters within the 20 working days recommended under the Code, they failed to advise her of her right to either seek an internal review of their decision or to make a complaint to me. The aim of the internal review is to ensure that the applicant has been fairly treated under the provisions of the Code and that any exemptions have been properly applied. The Cabinet Office guidance on the Code (part 1, paragraph 90) also says that it is good practice to allow for such a

review to be conducted by someone not involved in the initial decision. Had such a review been undertaken in this case, and by someone not involved in the initial decision-making process, it seems likely to me that Ms F would have received a better standard of service.

22. I am also concerned by the way in which the Department responded to the first part of Ms F's request, which was for information that led the Department to decide that the Government's policy on Foundation Trusts was appropriate for NHS Acute Trusts. The Department believed that they had given Ms F a full explanation of the basis of the Foundation Trust policy. However, Ms F made it clear that she wanted more information than was detailed in the Health Select Committee's report and she even specified the type of information she expected to be made available (paragraph 5). However, it was not until my staff sought to clarify the situation with regard to this part of Ms F's request that the Department explained the problems they faced in identifying and collating the information requested and it was only then that they cited Exemption 9 of the Code. Ms F, in subsequent correspondence with my staff, has said that she was very concerned by the Department's late use of this exemption and said that, had the Department cited Exemption 9 at the time that she made her request, she might have decided either not to pursue the request or to pursue it in a different way. She believes that the Department should have cited all of the exemptions that they thought were relevant during the exchanges between herself and the Department. I totally agree. I accept that this part of Ms F's request was broad. However, if the Department genuinely had problems meeting her request for information, they should have cited Exemption 9 of the Code at the earliest possible stage. Instead, the Department adopted a broad brush approach and applied Exemption 2 to all of the information related to the development of the Foundation Trust policy even though they could not have been sure what information they were applying it to.

23. Had the Department cited Exemption 9 of the Code in the first instance, they could then have helped Ms F to focus her request more narrowly. The Cabinet Office guidance on interpretation of Exemption 9 says that 'where a request is framed in very general terms because an applicant is unsure of what information is held and where, departments should attempt to help the applicant to focus their request more narrowly on the specific information which they require' (part II, paragraph 9.5). Ms F would then have had the opportunity to reconsider her position and decide whether to accept the Department's decision, to pursue her complaint with me or to narrow her request. I am highly critical of the way the Department have handled this matter and, in the light of my above comments, I recommended to the Chief Executive that he remind his staff of the need to treat every request for information as having been made under the Code (and, from 1 January 2005, under the Freedom of Information Act 2000) and to ensure that, in future, his Department complies with the relevant requirements for dealing with those requests, particularly the need to cite any relevant exemptions at the first possible opportunity and to offer an internal review of any decision to refuse information.

24. In reply, the Chief Executive said that, in applying Exemption 2 to Ms F's request for information related to the development of Foundation Trust policy, the Department had been acting in good faith, knowing that the policy had been formulated under close direction by Ministers and that any information likely to fall within the scope of the request would be covered by Exemption 2. He recognised, however, that this was a judgment based on overall

knowledge of how the policy was formulated, rather than an assessment of the application of Exemption 2 to the full range of possibly relevant information held in the Foundation Trust unit. The Chief Executive said that it was only after my staff had become involved, which involved the Department demonstrating the difficulties in identifying, locating and collating the information requested, that the question of citing Exemption 9 had arisen. He acknowledged that, in retrospect, it would have been more appropriate if Exemption 9 had been applied at the first stage of Ms F's enquiry, giving her the opportunity to pursue her request in a different way if she had wished. He said that, in all likelihood, any further request would still have been covered by Exemption 2; but a more considered judgment could have been made. He accepted that the handling of this case carried lessons for the Department in dealing with requests for information under the Code and the Freedom of Information Act. He said that he would issue guidance in line with my recommendation, including the need to offer an internal review of any decision to refuse information.

25. I shall now turn to look at the information sought by Ms F. Her request was divided into four distinct parts (paragraph 3). The first part of that request was for copies of documents, facts and analysis used by the Department to decide that the Government's policy on Foundation Trusts was appropriate for NHS Acute Trusts, particularly its effect on the quality of primary care and acute care and incidence of health inequalities. I should perhaps point out at this stage that the Code gives no right of access to documents: the right, subject to exemption, is only to information. I have already criticised the Department for the way in which they responded to this part of Ms F's complaint (paragraph 23). Having initially cited Exemption 2 of the Code, they belatedly cited Exemption 9. While Exemption 9 relates to voluminous and vexatious requests, I do not believe that it was ever the intention of the Department to classify Ms F's request as being vexatious. As I understand it, their reasons for refusing her request were related not only to the amount of information sought in her application, but also to difficulties in identifying, locating and collating the information requested. In each case, the test is whether these factors would mean that meeting a request for access to information would require an unreasonable diversion of resources or otherwise undermine the work of the department.

26. I have already outlined the amount of information held by the Foundation Trust unit (paragraph 19) and the Department have estimated that to attempt to bring together every aspect of the policy's development into a coherent package would involve several months of intensive work for a team of about five people. The volume of information is certainly considerable and I accept that the Department would have considerable difficulties not only in identifying and locating the information requested by Ms F but also in then deciding whether or not it can and should be released. The Foundation Trust unit is not a large unit within the Department and diverting staff away from their regular roles would have a substantial impact on the unit's work. In the light of all of these factors, together with the broad nature of Ms F's request, I consider that it would be unreasonable to expect the Department to divert resources to identifying and collating the information sought. To that extent, I consider the Department's application of Exemption 9 to have been correct. Whether or not there is information within the Foundation Trust unit's files that can and should be released is a point that can only realistically be determined if Ms F narrows her request to such an extent that the Department could no longer reasonably rely on Exemption 9 of the Code. It would then be necessary to

consider any material in respect of which other Code exemptions, including Exemption 2, might apply.

27. Part of the problem in identifying and locating the information sought by Ms F appears to have been due to poor file management. There is clearly much information related to Foundation Trusts that is held on the e-mail accounts of individuals that should be on the Department's database, where it would be accessible to the whole Department and not just to those who have access to the relevant e-mail accounts. It is not my role to look at how departments store information. However, the way in which information on Foundation Trusts is presently being held has had, and will continue to have, an impact on how the Department is able to respond to reasonable requests for information: there is also a strong likelihood that, when the individual rights of access take affect under the Freedom of Information Act, this is a subject that will attract such requests. With that in mind, I recommended to the Chief Executive of the Department that steps be taken within the Foundation Trust unit to ensure that all relevant information is stored in a structured format as soon as possible. In response, the Chief Executive acknowledged the importance of record keeping in this area. He accepted my recommendation and said that he would ensure that appropriate action was taken.

28. The second part of Ms F's request was for a copy of the risk assessment conducted by the Department to address 'the risk of introducing greater autonomy and higher powered incentives into health systems'. In response, the Department said that there was no formal document that set out the risks surrounding the policy on Foundation Trusts. Following my enquiries, I am satisfied that this is the case. As the Code does not require departments to acquire or create information they do not possess and, as the Department do not hold the specific information Ms F is seeking, their response to this part of her request was entirely satisfactory.

29. The third part of Ms F's request was for copies of the Department's assessments of those applications submitted by NHS Trusts in London. The Department's response was to say that they would make available a summary of the assessment of each application shortly after the Secretary of State decided whether or not to support applicants in submitting a formal application to the Regulator. They said that their approach to this part of Ms F's request was consistent with Exemption 10 of the Code. When Ms F asked the Department to review their decision, they said that any internal discussion about applications or information about meetings held with applicants formed part of the internal advice and opinion given to Ministers to enable them to make a decision about the preliminary applications, and could therefore be withheld under Exemption 2 of the Code. However, the Department also upheld their decision to cite Exemption 10 to withhold the summaries of the assessments.

30. It appears to me that Ms F's complaint with regard to this part of her request is not so much that the Department have refused to provide her with the original assessments made by the Department (under Exemption 2 of the Code) but that they refused to provide summaries of those assessments (under Exemption 10 of the Code) until after the Secretary of State had made his decision on the first wave of applications. The Cabinet Office guidance on the interpretation of Exemption 10 says that information which is soon to be published need not be provided (paragraph 10.4, part II). It continues by saying that the applicant should be informed of the position, given an indication of the expected publication

date and also evidence that the release of the information before that date would not be in the public interest. Ms F argued that refusing to reveal the grounds for the Secretary of State's decisions until after they were made locked the public out of the whole decision-making process. She was also concerned that the Department had refused to consult with relevant groups and bodies before the decisions were made. However, I do not believe that to be a debate on which I should comment: my role is purely to consider whether or not the Department were justified, under the terms of the Code, in refusing to release the summary assessments before the Secretary of State made his decision. I believe they were. Exemption 10 supports paragraph 3(i) in part I of the Code, which not only says that departments are required to publish the facts and analysis of the facts which the Government considers relevant and important in framing major policy proposals and decisions, but that such information will normally be made available when policies and decisions are announced (my emphasis). I am satisfied, therefore, that the Department were justified in refusing to release to Ms F the summary assessments of the first wave of Foundation Trust applicants before 16 January 2004, when the Secretary of State announced his decision on those applications.

31. I note here that the summaries were not in fact made publicly available until 18 August 2004. The Department have said that the delay in publishing that information was due to their desire to publish all the assessments together and the need to consult with the individual NHS trusts about the information that was being disclosed. While that may be so I still find it disappointing that it took seven months to release the summary assessments into the public domain.

32. Finally, the fourth part of Ms F's request for information was for copies of the documents used to support the wave 1 applications. In response, the Department said that this information was already publicly available and that Ms F could obtain copies of the relevant documents from the NHS Trusts in question. The Code does not require departments to provide information that is already in the public domain and I understand that all of the wave 1 NHS Trusts that applied for Foundation Trust status made their applications publicly available either on their respective websites or upon request. The Department referred Ms F to the source of the information and, in so doing, I am satisfied that they met their obligations under the Code with regard to this part of her request.

Conclusion

33. While I have upheld the Department's decision not to provide the information requested by Ms F, I have been critical of several aspects of the way in which they handled her request. I have also criticised the Department for the way in which some of the records relating to the development of policy on Foundation Trusts were being stored. The Chief Executive has accepted my recommendations and I welcome his assurance that the appropriate action will be taken.

Home Office

Case No: A.32/04

Refusal to release copies of documents relating to Myra Hindley

Summary

Mr Evans asked the Home Office for copies of the contents of two files relating to Myra Hindley. The Home Office said that one of the files had been routinely destroyed and declined to provide the documents on the second file, saying that either Exemptions 2 or 4(d) of the Code applied to all of the information it contained. The Ombudsman criticised the Home Office for their failure to specify which information they considered to be covered by which exemption. She nevertheless accepted that Exemption 4(d) applied to the information relating to court proceedings and the legal advice on the file. She also accepted that Exemption 2 applied in principle to the remaining non-factual information, but she considered that the public interest would best be served by the disclosure of some of that information. She welcomed the Home Office's agreement to provide Mr Evans with that and other, factual, information from the file. The Ombudsman regarded that as a satisfactory outcome to the complaint.

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

Background to the Code of Practice on Access to Government Information

2. Since the Code came into force in 1994 the Ombudsman has been able to consider complaints that, in breach of its provisions, government departments and other bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as being within the Ombudsman's jurisdiction have refused to provide information which is held by them. The Home Office is so listed. Refusal to supply information might be justified if it falls within one or more of the exemptions listed in Part II of the Code (see paragraphs 3 – 5).

Exemptions

3. 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.'

4. Exemption 4, headed 'Law enforcement and legal proceedings', reads:

'(a) ...

(b) ...

(c) ...

(d) Information covered by legal professional privilege.

(e) ...

(f) ...

(g) ...'

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

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

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

The complaint

6. On 2 April 2003 Mr Evans wrote to the Home Office asking, under the Code, for complete copies of all the documents contained in two files, file IPN 87 9/1/6 (PO 1835/87) entitled 'MP re play about Myra Hindley' and file LAB 97 47/110/29 entitled 'Hindley-Myra'. He asked for a reply within 20 working days, as required by the Code. The Home Office acknowledged Mr Evans' letter by e-mail on 8 April 2003.

7. On 15 May 2003 the Home Office replied to Mr Evans, saying that it would not be possible to comply with his request. They told him that file IPN 87 9/1/6 had been routinely destroyed several years ago in accordance with their record management policy. They further said that file LAB 97 47/110/29 was exempt from release, citing Exemption 2 of the Code relating to internal discussion and advice and Exemption 4 (d) relating to information covered by legal professional privilege. The Home Office went on to say that, if Mr Evans was not satisfied with their decision, he could ask for an independent internal review and that, if he remained dissatisfied, he could complain to the Parliamentary Ombudsman.

8. On 5 August 2003 Mr Evans asked the Home Office to reconsider their refusal to provide file LAB 97 47/110/29. He said that he believed that, in this case, the public interest outweighed the benefits of keeping this information secret; and that, given the nature of Myra Hindley's crimes, he believed that the public ought to know more about how she was dealt with by officialdom, for instance, by the prison system. He also questioned whether the files continued to retain their sensitivity given that Myra Hindley had now died. The Home Office acknowledged his letter by e-mail on 15 August 2003 and e-mailed him again on 20 October 2003 to apologise for the delay in replying to him.

9. On 24 October 2003 the Home Office replied substantively to Mr Evans, saying that they had considered carefully whether or not the passage of time had reduced the grounds for exemption and whether the public interest would outweigh any argument for non-disclosure. They concluded that there were no grounds for setting aside Exemptions 2 and 4. They said that the exemptions had been properly applied and remained valid because disclosure of the information would harm the frankness and candour of internal discussion and because many of the papers were covered by legal professional privilege. The Home Office again expressed regret at the delay in responding to Mr Evans and advised him that he could complain to the Ombudsman, via a Member of Parliament, if he remained dissatisfied.

Departmental comments on the complaint to the Ombudsman

10. The Permanent Secretary of the Home Office said that, in maintaining the refusal to give access to the file requested by Mr Evans, the Home Office had taken account of the public interest and the passage of time and its possible effect on sensitivities surrounding the information in that file. The Permanent Secretary went on to say that the Home Office still held the view that to give access to the information requested would have an adverse effect on the established conventions protecting the confidentiality of the internal decision-making process. He said, in addition, that the Home Office believed that where they had taken legal advice, that was covered by the exemption relating to legal professional privilege. Accordingly they still considered that Exemptions 2 and 4(d) applied.

Investigation

11. During the course of this investigation the Ombudsman's staff have examined in full file LAB 97/47/110/29 'Hindley-Myra'. Its contents include briefing and background papers; legal advice, comment and discussion; correspondence; and internal memoranda and minutes.

Assessment

12. Before considering the substantive matter of whether or not the information requested by Mr Evans should be released, I shall look at how the Home Office handled his request. In that context, I draw attention to paragraph 5 of Part I of the Code, which is headed 'Responses to requests for information' and goes on to say that, 'The target for response to simple requests for information is 20 working days from the date of receipt. This target may need to be extended when significant search or collation of material is required'.

13. In the present case, Mr Evans made his initial request for information on 2 April 2003 and the Home Office replied to him on 15 May 2003. While this was longer than 20 working days, given the detailed consideration that was needed of the file's contents, which were extensive, I do not consider the delay to have been unreasonable. However, the Home Office did not send Mr Evans a full reply to his review request of 5 August 2003 until 24 October 2003. Although the Code does not specify a target time for responding to a request for an internal review it is clearly not expected to take in excess of 11 weeks as it did in this instance. That was disappointing, particularly since in all other respects the Home Office have dealt with Mr Evans' information request in accordance with the Code, for which I commend them.

14. I now turn to the substantive issue of whether or not the information sought by Mr Evans should be disclosed to him, and this may be an appropriate place to issue the reminder that, subject to any applicable exemptions, the Code only gives a right of access to information, not to documents. Both the present Ombudsman and her predecessors have, however, taken the view that the release of the actual documents is often the best way of making available information that is recommended for disclosure.

15. The Home Office have said that the entire contents of the relevant file should be withheld and have cited both Exemptions 2 and 4(d) in justification. However, they have not specified which information in the file they consider to be covered by which exemption: this warrants my criticism. I turn first to the applicability, or otherwise of Exemption 4(d). That exemption is intended to protect from disclosure information covered by legal professional privilege, particularly where that disclosure would impede the ability of government legal advisers to communicate fully and frankly with their client. There are two types

of legal professional privilege: litigation privilege and legal advice privilege. Litigation privilege arises only after litigation or other adversarial proceedings are commenced or contemplated and protects all documents produced for the sole or dominant purpose of the litigation. As far as legal advice privilege is concerned, the Cabinet Office's Guidance on Interpretation of the Code states that Exemption 4(d) is intended to protect advice given by solicitors, barristers and legal advisers generally, whether they are within the department, from the Treasury Solicitor's Department, another department, or from external practices or firms. It also says that legal advice should only be disclosed with the express agreement of the legal adviser concerned. Exemption 4(d) is an absolute exemption and is not subject to the harm test outlined in paragraph 5 above.

16. There are certain communications on the file which relate to court proceedings in Myra Hindley's case which would fall within the definition of litigation privilege and the Home Office are able to rely on Exemption 4(d) as a basis for withholding the information contained in them. It is also clear from the documents on the file that at various stages the Home Office have sought legal advice on matters unrelated to litigation from a variety of different sources. Where the information in those documents comprises legal advice and nothing more, then I consider that information to be protected by legal professional privilege and Exemption 4(d), therefore, also applies. It is, in my view, a different matter where those documents refer to any other assistance that a lawyer might provide to a client such as presentational or policy advice. That kind of information cannot be said to fall within the terms of Exemption 4(d), although there may of course be other exemptions that it might be appropriate to apply to it.

17. I now turn to the question of whether or not the other exemption cited (Exemption 2, which relates to internal discussion and advice) can be applied to the remaining information in those documents and in the other documents on the file, which comprise internal and external correspondence as well as internal minutes, briefing and memoranda. I must emphasise at this point that Exemption 2 does not afford any protection to factual information. That being so, I consider that the Home Office are unable to rely on that exemption as a ground for denying Mr Evans any such information that might be contained in those documents and I therefore recommend that it should be released to him. In reply, the Permanent Secretary agreed to the release of the relevant factual information.

18. The purpose of Exemption 2 is to allow government departments the opportunity to discuss matters, particularly those which are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. I recognise the strength of the argument that advice and recommendations of the kind contained in the documents on the file, in particular internal minutes and briefing for Ministers, depend on candour for their effectiveness, and that the value of this advice could be substantially reduced if it were thought that it would be made available to a wider audience. I am satisfied, therefore, that such advice and recommendations are covered, in principle, by Exemption 2.

19. However, that is not the end of the matter. The Code also makes it clear (see paragraph 5 above) that, in those categories such as Exemption 2 which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in

making the information available. I have seen nothing in the papers to suggest that the Home Office have considered the harm test on an individual basis in relation to each of the documents on the file to which they considered Exemption 2 applied; rather more that they simply adopted a blanket approach to the entire file.

20. Against this background I have considered the undisclosed material very carefully. I should note first of all that the most recent documents on the file are now over five years old. There is a general presumption that the sensitivity of information will decrease over the passage of time, although each case must be judged on its individual merits. Also, Ms Hindley has now passed away. These facts would seem to strengthen the case for disclosure. There is also the fact that there is an unarguable and justifiable public interest in information relating to this subject. But such public interest can operate as a double-edged sword; it continues to exist in part because the whole issue of the Moors Murders remains both highly sensitive and highly controversial. It also needs to be borne in mind that Ms Hindley's accomplice is still alive and some of the information on the file relates directly to him. In difficult cases of this kind it is particularly important that officials can consider a range of options with complete frankness without fearing that their thinking will be exposed to the public gaze. Bearing all of this in mind, I do not therefore consider that the public interest in having access to all of the remaining non-factual information in these documents is strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. I accept therefore that, in practice, Exemption 2 can be applied to the opinions and advice contained in the documents and that some of the information falling in that category should be withheld. Nonetheless, there remains some information, the release of which seems to me to be unlikely to harm the quality of any future advice, and I recommended that it be made available to Mr Evans. In reply, the Permanent Secretary agreed to that recommendation.

21. How then should that information be provided to Mr Evans? While, as I explained in paragraph 14 above, the Code requires the release of information rather than specific documents, experience has shown that the simplest way in which to meet a request for information is often by providing the actual documents concerned. In this case, I consider that it would be helpful for Mr Evans to have an edited version of the documents with the withheld information simply blocked out, and I so recommended to the Home Office. In reply, the Permanent Secretary expressed his willingness to provide Mr Evans with documents redacted on that basis.

Conclusion

22. I found that the Home Office were justified in refusing to release much of the information sought, but I welcome their agreement to provide Mr Evans with the remainder. I consider this to be a satisfactory outcome to the complaint.

Department for International Development

Case No: A.45/04

Refusal to provide information about allegations of corruption with regard to the Lesotho Highlands Water Project

Summary

Dr Hawley asked the Department for International Development (DFID) for information about allegations of corruption with regard to the Lesotho Highlands Water Project as well as any information about the possibility of providing financial support to the Lesotho Government to assist the prosecution of those allegedly involved in the corrupt practices. DFID disclosed some information to Dr Hawley but refused to provide any further information under Exemptions 1(c), 2 and 4(d) of the Code. The Ombudsman found that much of the information being sought could be withheld under these exemptions, as well as Exemption 1(b), which was not cited by DFID. However, having applied the harm test, she found that there was some information that could be released on the grounds that the public interest in disclosure outweighed the potential harm that would be caused by its release. The Ombudsman welcomed DFID's agreement to release that information and also their willingness to review their procedures in the light of her criticism of the way they had handled Dr Hawley's request. The complaint was partially upheld.

1. Dr Hawley complained that the Department for International Development (DFID) had refused to supply her with information that should have been made available to her under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

The complaint

2. On 10 November 2003 Dr Hawley wrote to DFID and asked, under the Code, for: (i) information relating to allegations of corruption with regard to the Lesotho Highlands Water Project (the Project); and (ii) to any discussions held by DFID about the possibility of providing financial support to the Government of Lesotho to assist the investigation and prosecution of bribery charges against 18 consultants, contractors and agents. In particular, she asked for complete copies of the following: -

- all documents held or compiled by DFID on these issues;
- correspondence between DFID and various other Government offices about these issues; in particular, the British High Commission in Lesotho, the Foreign and Commonwealth Office, the Department of Trade and Industry, and the Export Credits Guarantee Department;
- correspondence between DFID and the World Bank about these issues;
- minutes, agenda and papers relating to any meetings held to discuss these issues.

Dr Hawley said that she understood, for example, that the British High Commission in Lesotho had attended meetings in November 1999 and March/April 2000 held by the Government of Lesotho and the chief financiers of the Project, including the World Bank, to discuss the corruption allegations. She said that part of her request was for the minutes of these particular meetings and for any further such meetings held to discuss the allegations and the financing of the subsequent legal action.

3. DFID replied on 1 December 2003 and said that, because of the need to contact their office in South Africa, which was moving to a new location, they would not be able to reply within the 20 working day target recommended by the

Code. They said that they would send a substantive reply as soon as possible. On 23 December 2003 DFID wrote to Dr Hawley enclosing copies of four internal documents that they had received from their office in South Africa. They said that they were continuing and extending their search for material and that they would contact her again in the New Year.

4. On 9 January 2004 DFID wrote to Dr Hawley again. They said that they had examined the material they had acquired from their searches and considered that it was exempt from disclosure under Exemptions 1(c), 2 and 4(d) of the Code. They said that, although the records they held were exempt from disclosure, Dr Hawley could contact them if there was any specific information that she believed they held. They also informed her of her right to seek an internal review of their decision if she was not satisfied with their handling of her request.

5. On 19 January 2004 Dr Hawley wrote to DFID and asked for an internal review of their decision. She noted that both Exemptions 1 and 2 were subject to a public interest test and gave reasons why she believed the public interest in disclosing the information she was seeking outweighed any harm that would be caused by its release. She said that her request was specifically for DFID's policy on providing financial support to the Government of Lesotho to assist in the corruption trials. She also said that she believed that a full explanation of the grounds for deciding whether or not to offer such financial support was very much in the public interest. Finally, Dr Hawley asked DFID to reconsider the decision to withhold all of the information she was seeking and said that she would be happy to receive redacted versions of documents where information that was properly exempt had been blanked out.

6. On 20 February 2004 DFID replied to Dr Hawley. They said that the review had been conducted by their internal audit department who had concluded that, on balance, she had been fairly treated under the provisions of the Code. They said, however, that had DFID taken the request in its widest terms and considered the release of information, rather than the more narrow issue of the release of documents, there would have been opportunities to be more open with her. They believed that, while the exemptions cited were valid in respect of the specific request for documents, it would have been appropriate to release certain factual information, in summarised form. They invited Dr Hawley to contact them if she wanted information in that format. They noted that Dr Hawley was specifically seeking information about DFID's policy on providing financial support to the Government of Lesotho with regard to the corruption trials. They said that there had been internal consideration of the potential for a joint donor fund to help with the cost of future prosecutions, which had examined the legal, policy and practical aspects of such an initiative. However, they said that there were matters relating to each of these aspects upon which the consideration had not produced a conclusive view. They also said that DFID had never received a formal request from the Government of Lesotho to fund such trials and the initiative, therefore, remained hypothetical. They informed Dr Hawley of her right to complain to the Ombudsman, via a Member of Parliament, if she remained dissatisfied with the way in which her request for information had been handled.

7. On 3 March 2004 DFID e-mailed Dr Hawley in response to a telephone conversation on 25 February 2004 in which she had sought to clarify their position. They said that they had tried in their letter of 20 February 2004 to summarise the key facts drawn from the records in

compliance with the findings of their internal audit department, who had stressed the fact that DFID had never had a formal request from the Government of Lesotho to fund the corruption trials. They invited Dr Hawley to contact them if there were any further specific points of information in which she was interested.

8. On 10 March 2004 Dr Hawley asked for clarification as to whether the factual information recommended for disclosure by the internal audit department had been disclosed in the letter of 20 February 2004 or if there was further factual information relating to her request that would be made available if she asked for it. She also noted her concern that DFID had taken a narrow approach to the release of the information she was seeking and that their refusal was inconsistent with their initial decision of 23 December 2003 to disclose four internal documents. DFID replied on the same day and confirmed that the summarised factual information that the review had considered it appropriate to be released was: that DFID had not, to date, received a request from the Government of Lesotho to fund the trials.

Department's comments on the complaint

9. In providing his comments on the complaint, the Head of DFID's Open Government Unit (the Unit Head) said that, although Dr Hawley had specifically requested copies of documents, for which there was no commitment in the Code, they had sought to be flexible and did release in full the documents received from their South Africa office. When they received the records retrieved from their Policy Division, they found that they consisted largely of sensitive e-mail exchanges and other correspondence between their officials and those in other government departments. He said that the documents also included legal opinion and accounts of confidential conversations with officials from other governments and international organisations. The Unit Head said that they felt that the documents were exempt from disclosure under Exemptions 1(c), 2 and 4(d) of the Code. Moreover, given that the discussions were largely hypothetical considerations of possible government positions and that no policy had ultimately been established, they considered that the public interest in disclosure did not outweigh the risk of harm to the frankness and candour of internal discussion and advice. He said that the redaction of exempt material from the papers would have required unreasonable diversion of resources and resulted in illegible documents.

10. The Unit Head said that on 20 February 2004, at the same time as they informed Dr Hawley about the result of the internal review, they also released a short factual statement about DFID's policy position as extracted from the records and confirmed by relevant colleagues. He said that they also asked Dr Hawley, amplifying the point made in the e-mail of 3 March 2004, to contact them if there was any other specific information she would like to receive. He said that Dr Hawley had not made any further request for specific information. While maintaining that the records requested were exempt from disclosure, he said that they remained open to the consideration of the disclosure of specific information should that be requested.

Exemptions of the Code

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

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

from disclosure would outweigh the public interest in making the information available.

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

12. Exemption 1 is headed 'Defence, security and international relations' and reads:

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

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

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

13. Exemption 2 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.'

14. Exemption 4 is headed 'Law enforcement and legal proceedings' and part (d) reads:

'Information covered by legal professional privilege.'

15. Although not cited by DFID I shall refer to Exemption 9 in my assessment. This exemption is headed 'Voluminous or vexatious requests' and reads:

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

Assessment

16. Before turning to the substantive issue of whether or not the information requested by Dr Hawley should be released to her, I shall look first at how DFID handled her request. Until the Freedom of Information Act 2000 comes fully into force on 1 January 2005 all requests for information should be treated as if made under the Code, irrespective of whether or not it is referred to by the applicant. Information should be provided as soon as practicable and the target for responses to simple requests for information is 20 working days from the date of receipt. While this target may be extended when significant search or collation of material is required, an explanation should be given in all cases where information cannot be provided. It is also good practice in such cases for departments to identify in their responses the specific exemptions in part II of the Code on which they are relying in

making that refusal. Moreover, they should make the requester aware of the possibility of a review under the Code, and of the possibility of making a complaint to the Ombudsman if, after completion of the review process, they remain dissatisfied.

17. So how did DFID's handling of Dr Hawley's request comply with these provisions? While it took DFID twice as long as recommended by the Code to respond substantively to Dr Hawley's request for information I note that they wrote to her before the target date to explain why there would be a delay in responding to her. As DFID needed to retrieve information from their South Africa office, which was also in the process of moving to a new location, I regard the delay in responding to Dr Hawley's request as being reasonable. I am also pleased to note that, in most other respects, DFID handled Dr Hawley's request in full accordance with the provisions of the Code.

18. However, there is one aspect of the way in which DFID handled Dr Hawley's request for information that does attract my criticism. In response to her request DFID released four documents but refused to disclose any more information on the grounds that it was exempt from release under Exemptions 1(c), 2 and 4(d) of the Code. However, DFID have also made it clear that, while they maintain that the documents requested by Dr Hawley are exempt from disclosure, they are willing to consider the disclosure of specific information should that be requested. That to me indicates that DFID have not fully considered the disclosure of all of the information sought by Dr Hawley and that there may be information contained within the documents that is not covered by any of the three exemptions they have cited. I am critical of this partial consideration. Dr Hawley asked to see complete copies of the documents she was seeking, and I see that as a legitimate request under the Code. One of the Ombudsman's predecessors said, in his review of the first eight months of the Code's operation (published in December 1994 as Second Report – Session 1994/95 – Access to Official Information: The First Eight Months):

'...I normally construe a request for documents as meaning that a complainant is seeking all the information contained in the document specified and, save where all or part of that information can legitimately be withheld under the exemptions in Part II of the Code, I normally expect all that information to be released... I conclude that the most practical way to release the information sought is to provide a copy of the actual document in which that information is contained.'

19. If DFID believed that there was information in the documents that was not exempt from disclosure it follows that this information should have been disclosed to Dr Hawley. Why have they not therefore disclosed that information? Their reasoning seems to be that its release would require the redaction of documents that would not only leave them illegible but would also need a diversion of resources that DFID regard as being unreasonable. I do not see how DFID could know that the redacted documents would be illegible unless they had first assessed how much of the information contained within them fell within the scope of the three exemptions cited. They have not made such an assessment. Moreover, if DFID believe that such a consideration could not be undertaken without an unreasonable diversion of resources, they should have cited Exemption 9 of the Code (paragraph 15).

20. In the light of my comments I asked the Unit Head to remind his staff of the importance of adhering to the requirements of the Code and, in particular, to draw their attention to the need to

consider the disclosure of all of the information contained within documents that are subject to a Code request. In response, DFID said that they had noted the criticism made in the above paragraph and that they would review their procedures accordingly.

21. Before going on to consider the substantive issue of whether or not the exemptions of the Code that were cited by DFID can be applied to the information requested by Dr Hawley I think it is first necessary to look more closely at the information that DFID have withheld. That information consists of approximately 50 separate documents, although this is not an exact figure because most of the documents are e-mails that contain copies of other e-mails and/or further attachments. The documents include: internal correspondence, such as that between DFID's head office in London and their office in South Africa; and external correspondence, such as that with other government departments, including the Department of Trade and Industry, the Home Office, the Foreign and Commonwealth Office and the Export Credits Guarantee Department, and international bodies such as the World Bank, the International Monetary Fund and the European Union. As the Unit Head said, the documents also include legal opinion and details of conversations with officials from foreign governments and international organisations.

22. Exemption 4(d) of the Code is intended to protect from disclosure information covered by legal professional privilege, particularly where that disclosure would impede the ability of government legal advisers to communicate fully and frankly with their client. The Cabinet Office guidance states that legal advice privilege is intended to protect advice given by solicitors, barristers and legal advisers generally, whether they are within the department, from the Treasury Solicitor's Department, another department, or from external practices or firms. It also says that legal advice should only be disclosed with the express agreement of the legal adviser concerned.

23. I have examined very carefully the information sought by Dr Hawley and, having done so, I am satisfied that it contains legal advice and opinion of the kind that falls within the scope of this exemption. I accept therefore that DFID acted properly in citing Exemption 4(d) of the Code as justification for refusing to release the information requested by Dr Hawley. Exemption 4(d) is an absolute exemption: there is no reference to harm or prejudice that would allow me to consider any argument as to whether or not the public interest in the information was sufficiently strong to outweigh the harm arising from disclosure (paragraph 11).

24. I am also satisfied that there is a substantial amount of information contained within the documents that is covered by Exemption 1(c) of the Code (paragraph 12). As I have said above, (paragraph 21) the information sought by Dr Hawley contains correspondence (mainly e-mails) between DFID and various international bodies as well as accounts of discussions with those bodies and foreign governments. The Cabinet Office guidance (paragraph 1.7, part II) says that this exemption may be relevant when account needs to be taken of the possible effect of disclosure on the maintenance of good working relations between the United Kingdom and other governments and international organisations, and the need to continue to offer effective guarantees that information received in confidence will not be released. Similar considerations apply where it is believed that the disclosure of information would harm the conduct of international relations or affairs and, although not cited by DFID, I believe that Exemption 1(b) (paragraph 12) is also relevant to

some of the information sought by Dr Hawley. The Cabinet Office guidance (paragraph 1.5, part II) states that the intention of this part of Exemption 1 is to protect information where there is a risk that its disclosure would undermine frankness and candour in diplomatic communications, and impair confidential communications and candour between governments or international bodies. Having examined the papers provided by DFID, I note that some are clearly marked 'restricted', indicating that the discussions with foreign governments and international bodies were conducted in confidence. However, even where there is no explicit reference to confidentiality, I have no doubt that the discussions reported in the documents were conducted in the reasonable expectation that they would remain confidential. I believe that this is information that could cause the type of harm envisaged by Exemptions 1(b) and 1(c) of the Code and I accept therefore that, in principle, DFID were justified in withholding it.

25. I shall look now at whether or not there is information within the documents outlined above (paragraph 21) that falls within the scope of Exemption 2 of the Code. The purpose of Exemption 2 is to allow departments the opportunity to discuss matters, particularly those which are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. All of the documents provided by DFID were produced as a result of the deliberative process by which they attempted to establish whether or not they could and should offer financial assistance to the Government of Lesotho. This involved the examination of legal, policy and practical matters and information was sought and received from several different government and non-government organisations in both this country and abroad. I recognise the strength of the argument that a confidential exchange of views is justifiable in relation to the need for candid and effective communication and that the value of such discussion would be substantially reduced if it were thought that it would be made available to a wider audience. I am satisfied, therefore, that such internal discussion and advice is covered, in principle, by Exemption 2.

26. In her letter of 19 January 2004 Dr Hawley noted that the Cabinet Office guidance (paragraph 3, part I) states that the Code commits departments to providing an explanation of the basis of a decision once reached and that the explanation should be as full and open as possible. However, as DFID have said, although they considered the potential for a joint donor fund to help with the cost of prosecutions, they never reached a conclusive view on the matter and, as they never received a formal request for assistance from the Government of Lesotho, the initiative remained hypothetical. This is important in terms of my consideration of Dr Hawley's complaint because, while there is a commitment under the Code to disclosing the facts and the analysis of the facts which were considered important in framing policies, that commitment is only relevant to those policies which the Government have acted on. As DFID never finalised an agreed policy on this matter, that commitment does not in this instance arise.

27. While I believe, therefore, that DFID were justified in withholding the information sought by Dr Hawley under Exemptions 1 and 2 of the Code, that is not the end of the matter. The Code makes it clear that, in those categories such as Exemptions 1 and 2 that refer to harm or prejudice, consideration must be given as to whether or not any harm arising from disclosure is outweighed by the public interest in making information available (paragraph 11). So what is the public interest in disclosing the information sought by Dr Hawley? In her letter of

19 January 2004 she sets out the reasons why she believes there is a strong public interest in disclosing this information. She said that the corruption trials in Lesotho were the first trials of multinational companies for bribery ever to have taken place in a developing country. As such, she believes that there is a strong public interest in knowing how the governments of the countries from which these companies come responded, both to the allegations of corruption and to the subsequent trials. The fact that UK companies were implicated in these trials and that some of them received government financial support through the Export Credits Guarantee Department meant that the trials were very much a subject of national interest. Dr Hawley believes that information held by DFID may greatly assist public understanding of the matter, particularly about how the United Kingdom Government has responded. While I accept that these are strong arguments they are tempered by the fact, as outlined above, that the Government has not made a policy decision on how to respond to the question of whether or not to financially support the Government of Lesotho with regard to these matters. I am particularly conscious of the need to treat sensitively information relating to issues which remain unresolved and on which policy may still be developing, even if some of the information may not be particularly recent.

28. In balancing the public interest against the harm caused by disclosure I have therefore considered not only the harm that would be caused to relations between the United Kingdom and other governments and international organisations but also the harm that might be caused to the frankness and candour of internal discussion and advice. I have also considered very carefully, where the exemptions permit, the strongly argued case for disclosure in the public interest. Against that background I have examined the papers provided by DFID. Having done so I believe that, on balance, much of the information within the documents sought by Dr Hawley was correctly withheld under Exemptions 1, 2 and 4(d) of the Code. However, I consider that there is information that can be released to her without causing harm of the kind envisaged by those exemptions. Moreover, I believe that there is information in the documents that does not fall within any of the exemptions cited by DFID. I therefore recommended to the Unit Head that this information be made available to Dr Hawley, in whatever format seemed most appropriate. In reply, DFID agreed to release that information to Dr Hawley.

Conclusion

29. I found that DFID were justified in withholding much of the information sought by Dr Hawley under Exemptions 1, 2 and 4(d) of the Code. However, I saw no reason why some of the information should not be released to her and I welcome DFID's agreement to accept my recommendation to do so. I regard that disclosure, and DFID's willingness to review their procedures in the light of my criticism of the way they considered Dr Hawley's request, as a satisfactory outcome to a partly justified complaint.

Commission for Social Care Inspection

Case No: A.6/05

Refusal to provide a boarding school inspection report

Summary

Mrs G asked the Commission for a full copy of an investigation report relating to a boarding school attended by her daughters. The Commission declined to provide a copy, saying that there was a statutory prohibition on the release of such reports to members of the public. The Ombudsman considered that there was nothing in the legislation that specifically prohibited disclosure of the report and invited the Commission to consider its release under the provisions of the Code. The Commission reviewed their decision and concluded that the report could be released in full. The Ombudsman welcomed that decision and also their willingness to review their procedures in the light of her criticism that they had failed to consider Mrs G's information request under the terms of the Code. The Ombudsman upheld the complaint.

1. Mrs G complained that the National Care Standards Commission (NCSC) had refused to provide her with information that should have been made available under the Code of Practice on Access to Government Information (the Code). NCSC is now known as the Commission for Social Care Inspection and, to avoid confusion, I shall refer to both as the Commission throughout this report, except where it is necessary to distinguish the two. I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

2. I should say at the outset that this report relates solely to the investigation of Mrs G's information complaint. Her substantive complaint, that the Commission did not carry out an adequate investigation into a complaint she made against a boarding school in 2002, and that the Commission mishandled her subsequent complaint about them, is the subject of a separate investigation by the Ombudsman. I shall refer to those matters in this report solely to put into context Mrs G's information complaint.

Background to the complaint

3. Mrs G contacted the Commission in July 2002 as a result of her two daughters suffering serious accidents at their boarding school. She complained about the school's lack of supervision and its breach of health and safety laws. She also complained about the breach of the minimum standards for boarding schools, as regulated by the Commission. The Commission decided to investigate Mrs G's complaints in parallel with their inspection of the school. On 14 October 2002 the Commission produced a ten-page investigation report into Mrs G's complaint (the investigation report). On the same date the Commission wrote to Mrs G and summarised the findings of the investigation. However, Mrs G was not satisfied with the way in which the Commission had handled her complaints against the school and she made a complaint against them.

4. On 19 April 2003 Mrs G wrote to the Commission and made a subject access request under the terms of the Data Protection Act 1998. On 27 May 2003 the Commission wrote to Mrs G to say that the personal information they held was available, and offered to either send it by post or to provide it to her in person at their offices. On 18 June 2003 Mrs G attended the Commission's offices and was given, as part of their response to her subject access request, a redacted version of the investigation report.

5. Mrs G's complaint against the Commission proceeded to the third stage of their complaints procedure, where it was reviewed by an independent reviewer. On 7 July 2003 the independent reviewer presented her report. In respect of the investigation report, she said that the reasons for not sharing the report, edited

or otherwise, with Mrs G at the time are unclear to me and I must admit to some puzzlement as to the way in which the exercise of editing the version for Mrs G has been carried out. One of the independent reviewer's suggestions was that the Commission consider giving Mrs G a full copy of the investigation report. On 30 July 2003 the Commission wrote to Mrs G in response to the independent reviewer's report and said, in respect of the above suggestion, that the Commission did not have the statutory power to publish any reports in respect of boarding schools, which was why only a summary had been provided.

The complaint

6. On 22 June 2004 Mrs G e-mailed the Commission and asked, under the Code, for a full copy of the investigation report. The Commission replied on the same day. They said that, when the Commission was set up on 1 April 2004 (to replace NCSC), the new legislation specifically required them to make school reports available for inspection at their offices and to provide a copy to anyone requesting one. They said that the Commission, as opposed to NCSC, had not produced any inspection reports with regard to her daughters' school but that in future all such reports would be made available to the public. However, they also said that, during the period from 1 April 2002 to 31 March 2004, NCSC had undertaken inspection of boarding schools, residential special schools and further education colleges, and the legislation that they had operated under did not include the power to make inspection reports available to the public. Inspection reports were only made available to the school and, in certain circumstances, to the relevant Local Education Authority. The Commission therefore concluded that the information Mrs G was requesting was not available under the Code and that she would have to ask the school for a copy of any report produced before 1 April 2004. (Note: Mrs G has subsequently told me that she did not consider that this was either a practical or realistic solution to the problem. She said that it was unlikely that the school would even acknowledge a letter from her in view of the circumstances of their dispute. Moreover, in the light of the distress that the school had caused to her family, she believed that it was insensitive of the Commission to have suggested it.)

7. On 23 June 2004 Mrs G e-mailed the Commission and asked which section of the legislation they were relying upon when they said that the law prior to 1 April 2004 prevented the disclosure of the report that she was seeking. The Commission replied on 25 June 2004. They said that public sector bodies could only act in accordance with legislation that gave them specific duties and powers, and that the Commission (and NCSC before it) could not act outside or beyond their powers, which they said was also known as acting ultra vires. They said that sections 105 – 109 in part VIII of the Care Standards Act 2000 covered the inspection of schools and colleges by NCSC and that there was no mention in those sections of making inspection reports available to the public. Any reports arising from inspections were not therefore public documents and the Commission believed they would be acting outside their powers if they made them available to members of the public. The Commission said that the Code was a voluntary one and that it could not override statutory prohibitions on disclosure; nor was it a means of access to original documents or personal files. For these reasons, the Commission told Mrs G that they were unable to provide her with copies of any reports on school inspections produced before 1 April 2004.

The Commission's comments on the complaint

8. The Commission said that they did not wish to withhold information from Mrs G: indeed, they said that they wished to be as open as possible and disclose information where they had the power to do so and thus comply with the Code and the Freedom of Information Act 2000. However, they said that the problem in this case was the lack of powers to enable them to disclose the full investigation report to Mrs G. They said that they believed they would be acting ultra vires if they disclosed the report, as the legislation in force at the time of the original request, the Care Standards Act 2000 and the Children Act 1989, did not contain the power for NCSC to disclose boarding school reports. Only when the Health and Social Care (Community Health and Standards) Act 2003 came into force on 1 April 2004, amending the Children Act 1989, did the Commission gain the explicit power to disclose boarding school reports.

9. The Commission said that, notwithstanding the above, the school could have disclosed the report to Mrs G and, in a series of e-mails between themselves and Mrs G in June 2003, she was advised to approach the school.

The Code of Practice on Access to Government Information

10. Although the Commission did not specify any Code exemption(s) in their dealings with Mrs G, they did refer to part of paragraph 8 in part I of the Code, which reads as follows:

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

11. I shall also refer to Exemption 15(a) of the Code, which is headed 'Statutory and other restrictions', and reads as follows:

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

Investigation

12. The investigation report being sought by Mrs G was prepared at a time when sections 105 – 109 in part VIII of the Care Standards Act 2000 covered the inspection of schools and colleges by NCSC. The Commission's reason for not disclosing the full investigation report to Mrs G was that there is no mention within that legislation of making inspection reports available to the public. However, there is nothing in that legislation that specifically prohibits the disclosure of such reports, and it was the Ombudsman's view that the disclosure of the investigation report should be considered under the terms of the Code. She therefore asked the Commission to review their decision not to consider the disclosure of the investigation report in the light of the Code provisions.

13. In reply, the Commission said that they had reviewed their decision not to release the investigation report and had decided that it should be disclosed, in full, under the terms of the Code. They wrote to Mrs G on 9 November 2004, enclosing a copy of the investigation report, but said that this was an exceptional case and that the Commission retained ownership of the copyright to the report. They said that the report was not a public document and that it was provided to her for her own personal use. They said that this meant that she did not have the right to re-use the report or the information it contained in any way that would breach confidentiality or infringe copyright, such as making multiple copies, publishing it or distributing it to the public. They apologised for

the delay in reaching this decision. (Note: Mrs G was pleased that the Commission had decided to release the report to her and she asked me to express in this report her thanks to the Ombudsman for intervening on her behalf.)

Assessment

14. In assessing this complaint I have to consider not only the substantive issue of whether or not the information requested by Mrs G should be released to her, but also the way in which the Commission handled her request. As far as the information sought is concerned, the Commission have now agreed to its release to Mrs G. I very much welcome that decision. In the light of that development, I do not think that anything would be gained by considering whether or not the Commission could have successfully applied one or more of the exemptions in part II of the Code to the information requested had they continued to withhold it. I therefore make no formal finding on this matter.

15. I believe that I should, however, consider more closely the way in which the Commission handled Mrs G's request for information. By her request, I am referring to her e-mail of 22 June 2004, when she sought access to the full investigation report under the terms of the Code (paragraph 6). She had previously made a subject access request under the terms of the Data Protection Act 1998 and it was following this request that the Commission had disclosed to her a redacted version of the investigation report. Any dispute Mrs G may have about the way the Commission handled her subject access request is not for the Ombudsman: it is for the Information Commissioner's Office, or for the courts, to interpret data protection legislation and its applicability in individual cases. I, therefore, am confining my observations only to matters that fall outside the scope of the Data Protection Act 1998 but within the scope of the Code.

16. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005, all requests for information should have been treated as if made under the Code, irrespective of whether or not it was referred to by the applicant. It is disappointing, therefore, that the Commission failed to consider Mrs G's request of 22 June 2004 (paragraph 6) under the terms of the Code. Instead, they said that the Code did not apply because they believed that they were statutorily required to withhold the report from Mrs G. If that was the case, the Commission should still have considered the request under the Code. Exemption 15(a) relates to information whose disclosure is prohibited under any enactment or regulation (paragraph 11) and this exemption should have been cited by the Commission if they believed there to be a statutory restriction on the disclosure of the investigation report. Moreover, they should then have made Mrs G aware of the possibility of a review under the Code, and of the further possibility of making a complaint to the Ombudsman if, after completion of the review process, she remained dissatisfied. I am critical of the Commission's failure to follow these basic requirements of the Code.

17. Notwithstanding the above, the Ombudsman's view is that the Commission could not have withheld this information under the terms of the Care Standards Act 2000. That piece of legislation does not contain any specific reference to a prohibition on the disclosure of reports such as that being sought by Mrs G and, even if the Commission had cited Exemption 15 to withhold the investigation report, on the basis of legal advice she has received the Ombudsman would not have upheld the use of that exemption. I note that, when the independent reviewer commented on the Commission's failure to provide Mrs G with a full copy of the investigation report, she said that she was confused by the action they had taken (paragraph 5). I have to agree. It has been

unclear from the beginning why the Commission redacted the investigation report in the way that they did. I recognise that the redacted version was provided following Mrs G's subject access request and that the Commission were only required, at that stage, to provide her with the personal data contained within it. However, even after Mrs G requested access to the full investigation report under the terms of the Code, the Commission still appear to have been unclear as to the basis on which the information could be withheld. The approach to the release of information under the Code should, in all cases, be based on the assumption that information should be released, except where disclosure would not be in the public interest. In my view, the Commission failed to make a satisfactory case for withholding the information sought by Mrs G and, had the Commission's staff been more clear about their obligations under the Code when she first requested information from them about her complaint against the school, I believe it would have prevented a great deal of time and effort on Mrs G's part.

18. I am critical of the Commission's failure to have considered the disclosure of this information under the terms of the Code and, in the light of my above comments, I recommended that the Chief Inspector of the Commission remind his staff of the importance of adhering to the requirements of the Freedom of Information Act 2000, which replaced the non-statutory Code on 1 January 2005. In particular, I asked him to ensure that the Commission's guidance to staff clearly explained those situations in which their own statutory requirements relating to the disclosure of information override those of the Freedom of Information legislation, and also those in which they do not.

19. In reply, the Chief Inspector said that he would like to explain the context of the previous Commission's stance in respect of the non-disclosure of inspection reports in the light of new information which had only recently been brought to his attention. He said that NCSC had once made reports publicly available on request on the understanding that this was Government policy. Indeed, he said that the Department of Health had considered issuing NCSC with a Direction to publish such reports under the Care Standards Act 2000. However, he said that the policy had reverted to one of non-publication for three reasons:

(a) A school had taken legal advice on whether or not NCSC could publish a report. In response, NCSC sought legal advice which concluded that there was insufficient legal basis to publish reports.

(b) The Department of Health's decision not to issue a Direction, which effectively left NCSC open to any other challenges on publication.

(c) The Department of Health acknowledged that it had failed to support its policy with the necessary legislation in the Care Standards Act 2000, which was corrected in the subsequent legislation.

In the light of the above, the Chief Inspector strongly emphasised the comments they had expressed previously (paragraph 8) that the Commission did not wish to withhold information from Mrs G but had struggled to find a means by which information could be released.

20. The Chief Inspector said that the Commission clearly needed to ensure that they applied the lessons learnt from this case. He said that he had asked that guidance issued to staff on Freedom of Information issues would take full account of the Ombudsman's recommendation (paragraph 18). He said that they continued to review the

policies and procedures of the bodies that they had succeeded with the aim of meeting their responsibilities and aspiring to good practice in the release of information.

Conclusion

21. Following the Ombudsman's intervention the information sought by Mrs G was released to her. While I welcomed that disclosure, I was critical of some aspects of the way in which the Commission handled this request for information. The Chief Inspector of the Commission has acknowledged the need for future guidance on Freedom of Information issues to take full account of the lessons learnt from this case. I regard the release of the information sought and the Chief Inspector's comments as a satisfactory outcome to this complaint.

Commission for Social Care Inspection

Case No: A.15/05

Refusal to provide information about the Commission's race equality policy and complaints procedure against service providers

Summary

Mr H asked the Commission for a copy of their race equality policy and of their procedure for dealing with complaints made to them against service providers. The Commission refused to provide the former, on the grounds that it was for internal use only, and failed to provide Mr H with a copy of the latter. Following the Ombudsman's intervention, the Commission released to Mr H the information he had requested. The Ombudsman welcomed the disclosure made by the Commission, but criticised them for their mishandling of Mr H's information requests and their failure to deal with them in accordance with the Code. She upheld Mr H's complaint.

1. Mr H complained that the Commission refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code).

Background

2. Mr H's complaint concerning the Commission's refusal to supply information stems from a complaint he made against the Commission about the way in which they had handled complaints made against him during his time as the 'Responsible Individual' in respect of a children's home. At a meeting with the Commission on 10 November 2003, a meeting which had been convened by the Commission to discuss complaints they had received about him, Mr H requested a copy of the Commission's 'race equality policy' and a copy of their procedure for dealing with complaints made to them about service providers. The Commission provided Mr H with a copy of their complaints procedure, but not the procedure relating to complaints against service providers. The Commission told this Office that, although their officers 'tried to obtain copies of policy on race equality and complaints against providers', the request at the meeting had taken them by surprise; in any event the documents in question were held internally on computer databases and were 'not intended for public release'. As a result, the Commission informed Mr H that the 'race equality policy' was not immediately available. On 13 November 2003 Mr H's union representative wrote to the Commission, again requesting a copy of their 'race equality strategy' and of the procedures for complaints against service providers. No reply was received, although the union representative had subsequently telephoned on two occasions to chase a response. (Note: The Commission have told me that they have apologised to Mr H for their failure to respond to the union's letter and telephone calls. They have said that this was caused by 'extraordinary work pressure in the Stafford Office at the time'.)

3. On 23 February 2004 Mr H wrote to the Commission requesting a copy of their 'race equality scheme'. On 25 February 2004 the Commission replied to Mr H explaining that, although the documentation existed, it was for internal use only. The Commission said that they were unaware that Mr H had also requested a copy of the complaints procedure in relation to service providers, believing that his request had been in relation to their own complaints procedure for complaints against the Commission, which they had provided. On 1 March 2004 Mr H requested the information from the Commission's solicitors and, on 25 March 2004, he wrote to the Commission requesting, yet again, a copy of the complaints procedure in relation to service providers and disputing the assertion, made in the letter of 25 February 2004, that his earlier request had not been clear. On the same day, he repeated

his request for that procedure. On 20 May 2004 the Commission wrote to Mr H saying that they would not respond further to the issues he had raised with regard to his complaint against them. They did not, however, address Mr H's outstanding information request, nor did they, at any time during the correspondence, refer to the Code.

Commission's comments on the complaint

4. Following an intervention by the Ombudsman, the Commission reviewed their decision to withhold the information relating to their 'Valuing Diversity' policy (which they refer to as 'an equality policy in respect of employment issues') and their procedure for dealing with complaints against service providers. On 11 August 2004 the Commission wrote to Mr H, disclosing the information and apologising for the long delay in providing it. They explained that, in arriving at their decision to disclose the information, they had taken into account the public interest issue as a result of Mr H's request, balanced with the need to keep some internal procedures confidential. In the event, they had decided that they should disclose the information. The Commission have told me that on 13 August 2004 they spoke with Mr H on the telephone and that he had thanked them for their 'openness and transparency' in disclosing the documents, but had also commented that the disclosure was too late for his purposes.

5. In his comments to me on the complaint, the Commission's Chief Inspector acknowledged they had made mistakes and that their handling of Mr H's request was not as it should have been. The Chief Inspector told me that, in order to improve the Commission's standard of service, and to ensure that they learned lessons from this complaint, they were preparing guidance for all their staff in the handling of requests for information under the Freedom of Information Act (which superseded the Code with effect from 1 January 2005). The Chief Inspector explained that the improvements being made included the setting up of a dedicated e-mail box to receive and control centrally requests for information. In addition, he said that a dedicated team had also been set up to monitor and advise on those issues and that he had arranged for this team to brief him on a monthly basis and that the Commission's staff now had access to guidance on their intranet site. The Chief Inspector expressed his regret that no such guidance had been made available under the previous Commission to deal with requests for information under the Code. He believed that lack of guidance to have been a significant contributory factor in the way in which Mr H's request was handled. He offered his apologies to Mr H for the above omissions.

6. The Chief Inspector believed matters to have been further confused by the Commission only having a draft internal document in place relating to racial equality, rather than a final or published version. He explained that, when Mr H had first raised the issue of whether that document complied with race relations legislation, the Commission took external legal advice to ensure that it was meeting any statutory requirements. The resultant advice was that the Commission was not obliged to publish a Race Equality Scheme. The Chief Inspector has said that, as the Commission did not have such a scheme, it was not able to provide Mr H with a copy, but that the advice it received may have caused the confusion about what information Mr H was actually requesting.

Mr H's response to the disclosure

7. On 25 August 2004 Mr H wrote to one of my colleagues, expressing his dissatisfaction with the delay by the Commission in providing the information. Mr H said that the information relating to the complaints procedure had come

too late in the day for him to extract any benefit from it. He said that the Commission's initial refusal to supply the information had meant that he had been unable to challenge them, at the requisite time, for failing to comply with their own procedures. As far as the 'Valuing Diversity' policy was concerned, Mr H was of the view that it failed to comply with race relations legislation which, in his view, might have provided him with 'some protection and leverage against the treatment [he] was experiencing at the time'.

Assessment

8. Firstly, I welcome the disclosure made by the Commission, albeit very late in the day. Certainly, it is difficult to see why the information could not have been made available to Mr H at a much earlier stage.

9. The fact that the Commission have now disclosed the information Mr H requested in full leaves me only to consider how the Commission handled Mr H's request for that information. It should be said, at this point, that the Code only gives an entitlement to information and not to the documents in which information is contained; it is on that basis that I have examined the complaint. Further, the Ombudsman has said that it is good practice, if departments refuse information requests, for them to identify in their responses the specific exemption or exemptions in Part II of the Code on which they are relying. Moreover, the possibility of a review under the Code needs to be made known to the person who requests the information at the time of that refusal, as does the possibility of making a complaint to the Ombudsman if, after the completion of the review process, the requester remains dissatisfied. Finally, departments are expected to respond to requests for information within 20 working days, although the Code recognises that this target may need to be extended when significant search or collation of material is required.

10. Mr H's information request was very poorly handled by the Commission. Mr H's initial requests, and those subsequently made by his union representative throughout November 2003, were effectively ignored. Prompted to respond by Mr H in February 2004, the Commission told him that the documents he sought were 'for internal use only' and, somewhat puzzlingly, claimed not to have been aware of his request for information about their complaints procedure in relation to service providers. Further letters from Mr H failed to elicit a response from the Commission until May 2004. That reply however, which was couched in terms of a final response, made no reference to Mr H's information request and, indeed, no further action was taken by the Commission on his request until the Ombudsman contacted them following Mr H's referral of his complaint to her.

11. Consequently, before I even consider how the Commission dealt with Mr H's request in relation to the Code requirements, it is clear that, purely in terms of good administrative practice, the Commission's handling of Mr H's request was poor. They failed on various occasions to respond to letters and telephone calls requesting the information. When the Commission did finally respond, in February 2004, their decision to refuse disclosure of the information was made without any reference to the Code. In reaching that decision it had also taken them significantly longer than the 20 working days required by the Code for the processing of requests. Importantly, in notifying Mr H of their decision, the Commission failed to explain the Code exemptions under which the information was being withheld. That, presumably, was because the Commission themselves had not considered the applicability of the Code to Mr H's request which meant, in turn, that they failed to inform Mr H of his right to a review of their decision and then of his right to refer his complaint to the Ombudsman if he remained dissatisfied with their review decision.

12. I do of course recognise that Mr H's information request formed only a small part of a much wider complaint. But, nevertheless, the Commission's handling of Mr H's request for information was unacceptable. Mr H was entitled to a prompt and more adequately considered reply to his request. It is apparent that confusion arose at various stages as to the precise nature of the information sought by Mr H. The 'Valuing Diversity' policy has been referred to by Mr H and his representatives under a number of different names, for example, as a 'race equality scheme' and a 'race equality strategy'. It seems that the Commission also, wrongly, understood Mr H's initial request for their complaints procedure in relation to service providers to be merely a request for a copy of their internal complaints procedure. Nevertheless, the crucial failing here was the Commission's failure to deal with the request without reference to the Code. While I welcome the fact that the Commission have now reviewed their earlier decision and chosen to disclose the information to Mr H, that disclosure does not entirely negate the earlier failing. In particular, although the Code itself is now about to disappear, the Commission will need to ensure that their staff are fully informed of their responsibilities under the Freedom of Information Act 2000, as the individual rights of access to information under that legislation came into force on 1 January 2005.

13. I have already referred (paragraph 8) to the letter of 25 August 2004 in which Mr H says that he believes the Commission to have failed in their statutory duty, under the Race Relations Act 1975, to formulate a race equality scheme, as their 'Valuing Diversity' policy fails to meet that requirement. That, I should say, is a legal matter on which Mr H should seek the appropriate advice if he wishes to take matters further. It is not a matter with which the Ombudsman can help him.

Conclusion

14. The Commission's handling of Mr H's request for information not only fell below the standard of service Mr H was generally entitled to expect from them, it also failed entirely to comply with the requirements of the Code. I criticise them for that failure. Consequently, I welcome the disclosure of the information that has now been made by the Commission and I consider that disclosure to be a satisfactory outcome to Mr H's fully justified complaint.

Commission for Social Care Inspection

Case No. A.38/04

Refusal to provide a copy of an investigation report

Summary

Mr B asked the Commission to provide him with a copy of an internal report of their investigation into a complaint that he had made about the way in which the Commission had dealt with a complaint made by a former resident of a care home group which he had managed. The Commission had provided a summary of the results of the investigation to Mr B's mother (who owned the group) but Mr B wished to have access to the full report. In response, the Commission sent Mr B a copy of the summary (which he had already seen) but did not address his request for a copy of the complete report. They did not refer to the Code or cite any exemptions. In their response to the Ombudsman the Commission said that the decision not to release the full investigation report was based on the fact that other care homes were named in the report. Their guidance stated that neither service providers nor complainants had an automatic right to background working papers or witness papers which were confidential to the Commission. Again, no Code exemptions were cited. However, the Commission later reconsidered the position and decided to release the report to Mr B in its entirety. The Ombudsman saw the release of the information, together with the Commission's assurances that they had now taken positive action in relation to dealing with information requests, as a satisfactory outcome to a justified complaint.

1. Mr B complained that the National Care Standards Commission – now known as the Commission for Social Care Inspection (the Commission) – refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). To avoid confusion I shall refer to the Commission throughout this report. I have not put into this report every detail investigated but I am satisfied that no matter of significance has been overlooked.

Background

2. On 19 August 2002 the Shrewsbury Area Office of the Commission wrote to Mr B's mother – the owner of a care home group – enclosing a copy of a report of their investigation into a complaint made against the group by a former resident. The report was particularly critical of Mr B who, at the time, managed the group on behalf of his mother. On 24 September 2002 Mr B complained to the Commission about the manner in which they had investigated the complaint. On 4 November 2002 Mr B's mother wrote to the Commission asking for Mr B's complaint to be treated as her formal complaint as the group's Registered Provider under the Care Homes Regulations 2001. On 14 July 2003 the Commission's Regional Professional Adviser, Adult Services (the Professional Adviser) wrote to Mr B's mother informing her that she had completed her investigation of her complaint, and that she had prepared a report for the Regional Director. On 5 September 2003 the Professional Adviser wrote to Mr B's mother with a summary of the results of her investigation. The Professional Adviser accepted that the original investigation of the complaint against the group had not included interviews with relevant employees of the group and that the conclusion reached was therefore premature. However, further enquiries had confirmed most of the criticisms contained in the first investigation report.

3. On 29 October 2003 Mr B wrote to the Professional Adviser explaining that he had been given a copy of her letter of 5 September 2003 and asked for a copy of the investigation report that she had prepared for the Regional Director. On 3 November 2003 the Professional Adviser wrote to Mr B explaining that she would ask the Regional Director whether he would agree to

further information being sent to Mr B's mother. On 12 November 2003 Mr B wrote to the Professional Adviser, repeating his request for her investigation report. On 24 November 2003 the Professional Adviser replied to Mr B enclosing a copy of her letter to Mr B's mother dated 5 September 2003. She confirmed her findings, but did not address Mr B's request for her report to the Regional Director, and no further action was taken by the Commission until this Office contacted them following Mr B's complaint to the Ombudsman.

The Commission's initial comments on the complaint

4. In response to an enquiry from this Office, the Commission said that the investigation report was prepared for the Regional Director and covered a broad range of matters that had arisen out of the investigation, including some relating to other registered services. For that reason the Regional Director decided not to send the report to Mr B or his mother, but instead asked the Professional Adviser to respond to Mr B's mother by letter.

The Commission's formal response to the Statement of Complaint

5. In their comments on the complaint the Commission said that the decision reached by the Regional Director to provide Mr B with a summary of the investigation findings rather than the report was based on the fact that other care homes were named in the report. The decision was also based on extensive consultation with the Commission guidance on the disclosure of information. The Commission said that the guidance states that neither the service provider nor complainants have an automatic right to background working papers or witness statements, which are confidential to the Commission: releasing such information could breach the Data Protection Act 1998 and the information could be covered by Code exemptions. They said that, generally, complainants should only receive confirmation that their complaint had resulted in an inspection, general information about the outcome (whether upheld, etc) and possibly a copy of the resultant inspection report once it was published – i.e. after the service provider had had the opportunity to comment – but not all the details of what was done, who was interviewed or the service provider's action plan. Inspection reports can be disclosed on request because these are in the public domain, but information and documents obtained from other organisations or individuals without their consent cannot be disclosed unless some other lawful basis exists for disclosure. Furthermore, the Commission may not want to disclose information generated internally if it affects their regulatory position. Any requests for background information from either the service provider or a complainant need, therefore, to be considered on a case-by-case basis. In Mr B's case the Regional Director felt that the naming of homes mentioned in the report would place the Commission in breach of the Data Protection Act 1998, and the decision was therefore taken to provide a summary of the findings with the names of the homes omitted.

Further developments

6. Following further enquiries by this Office the Commission explained that they did not have a specific policy related to information disclosure (other than their Data Protection policy) but that it was 'custom and practice' not to disclose in most cases. However, the Commission later reconsidered the position and decided that the report should be disclosed, in full, under the terms of the Code. They wrote to Mr B on 22 December 2004 enclosing a copy of the investigation report and apologising for the delay in providing it.

The Code of Practice on Access to Government Information

7. Between April 1994 and 31 December 2004 the Ombudsman was able to consider complaints that, in breach of the Code, bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as being within the Ombudsman's jurisdiction had refused to provide information which was held by them. The Commission are so listed. It was an accepted procedure of dealing with requests for information under the Code that, if a department decided to refuse a request for information, they should have identified the specific exemption(s) in part II of the Code on which they were relying. Also, where information had been refused, the possibility of a review under the Code needed to be made known to the person requesting the information at the time of that refusal, as did the right to complain to the Ombudsman if, after the review process had been completed, the requester remained dissatisfied.

Assessment

8. I welcome the decision of the Commission to disclose to Mr B the information that he sought, albeit late in the day. In the light of this, I do not believe that anything would be gained by considering whether or not the Commission could have successfully applied any of the Code exemptions to the information requested, had they maintained their refusal to disclose it. I therefore make no formal finding on this aspect of the complaint.

9. However, I believe it appropriate to look at the way in which the Commission handled Mr B's request for information. Until the Freedom of Information Act 2000 came fully into force on 1 January 2005, all requests for information should have been treated as if made under the Code, irrespective of whether or not it was referred to by the applicant. Mr B first requested a copy of the investigation report on 29 October 2003, and repeated his request on 12 November 2003. On 24 November 2003 the Commission wrote to Mr B enclosing a copy of their letter to his mother of 5 September 2003 in which they had summarised the results of their investigation (which Mr B had already seen); they made no mention of his request for a copy of the investigation report. No reference was made to the Code or to any exemptions and it does not appear that the Commission considered the request under the Code at any stage.

10. Clearly, the Commission's general handling of Mr B's request for information was poor. His request was effectively ignored and he was provided only with information which he had already seen. In particular, the Commission failed to act in accordance with the Code. No Code exemptions were cited for the decision not to provide Mr B with the information that he sought; he was not offered the review to which he was entitled; and he was not informed of his right to complain to this Office. Even after an approach from this Office the Commission offered no Code exemptions in support of their earlier decision to refuse to provide the information sought by Mr B. I am critical of the Commission's failure to consider Mr B's request under the terms of the Code, which I find particularly disappointing in view of similar criticisms in other recent reports issued by the Ombudsman (A.6/05 and A.15/05).

11. Although the Code has now disappeared I reiterate the recommendations made in those earlier reports that the Chief Inspector of the Commission ensure that his staff are fully conversant with the requirements of the Freedom of Information Act 2000, and are reminded of the importance of adhering to those requirements. In reply the Chief Inspector said that the Commission had now taken firm action to improve their service in relation to requests for

information and to ensure that they learn lessons from this complaint. The Commission have prepared guidance for all staff in the handling of requests for information under the Freedom of Information Act. This includes setting up a dedicated e-mail box to receive and control centrally requests for information. In addition they have established a dedicated team to monitor and advise on those issues and the Chief Inspector has arranged for the team to brief him on a monthly basis. Further, all Commission staff have access to Freedom of Information issues via an internal intranet site.

Conclusion

12. While I was pleased that the Commission decided to release the information sought by Mr B, I was critical of the way in which the request was handled and I welcome the measures outlined by the Chief Inspector which the Commission have taken as a result of this complaint. I see the release of the information requested, together with the Chief Inspector's assurances, as a satisfactory outcome to a justified complaint.

Office for Standards in Education

Case No. A.12/04

Refusal to provide information relating to the inspection of a school

Summary

Following the inspection of a school, of which Mr A is the proprietor, he disputed the accuracy of the number and duration of classes and lessons inspected as shown in the report of the inspection. He asked Ofsted for copies of the individual inspectors' evidence forms showing the time they had spent inspecting classes and lessons. Ofsted refused to release the documents, saying that they did not release their evidence base for inspection beyond the summary in the report. During a complaint about the inspection to the Independent Complaints Adjudicator for Ofsted and the Adult Learning Inspectorate, Mr A became aware that the Ajudicator had had access to Notes of Visit relating to earlier inspections of the school, and he asked Ofsted for those documents. Following the Ombudsman's preliminary intervention Ofsted wrote to Mr A, citing Exemption 2 of the Code as the basis for withholding both the inspectors' records and the Notes of Visit. The Ombudsman concluded that the information contained in the inspectors' evidence forms showing a class by class/inspector by inspector breakdown should be released to Mr A and Ofsted agreed to provide him with a table setting out that information. While accepting that Exemption 2 applied to some of the information in the Notes of Visit the Ombudsman also concluded that some of the information they contained should be released, which again Ofsted agreed to do by providing him with edited versions of the Notes. Ofsted also apologised for not considering Mr A's requests for information under the Code. Although the Ombudsman criticised Ofsted for their handling of Mr A's information requests, she commended them for now agreeing to release information to him. She considered this and their apology to be a satisfactory outcome to a partially justified complaint.

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

Background to the Code

2. Since the Code came into force in 1994 the Ombudsman has been able to consider complaints that, in breach of the Code, bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as being within the Ombudsman's jurisdiction have refused to provide information which is held by them. Ofsted is so listed. Refusal to supply information might be justified if the information falls within one or more of the exemptions listed in Part II of the Code (see paragraphs 3 - 4). The Code gives no right of access to documents: the right, subject to exemption, is only to information.

Exemptions of the Code

3. 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.'

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

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

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

Ofsted and HM Chief Inspector of Schools

5. Ofsted incorporates the Office of HM Chief Inspector of Schools (HMCI) and, as a consequence, is responsible for the inspection of schools. The Department for Education and Skills (DfES) makes decisions on schools' registration. At the time relevant to this complaint, inspections of mainstream independent schools were carried out at the request of the Secretary of State for Education and Skills under section 2(2)(b) of the Schools Inspection Act 1996. Most inspections are designed to ensure that the school meets the criteria for registration. While, in general, these registration inspections occur every five years, they are carried out more frequently if there are ongoing concerns about the school. The formal record of registration inspections, which HMCI send to DfES, is known as a Note of Visit. Notes of Visit are neither published nor sent to the school. It is for the Secretary of State for Education and Skills, as the regulator of independent schools, to determine what action a school needs to take after an inspection. DfES notify schools of the main findings of the inspection and of any requirements for action by the school by means of an Official Letter; this stands as the official record of the outcome of the inspection. In addition, DfES ask HMCI to carry out full reporting inspections of a number of schools each year in order, for example, to gain a broader picture of a school and any progress that it might have made than would be gained during a short registration inspection. HMCI produce an inspection report containing the judgments of their inspectors, which is sent to the school and published on HMCI's website.

Background to the complaint

6. Between 18 and 21 June 2001 HMCI carried out a full reporting inspection of Manor House School, of which Mr A is proprietor. Mr A disputed a number of the inspectors' findings. On 20 September 2001 he wrote to one of the participating inspectors questioning the accuracy of the number and duration of classes and lessons inspected as recorded in the draft report of the inspection. He asked HMCI to let him see the individual inspectors' records; however, HMCI did not provide them.

7. In an attachment dated 2 October 2001 to a letter which he sent to Ofsted on 19 October 2001, Mr A set out details of the lessons inspected, which he said had been provided by teachers at the school at the time of the inspection. He said that he had asked for the summary of inspection evidence in the report of the investigation to be amended to show that 16, and not 40, lessons had been observed, but the inspectors had denied that their figures were incorrect. In replying to that letter on 28 November 2001 one of HMCI's Divisional Managers summarised the evidence forms completed by the inspectors, saying that

they included records of 40 lessons, 32 of which contained direct teaching and eight of which consisted solely of internal examinations. He said that he had taken the evidence forms, completed by the inspectors at the time or shortly after the particular observation, to be an accurate account of the evidence that they collected. Mr A responded on 6 December 2001, saying that he was incensed with the Divisional Manager's acceptance of the inspectors' evidence forms without either weighing them or examining them against the individual teachers' comments that he held and which had been passed to Ofsted.

8. On a number of subsequent occasions Mr A noted that he had not been afforded sight of the inspectors' evidence. In a letter dated 7 February 2002 the Divisional Manager agreed to take up Mr A's offer of producing the teachers' detailed responses. These Mr A provided on 19 February 2002, in a letter in which he noted that he had not been provided with Ofsted's evidence base. On 8 March 2002 he wrote to Ofsted, seeking to initiate their complaints procedure in relation to this and other aspects of the inspection (although he subsequently agreed to await their detailed consideration of the information that he had provided on 19 February 2002 before proceeding). On 18 March 2002 the Divisional Manager told Mr A that he had studied the material provided. He said that, although he recognised that Mr A doubted the accuracy of the summary of the evidence base given in the report, Ofsted did not release the evidence base for inspections beyond that summary. He went on to analyse the apparent discrepancy between the school's and the inspectors' records and explained the basis of that analysis to Mr A. Mr A nevertheless remained dissatisfied and, on 15 May 2002, he asked for the complaint which he had made on 8 March 2002 to proceed. Ofsted acknowledged this on 20 May 2002, and explained that their Director of Inspection would be responsible for responding to his complaint.

9. In his report of 25 July 2002 the Director of Inspection did not address Mr A's request to see the inspectors' records, although he did discuss the differences between the inspectors' and the teachers' evidence. Mr A remained unhappy with the outcome of the inspection and the response to his complaints and, on 1 November 2002, he complained to the Independent Complaints Adjudicator for Ofsted and the Adult Learning Inspectorate (the Adjudicator). Mr A also wrote again to the Director of Inspection on 12 November 2002, asking to see the full HMI evidence base. The Director replied on 25 November 2002, saying that he saw no reason to reopen debate about the discrepancies between the school's and the inspectors' tally of lessons inspected, particularly since Mr A was now appealing to the Adjudicator.

10. Although in her report of 11 March 2003 the Adjudicator discussed the unresolved discrepancies between Ofsted's and the school's records, she did not comment on the question of whether or not the inspectors' records should be released to Mr A. From correspondence with the Adjudicator after he had received her report, Mr A became aware that she had had, in evidence before her at the time of the adjudication, copies of the last three Notes of Visit (see paragraph 5 above), which Ofsted had asked her to treat as confidential. On 10 June 2003 Mr A wrote to Ofsted, asking to see the Notes of Visit and the inspectors' evidence of classroom visits.

Preliminary action

11. As part of the preliminary assessment of Mr A's complaint, the Ombudsman's staff asked Ofsted to write to him setting out the exemptions of the Code on which they were relying to base their refusal to give him access to the inspectors'

evidence. HM Chief Inspector of Schools did so on 16 June 2003 saying that, as far as the matter of the number of lessons observed was concerned, he believed that Ofsted had satisfied the requirements of the Code. The Chief Inspector said that a summary of the lessons observed appeared in the inspection report, and also in the Divisional Manager's letter of 28 November 2001 (paragraph 7 above): the Divisional Manager had also provided a detailed analysis and comparison between HMI records and those of Mr A (paragraph 8). He went on to say that the Code required the provision of information, not copies of documents, and he did not believe that the actual evidence forms would add anything to what had already been said. The Chief Inspector said that, as a matter of policy, he believed that inspectors should be able to gather evidence and shape and record their working notes formatively for discussion and use by the inspection team, and that the formal record of their judgments was the inspection report, which was publicly available. He cited Exemption 2 of the Code, relating to internal discussion and advice, in relation to this material. He also went on to discuss Mr A's request to see the Notes of Visit and said that, since the Secretary of State for Education and Skills might choose not to accept the HMI judgments expressed in those Notes, those documents also had the status of internal advisory documents and Exemption 2 applied to them. Mr A responded to the Chief Inspector on 23 June 2003, again asking to see the evidence forms and the Notes of Visit, and saying that policy should not get in the way of justice. The Chief Inspector replied on 4 July 2003, declining to comment further since the matter was now with the Ombudsman.

Ofsted's comments on the complaint

12. In providing his comments on the complaint to the Ombudsman the Chief Inspector maintained the view expressed in his letter of 16 June 2003 (paragraph 11). He said that he remained of the opinion that the Notes of Visit and the evidence base (of which the evidence forms were part) were exempt from disclosure under Exemption 2 of the Code, for the reasons given in earlier correspondence. In his view, Mr A had already been supplied with the information he sought. He said that the inspectors' judgments from the 2001 inspection of Manor House School were formally recorded in the inspection report, which Mr A already had, and that the official outcome of this and the previous inspections had been set out in Official Letters to the school from DfES. As to the numbers of lessons observed, the Chief Inspector said that the Divisional Manager had provided an analysis of these in his letters of 28 November 2001 and 18 March 2002 to Mr A (paragraphs 7 and 8 above). The Chief Inspector maintained that, since the Code did not require the disclosure of original documents, Ofsted had complied with its requirements.

Assessment

13. Mr A has throughout pressed Ofsted for access to the specific evidence forms completed by the inspectors who undertook the inspection of Manor Farm School between 18 and 21 June 2001. At a later stage he also asked to see copies of the Notes of Visit which had been made available to the Adjudicator. How then should Ofsted have dealt with those information requests in the context of the Code?

14. I turn first to the evidence forms, and Ofsted's contention that Mr A has already received the information contained in them. While it is clear that Ofsted have expended considerable time and effort in analysing the discrepancies between the teachers' own records of lessons inspected and the evidence provided by the inspectors, I can see no evidence to suggest that they have provided Mr A with the class by class/inspector

by inspector breakdown of the duration of each individual inspection as contained in the evidence forms.

15. Ofsted have cited Exemption 2 of the Code as the basis for not providing that specific information. The purpose of that exemption is to allow bodies the opportunity to discuss and consider matters on the understanding that their thinking will not be exposed in such a way as to inhibit future discussion. I must however emphasise at this point that the purpose of Exemption 2 is not to protect factual information. That being so, I consider that Ofsted are unable to rely on that exemption, the only one they have cited, as grounds for denying Mr A the factual information contained in the evidence forms relating to the time individual inspectors spent inspecting each lesson. I therefore recommend that that information be released to him. I have seen that Ofsted have, helpfully, already prepared a table showing precisely that information and I consider that this is probably the most efficient way of providing it to Mr A. In response, the Chief Inspector agreed to release that table to him.

16. I turn now to the copies of the Notes of Visit which Ofsted provided to the Adjudicator in connection with her investigation (paragraph 10). I have examined those Notes and the Official Letters which resulted from them. It appears to me that much of the factual information and advice from Ofsted can already be found in the relevant Official Letters sent by DfES to the school. This is particularly so for the full reporting inspection in June 2001, in which the Official Letter and the inspectors' published report combined to give Mr A most of the factual information and the inspectors' opinions which had been reported to DfES in the Notes of Visit. However, there remains factual information, advice and opinion in the Notes of Visit for the inspections on 4 November 1997, 1 December 1998 and 5 June 2000 which Ofsted consider should be withheld under Exemption 2 of the Code. As I explained above (paragraph 15), Exemption 2 does not protect factual information, and thus does not apply to any factual elements contained in those Notes of Visit, which I again recommend should be released to Mr A.

17. The purpose of Exemption 2 is to allow bodies the opportunity to discuss matters, particularly those which are likely to be sensitive or contentious, on the understanding that their thinking will not be exposed in a manner likely to inhibit the frank expression of opinion. I recognise the strength of the argument that the comment and recommendations contained in the Notes of Visit depend on candour for their effectiveness and that the value of such advice could be substantially reduced if it were thought that it would be made available to a wider audience. I am satisfied, therefore, that such advice and recommendations are covered, in principle, by Exemption 2.

18. However, that is not the end of the matter. The Code also makes it clear that, in those categories such as Exemption 2 which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available (paragraph 4). I see nothing in the papers to suggest that Ofsted have considered the harm test in relation to the specific information contained in each of the Notes of Visit: what they appear to have done is adopted a class approach to the matter, refusing to provide Mr A with the Notes of Visit on the principle that they contained information of a type which should not be released, because the final decision as to which of the inspectors' recommendations should be acted upon lies with DfES and not Ofsted, whether or not DfES's conclusions reflected those of the inspectors.

19. It is against this background that I have considered carefully the undisclosed material. I fully accept that the provision of candid comments and recommendations by inspectors might be hampered if their views were in all circumstances to be made widely available. With this in mind, I do not consider that the public interest in having access to all of the non-factual information in the Notes of Visit is strong enough to outweigh the potential harm to the frankness and objectivity of future advice which might result from its disclosure. I accept therefore that, in practice, Exemption 2 applies to the opinions and advice contained in the Notes of Visit and that some of the information in that category should be withheld. Nevertheless, there remain comments which, if released, seem to me to be unlikely to harm the quality of any future advice, and I therefore recommend that they be made available to Mr A.

20. How then should that information be provided to Mr A? While, as the Chief Inspector has said, the Code requires the release of information rather than specific documents, the Ombudsman and her predecessors have accepted that the most effective way in which to meet a request for information is often by releasing the actual documents concerned. In this case, I consider that it would be most helpful for Mr A to have an edited version of the Notes of Visit with any withheld information simply blocked out, and I so recommended to Ofsted. In reply, the Chief Inspector agreed to release the edited versions to Mr A.

21. Finally, I turn to Ofsted's handling of Mr A's information requests. It has been the case that, since the Code came into operation in 1994, all requests for information should be treated as made under it irrespective of whether or not the Code was mentioned. The Ombudsman has also said that it is good practice, if bodies refuse to provide information, for them to identify in their responses the specific exemptions in Part II of the Code on which they are relying in making that refusal. They should also make the requester aware of the possibility of a review under the Code and of making a complaint to the Ombudsman if, after completion of the review process, they remain dissatisfied. I was therefore concerned to see that, despite a number of requests by Mr A for access to the evidence forms completed by the inspectors, Ofsted failed to provide the information without reference to the provisions of the Code. In particular I find it troubling that, in their letter of 18 March 2002 (paragraph 8) Ofsted said only that they did not release their evidence base, without attempting to consider Mr A's request under the Code. It was not until the intervention of the Ombudsman's staff in June 2003 (paragraph 11) that Ofsted wrote to Mr A setting out details of the exemptions that they considered to be applicable to their withholding of the evidence forms (and also the Notes of Evidence). That was unfortunate, and I take this opportunity to ask the Chief Inspector to remind his staff of the importance of dealing with information requests not only in accordance with Code procedures but in the light of the forthcoming requirements of the Freedom of Information Act. In reply, the Chief Inspector said that he regretted that Ofsted had not met their obligation to consider Mr A's request with reference to the Code; that Ofsted were fully committed to its principles and, that, in the time since the Ombudsman began her consideration of Mr A's complaint, guidance had been issued to Ofsted staff on the need to apply the Code to all requests for information. The Chief Inspector said that he would consider whether or not there was more that Ofsted could do to improve their practices with regard to the Code. I welcome that commitment.

Conclusion

22. I found that Exemption 2 could only be correctly applied to some of the advice and opinion in the documents sought by Mr A. I am pleased that Ofsted have accepted my recommendation that the table showing the breakdown of the time individual inspectors spent inspecting each lesson, as well as edited versions of the Notes of Visit, should be released to him. While I have criticised Ofsted for the way in which they handled Mr A's information request, the Chief Inspector has said that he has used this investigation as an opportunity to remind his staff of the requirements of the Code. I see this, and the release of information to Mr A, as a satisfactory outcome to a partially justified complaint.

Department of Trade and Industry

Case No: A.20/04

Refusal to provide information in relation to a complaint about a member of the Institute of Chartered Accountants of Scotland (ICAS)

Summary

Mr C asked for copies of all information held on DTI files in relation to a complaint he had made to ICAS about one of their members. DTI said that they had no formal remit to intervene in individual disciplinary cases such as this, and that any correspondence between them and ICAS had been on a strictly confidential basis as one regulatory authority to another. DTI did, however, provide Mr C with a limited amount of information. They considered the remainder of the information to be exempt from disclosure under Exemptions 2, 4, 12, and 14 of the Code. DTI said that ICAS had asked that information they had provided should remain strictly confidential, and that they had respected that wish in the interests of maintaining the existing open dialogue with ICAS on complaints such as Mr C's. The Ombudsman found that the information that Mr C had not already seen fell within two broad categories: (i) correspondence from ICAS to DTI, and (ii) internal DTI minutes and correspondence sent to ICAS. In relation to (i) the Ombudsman considered that, as ICAS specifically asked for information provided by them to be kept confidential, DTI had correctly applied Exemption 14(b). As for (ii) the Ombudsman found that the information either fell within Exemption 4(d), or that it had already been seen by Mr C. However, the Ombudsman could see no reason why one letter from DTI to ICAS should not be released to Mr C, and DTI agreed to provide most of the information contained in that letter. The Ombudsman criticised DTI's initial handling of Mr C's request, but considered this to be a satisfactory outcome to the complaint.

1. Mr C complained that the Department of Trade and Industry (DTI) refused to supply him with information that should have been made available to him under the Code of Practice on Access to Government Information (the Code). I 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.

DTI and the Institute of Chartered Accountants of Scotland (ICAS)

2. The accountancy profession is subject to statutory regulation in three areas: investment advice, insolvency work and company audit. Under Part II of the Companies Act 1989, Recognised Supervisory Bodies (RSBs) have delegated responsibility to ensure that only properly supervised and appropriately qualified persons are appointed as company auditors, and that audits are carried out properly, independently and with integrity. ICAS are such a body. Requirements for RSB status include fair and reasonable rules and practices relating to discipline exercised over members. DTI have no remit to intervene in individual disciplinary cases being handled by accountancy professional bodies, even when these relate to audit issues. Nevertheless, DTI do take up generic issues raised by specific complainants when it is considered appropriate to do so. I have been told by DTI that there is a general understanding that information provided to them by ICAS in such circumstances will be treated in confidence.

The complaint

3. On 28 December 2000 Mr C wrote to DTI requesting copies of all information held on their files relating to a complaint that he had made to ICAS about the conduct of one of their members. DTI replied on 15 January 2001. They said that any correspondence between them and ICAS had been on a strictly confidential basis, as one regulatory authority to another. Therefore, as ICAS had not given their consent for the information to be disclosed, they could not accede to Mr C's request. There was no reference to the Code. Following further correspondence, during which Mr C raised the issue of his rights

under the Data Protection legislation, the DTI Data Protection Officer wrote to Mr C on 5 February 2001 explaining that he would be provided with copies of any personal information held about him to which he had right of access under the Data Protection Act 1998. The Data Protection Officer went on to say that the bulk of the remaining information was either already in Mr C's possession or exempt from disclosure under Exemption 2 of the Code. He did, however, enclose copies of three letters sent from DTI to ICAS which he did not consider to fall within the scope of the Exemption.

4. On 9 February 2001 Mr C wrote to DTI seeking an internal review of their decision. DTI replied on 15 March 2001. They said that Mr C was already in possession of most of the documents on their file, with the exception of internal minutes which discussed legal and administrative issues around his complaint, and letters from ICAS providing information on a confidential basis. In refusing to disclose that information DTI cited Code Exemptions 2, 4, 12 and 14. It was decided, however, that two further documents should be disclosed and copies of these were enclosed with the letter. DTI told Mr C that he could refer the matter to the Ombudsman via a Member of Parliament if he remained dissatisfied.

5. On 9 May 2001 the Member wrote to DTI on behalf of Mr C, seeking their comments on the issues he had raised. The Permanent Under Secretary of State for Consumer and Corporate Affairs replied on 30 May 2001. He said that officials had taken legal advice about Mr C's request, including whether information should be disclosed to him under the Code. He said that DTI had provided copies of documents which could be disclosed and had explained to Mr C why other documents were subject to Code exemptions. He explained that ICAS had asked that information they had provided to DTI should remain strictly confidential, and said that DTI had respected that wish in the interests of maintaining the present open dialogue with them on complaints such as Mr C's. He concluded that there was nothing further that DTI could do for Mr C.

6. On 11 June 2003 Mr C sent an e-mail to the Member asking him to arrange for his complaint to be reopened, including the question of access to DTI's files. The Member forwarded Mr C's request to DTI and the Minister of State for Industry and the Regions replied on 6 July 2003. She said that the letter of 30 May 2001 had explained fully DTI's position and that there was nothing to suggest that the decision should be reviewed.

DTI's comments on the complaint

7. The Permanent Secretary of DTI said that Mr C's complaint stemmed from a long-standing dispute with ICAS in relation to a complaint that he had made about one of their members. Mr C had been corresponding with DTI since 1999 seeking assistance with his case. However, the Permanent Secretary said that it was not within DTI's remit to intervene in disciplinary cases being handled by accountancy professional bodies although DTI did take up generic issues raised by individual complainants where it was judged appropriate to do so. This was the case with Mr C's complaint when, in the interests of good administration, DTI had encouraged ICAS to address Mr C's concerns.

8. The Permanent Secretary said that a substantial amount of the material requested by Mr C consisted of correspondence between him and DTI or ICAS, which was already in his possession. Papers not in his possession were the majority of

those constituting correspondence between DTI and ICAS, and internal exchanges between officials, including DTI lawyers. Having taken advice from both the Department's Open Government Unit and lawyers about Mr C's rights under the Code, DTI concluded that three of the documents could be disclosed to him. These were letters from DTI's Company Law & Investigation Directorate to ICAS. It was concluded that the remaining documents fell either within Exemption 2 or 4 of the Code, as well as Exemption 14 and, possibly, Exemption 12.

9. The Permanent Secretary said that, when Mr C requested a review, the non-disclosure decision in respect of certain documents had been reviewed by the relevant Director-General. She had upheld the earlier decision but had concluded that two further documents could be disclosed to Mr C. These documents (an internal minute and a letter from the Company Law & Investigation Directorate to ICAS) were enclosed with the Director-General's letter of 15 March 2001. Mr C's request under the Data Protection Act was also fully considered but no personal information was found to which he was entitled under the Act.

The Code of Practice on Access to Government Information

10. In refusing to provide the information sought by Mr C, DTI cited four exemptions of the Code. Exemption 2 is headed 'internal discussion and advice' and reads:

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

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

11. Exemption 4 is headed 'Law enforcement and legal proceedings', and includes:

'(a) Information whose disclosure could prejudice the administration of justice (including fair trial), legal proceedings or the proceedings of any tribunal, public enquiry or other formal investigations (whether actual or likely) or whose disclosure is, has been, or is likely to be addressed in the context of such proceedings.

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

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

(d) Information covered by legal professional privilege.

12. Exemption 12 comes under the heading 'Privacy of an individual' and reads:

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

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

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

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

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

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

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

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

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

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

Assessment

14. Before considering the question of whether or not Mr C is entitled to the information he has requested, I shall look first at the way in which DTI handled his request. Since the Code came into effect in April 1994 the Ombudsman has been able to consider complaints that, in breach of the Code, bodies which are listed in Schedule 2 to the Parliamentary Commissioner Act 1967 as being within the Ombudsman's jurisdiction have refused to provide information which is held by them. DTI are so listed. It is an accepted procedure of dealing with requests for information under the Code that, if a department decides to refuse a request for information, they should identify the specific exemption(s) in part II of the Code on which they are relying. Also, where information has been refused, the possibility of a review under the Code needs to be made known to the person requesting the information at the time of that refusal, as does the right to make a complaint to the Ombudsman if, after the review process has been completed, the requester remains dissatisfied. Finally, departments are expected to respond to requests for information within 20 working days, although the Code recognises that this target may need to be extended when significant search or collation of material is required.

15. I note that, in their first response to Mr C's request for information, DTI simply stated that correspondence between ICAS and DTI had been on a strictly confidential basis and that, as ICAS had not agreed to the release of the correspondence, they could not do so either. DTI did not mention the Code and addressed only the question of their correspondence with ICAS, not the other information held on their files. I am critical of that failure. It was not until DTI's Data Protection Officer became involved as

a result of further correspondence from Mr C that the Code was mentioned, reference to Exemption 2 made, and limited material provided to Mr C. In his letter of 5 February 2001 the Data Protection Officer advised Mr C of his right to request a review. That review was carried out by a senior manager, who concluded that two further documents could be provided to Mr C and cited four exemptions in upholding the earlier decision not to disclose the majority of the information requested. She also told Mr C that he had a right to make a complaint to the Ombudsman. While I am critical of DTI's initial handling of Mr C's complaint, they appear to have subsequently acted in full accordance with the requirements of the Code.

16. I turn now to the substantive issue of whether or not DTI were justified in refusing to provide Mr C with the information that he requested. In doing so DTI cited Exemptions 2, 4, 14, and, possibly, 12 (see paragraphs 10 to 13). These exemptions have been quoted in 'blanket' form, and not applied to specific information. The Ombudsman has previously criticised the overuse of exemptions in justifying the withholding of information: certainly it is much more helpful, if several exemptions are to be cited, if they can be applied to individual items of information rather than employed in such a general fashion. The Ombudsman's staff did, however, examine all of the documents in the relevant DTI files with the above exemptions in mind. Some of the documents are exchanges of correspondence between DTI and Mr C, and some are other papers that he has already seen. The remaining documents fall into two main categories: (i) correspondence from ICAS to DTI, some of which contains information about ICAS's investigation; and (ii) internal DTI minutes and correspondence sent to ICAS. I should point out at this stage that the Code gives no right of access to documents: the right, subject to exemption, is only to information. Successive Ombudsmen have, however, taken the view that the release of actual documents is often the best way of making available information that is recommended for disclosure. In this context I shall go on to assess the merits of the exemptions cited by DTI.

17. I shall consider first the letters and information sent from ICAS to DTI, as these form the majority of the relatively small number of documents in question. Having carefully studied the papers I have seen that, although two letters from ICAS's Director of Legal Services to DTI about Mr C's complaint were withheld from him, the information contained in them was conveyed to him in later letters. As explained above, the right of access under the Code is to information, not to documents, and I therefore accept that DTI have fulfilled their obligations in respect of these documents. The remaining information comprises various letters and reports in relation to ICAS's investigation of Mr C's complaint. DTI have said that ICAS provided this information to them on a confidential basis and asked that it should remain strictly confidential. They have said that they have respected those wishes in the interests of maintaining their existing open dialogue on complaints such as Mr C's.

18. Exemption 14(a) applies, in part, to information supplied by someone who was not under any legal obligation to provide it and who has not consented to its disclosure. Exemption 14(b) relates to information whose disclosure without the consent of the supplier would prejudice the future supply of such information. In their letter of 26 September 2000 ICAS specifically asked that the information that they provided should be kept confidential. Furthermore, in reply to an enquiry from DTI asking ICAS for their views on Mr C's request for information, ICAS's Director of Legal Services replied on 12 January 2001 asking

DTI to '... hold all of the correspondence on your file from the Institute secure and confidential'. In the light of those explicit requests, and the fact that ICAS were under no legal obligation to make the information available to DTI, I believe that it was reasonable for them to withhold this from Mr C. Moreover, I consider that for DTI to reveal the correspondence and material in question would be likely to undermine the trust placed in them and prejudice future co-operation by ICAS. I do not consider that there is any distinct public interest in releasing this information that would outweigh the potential harm caused by its release. While some documents provided by ICAS contain legal advice, as I am satisfied that Exemption 14 applies to the totality of the information contained in them, I have not found it necessary to consider the applicability of Exemption 4. Similarly, I have not considered Exemptions 2 or 12.

19. I turn now to the internal information held by DTI and letters sent by them to ICAS. Having looked at all of the correspondence involved, I have concluded that there is only one letter that Mr C has not seen. This is a letter from DTI's Company Law and Investigations Directorate enclosing letters from Mr C and asking to be kept informed of the current position with his case. The letter contains none of the elements covered by the Code exemptions cited and I cannot see that there is any other Code reason why this information should not be disclosed. I therefore recommended that it be released to Mr C. In reply, the Permanent Secretary said that he had some concerns about releasing the letter in its entirety. Following an exchange of correspondence, DTI agreed to release the letter to Mr C with two minor redactions. DTI also notified this Office at a late stage that Mr C had already been provided with some of the information contained in the letter as a result of his earlier request under the Data Protection Act, albeit that the information released was not personal to Mr C.

20. As far as documents relating to DTI's internal communication are concerned, I have identified only two minutes that are pertinent to Mr C's request. These minutes are in relation to legal advice provided to the Director of Legal Services about an issue raised by Mr C under the European Courts Human Rights legislation. Of the exemptions cited by DTI, Exemptions 2 and 4 would appear to be relevant in this instance. I will first consider Exemption 4(d) of the Code which relates to legal professional privilege. As I understand it, there are two types of legal professional privilege: litigation privilege and legal advice privilege. As the documents held by DTI did not come into existence due to litigation, I do not see that the first of these is relevant in this case. As far as the second is concerned, Cabinet Office guidance on the Code states that legal advice privilege is intended to protect advice given by solicitors, barristers and legal advisers generally, whether they are within the Department, from the Treasury Solicitor's Department, or from external practices or firms. It also says that legal advice should only be disclosed with the express agreement of the legal adviser concerned. The guidance continues by referring to the long-established convention that neither the fact of consultation nor the opinions or advice given by the Law Officers, may be disclosed outside government without their express approval.

21. The advice provided to the Director of Legal Services in this case was in part legal and in part presentational. However, the presentational element (which took the form of a draft letter to Mr C) was conveyed to him verbatim in a letter dated 17 October 2000, sent shortly after the advice was received. As for the part of the advice that Mr C has not already seen, in the absence of

an agreement by the provider of it for the information to be disclosed, I am satisfied that Exemption 4(d) of the Code was correctly applied. This Exemption is absolute, as there is no reference to harm or prejudice that would allow me to consider whether or not the public interest in the information is sufficiently strong to outweigh the harm arising from disclosure. In view of this I do not consider it necessary also to consider the applicability of Exemption 2 to the information.

Conclusion

22. While I have criticised DTI's initial handling of Mr C's request, I have found that they were justified in refusing to release most of the information sought. They have agreed to release the relevant part of the only document found not to be exempt under the Code. I regard this as a satisfactory outcome to a partly justified complaint.

Department for Work and Pensions

Case No: A.23/05

Refusal to provide a copy of a contract relating to the management and provision of Employment Zone services

Summary

Ms E asked the then Employment Service for a copy of the contract drawn up between the former Department for Education and Employment and Company X for the management and provision of Employment Zone services. They declined to provide a copy. Ms E pursued the matter with the Department for Work and Pensions (DWP), with whom responsibility for the contract now lies. They again refused to provide a copy, saying that the document was commercially confidential, but their response to Ms E did not follow Code procedures. Following the Ombudsman's intervention, DWP agreed that a copy of the contract could be released to Ms E. While critical of DWP's handling of Ms E's information request, the Ombudsman nevertheless considered the release of the relevant information, and DWP's acceptance of their failings and their assurance that future information requests would be dealt with correctly in accordance with the Code, to be a satisfactory outcome to the complaint.

1. Ms E complained that the Department for Work and Pensions (DWP) had refused to provide her with information that should have been made available to her under the Code of Practice on Access to Government Information (the Code). I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked.

Background to the complaint

2. On 31 March 2000 the then Secretary of State for Education and Employment contracted with Company X for the management and provision of Employment Zone services in the Haringey Zone, on the terms and conditions set out in the contract. (Such matters were at that time within the remit of the then Department for Education and Employment; responsibility for the contract later passed to DWP.) Company X's principal obligation was described as being to assist job seekers referred to them by the Employment Service to achieve sustainable employment.

The complaint

3. On 3 January 2002 Ms E wrote to the Employment Service asking for details of Company X's contract with them in relation to an Employment Zone programme in which she had participated in August 2001.

4. On 18 February 2002 Ms E wrote to Company X asking for a copy of the full contract between them and the Employment Service. She repeated her request on 23 March 2002. On 2 April 2002 she wrote to the Employment Service saying that Company X had not replied to her request. On 22 April 2002 she again wrote to the Employment Service complaining that neither they nor Company X had replied.

5. On 10 May 2002 Ms E asked her Member of Parliament to intervene. After further correspondence and a meeting between the Member and representatives from Company X, the latter wrote to Ms E on 31 January 2003 providing an extract from the contract. On 6 February 2003 Ms E replied saying that, throughout, they had failed to provide her with a copy of the contract and had given no explanation for that failure. She asked for a copy by return. On 27 February 2003 Company X wrote to Ms E saying that they were unable to furnish her with a copy of the contract because it was 'commercially in confidence'.

6. On 3 March 2003 Ms E wrote to DWP's Parliamentary Relations Unit about Company X's letter of 27 February 2003 asking why the contract was not available because her local Jobcentre Plus office had, in October 2001, suggested that she obtain a copy in order to

resolve any dispute over in-work benefits. She asked DWP to investigate.

7. On 7 March 2003 Ms E wrote to Company X saying that she had forwarded their letter of 27 February 2003 to both her Member of Parliament and DWP for reply and that she considered that, although Company X had now made a minor financial concession, without sight of the contract it would be wrong for her to accept it since it would be mere conjecture on her part as to what their responsibilities were.

8. On 19 March 2003 Company X wrote to the Member saying that the contract between DWP and Company X contained details which were restricted for commercial purposes between the two contractual parties. On 11 April 2003 Ms E wrote to the Minister for the Disabled asking her to intervene. DWP replied on 4 July 2003, saying that they held the contract with Company X, that the tender document was not a public document as it was 'commercially confidential' and that they understood that Company X had supplied her with an excerpt of the contract for her information. They also said that the contract was not relevant to Ms E's complaint.

9. After further exchanges, on 26 August 2003 DWP wrote to Ms E, explaining that their contract with Company X set out the minimum standard of help that they were required to provide to participants and the points during the process at which they were able to claim payment from DWP. They said that, as with all contracts of this type, the document was 'commercial in confidence' and as such was not available for public inspection.

The Permanent Secretary's comments on the complaint

10. The Permanent Secretary of DWP acknowledged that they had not followed the Code when considering Ms E's request for a copy of the contract. He accepted that she had neither been advised about the Code, nor of her right under its provisions to have an internal review of DWP's decision and to refer the matter via her Member of Parliament to the Ombudsman. DWP had, however, explained to Ms E their reason for refusing to provide her with the contract document, the case had been reviewed by a senior officer and they had advised her that she could contact her MP.

11. The Permanent Secretary said that Ms E had been given the relevant extract from the contract and confirmed that both Company X and DWP had told her that the contract document was 'commercially confidential'. However, he went on to say that, since then, the contract had been re-tendered and commercial confidentiality was no longer an obstacle to disclosure. He said that the case had prompted DWP to remind staff about the need to comply with the Code and the provisions of the Freedom of Information Act.

The Code of Practice on Access to Government Information

12. Although DWP did not specify any Code exemption(s) in their dealings with Ms E, it is clear that they had one particular exemption in mind. I set this out below:

Exemption 13 of the Code 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'.

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

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

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

Assessment

14. In assessing this complaint I have to consider not only the substantive issue of whether or not the information requested by Ms E should be released to her but also the way in which DWP handled her request. As far as the information sought is concerned, DWP have now agreed to its release to Ms E. I very much welcome that decision. In the light of that development, I do not think that anything would be gained by considering whether or not Exemption 13 could have been successfully applied to the information requested had DWP continued to withhold it. I therefore make no finding on this matter.

15. I now turn to the way in which DWP dealt with Ms E's request for information. Until the Freedom of Information Act 2000 comes fully into force on 1 January 2005, all requests for information should be treated as if made under the Code, irrespective of whether or not it is referred to by the applicant. The Ombudsman has said that it is good practice, if departments refuse a request for information, for them to identify in their responses the specific exemptions in Part II of the Code on which they are relying in making that refusal. They should also make the requester aware of the possibility of a review under the Code, and of the further possibility of making a complaint to the Ombudsman if, after completion of the review process, they remain dissatisfied. Ms E has assiduously sought information from DWP over a period of almost three years and, as has been acknowledged by the Permanent Secretary of DWP, their handling of her information requests has fallen well short of what is required under the Code and, indeed, under the forthcoming legislation: this warrants my criticism. I am, however, pleased to see that DWP are committed to ensuring that future requests are dealt with correctly.

Conclusion

16. Following the Ombudsman's intervention, the information sought by Ms E has now been released to her and the Permanent Secretary has acknowledged DWP's failure to follow Code procedures. I regard this release, and the Permanent Secretary's assurance that DWP staff will be reminded of the requirements of the Code, as satisfactory outcomes to this complaint

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