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FREEDOM OF INFORMATION ACT 2000

DECISION NOTICE

Date 31 July 2006

Public Authority: Office of Government Commerce
Address: Trevelyan House, 26-30 Great Peter Street,
London
SW1P 2 BY

Summary Decision and Action Required

The Commissioner's decision in the matter is the Office of Government Commerce (OGC) has not dealt with the complainant's request in accordance with Part 1 of the Freedom of Information Act 2000 ("the Act") in that it has failed to comply with its obligations under section 1(1).

The Commissioner requires that the OGC shall, within 35 calendar days of the date of this Decision Notice, provide the complainant with all the information he requested on 3 January 2005.

1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner

1.1 The Commissioner has received an application for a decision whether the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Act.

1.2 Where a complainant has made an application for a decision, unless:

- the complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority



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2. The Complaint

- 2.1 The complainant has advised that on 3 January 2005 the following request for information was made to the OGC:

“Please provide me with the two pre-Stage Zero and the actual Stage Zero Gateway Reviews of the Identity Cards Programme project being run by the Home Office”

- 2.2 The OGC has explained that the Gateway Review process examines the progress of high to medium risk governmental projects at five critical stages of their life-cycle. Reviews are mandatory for projects which are classified as high or medium risk. In addition there is a Gate Zero stage at which the feasibility of a project or programme is assessed at its outset. A Traffic Light Status (RAG Status) is awarded to the project at the end of each stage. Red Status means the project team should take action immediately in order to achieve success. Amber Status means the project should go forward, with actions to be carried out or recommendations to be acted on, before the next OGC Gateway Review of the project. Green Status means the project is on target to succeed but may benefit from the uptake of recommendations.
- 2.3 The OGC advised the complainant that it only holds two Gate Zero Reports about the identity card project. It explained that it does not hold any Pre Stage Zero Report but that an earlier report containing the technical risk assessment of an entitlement cards scheme was conducted by the Home Office in 2003 and is held by the Home Office. The OGC confirmed in a letter to the Commissioner dated 2 September 2005 that it would transfer this element of the request to the Home Office.
- 2.4 On 22 February 2005, the OGC disclosed some of the background information contained within the two Gate Zero Reports that were prepared in June 2003 and January 2004. The remainder of the information was withheld on the grounds that the OGC considered it was exempt from disclosure by virtue of s.33 (audit functions) and s.35 (formulation of government policy) of the Act.
- 2.5 The OGC carried out an internal review at the complainant's request on 24 March 2005 but maintained its decision to withhold the remainder of the requested information. It again invoked s.33 and s.35 as its basis for withholding the information.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides that –



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“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 33 provides that –

“(1) This section applies to any public authority which has functions in relation to-

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).”

Section 35 (1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office. “

4. Review of the case

Scope of the investigation

- 4.1 The complainant wrote to the Commissioner on the 5 April 2005 expressing his dissatisfaction with the OGC's decision to withhold the information.



- 4.2 The Commissioner's investigation focused on whether the OGC was justified in relying on the exemptions at s.33 and 35 of the Act as its basis for withholding the two Gate Zero Reports.
- 4.3 The Commissioner requested a copy of the two Gate Zero Reports held by the OGC. At first OGC did not provide copies but did allow the Commissioner to examine them in situ. It then provided a copy of the information to the Commissioner.

The Commissioner's investigation

- 4.4 On 9 June 2005 the Commissioner began his investigation by writing to the OGC to ask it to explain in more detail why it believed the exemptions were engaged. The Commissioner also requested a copy of the information. Both the exemptions cited by OGC are subject to the public interest test. Therefore the Commissioner asked OGC to explain why it believed that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. OGC was also invited to provide any additional information in support of its decision to withhold.
- 4.5 The OGC replied on 12 July 2005. It explained the purpose and operation of the Gateway process and why it believed the information should not be disclosed. It also provided supporting statements from those involved in the Gateway process. It did not provide a copy of the information but suggested the reports could be reviewed on the OGC's premises.
- 4.6 On 11 August 2005 representatives of the Commissioner visited the OGC offices and reviewed the information requested.
- 4.7 The Commissioner wrote again to the OGC on 12 August 2005 and explained that as a result of viewing the information it appeared that it had not dealt with all the complainant's request. The complainant asked for the two Pre-Stage Zero Reports and Stage Zero Reports. The OGC explained that it actually held two Stage Zero Reports but did not hold any Pre-Stage Zero Reports. However it explained that there was an earlier review carried out by the Home Office and that the complainant had also made a request to the Home Office for the same information. The Commissioner suggested it should clarify with the complainant what information it held and should pass the other part of the request on to the Home Office.
- 4.8 In his letter of 12 August 2005 the Commissioner also explained that he required a hard copy of the information in order to consider this complaint properly and reassured the OGC about its concerns over sending a copy to the Commissioner.
- 4.9 On receipt of the information the Commissioner considered the application of the exemptions and the relevant public interest arguments.



Section 33 – audit functions.

- 4.10 The OGC has explained that one of its functions is to examine and review the ID card programme, at critical stages in its lifecycle, to assess whether it can progress successfully and to make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that OGC is a public authority to which the exemption at s.33 of the Act applies.
- 4.11 Section 33 allows a public authority to refuse to disclose information if disclosure would, or would be likely to, prejudice the exercise of the public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
- 4.12 The OGC has argued that the release of information provided to it in confidence on a voluntary basis may inhibit the frankness, candour and general co-operation of interviewees for further Gates in connection with this programme and future programmes or projects. The OGC has provided the Commissioner with statements from those involved in Gateway Reviews confirming that they would be less willing to cooperate fully if information was likely to be disclosed. It is therefore the OGC's view that the publication or disclosure of Gateway Reports would severely prejudice the efficacy of the Reports and that delays will result in the provision of the Reports to the Senior Responsible Owner of the project or programme. It argues that the Gateway process is unique and that disclosure or the threat of disclosure, of this information would harm this process. If it is weakened in this way there is presently no other process to replace it.
- 4.13 The Commissioner is not persuaded that the information contained in these two Gateway Reports is of such a nature that its disclosure would discourage future cooperation by those providing the information to the OGC. In addition, the Commissioner does not accept that those contributing information as part of the Gateway Review process do so on a genuinely voluntary basis, or that they are at liberty to refuse to co-operate with future Gateway Reviews. Those contributing information do so in a professional capacity. It is part of their official responsibilities to participate fully and frankly with Gateway Reviews and similar initiatives. The Commissioner does not accept that the officials responsible for gathering and collating the requested information would cease to perform their duties on the grounds that the information may be disclosed. Government departments, such as the OGC, are expected to provide accurate information when they are asked to do so. The Commissioner does not accept that the release of the requested information will result in government departments failing to provide information or in their providing incomplete or inaccurate information to other government departments. Civil servants would be in breach of their duty, and would damage their integrity as servants of the Crown, should they deliberately withhold relevant



information or provide information other than the best they believe they can give. It is a matter for the bodies concerned, including the OGC, to ensure that their officials continue to perform their duties according to the required ethical standard, including the completion of reports such as those falling within the Complainant's request.

- 4.14 The OGC has not demonstrated that release of the requested information would, or would be likely to, prejudice the exercise of any of its audit functions. The Commissioner's decision therefore is that the exemption at s.33 of the Act is not engaged in respect of the requested information.

Section 35 – formulation of government policy.

- 4.15 The OGC also argued that the requested information was exempt from disclosure by virtue of s.35 of the Act. Section 35 exempts information held by a government department from disclosure if it relates to the formulation or development of government policy.
- 4.16 It is arguable whether the exemption at s.35 (1) (a) is engaged in respect of the requested information. There is a strong argument that the information contained in these Gate Zero Reports in fact relates to the implementation of the ID card project, rather than to the formulation or development of government policy on ID cards. The original Identity Card Bill was announced in the Queen's Speech of November 2004. The Act of 2006 has now been enacted. It is arguable whether Government policy on identity cards was still being formulated or developed when this request was made. However, the Commissioner is willing to accept that the information does relate to the development of government policy. He is therefore prepared to accept that s.35 is engaged.
- 4.17 Section 35 is a qualified exemption and is subject to a public interest test. The OGC asserts that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- 4.18 The complainant has put forward what he considers to be strong public interest arguments in favour of the release of the requested information. He argues that:
- The Government's compulsory centralised biometric National identity Register Database and Smartcard ID plans have far reaching consequences for privacy, data protection and civil liberties. The project looks set to involve the expenditure of several billion pounds of public money. It is very difficult to argue why publishing these reports is not in the public interest
 - Disclosure would enable the public to form a view on whether the recommendations of the Review were being implemented
 - It would also allow the public to understand whether the Gateway process was generally effective



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4.19 The OGC put forward the following public interest arguments in favour of maintaining the exemption:

- Disclosure will inhibit the candour and frankness of officials. The OGC has pointed out that it considers that the importance and success of the reviews are based fundamentally on the underlying candour, confidentiality and promptness. The reviewers have indicated that nothing is held back, there are no taboo subjects and concerns and criticisms are freely expressed and discussed. The OGC explained that the same interviewees may be expected to participate in future Gateway Reviews of the same programme and projects. They may be less willing to do so if there was a risk of their comments being placed in the public domain.
- This lack of candour may reduce the likelihood of adverse recommendations being made to the Senior Responsible Officers, leading to a less reliable process. This in turn would harm the public interest because the recommendations that would offer the greatest benefit would be less likely to emerge.
- The risk of disclosure may result in more cautiously drafted documents which would result in delays in the completion of reports or dilution of the substance of the Report. The OGC has advised the Commissioner that Gateway Reports are produced very quickly, usually in a matter of days. Such promptness is only possible because the reviewers are writing for a narrow audience. If the reviewers had to have regard to disclosure or publication of the Reports, then substantial further consideration would have to go into their drafting. Each draft would be subject to consultation with interested third parties. This would mean it would take substantially longer to prepare the Report before it was ready to be released to the Senior Responsible Owner of the programme or project.
- The OGC expressed concern that release of the Reports could be taken out of context and the style or form of language could be criticised. The release of such Reports could create an inaccurate or incomplete picture which would require additional resources in order to set them in context. Further explanation may also be required to ensure the contents of the Report are not misrepresented.
- The Government considers that the Gateway process has been very successful, leading to demonstrable value for money gains across central government. The Gateway process is presently unique and any threat to it would not be in the public interest
- Disclosure of the information could undermine the still live policy development process



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5. The Commissioner's Decision

5.1 The Commissioner's decision is that the exemption at s.33 of the Act is not engaged in respect of the requested information.

5.2 He has decided that the exemption at s.35 of the Act is engaged. In order to decide whether the public authority has dealt with the complainant's request for information in accordance with the requirements of Part 1 of the Act, the Commissioner must assess whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In coming to his decision the Commissioner has taken the following factors into account:

5.3 *Importance of the Gateway Review Process*

The Commissioner is aware of the importance the Government attaches to the Gateway Review process. He recognises that there is a balance to be drawn between the competing societal objectives of public accountability and transparency and the importance of maintaining public confidence in the robustness and effectiveness of the Gateway Review process. The Commissioner has taken these competing objectives into account in reaching his decision.

5.4 *Nature of the Project being reviewed*

The subject of these Reports, i.e. identity cards, will have a significant impact on the lives of individuals and their relationship with the state. The Commissioner considers that this in itself presents a very strong argument in favour of disclosure. The public should therefore be kept informed as far as possible as to how the programme is progressing and what the impact on them of identity cards will be. Disclosure is likely to enhance public debate of issues such as the programme's feasibility and how it is being managed. It will also allow the identification of project risks and practical concerns. It could also go some way towards educating the public by allowing it to develop a better understanding of the issues surrounding the development of identity cards. In the Commissioner's view the nature of the identity card project and its implication for citizens is in itself a highly significant factor in deciding in favour of disclosure.

The Commissioner is mindful of the OGC's view that because the programme is of such great public importance, there is a strong public interest in the programme being successful. The OGC argues that it is therefore essential that the integrity of the Gateway Process is maintained and not damaged in any way. The Commissioner has taken this into account but still considers that allowing the public an opportunity to better understand the development of the ID card programme outweighs the public interest arguments put forward by the OGC. In any event, the



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Commissioner is not persuaded that that disclosure of the requested information will damage the Gateway process in the way the OGC has suggested it will.

5.5 ***Content of the Reports and the impact on candour of Interviewees***

The Commissioner is mindful of the OGC's view that the release of the report would make future prospective interviewees and interviewers less willing to participate in the Gateway process. However, in this case he is not persuaded by this argument.

In the Commissioner's opinion the Reports do not contain any information which would cause participants to be less willing to contribute openly and fully in future Gateway Reviews. The Commissioner has noted that during his discussions with the OGC it accepted these Reports were prepared at a very early stage in the life of a project. Because these Gate Zero Reviews were carried out at an early stage, it concentrates more on the practical issues of ensuring the right personnel and management structure is in place. It is difficult to envisage how disclosure of information of this sort could lead to contributors being less candid with their views. The Commissioner is satisfied that the Reports consist of material one would expect to see in relation to the early stages of any major governmental programme.

Gateway reports do not attribute comments to any particular person, although the Commissioner recognises that in some cases the nature of the information is such that it may be possible to attribute content to a particular individual. However, even if it is possible to do this, the Commissioner is still not convinced that disclosure of the requested information would, or would be likely to, lead to contributors being less candid in future reports. Should there be evidence of this, the organisations involved must take the necessary measures to ensure that their staff continue to deliver the quality of advice that they are expected to provide as part of their official duties.

5.6 ***Timing and Stage of Report***

The Commissioner has noted that these two Reports were prepared in June 2003 and January 2004. A Home Office press release confirmed in April 2004 that the Gate Zero review of the ID card programme was successfully completed in January 2004. In the Commissioner's opinion the timing of the ID card programme, and the stage it was at, is a crucial consideration in deciding whether the requested information should be released. The Commissioner has also taken into account the fact that the Review process has now moved on to the Gate One Stage. As such the Gate Zero Reports contain information that is essentially historical. This is an additional factor that militates against withholding the information on public interest grounds.



5.7 ***Likely damage to promptness of reports***

The OGC has said that one of the benefits of these Reviews is that they are produced very quickly after an intensive interviewing process. It has highlighted its concerns that disclosure of these Reports will lead to delays in their production. The OGC has argued that substantial further consideration and consultation would then have to go into the drafting of such reports. The Commissioner recognises the need for the Reports to be produced promptly. However, the OGC has not been able to provide any compelling evidence to substantiate its view that disclosure of the requested information will slow down the Gateway Review process. The Commissioner considers that even if disclosure were to lead to some delay in the drafting of future reports, this would be outweighed by improving public understanding of the subject of these Reports. In any event, in the Commissioner's opinion keeping the report process on track, in terms of meeting deadlines, is essentially a management issue for the OGC to address.

5.8 ***Providing misleading information***

The OGC is also concerned in ensuring that it does not mislead the public by the way in which reports are produced. The OGC is concerned that, because of the way the Reports are drafted, their disclosure could mislead the public. The OGC has explained that the Reports may not include or explain issues raised in previous Reports or may address issues in a way which could be misinterpreted or taken out of context. Whilst the Commissioner recognises this concern, he is not persuaded, having viewed the information, that the disclosure of these two Reports would lead to public misunderstanding of the identity card issue. If the OGC does feel that the Reports require clarification this could be provided by attaching a brief explanatory note to the Reports. It is for the OGC to consider whether this is an appropriate course of action.

5.9 His assessment is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The Commissioner's decision in this case is therefore that, for the reasons set out above, the OGC has not dealt with the complainant's request for information in accordance with the requirements of Part 1 of the Act.

6. **Action Required**

In view of these matters the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires the OGC to disclose the information requested by the complainant on 3 January 2005 within 35 calendar days of the date of this Decision Notice.



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7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 31 day of July 2006

Signed:

**Richard Thomas
Information Commissioner**

**Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**