

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 23 August 2006

Public Authority: Plymouth City Council
Address: Civic Centre
Plymouth
PL1 2AA

Summary Decision

The request was for a full copy of a report into the performance of the child protection agencies following the death of a child from neglect. The Commissioner decided that although the Council was wrong to deem the request vexatious, the information requested is exempt information. The entire report was exempt under section 36 – prejudice to the conduct of public affairs. Furthermore substantial parts of the report constituted exempt information under section 40 – personal information and section 41 – information provided in confidence. Since the Commissioner was satisfied that the information was exempt he did not consider a number of other exemptions which the Council raised during the course of the investigation.

In light of the above the Council is not required to take any steps.

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. The request relates to a Serious Case Review carried out following the death of a child from neglect. Serious Case Reviews are commissioned by the local Area Child Protection Committee (the 'ACPC'), which is a group comprising of representatives from the main statutory care agencies who are brought together to ensure these different agencies work together successfully to protect children. The purpose of the Serious Case Review is to identify what lessons need to be

learnt from tragedies such the death of this child and to ensure those lessons are acted upon in order to improve interagency working. These Serious Case Reviews are commonly referred to as Part 8 Reviews, a reference to fact that they were established under part 8 of the guidance 'Working Together to Safeguard Children' (the 'Working Together document') which was issued jointly by the Department of Health, the Home Office and the Department for Education and which is informed by the requirements of the Children Act 1989. Once completed the Part 8 Review is distributed to the members of the ACPC a copy is also forwarded to the Secretary of State.

3. In April 2005 the complainant was liaising with Plymouth City Council (the "Council") over the making of a documentary programme about its social services department and child protection issues in light of the tragic death of the child. During a meeting with the Council on the 19 April 2005 the complainant posed a number of questions to the Council. The Council provided what appears to be note of that meeting as an attachment to an email dated 6 June 2005. The note sets out the questions that were asked and provides the answers to some them. One of those questions was a request for "...access to the full part 8 review with name[s] blocked out to protect identities, including chronology of events?"
4. The note informs the complainant that the Council is already dealing with a Freedom of Information request for the Part 8 Review and that it will advise the complainant of the outcome of that request. It later became apparent that there had been two requests from other journalists for the Review.
5. On the 30 June 2005 the Council advised the complainant by email that the Freedom of Information requests had been refused and that that decision had been maintained following an internal review. Later that day the Council emailed the complainant a copy of the explanation of the outcome of the internal review provided to the other journalists. This explained that their requests had been deemed vexatious under section 14(1) and that the Review itself was exempt information under section 36 which provides an exemption in relation to information, the disclosure of which would prejudice the conduct of public affairs by inhibiting the free and frank exchange of views. Although the email did not cite sections 40 – personal information, or section 41 – information provided in confidence, it did refer to the Review being full of confidential and personal information.
6. Section 36 is subject to the public interest. The Council gave its opinion that the public interest "is best served by there being an effective child protection system" which is the purpose behind the Part 8 Review.
7. The complainant then wrote to Commissioner on the 1 July 2005 complaining that her request had been refused. In her letter she raised a number of counter arguments to the Council's reasons for withholding the information.
8. The Council had claimed that the request was vexatious because all the information that could be disclosed was already contained in the executive summary which had already been released. The complainant pointed out that she

had no way of knowing that this was in fact the case and that in any case this was a subjective opinion.

9. In relation to the application of section 36 the complainant acknowledged that the ACPC may find it difficult to perform its duties if it was subject to continual public scrutiny. However she argued that because of the seriousness of this particular incident the public interest was best served by allowing access to all the facts. Furthermore she suggested that the names of individuals could be protected and that this would prevent the free and frank exchange of information being inhibited.
 10. The complainant also pointed out that as a result of the criminal prosecutions that followed the child's death much of the family's personal information has already been released. Finally the complainant argued that although the Council claimed the public interest was best served by there being an effective child protection system there is "a question mark raised over the effectiveness of Plymouth's child protection system and that the public interest is best served by knowing exactly where things went wrong in [child's name] case and what measures authorities are taking to improve the system".
 11. Having reviewed the complainant's submissions the Commissioner drew the conclusion that the original request was only a verbal one. As such it would not be a valid request as under section 8 of the Act requests need to be made in writing.
 12. The Commissioner rang and raised this matter with the complainant on the 16 January 2006 and as a result the complainant emailed a written request to the Council the same day in which it stated "ITV Westcountry would like to request under Freedom of Information a copy [of] the full Part 8 inquiry into the death of [the child's name]."
 13. The request was refused, by email, the next day, 17 January 2006, on the same grounds as the other requests had been. The final paragraph of this refusal notice advised the complainant that the Commissioner was currently considering two other complaints in relation to the Council's refusal to disclose this Review and that should the complainant wish to pursue an internal review it may be best to wait until the Commissioner had made a decision in those two cases.
 14. The Commissioner contacted the Council to clarify its position in relation to the internal review and as a consequence on the 19 January 2006 the Council advised the Commissioner that it did not object to the complainant's case being considered alongside the complaints from the other two journalists. This constructive approach was welcomed by the Commissioner.
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The Investigation

Scope of the case

15. The focus of the complaint is on the complainant's right of access to the actual Review.
16. As is discussed above, two other journalists have also requested copies of the full Part 8 Review from the Council and the Council's refusal of those requests has also led to complaints being made to the Commissioner. The Commissioner has conducted one investigation into all three complaints.

Commissioner's Investigation

17. **19 January 2006.** The Council contacted the Commissioner, again by phone, to clarify certain procedural aspects of the investigation. The Council also took the opportunity to explain the references to personal and confidential information in its internal review email of the 27 June 2005. The Council considered the whole of the document was exempt under section 36 – prejudice to the conduct of public affairs, however even if it waived section 36 it believed that elements of the Review could be withheld under the exemptions provided by section 40 – personal information, and section 41 – information provided in confidence.
18. The Council also argued that it considered the requests were vexatious as it should have been apparent to the complainants that the subject of their requests was information of such a sensitive nature that the requests would be refused. The sensitivity of this information was set out in the Working Together document that was referred to in the executive summary of the Part 8 Review which the complainants had already been provided with.
19. The Commissioner accessed a copy of the Working Together document from the internet.
20. **20 January 2006.** The Commissioner wrote to the Council on the 20 January 2006 setting out his understanding of the complaints and the Council's grounds for refusing the requests.
21. In relation to the application of section 14 – vexatious requests, the Commissioner recognised that where it would be clear to an applicant that the redaction of sensitive information from a document would render the remaining information meaningless, a request may be vexatious. Therefore as part of the assessment of whether the requests were vexatious the Commissioner would need to determine whether the removal of sensitive information would render the residual information meaningless or whether there would be little of any substance left that had not already been released in the executive summary. This would involve consideration of the exemptions claimed by the Council i.e.

sections 36, 40 and 41. In light of this the Commissioner requested a copy of the full Part 8 Review marked to indicate which exemptions applied to which parts of the report.

22. **17 February 2006.** The Council rang the Commissioner's Office on the 17 February 2006 and briefly explained that the coroner had asked for a copy of the Part 8 Review which it is understood had been refused because it contained information relating to child care proceedings concerning the dead child's siblings. As a result the High Court was to consider the coroner's right of access to the Part 8 Review. The Council believed it was not appropriate to provide the Commissioner with a copy of the Part 8 Review until the issue of the coroner's access to it had been resolved. The Council did however email the Commissioner a copy of the executive summary.
23. **3 March 2006.** The Council provided a very detailed written response to the Commissioner's letter on the 3 March 2006. In that letter the Council explained how Part 8 Reviews are compiled. In broad terms, each of the agencies involved, e.g. social services, health trusts, the police, produce a chronology of its interactions with the child and their family. Those chronologies are then brought together to create an 'Integrated Chronology of Events'. Interviews are then conducted with the professionals from these agencies. This then provides a very detailed picture of the involvement these agencies had in protecting the child.
24. The Council also explained why it did not feel able to provide the Commissioner with a copy of the Part 8 Review. Care proceedings relating to the child's siblings were in progress at the time the Part 8 Review was commenced. The chronologies drew on information that had been filed with the court in relation to these proceedings. The staff who were interviewed were also involved in these proceedings. Therefore the Council took the view that the confidentiality around the child care proceedings extended to the Part 8 Review and that to release this information to any party not involved in those proceedings without the permission of the court would be a contempt of court.
25. The Council then expanded on the exemptions under the Act which it was relying on to refuse the complainants' requests. The grounds now cited by the Council were as follows;
 - section 14 – Vexatious requests
 - section 30 – Investigations and Proceedings
 - section 31 - Law enforcement
 - section 35 – Formulation of Government Policy
 - section 36 – Prejudice to the Conduct of Public Affairs
 - section 38 – Health & Safety
 - section 40(2) – Personal Information about Third Parties
 - section 41 – Information Provided in Confidence
 - section 42 – Legal Professional Privilege
 - section 44 – Prohibitions on Disclosure .
26. The Council enclosed the submission made to its monitoring officer setting out the reasons why releasing the information would prejudice the conduct of public

- affairs. This submission also made reference to the grounds for believing the request was vexatious and included a table identifying the range of exemptions that may apply to the Review. This submission is dated the 13 June 2005 and was produced as part of the internal review process. Also enclosed was a record of the qualified person's opinion following consideration of that submission, signed by both the qualified person and the director responsible for the social services department. This was dated 14 June 2005.
27. **11 April 2006.** The Commissioner accepted that the Council had serious and genuine concerns that releasing the information to the Commissioner would be a contempt of court. However after discussing the matter with a legal adviser on the 11 April 2006 the Commissioner decided that as it was not possible to properly consider the Council's application of the exemptions without sight of the Part 8 Review, an Information Notice, requiring its disclosure to the Commissioner's Office, should be issued.
28. **12 April 2006.** When the Commissioner advised the Council, on the 12 April 2006, that he planned to serve an Information Notice the Council suggested that it may now be able to release the information to the Commissioner on a voluntary basis. This was because in the intervening period the High Court had ruled that the coroner could have access to the Part 8 Review. However the Council explained that it would appreciate time to seek legal advice and the views of the other members of the ACPC.
29. It is understood that following the release of the Review to the coroner, he will then consider what information from it, if any, should be disclosed in the coroner's court. In other words the disclosure to the coroner does not mean the information will necessarily be heard in open court.
30. **25 May 2006.** The Commissioner recognised the benefit to the Council in maintaining good working relations with the other care agencies in order to carry out its child protection function effectively. Therefore the Commissioner was sympathetic to the Council's desire to discuss the release of the Review to the Commissioner with the other members of the ACPC. The Commissioner therefore agreed to refrain from issuing an information notice until the Council had consulted with the other parties and on the 25 May 2006 the Council provided the Commissioner with a copy of the full Part 8 Review.
31. **3 July 2006.** During a telephone conversation on the 3 July 2006 the Commissioner referred back to an issue raised in the Council's letter of 3 March 2006 and asked the Council whether it had been served with any notices under section 10 of the Data Protection Act 1998 (the "DPA") in relation to this request. Such notices can be served by an individual to prevent an organisation processing information about them in a way that would cause them damage and distress. Under the Freedom of Information Act information is exempt if its disclosure would breach section 10 of the DPA. This was one of the reasons given by the Council in support of its application of the exemption provided by section 40 of the Act. This issue is dealt with in more detail at paragraph 65. The Council responded that it had not received any DPA section 10 notices in relation to this matter.

32. **4 July 2006.** The Commissioner rang the Council again. In order to assess the validity of the Council's arguments relating to the confidentiality of care proceedings (as discussed at paragraph 77) the Council was asked to clarify whether the Part 8 Review had ever been filed in any of the child care proceedings relating to the dead child's siblings. The Commissioner also commented that the information contained in the 'Action Plan' section of the Review did not seem sensitive, nor did some of the information in the 'Methodology' section as this would be common to all Part 8 Reviews.
33. The Council wanted time to consider the sensitivity of the Action plan and to clarify whether the Part 8 Review had been filed in care proceedings. However it explained that whilst it accepted that some information on the methodology was not sensitive, the same information was contained in the publicly available documents, not least the Working Together document which the complainant had been referred to.
34. **6 July 2006.** The Council wrote to Commissioner on the 6 July 2006 to clarify the remaining points. It clarified that the Part 8 Review had not been filed in care proceedings. It did however advise the Commissioner that the coroner had made an order imposing reporting restrictions in respect of the dead child's siblings which remained in force and making it a Contempt of Court to publish these names. A copy of the order was enclosed.
35. The letter also advised the Commissioner that it had been liaising with the Department of Education of Skills (DfES) over this case and quoted from correspondence it had received from the Department. In brief the DfES argued that the strongest argument for withholding the Part 8 Review was provided by section 36 in that disclosure would inhibit the free and frank exchange of views and that although it recognised that there were very strong public interest arguments in favour of release, the paramount public interest was in ensuring that the review process was an effective method of identifying the lessons that needed to be learnt.

Analysis

36. The Commissioner has considered the public authority's response to the complainant's request for information.

Procedural breaches

37. Section 1(1) of the Act obliges a public authority to inform any one who has requested information from it, whether it holds the information requested, and where the public authority does hold the information, to communicate that information to them.

38. Section 14(1) of the Act provides that where a request is vexatious a public authority does not have to comply with its obligations under section 1(1).
39. The Act does not provide any definition of the term vexatious. However the Commissioner has issued guidance on the subject, 'Awareness Guidance No. 22 - Vexatious and Repeated Requests'. In accordance with this guidance a request may be considered vexatious if either its intention is to cause inconvenience or expense to the public authority or where a reasonable person would conclude that the main effect of the request would be to cause inconvenience and expense.
40. The Commissioner's guidance gives a number of examples of when a request may be vexatious. Two of those examples are helpful in considering this case. The first is where the effect of editing out sensitive information would be to render the remaining information worthless. The Commissioner's approach here is to consider whether the applicant is likely to have been aware that much of information would have to be redacted. The second example is closely allied to the first and covers situations where it would be abundantly clear to the applicant that the information requested was exempt even after the application of the public interest test.
41. In its submission to its monitoring officer concerning the application of the exemption relating to the conduct of public affairs, the Council explained that if it did not apply that exemption, it would still need to consider a range of other exemptions which would lead to the Review being comprehensively redacted. In its letter to the Commissioner dated 3 March 2006 the Council explained that although redaction had been considered it was not felt to be practicable as this would lead to the meaning of the Review being lost or being construed to have a meaning that was not intended.
42. By the time the complainant made a valid written request for the Review on the 16 January 2006 she would have fully expected it to be refused. However this is rather different than saying she should have recognised that the information was indeed exempt. The Commissioner accepts that it was probable that the complainant would have anticipated that the Review would contain some sensitive information. Indeed the note of her original verbal request makes reference to the fact that she accepted that the names of individuals would have to be blocked out.
43. The Commissioner also acknowledges that the executive summary to the Review directs the reader to the Working Together document which explains the composition of such a Review and the confidential nature of the information contained in them. However the Commissioner is not satisfied that it is a realistic expectation that potential applicants would have read the Working Together document.
44. Even though the complainant is likely to have appreciated that the Review contained exempt information, it would have been more difficult for her to estimate the proportion of the Review that was likely to be exempt. Furthermore even if the complainant accepted that some of the information would be exempt, it

is quite possible for her to have a different opinion from the Council as to where the public interest lies in respect of any qualified exemptions.

45. The Commissioner has also had regard for the fact that at the time of the original request was made the Act had only been in force for just over four months. Therefore there was very little experience of how the Act would apply to such Reviews and therefore it seems legitimate for a journalist, or any one else, to challenge some of the assumptions around confidentiality that existed prior to the Act coming into force.
46. In light of the arguments set out above, the Commissioner does not accept that the request itself was vexatious.

Exemptions

47. The Council refused the complainant's written request on the 17 January 2006. It claimed that the whole of the Part 8 Review, apart from the executive summary, was exempt under section 36 – prejudice to the conduct of public affairs and that even had section 36 not applied much of the Review would be exempt because it was personal and confidential information, which it later clarified as being a reference to the exemptions provided by section 40(2) – personal information about third parties, and section 41 – information provided in confidence.
48. Although in its letter of the 3 March 2006 the Council cited a number of exemptions that it believed provided grounds for withholding the Part 8 Review, the Commissioner's approach was to first consider the exemptions it relied on in its internal review email of the 27 June 2005. Only after that exercise would the Commissioner decide whether it was necessary to consider the exemptions that were raised later.

Section 36 – Prejudice to the conduct of Public Affairs.

49. Section 36 provides an exemption where in the opinion of the public authority's 'qualified person' disclosing the information would prejudice the conduct of public affairs. In particular section 36(2)(b)(i) and (ii) allows a public authority to withhold information where the disclosure would, or would be likely to inhibit either the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
50. For the exemption to be engaged the qualified person must have reached a reasonable opinion that the disclosure would, or would be likely to, prejudice the conduct of public affairs. In local authorities, the monitoring officer is appointed the qualified person. From the documents presented by the Council, the qualified person considered the application of section 36 on the 13 and 14 June 2005 when the requests from the other two journalists were going through the internal review stage. The Commissioner is satisfied that there had been no substantial change in the circumstances around the disclosure of this information between that time and when the valid written request for the Review was made by the

complainant. Therefore it follows that it is reasonable for the Council to still rely on that opinion as the basis for withholding the information.

51. The Council enclosed the submission made to its qualified person in relation to the application of section 36 dated 13 June 2005 with its letter to the Commissioner of the 3 March 2006. It also included the record of the qualified person's opinion dated 14 June 2005. This record has regard for the advice provided in the Working Together document which stresses the need to "secure full and open participation from the different agencies and professionals involved." (paragraph 8.29 Working Together Document) The qualified person stated his opinion that "...it is necessary to ensure that all the agencies concerned with the protection of children continue to have a forum in which they can deliberate on processes after a free and frank exchange of views."
52. This argument is further developed in the Council's covering letter of the 3 March 2006 in which it explains that the professionals contribute to Part 8 Reviews on a voluntary basis, without any legal representation, and that any relaxation of the confidentiality surrounding the Review could affect the willingness of those professionals to participate in the process. This in turn would hinder the ability to learn the necessary lessons from these tragic incidents. Ultimately this prejudices child protection.
53. The Commissioner has considered these representations. It is clear from the Working Together document that the purpose of a Part 8 Review is to identify the lessons that need to be learnt and to implement any necessary changes or improvements as soon as possible in order safeguard vulnerable children. In this particular case there were delays in initiating the Part 8 Review, however the Commissioner accepts that the willing cooperation of the professionals is essential if the reviewer is to obtain reliable information reasonably quickly. This willingness and openness is based on a clear understanding by the professionals involved that the prime purpose of a Part 8 Review is to improve child protection and that to this end it, will only be disclosed to a very limited number of people who have a role in implementing the Review's recommendations.
54. The Commissioner finds it a convincing argument that concerns over the possible disclosure of Part 8 Reviews to the general public would inhibit the participation of professionals who may have worries that the information could be used to direct public criticism at individuals. Any reluctance by professionals to fully and openly contribute to the Part 8 Review process would inevitably reduce the reviewer's ability to accurately identify the lessons that need to be learnt. If professionals felt the need to seek legal advice, or any other form of representation, in order to protect their own positions, this would inevitably delay the review process. Both these consequences would have a detrimental impact on child protection. In light of the above the Commissioner is satisfied that the qualified person's opinion that disclosing the information would prejudice the conduct of public affairs was a reasonable one and that the exemption was engaged.
55. The Commissioner has also considered whether it is possible to dissect the Part 8 Review in order to extract information that, in isolation, may seem non-sensitive. However the Commissioner considers that if information was taken out

of context it could only provide a distorted impression of the circumstances around the child's tragic death and could lead to people reaching inaccurate opinions on the roles played by the various agencies. This in itself could deter professionals cooperating fully with the Part 8 Review process.

The Public Interest

56. When applying the public interest test to the exemption the qualified person recognised the fact that releasing the report would promote accountability and transparency and would demonstrate how the agencies intended to deal with the issues raised in the Part 8 Review. However the Council balanced this against the public interest in maintaining the exemption. The purpose of the Part 8 Review is to improve services, not to determine who is culpable. In light of this the Council suggested that releasing the full Part 8 Review could prejudice any later investigation into who was responsible for the child's death. The internal review concluded that the public interest favoured maintaining the exemption.
57. In addition, in its letter of the 3 March 2006 the Council highlighted the important role Part 8 Reviews play in improving services for children. In a later letter dated 6 July 2006 the Council also presented opinions expressed by the DfES who they had been liaising with over this matter. The DfES stress the public interest in ensuring that Part 8 Reviews remain an effective means of improving services and that the public interest is best served by public authorities maintaining the highest possible standards.
58. The Commissioner recognises that there is a high public interest in holding public authorities accountable for their performance, particularly in relation to the protection of the most vulnerable members of our society. There are strong arguments that scrutiny of public sector performance drives up standards. However in this case the Council has presented persuasive arguments that the prospect of public scrutiny would actually compromise the reliability of the Part 8 Review and so undermine attempts to improve standards. This is not to say that public scrutiny does not encourage better standards, it is simply that in this case full and willing participation by professionals in the Part 8 Review is a more effective method of improving standards.
59. The Commissioner recognises that the public interest is also served by disclosing information that reveals whether the appropriate lessons have been learnt and that this builds public confidence in the ability of care agencies to change in response to such incidents, which in turn may encourage greater cooperation with these services.
60. These issues are raised by the complainant in her original letter of complaint to the Commissioner dated 1 July 2005 which related to how her earlier verbal request had been handled. The complainant argued that there were doubts about the effectiveness of the child protection system and that the public interest would be served by revealing exactly where things went wrong and what the authorities were doing to remedy any shortcomings. The Commissioner recognises that when a tragedy such as this child's death occurs there is public concern voiced over the competency of the care agencies.

61. The Commissioner accepts that an informed public debate has the potential to influence policy and perhaps to reprioritise resources. However in assessing the strength of this argument regard must be had for degree to which this information would actually serve to inform the public debate, particularly once allowance was made for any information which could be withheld under the absolute exemptions provided by section 40 – personal information, and section 41 – confidential information. Since the executive summary already provides access to the Review's recommendations as to what actions should be taken in order to prevent a similar tragedy occurring in the future, the value in releasing additional information is weakened.
62. In a case such as this the overriding public interest must be the protection of children. The most effective and efficient way of incorporating the lessons learnt from these tragedies into working practices in order to increase the level of protection afforded to children is to provide an environment in which professionals can freely discuss the circumstances of a case as honestly as possible. The established means of achieving this is the Part 8 Review and the Commissioner accepts that this process would be compromised if professionals anticipated that reviews would be disclosed to the public. It follows that the public interest is best served by maintaining the exemption in order to preserve the best opportunity care agencies have in improving the protection they provide.
63. As already noted above, there is a public interest in promoting accountability and transparency in public authorities which is particularly strong in relation to child protection functions. The Working Together document recognises that there are difficult interests to balance, on one hand the privacy of the family involved together with the need to secure the willing participation of professionals and the "accountability of public services and the importance of maintaining public confidence in the process of internal review" on the other (para 8.29 of Working Together). The Working Together document advises that in anticipation of requests for information the Part 8 Review should include an executive summary which provides an explanation of how the Review was conducted and the recommendations which come out of the Review as a means of satisfying the public interest in the accountability of care agencies.
64. The Commissioner has compared the executive summary of this particular Part 8 Review with the full Review. The executive summary does provide a balanced and coherent overview of the full Review, including its recommendations, without disclosing any of the sensitive information. This overcomes the problem discussed at paragraph 55 above, in trying to extract information which in isolation may seem non-sensitive, from the main Part 8 Review. This executive summary seems to go as far as possible in addressing public interest issues of accountability and transparency without compromising the confidentiality of the Review.

Section 40 Personal Information

65. Section 40(2) provides an exemption in relation to third party personal data. In broad terms information is exempt if it is personal data about some one other than the person making the request and disclosing it to the general public would breach either the data protection principles of the Data Protection Act 1998 (the 'DPA') or where the disclosure would breach a notice served under section 10 of the DPA. The data protection principles combine to protect the privacy of individuals. Section 10 of the DPA provides individuals with the right to serve a notice on a data controller (the person or organisation holding the information of which they are the subject), requiring them not to use that information in a way that would cause them damage and distress.
66. Under the DPA, personal data held in a manual format which does not form part of a sophisticated filing system which would allow ready access to specific information about an individual, is treated rather differently to personal data held in a more structured manner or in an automated format (generally speaking on computer). However these differences are ignored for the purpose of considering section 40 of the Freedom of Information Act 2000. In any event as the Part 8 Review was provided to the Commissioner in CD ROM format it is clearly held by the Council as automated data and therefore the provisions of the DPA apply in full.
67. In its letter of the 3 March 2006 the Council explained that disclosing the personal data held in the report would breach the first data protection principle and section 10 (relating to the prevention of damage and distress) of the DPA. During a telephone conversation on the 3 July 2006 the Commissioner asked the Council whether it had been served with a notice under section 10 of the DPA by any of the individuals concerned. The Council explained that it had not been served with any notices. However it had taken the view that it was unreasonable to expect individuals to be familiar with their rights under the DPA or to have anticipated the Part 8 Review would be the subject of a Freedom of Information request. If they had, the Council argued, the individuals concerned were likely to have served section 10 notices and so had considered the request on the basis that such notices had in fact been served.
68. The Commissioner does not accept that this is the correct approach. Section 10 of the DPA can only be breached where a notice has been served. Whilst the Commissioner recognises that the Council adopted this approach so as not to disadvantage the individuals concerned the approach is never the less flawed. More importantly the Commissioner considers that compliance with the data protection principles adequately protects the interests of these individuals.
69. When serving a notice under section 10 of the DPA an individual is required to specify the reasons why using the data in a particular way would cause them substantial and unwarranted damage and distress. On receiving a section 10 notice a data controller is entitled to consider the validity of the individual's reasons for believing he or she would suffer damage and distress. If a data controller is not satisfied that the reasons are justified, it may reject the notice. In this situation the Commissioner considers that in assessing the disclosure of this information under the 'fairness' element of the first data protection principle the

Council is likely to have had to consider the same issues as would have been raised by a section 10 notice.

70. There still remains the question of whether the disclosure of the personal data contained in the Part 8 Review would breach the first data protection principle. The first data protection principle states that personal data shall be processed fairly and lawfully. It also requires that personal data shall not be processed at all unless the data controller can satisfy at least one of the conditions in Schedule 2 of the DPA, and where the information constitutes sensitive personal data the processing must meet also meet one of the conditions in Schedule 3.
71. Having viewed the Part 8 Review the Commissioner is satisfied that much of it is inextricably linked to personal data about the surviving members of the dead child's family and their associates. Certainly the information contained in the sections of the Review titled Family Composition, Genogram, Family History, Chronology of Events and Specific Issues to Highlight, could not be released without disclosing personal data about third parties. These sections alone make up approximately 80% of the Review.
72. In assessing whether disclosing the information would be fair the Commissioner has taken account of how the individuals concerned would have expected the information held about them would be used. The Commissioner is satisfied that family members and their associates would have an expectation that the information held about them by the care agencies, or provided by them to the care agencies, would be used for a limited number of purposes such as performing its child protection functions. Certainly they would not have expected this information to be disclosed to the public.
73. The Commissioner has also had regard for the fact that at the time of the child's death and at the criminal trials that followed some of the details surrounding the case would have been revealed and reported in the press. This is another of the issues raised by the complainant in her letter of the 1 July 2005. The child died in the summer of 2002 and resulting trials concluded around February 2004. This tragedy was a high profile news story, certainly within the local area, and when the request was made in May 2005 there was likely to still be an awareness of the main issues within the locality. This may weaken the argument that disclosure of the information relating to any defendants in the criminal trials would be unfair. However this would not overcome the Council's obligations to respect the privacy rights of others whose personal data is inseparable from that relating to the defendants.
74. Furthermore the Commissioner is satisfied that none of the conditions set out in Schedule 2 of the DPA can be met. A significant proportion of the personal data in the Review is sensitive personal data which includes information on the physical or mental health of individuals or the alleged commission of offences. In relation to this sensitive personal data the Commissioner can find no condition in Schedule 3 which would accommodate its disclosure to the public.
75. In light of this the Commissioner is satisfied that the personal information contained in the Part 8 Review relating to the surviving family of the dead child

and their associates could not be disclosed without breaching the data protection principles. The exemption provided by section 40 is engaged and this being an absolute exemption it is not subject to the public interest test.

Section 41 - Information Provided in Confidence.

76. Section 41 provides that where the disclosure of information would constitute an actionable breach of confidence the information is exempt. In other words, if the public authority disclosed the information the provider of that information or a third party could take the authority to court.
77. When the Council advised the complainant by email on the 30 June 2005 that her written request had been refused it simply stated that the Part 8 Review was full of confidential information. In its letter to the Commissioner dated 3 March 2006 the Council explained that at the time the Part 8 Review was initiated, there were care proceedings in progress relating to the dead child's siblings. The Council presented arguments, supported by case law, that such care proceedings are regarded as confidential and also identified enactments which again protected information in relating to child care proceedings. The Council reasoned that the Part 8 Review could not be considered in isolation as many of the professionals interviewed during the Part 8 Review process were also involved in these proceedings and many of the documents used to compile the chronology may also be used in the proceedings. In light of this the Council argued that the Part 8 Review was subject to the same umbrella of confidentiality as the care proceedings. On the 6 July 2006 the Council also provided a copy of the court order made by the coroner imposing reporting restrictions on publishing information in respect of the dead child's surviving siblings.
78. Although the term 'confidentiality' may be used to convey the sensitive nature of such information it does not necessarily mean that its disclosure would constitute an actionable breach of confidence. Where the disclosure of information may be restricted by an enactment or would constitute a contempt of court the most appropriate exemption to apply is that provided by section 44 – prohibitions on disclosure. It is noted that the Council did include section 44 amongst the exemptions it listed in its letter of 3 March 2006.
79. However the Commissioner has considered whether the Council owed a duty of confidence to the ACPC, the other care agencies, the individual professionals who contributed to the report or, the family members and their associates.
80. There are a number of elements which need to be in place for an actionable breach of confidence to occur. The first is that the party confiding the information has a reasonable expectation that the information will only be used or disclosed in accordance with their wishes. The second is that the information has to have the necessary quality of confidence, in other words, is the information is worthy of protection.
81. It is clear that the information in question is of a sensitive nature and therefore has the necessary quality of confidence. Furthermore in relation to the second

element, the ACPC, care agencies and individual professionals would have an expectation that information would be used for the sole purpose of improving child protection and to this end would only be disclosed to a limited number of people. Similarly the family members and associated parties would have expected their relationship with the care agencies to be a confidential one.

82. The third element of an actionable breach of confidence is that the disclosure must have a detrimental impact on the provider of the information or a third party. Disclosure may well have a detrimental impact on family members, their associates and any individual professional criticised in the Review. The exemption provided by section 41 would therefore protect from disclosure any information relating to these parties. Such information makes up a significant proportion of the Part 8 Review.
83. Section 41 is an absolute exemption and there is no requirement to consider the public interest in maintaining it.
84. It is less clear whether criticism of any of the public authorities involved would in itself amount to a detrimental impact. However having accepted under section 36 that disclosure would compromise the compilation of the Part 8 Review and so, ultimately, child protection, it would be difficult to argue that there would be no detrimental impact to these agencies as a result of releasing the Part 8 Review. However in these circumstances section 36 provides a more appropriate protection against this harm.

The other exemptions claimed.

85. In its letter to the Commissioner dated 3 March 2006 the Council cited a number of exemptions that it believed provided grounds for withholding the full Part 8 Report. Having considered the exemptions relied on at the time it refused the complainants written request the Commissioner does not find it necessary to consider the validity of these additional grounds.

Means of Communication.

86. In paragraph 55 the danger of attempting to provide any fragments of the Review which, in isolation did not seem to be sensitive was considered. And in paragraph 64 it was recognised that the executive summary overcame these difficulties by providing a coherent overview of the full Part 8 Review. In light of this it is possible to consider the Council's handling of the complainant's request by reference to section 11 – means by which communication to be made. In effect the only practical means of communicating the information in the full Part 8 Review in a meaningful and balanced manner, having made allowance for the removal of the sensitive information, was to create the executive summary.

The Decision

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87. The Commissioner's decision is that the public authority was right to regard the information as exempt and that, where relevant, the public interest favoured withholding the information. However it was wrong to regard the request as vexatious.

Section 14 – Vexatious Requests.

89. The Council was wrong to deem the request vexatious under section 14 of the Act.

Section 36 – Prejudice to the conduct of public affairs.

90. The full version of the Part 8 Review was exempt information under section 36 – prejudice to the conduct of public affairs. The Commissioner found that the exemption could be maintained in the public interest.
91. The information that could be released without undermining child protection had already been disclosed in the form of an executive summary which provided a coherent and balanced summary of the report without revealing sensitive information.

Section 40 – Personal Information

93. The exemption provided by section 40 is engaged in relation to a substantial proportion of the Part 8 Review which constituted personal data about the surviving family members and their associates.

Section 41 – Information Provided in Confidence

94. The exemption provided by section 41 is engaged in relation to information about, or provided by the family members and their associates.

Steps Required

95. The Commissioner requires no steps to be taken.

Right of Appeal

96. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 23rd day of August 2006

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**