

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 14 May 2007

**Public Authority:** Her Majesty's Chief Inspector of Schools in Wales  
**Address:** Anchor Court  
Keen Road  
Cardiff  
CF24 5JW

### Summary

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1. The complainant requested information relating to complaints made against two named individual officers of the public authority. The public authority refused to confirm or deny that any information of the description requested was in fact held by the authority, citing the exemption at section 40 of the Act. This section allows information to be withheld if it constitutes personal data and to confirm or deny its existence would breach any of the data protection principles. The Commissioner has decided in this case that the public authority applied the Act correctly in citing the section 40 exemption and therefore requires no further action to be taken.

### The Commissioner's Role

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2. 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

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3. On 17 January 2005 the following two requests for information were submitted to the public authority:

*"... access to any files you may have regarding complaints against [named official A] from 1<sup>st</sup> January, 1995, to the present date."*

*"... access to any files you may have regarding complaints against [named official B] from 1<sup>st</sup> January, 2001, to the present date."*

4. In response to these requests the public authority issued two refusal notices, both dated 7 February 2005, stating that it neither confirms nor denies that it holds the information requested. In both cases the public authority cited the exemption at section 40(2) of the Act.
5. Following a request for an internal review, the public authority sent two letters to the complainant, both dated 14 July 2005, upholding the original decisions to neither confirm nor deny that it holds the information requested. Again, the public authority cited the section 40(2) exemption.

## **The Investigation**

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### **Scope of the case**

6. On 31 July 2005 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. In a further letter, dated 29 September 2005, the complainant stated that he believed information had been withheld unlawfully by the public authority. In the context of the two requests that are the subject of this Notice, the complainant asked the Commissioner to consider the public authority's use of the section 40(2) exemption.
7. The complainant also raised other issues relating to further requests for information made to the public authority. These are not addressed in this Notice.
8. The Commissioner has chosen to consider these two requests together because of the substantial similarities between them, and the identical issues that they raise with regard to the application of the section 40 exemption. For the reasons set out at paragraphs 13 and 14, below, the Commissioner has considered the application of the exemption at section 40(5) of the Act.

### **Chronology of the case**

9. In May 2006 the Commissioner contacted the complainant to seek further information relating to his complaints.
10. In August 2006 the Commissioner contacted the public authority to seek further information in relation to these and other complaints made by the complainant. The public authority responded on 7 September providing further information about the decision to cite the section 40(2) exemption to neither confirm nor deny the information was held.

### **Analysis**

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

## Exemptions

12. Section 40 of the Act provides for information to be exempt if it constitutes the personal data of a third party and its disclosure breaches the data protection principles. The entirety of section 40 is set out in full in the legal annex at the end of this notice.
13. The public authority has cited section 40(2) in its refusal notice and subsequent response to the complainant's request for internal review. However, subsection (2) indicates which personal data are exempt from the requirement to disclose the information and does not relate to the duty to confirm or deny that information is held. Accordingly, the Commissioner considers that the public authority should have cited subsection (5) of section 40 in order to neither confirm nor deny that the information requested is in fact held by the public authority.
14. Section 40(5) allows public authorities to neither confirm nor deny that information is held, if the act of confirmation or denial would in itself contravene any of the data protection principles. As the data protection principles only relate to the processing of personal data, the Commissioner has considered whether a confirmation or denial would constitute the 'personal data' of a third party, and has then considered whether such a confirmation or denial breaches any of the data protection principles. These questions are addressed below.

### Would the confirmation or denial that the information requested is held in itself constitute 'personal data'?

15. Section 1(1) of the Data Protection Act 1998 (the 'DPA') states that:

*"personal data" means data which relate to a living individual who can be identified –*

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*

16. The information that has been requested in this case relates to complaints made against named individuals. In confirming or denying that the information requested is held, the public authority would be revealing something about those individual members of staff, specifically whether or not complaints had been made about them.
17. The Commissioner, therefore, believes that confirming or denying that the information requested in this case is held would disclose the 'personal data' of

those individuals, within the definition set out above.

Would confirming or denying the existence of the information breach any of the data protection principles?

18. Section 40(5)(b)(i) of the Act states that the duty to confirm or deny does not arise if the confirmation or denial would contravene any of the data protection principles. Schedule 1 of the DPA sets out the eight data protection principles. Data controllers must comply with these eight principles when processing personal data. In this case, the actual confirmation or denial itself is considered personal data, for the reasons set out above, and therefore the disclosure of that confirmation or denial will be considered processing.
19. The public authority has argued that confirming or denying that it holds the information requested would breach the first data protection principle. The first principle states:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

  - (a) *at least one of the conditions in Schedule 2 is met, and*
  - (b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*
20. The key issue in this case is whether, in confirming or denying that it holds the information requested, the public authority would be processing that data ‘fairly and lawfully’.
21. In considering fairness, the Commissioner takes the view that the first and paramount consideration must be given to the consequences of processing to the interests of the data subjects.
22. The Commissioner considers that for data to be processed fairly, individuals should be made aware of any ‘non-obvious’ purposes for which the information about them may be used or disclosed. The Commissioner believes that in this case it would be reasonable for employees of the public authority to expect that, if complaints are made against them personally, the fact that such complaints had been made would be kept confidential within the authority and would not be released into the public domain. Accordingly, the Commissioner believes that for the public authority to confirm or deny that the information requested is held would be unfair and therefore breach the first data protection principle.
23. The Commissioner has considered the argument that public employees should be accountable and that public authorities should be open about the complaints they receive. The Commissioner considers that public authorities should provide information to the public about complaints received, but that this can be achieved without revealing information that constitutes the personal data of individual officers in that authority (for example by releasing aggregated statistical information). To release the fact that a complaint has been made against an employee may lead to assumptions being made about that employee’s

competence. However, the complaint may be unsubstantiated or malicious, or certain employees may be involved more frequently with difficult decisions that are more likely to result in dissatisfaction. Therefore, releasing this information does not aid transparency or accountability but could be misleading and unfair to particular employees.

## **The Decision**

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24. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act by correctly applying the exemption at section 40. However, the Commissioner considers that the public authority should have cited subsection (5) and not subsection (2) of that section of the Act.

## **Steps Required**

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25. The Commissioner requires no steps to be taken.

## Right of Appeal

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26. 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](mailto: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 14th day of May 2007**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### General Right of Access

**Section 1(1)** provides that -

“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 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

### **Personal information.**

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-



- (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.