

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**25 June 2007**

**Public Authority:** Ministry of Justice (formerly the Department for Constitutional Affairs)  
**Address:** Selborne House  
54 Victoria Street  
London  
SW1E 6QW

### Summary

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The complainant requested a copy of the Report that was produced following the disciplinary hearing of a named Magistrate. The request was refused and section 40 and 36 exemptions cited as reasons for non-disclosure. The DCA did not comply with sections 10 and 17 of the Act in this respect as the refusal notice was provided outside of the requisite 20 working days and did not cite exemptions that the DCA eventually wished to rely upon in addition to the above (sections 31 and 41). The Commissioner has decided however, that although the details of it were cited late in the course of the matter, the DCA's application of the exemption at section 40(2) of the Act was correct and the complaint is therefore not upheld in that respect.

**The request for information was made to the DCA in March 2005. The DCA has now ceased to exist and its functions have transferred to the Ministry of Justice ("MOJ"). Therefore this decision notice has been served on the MOJ, the public authority listed above.**

### The Commissioner's Role

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1. The Commissioner's duty 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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2. On 22 March 2005, the complainant wrote to the Department for Constitutional Affairs (DCA) requesting the following information:  
  
*“A copy of the report of the [area removed] Advisory Committee following their investigation into the behaviour of [Mr X] about which I and others complained to the Department”.*
3. On 26 April 2005, the complainant sent a reminder to the DCA, as she had not received a reply within 20 working days of receipt of the request required under the Act.
4. On 9 May 2005, the DCA provided an interim response. The DCA refused to disclose the information relying upon Section 36 as an exemption under the Act. However the DCA wanted more time to consider the balance of the public interest and to obtain the reasonable opinion of the qualified person.
5. On 12 May 2005 the DCA provided a more detailed response.
6. The DCA confirmed that the requested information was for a copy of a report (the Report) following an investigation panel hearing regarding the conduct of a named Magistrate, Mr X.
7. The Report was a written record of the investigation that also included Mr X's evidence. The Report also contained the panel's recommendations.
8. The DCA stated, as a further exemption, that the Report contained Mr X's personal data and its disclosure would breach the first data protection principle of the Data Protection Act 1998 (DPA 1998). That is, that disclosure would amount to unfair processing of Mr X's personal data.
9. The Secretary of State for Constitutional Affairs had formed the opinion that disclosure of the information could prejudice the effective conduct of public affairs and was therefore exempt under Section 36(2)(b) of the Act.
10. On 16 May 2005, the complainant then complained to the Commissioner under Section 50 of the Act. As the Commissioner was not satisfied that the complainant had exhausted the DCA's internal complaints procedure as required by the Act, on 2 June 2005 he advised the complainant to pursue this before any further assistance could be offered.
11. On 4 June 2005, the complainant requested the DCA carry out an internal review of its decision to refuse the requested information.
12. On 30 June 2005 the complainant sent a reminder to the DCA for a response.

13. On 1 July 2005 the DCA told the complainant, that as the matter had to be put before the Secretary of State, it could take up to another 4 weeks before it responded.
14. On 8 August 2005, the DCA communicated the outcome of its internal review. This upheld the refusal.
15. The DCA restated that the report contained Mr X's personal and confidential account to the investigating panel and the questioning of that account, and that he report was ultimately used to inform the Lord Chancellor whether any disciplinary measure should be taken. The DCA therefore considered that the investigation should take place in an uninhibited environment.
16. The review found that the report contained some personal data about the complainant herself. Information about the person making the request, is exempt under Section 40(1) of the Act. The complainant was asked whether she required the DCA to deal with that element of her request as a subject access request about her own personal information under the DPA 1998. However this invitation came with the caveat that the complainant's personal data was intrinsically linked to Mr X's personal data.
17. The DCA also raised sections 31(1)(g) and 31(2)(b) as further exemptions from disclosure under the Act and stated disclosure would prejudice its functions relating to ascertaining whether any person is responsible for any conduct which is improper.

## The Investigation

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### Scope of the case

18. On 16 May 2005, the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
19. The DCA had sought to rely on Sections 31(1)(g), 31(2)(b), 36(2)(b) and 40(1) and 40(2) by virtue of 40(3)(a) in its refusal to release the information. During the investigation the DCA introduced sections 41(1) and 40(4) as additional exemptions which it considered also applied at the time of the request.
20. Where a public authority seeks to rely upon several exemptions, the Commissioner considers that in many cases it will be appropriate to consider absolute exemptions first. If he decides that absolute exemptions have been incorrectly applied he will then move on to consider qualified exemptions.
21. In this case the Commissioner has focussed his consideration on section 40(2). As previously mentioned, the DCA has explained that this exemption applies by virtue of subsection (3)(a)(i) because disclosure of the requested information would breach one of the data protection principles.

22. The Commissioner notes that the information which may constitute the complainant's personal data has been treated as a subject access request under the DPA. The complainant was dissatisfied with the outcome and submitted a request for assessment to the Commissioner for him to consider the DCA's compliance with the DPA. This has been considered as a separate case by the Commissioner's data protection compliance staff. Therefore the Commissioner has not given further consideration to this point in the context of this case nor has he commented on it further in this notice. This notice relates solely to those parts of the Report that are not the complainant's own personal data.
23. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. These are issues concerning purported problems the complainant had with the DCA antecedent to her request under the Act and an allegation relating to the possibility of bias by the DCA towards Mr X based upon the fact that he was formerly an employee of DCA.

### **Chronology**

28. Once in receipt of a copy of the internal review outcome, the Commissioner wrote to the DCA on 7 July 2006 with details of the complaint. The Commissioner specifically asked the DCA to address certain points and provide evidence in support of the Section 31(1)(g) and (2)(b) exemption to demonstrate that disclosure would prejudice its ability to carry out its functions in relation to ascertaining whether or not any person is responsible for any conduct which is improper.
29. He also asked for evidence in support of the Section 36 exemption to demonstrate that the provision of free or frank advice or free and frank discussion would be inhibited by the disclosure and for a copy of the withheld information for the Commissioner's consideration.
30. On 12 July 2006 the DCA provided a holding response advising its complete response would be provided on 1 August 2006. As no response had been received from the DCA, the Commissioner sent a reminder on 2 August 2006.
31. The Commissioner sent a further reminder to the DCA on 10 August 2006.
32. On 16 August 2006 the DCA contacted the Commissioner to advise that due to parliamentary recess it expected to respond by the end of 25 August 2006.
33. The DCA provided its comprehensive response on 25 August 2006 including additional submissions in support of a further Section 41(1) exemption it wanted to rely on.
34. In its response the DCA also explained that there was an undertaking that Magistrates' Disciplinary hearings would be conducted in confidence and that this was enshrined in section 139 of the Constitutional Reform Act 2005.

35. The Commissioner was also referred to Paragraphs 19.17 to 19.19 of the Lord Chancellor's Directions for Advisory Committees on Justices Peace 1998 (the Directions) in respect of the confidentiality of the proceedings.

## Findings of Fact

36. The requested information was used by the panel on the Advisory Committee to inform the Lord Chancellor and the DCA of its recommendations as to any disciplinary action that should or should not be taken against Mr X. The requested information is accordingly held by the DCA.
37. With reference to Section 139 of the Constitutional Reform Act 2005, the Commissioner notes that this only received Royal Assent on 24 March 2005 and was not in force at the time the Report was obtained.
38. The Commissioner accepts that paragraphs 19.17 to 19.19 of the above-referred Directions contain provisions that disciplinary hearing panels should be held in confidence.

## Analysis

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### Procedural matters

39. In its refusal notice on 12 May 2005, the DCA stated its reliance upon Section 36(2)(b) of the Act. However, the DCA failed to identify whether it was specifically relying upon Section 36(2)(b)(i) or Section 36(2)(b)(ii) or both. In failing to specify the exact exemption being relied upon, the Commissioner finds that the DCA was in breach of Section 17(1)(b) of the Act.
40. Section 10 of the Act provides that a public authority must respond to a request for information within 20 working days of receipt. In providing its initial refusal on 9 May 2005, almost 8 weeks after the first request for information, the DCA has breached Sections 10(1) & 10(3) of the Act.
41. The Commissioner notes that the DCA introduced four additional exemptions at two different stages beyond its initial refusal notice. Although it is recognised that the substantive refusal was given on 12 May 2005, the Commissioner finds the DCA in breach of Section 17(1)(b), in failing in its preliminary refusal of 9 May 2005 to state its subsequent reliance upon the Sections 31, 40, and 41 exemptions raised.

### Exemptions

#### Section 40(2)

42. Under Sections 40(2) & 40(3)(a)(i), where a person is requesting information about a third party (in this case Mr X) and that information, (the Report), contains

- the third party's personal data, then it may be exempt under the Act, if disclosing it would breach the Data Protection Act 1998 (DPA).
43. In this case, the Commissioner agrees with the DCA that the most relevant data protection principle to consider is the first principle - whether disclosing the Report would amount to unfair or unlawful processing of that personal data.
  44. In the DPA, the definition of personal data includes information from which the data subject (Mr X) can be identified and includes expressions of opinion and intentions in respect of that data subject.
  45. In this case the Commissioner is satisfied that Mr X can be easily identified from the Report. Further, the Report contains an account of Mr X's own evidence, expressions of opinion about him as well as details of intentions towards him.
  46. The Commissioner is therefore of the opinion that the information falls within the definition of personal data. A public authority must, however, demonstrate that to release that information would breach one of the data protection principles or section 10 of the DPA.
  47. The DCA has argued that in this case Mr X received an assurance that the information in the Report would remain confidential. As such, he would have had an expectation that information imparted and reported would remain confidential. When reaching a view about whether disclosing information would breach the first data protection principle, the Commissioner considers one of the key factors to consider is what the expectations of the data subject are and whether these are reasonable.
  48. The Commissioner has been referred to Paragraphs 19.17 to 19.19 of the Directions. The Commissioner accepts that those specific Directions relate to the type of hearing recorded in the Report and that they stress to all those involved that such a hearing is held in confidence and that any views expressed as part of those proceedings are to be treated as confidential.
  49. Accordingly, against the background of the type of hearing being conducted, and the Directions, the Commissioner finds that it would have been reasonable for Mr X and others involved in the proceedings to have an expectation that the hearing and the Report recording it would remain confidential.
  50. The Commissioner finds that where there is a reasonable expectation of confidence, information would be imparted on that basis. In his view it would be unfair to the individuals involved in this case to disclose information to the public where a reasonable undertaking had been given to keep that material confidential.
  51. The Commissioner has also considered the fact that, in this case the data subject is a Magistrate and the requested Report details the outcome of a hearing into his conduct. Magistrates occupy a position of significant responsibility within society and are required to sit in judgement on a very wide range of issues including credibility as well as moral and social questions. As such, the Commissioner

recognises the importance of public confidence in the competence of individuals occupying such roles. It is arguable that it would be reasonable for individuals in such positions of responsibility to have a greater expectation of transparency in order to preserve that confidence. Therefore, where the conduct of a member of the judiciary is called into question the public may have a legitimate interest in knowing what, if any, disciplinary action has been taken. It may also be appropriate for the public authority to demonstrate that it has fully investigated allegations in accordance with its set procedures.

52. However, the Commissioner also recognises that, notwithstanding the comments above, Magistrates also have a right to privacy like other individuals. In this case, the Commissioner notes that the hearing did not relate to the competence or conduct of Mr X in carrying out his functions as a Magistrate. Further he is unaware of any evidence that the hearing was not conducted in accordance with normal procedure. In addition, Mr X was given a specific and in the Commissioner's view, a reasonable undertaking, in accordance with the Directions, that the hearing and the Report would remain confidential. Bearing all of these factors in mind, the Commissioner does not consider that the legitimate interests of the public justify an infringement of Mr X's right to privacy.
53. The Commissioner concludes that to disclose the Report would breach the first data protection principle. The Commissioner therefore considers Section 40(2) to be engaged as section 40(3)(a)(i) is satisfied and that the DCA was correct to withhold the requested information.
54. As the Commissioner is satisfied that the section 40(2) exemption applies, no further comment has been made in this Decision Notice about the other exemptions applied by the DCA in this matter.
55. Sections 10, 17 and 40 of the Act are included in the attached legal annex.

## The Decision

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56. The Commissioner's decision is that the public authority applied the section 40(2) exemption in accordance with the requirements of the Act.
57. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The DCA breached section 10 as the request was not responded to within 20 working days of receipt.

It also breached section 17 as it failed to provide details of all of the exemptions that it wished to rely upon in the initial refusal notice sent to the complainant and did not provide the complete exemption in relation to others that it did cite.

## Steps Required

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58. The Commissioner requires no steps to be taken.

## Other matters

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59. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
60. Although not directly covered by the provisions of the Act, the Commissioner has also considered the way in which the DCA has handled the request for a review of its refusal of the complainant's request for information.
61. Although the DCA eventually carried out an internal review, the Commissioner is dissatisfied with the DCA as to the length of time taken to communicate the results of such a review.
62. Specifically the Complainant asked for internal review of the initial refusal to be carried out on 4 June 2005. Despite an intervening reminder to the DCA, it only provided the outcome of its internal review on 8 August 2005, some 8 weeks later.
63. Pursuant to Section 45 of the Act the Secretary of State for Constitutional Affairs has issued a Code of Practice (the Code) for public authorities to follow. The Code provides guidance as to desirable practice for a public authority to follow in connection with the discharge of its functions under Part I of the Act.
64. In accordance with Paragraph 39 of the Code the complaints procedure, "should encourage a prompt determination of the complaint". In taking 8 weeks to report the outcome of its internal review, the Commissioner is of the opinion that the public authority has not acted within the spirit of the Code and that the period is excessive. However this is not in itself a contravention of the Act.



## Right of Appeal

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65. 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 25<sup>th</sup> day of June 2007**

**Signed .....**

**Jane Durkin  
Assistant Commissioner**

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