

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 28 February 2008**

**Public Authority:** The Chief Officer of Bedfordshire Police  
**Address:** Police Headquarters  
Woburn Road  
Kempston  
Bedford  
MK43 9AX

### Summary

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The complainant requested statements obtained during the public authority's investigation of events surrounding his son's death and other statements obtained in relation to an event which occurred some time before his son's death. He also requested a copy of a report compiled by an officer of the public authority. The public authority refused citing the exemptions at Section 40(2) (Unfair Disclosure of Personal Data) and Section 30 (Investigations Information). Some information was disclosed outside the scope of the Act as a gesture of goodwill. The complainant was dissatisfied with the extent of this private disclosure and complained to this office arguing that all the requested information should have been disclosed to him under the Act. Focussing on that information which remains withheld from the complainant, the Commissioner has decided that the public authority has correctly applied the exemption at Section 30(1) to the information that it holds. Given that Section 30(1) applies to all the requested information, the Commissioner has not considered the application of any other exemption cited. However, the Commissioner is not satisfied with the public authority's refusal notice in three respects. Firstly, it did not construe an earlier request of a similar nature as a request under the Act and therefore its response to that earlier request was out of time. Secondly, it failed to confirm or deny whether it held some information caught by the scope of the earlier request which was not specifically referred to in a later request. Thirdly, its explanation of the application of Section 40(2) is confusing and inaccurate. He has therefore decided that the public authority did not comply with all its obligations under Section 1(1)(a), Section 17(1) and Section 17(3).

### 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. The complainant's son was killed when he was hit by an articulated lorry while crossing the A1(M) in Hertfordshire on foot in the early hours of 26 July 2003. The driver of the lorry was an Irish national and the lorry was owned by a road haulage company based in the Republic of Ireland. This incident was investigated by Hertfordshire Constabulary. That public authority's response to a separate request made by the complainant is the subject of another decision notice (ICO Reference: FS50133286).
3. It is the complainant's contention that his son was in some way forced onto or chased onto on the A1(M) following an altercation with a former associate or associates. It is further alleged that one of these former associates made a threat of violence against the complainant's son shortly before the young man's death. There was an earlier alleged falling out between the complainant's son and the former associate following an incident involving a company car used by the complainant's son. The car was allegedly taken without the son's permission. This earlier incident took place in Bedfordshire where the public authority is based.
4. The complainant had been in contact the public authority raising concerns about its investigation into the alleged threat of violence and related matters, including the earlier incident involving his son's car.
5. There was co-operation between the two neighbouring police forces over the investigation given that the incident took place in Hertfordshire but the deceased was resident in Bedfordshire and the earlier incident involving the company car took place there. The public authority conducted an interview with the individual who had allegedly made the threat of violence against the complainant's son. This interview was conducted by the public authority on behalf of Hertfordshire Constabulary at the request of the Coroner. The Coroner made this request during an inquest hearing in July 2004. This inquest was apparently stayed pending the collection of further information such as this. The Coroner's inquest was concluded in February 2006 and a narrative verdict was issued where the events leading to the circumstances of the young man's death, so far as they were known, were set out.
6. Since his son's death, the complainant and his family have received distressing material in the post. This includes an anonymous drawing of a crucifix with the words "IT'S PAYBACK TIME." typed beneath it. His house has also been defaced with abusive graffiti. This has been investigated by the public authority and the quality of that investigation has also been questioned by the complainant although that matter is not dealt with in this decision notice. The complainant is of the view that his son's death, his own attempts to find out what lead to the death and the incidents of harassment are related.
7. In a letter to the public authority dated 27 August 2005, the complainant stated that *"we have still not been provided with any copy statements of the case relating to the taking of my son's company car that led to the threats to kill him,*

*we have still not been provided with the copy of [the police officer's] report into this matter, we have still not been provided with a copy of any statements of any witness relating to the death of my son". He then asked for "copies of all statements and reports repeatedly requested".*

8. At some point in either late August or early September 2005, the police officer preparing the report advised the complainant by telephone that if he wanted a copy of the report and copies of statements taken in connection with the matter, he would need to apply for them formally under the information access provisions of the Act.
9. In a letter to the public authority dated 8 September 2005 he made the following request:

*"If the Bedfordshire Police have only taken statements from three individuals over the past two years it is reasonable to believe that no proper investigation has been carried out into the circumstances leading up to the death of my son but I would formally request under the Freedom of Information Act that you provide the limited statements obtained and a copy of [the officer's] report."*
10. The public authority acknowledged his request in a letter dated 20 September 2005.
11. On 21 September 2005, a senior officer at the public authority wrote to the complainant to advise that two of the witnesses had agreed verbally to the release of their statements to him and that the public authority was seeking written confirmation to that effect. The public authority also advised that the report would be released to him but that *"personal details and identifying information (for example, vehicle registration numbers) will be removed"*.
12. On 28 September 2005, a formal refusal notice was sent to the complainant. In this letter, the public authority noted *"you seek access to statements obtained during the investigation into the death of [the complainant's son]."* The public authority stated that the information was exempt under Section 40(2) of the Act. It stated that *"This exemption applies because the right given under the Act to request official information...does not apply to personal data – any such requests become subject access requests under the Data Protection Act 1998."* It went on to state that *"If the personal data requested is about someone other than the applicant, there is an exemption under the Data Protection Act 1998 if disclosure would breach any of the Data Protection Principles."*
13. It then went on to assert that the exemption at Section 30 of the Act also applied. It explained that Section 30 applied where the requested information has at any time been held by the public authority for the purposes of *"(a) any investigation which the public authority has a duty to conduct (b) any investigation which is conducted by the public authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings."*

14. It then explained that Section 30 was subject to a public interest test and listed public interest factors favouring disclosure and against disclosure. These will be addressed in more detail later in this Notice.
15. It also noted that *“as a gesture of goodwill and providing we have obtained written consent from the authors we will provide a version of the statements obtained omitting details that would breach any disclosure act. It also undertook to disclose the report “again omitting any details that would breach any disclosure act”.*
16. The complainant responded in a letter dated 4 October 2005 expressing the view that the public authority's letter of 28 September was a *“standard fobbing off letter”*. He reiterated his concerns about the investigation into his son's death. He added that his son's *“family have a legitimate and overriding right of access to all information and statements relating to his death and I would ask you to consider this letter to be a formal complaint into your decision and to have your decision reviewed at the earliest opportunity.”*
17. The public authority conducted an internal review and wrote to the complainant to advise the outcome of this review on 29 November 2005. This letter restated much of the letter dated 28 September 2005. The author also commented that a *“version of the statements omitting details that would breach any disclosure act and also a general report of the occurrence”* had been provided to the complainant as a gesture of goodwill and *“outside the Freedom of Information Act”*.

## The Investigation

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### Scope of the case

18. The complainant wrote to the Commissioner on 10 February 2006 to complain about the public authority's continued refusal to provide him with the information he had requested. A member of the Commissioner's Customer Service team asked the complainant to provide copy correspondence in support of his complaint. He did so in a letter dated 20 February 2006.
19. The Commissioner's investigation focused on the complainant's letters dated 27 August 2005 and 8 September 2005. The earlier letter referred to statements the public authority might have in connection with the incident involving his son's car and information relating to his death. The second letter, where the Act was formally quoted, referred specifically to information relating to his death. Given the link that the complainant had made between the incident involving his son's car and his son's death, the Commissioner took the view that the complainant was seeking access to both sets of information. In August 2005, the complainant was attempting to obtain information which he believed he was entitled to as the father of the deceased, in other words, outside the scope of the Act. The public authority was corresponding with him on that basis as well. When he specifically quoted the Act he focussed on one part of the information he was seeking. In the

Commissioner's view and in the particular circumstances of this case, it would be unfair to exclude the information requested on 27 August 2005 from his deliberations simply because the complainant did not quote the Act in that letter. The Commissioner is satisfied that the two requests are inextricably linked and that the complainant seeks access to information caught by the scope of both sets of requests. This point is addressed in more detail in the Analysis section of this Notice.

20. Noting that some information was provided to the complainant other than under the Act, the Commissioner centred his investigation on that information which was not so provided but which nevertheless is caught by the scope of the requests of 27 August 2005 and 8 September 2005.
21. The Commissioner has therefore considered how the public authority has handled the complainant's requests for the following information:
  - Any statements held by the public authority that relate to the taking of the company car
  - Any statements of any witness not already provided to the complainant relating to the death of his son including any which relate to alleged threats to kill him.

### **Chronology of the case**

22. The Commissioner wrote to the public authority on 12 May 2006 asking for a copy of the withheld information and for further information about its reasoning when applying Section 40(2) and Section 30. At this point, the Commissioner was focussing on the 8 September 2005 letter. The Commissioner asked for the public authority's comments as to which data protection principle would be breached if the requested information was disclosed under the Act. The Commissioner also asked for more detail about the public authority's consideration of the public interest test in relation to Section 30 with specific reference to the information in question.
23. The complainant wrote to the Commissioner on 22 May 2006 providing further public interest arguments in favour of disclosure. He stressed the importance of accountability in relation to what he believed was a mishandled investigation by the police into his son's death.
24. The public authority replied on 7 June 2006. It enclosed copies of letters to and from the complainant and copies of the withheld information. It explained that the report and witness statements made by two individuals had been released in wholly unredacted format to the complainant outside the Act on 7 October 2005. This disclosure post-dated the complainant's initial request but pre-dated the public authority's letter outlining the outcome of its internal review.
25. The public authority provided copies of that information and also of the witness statement made by a third individual which had not been provided to the complainant. It asserted that all the requested information was exempt from disclosure under the Act by virtue of Section 30 but added that "*for clarity*, [it had]

- identified those areas considered as exempt material under Section 40.*” These were marked on the documents. It expanded on the arguments it had given to the complainant about why it considered the information to be exempt from disclosure under the Act.
26. The Commissioner subsequently made several attempts to clarify with the complainant whether or not he had, in fact, received some of the information he had requested. The Commissioner’s letters also included questions and updates on three other related cases that were running concurrently. The Commissioner took the view that it was more sensible to consider all four cases at the same time.
  27. The complainant responded to these letters expressing considerable frustration at protracted delays in case handling on the Commissioner’s part and stressing his view that the police had acted either improperly or incompetently in relation to the investigation. He also reminded the Commissioner of his considerable distress over the death of his son and the uncertainty as to the circumstances which lead to his death. This distress was being exacerbated by the anonymous attacks he and his family were suffering and also, in no small part, by the delays he was experiencing in the Commissioner’s handling of his complaints. This made it difficult for him to take forward certain legal actions that he wished to pursue. He confirmed what information he had received from the public authority in a letter dated 28 December 2006.
  28. Meanwhile, on 29 November 2006, the Commissioner called the public authority to discuss the case in more detail. This call was followed by an email to the public authority dated 5 December 2006.
  29. In the email, the Commissioner referred to the letter of 27 August 2005 and commented that he considered the complainant’s request to be quite broad. He asked the public authority to confirm in writing what information it held in relation to the investigation into the young man’s death. He also noted certain comments in information already disclosed to the complainant. These comments appeared to refer to other information caught by the scope of the request, namely,
    - a letter allegedly sent to the complainant’s daughter
    - a statement taken from an individual in relation to the earlier car incident
    - a statement taken from an individual at the request of the Coroner on behalf of Hertfordshire Police
  30. The Commissioner asked whether the first item was held by the public authority and if it was for a copy to be provided. He also asked whether this information had been given to the complainant and, if he had not been provided with it, why that was the case.
  31. The Commissioner asked whether the other statements referred to above were still held by the public authority. During the telephone conversation, the public authority had advised that statements were passed to the Coroner and copies were not held. It had also said that where statements are passed to the Coroner copies would not necessarily be retained. The Commissioner asked for confirmation in writing that this was the case.



32. The Commissioner also queried whether the public authority had a retention policy bearing in mind that some statements related to this matter had been retained and some had apparently not been retained. The Commissioner asked for a copy of the public authority's retention policy if it had one.
33. The public authority responded on 13 December 2006. It argued that the letter of 27 August 2005 had not been treated as a request under the Act. It had been passed to the public authority's Professional Standards Department and had been dealt with as a complaint about the way the public authority had handled the case.
34. Dealing first with the letter allegedly sent to the complainant's daughter, the public authority advised that it had now traced a copy believing that the original was with either Hertfordshire Constabulary or the Coroner at Hatfield. The public authority recognised that this letter would be included in the scope of the 8 September 2005 request although it was not available for consideration at the time. That said, it was not able to verify whether it had, in fact, been sent to the supposed recipient (the complainant's daughter) and for that reason it would not be appropriate to release it otherwise than in accordance with the Act.
35. The public authority maintained that it was exempt from disclosure under the Act under Sections 30 and 40 and added that it was also exempt from disclosure under Section 38 (Health and Safety) and Section 44 (Prohibition on Disclosure). It argued that disclosure could endanger the health and safety of individuals who gave statements or who were mentioned or alluded to in statements. It stated that disclosure could result in repercussions on these individuals or their families. It also argued that the health and safety of officers would similarly be put at risk by disclosure. As such Section 38 was engaged and the public interest in maintaining this exemption (thus avoiding the risk of endangering these individuals) outweighed the public interest in disclosure.
36. In relation to Section 44, it argued that disclosure would contravene Articles 2 (Right to Life) and Article 6 (Right to a Fair Trial) of the Human Rights Act 1998. It argued that it had a positive obligation to protect life and in some circumstances to take preventative action to protect an individual's identification. It did not elaborate any further on the possibility that an individual's life would be put at risk as a consequence of disclosure. It further argued that any disclosure which lead to an individual's innocence being questioned would infringe their human rights in particular their right to a fair trial. It added that an individual is presumed innocent until their guilt has been proven before a court. Where disclosure contravenes Articles 2 and 6 of the Human Rights Act 1998, such a contravention would, in its view, impose a prohibition on disclosure sufficient to engage Section 44 of the Act.
37. The public authority further advised that it had a transcript of an interview with an individual that had been conducted on behalf of Hertfordshire Constabulary at the request of the Coroner. It did not consider that this information was caught by the scope of the 8 September 2005 request and therefore it did not consider whether or not it should be disclosed. Had it considered this information for disclosure under the Act it would have withheld it under Sections 30, 38, 40 and 44.

38. It also advised that it had located a brief statement of an officer stating that he had conveyed the individual to a police station in Bedfordshire to conduct the interview with him there.
39. The transcript and the police officer's statement were also included with the public authority's letter to the Commissioner.
40. It affirmed that aside from any documents dealing with the complainant's complaint to the force, the information it had forwarded to the Commissioner was the full information held by the public authority on this matter. It stated that the public authority had acted as agents for Hertfordshire Constabulary and therefore it anticipated that more information was held by that Constabulary and by the Coroner at Hatfield. It said that it was required by law to send original statements to the Coroner and that this was the public authority's usual practice in matters such as these.
41. It also enclosed a copy of its records retention policy and commented that it was unusual that full copies of all the statements submitted to other bodies were not retained and could offer no explanation as to why this departure from normal practice had occurred in this case. It commented that records management had improved since that date.
42. In setting out its arguments as to the applicability of the various exemptions cited the public authority first outlined why it believed each exemption was engaged. It then expanded on the harm test and public interest test arguments that it had supplied to the complainant. The public authority did not set out a separate and specific analysis of the potential for harm or the balance of public interests in relation to each exemption. These arguments are set out in the Analysis section of this Notice.
43. The Commissioner noted the complainant's regular reference in correspondence to an investigation conducted by an officer of Essex Police into the competence of the public authority and Hertfordshire Constabulary. He asked the complainant for clarification and for an update regarding this investigation in a letter dated 30 October 2007.
44. The complainant responded by return fax and post expressing further frustration in the protracted delays at the Commissioner's office and in what he saw as the Commissioner's request for information he had already supplied. In that letter and a further letter dated 6 November 2007, he indicated that the report was likely to criticise an officer who is now retired although he did not specify which police force this officer worked for and argued that other more senior officers were also aware of concerns he had raised from the outset. He added that the delays at the Commissioner's office had meant that he had been unable to contribute to this peer investigation by Essex Police in a meaningful way.

### **Findings of fact**

45. The complainant's son was killed when he was hit by an articulated lorry while crossing the A1(M) in Hertfordshire on 26 July 2003.



46. In December 2005, the driver of the articulated lorry was found guilty of falsifying his tachograph records in relation to a journey which took place on one of the days prior to this incident. The falsification was discovered during the investigation of the accident. The driver was fined £750 with £750 costs and banned from driving for a year although the ban would not be effective in his home country, the Republic of Ireland.
47. The driver had argued in mitigation that he was under pressure from his employer to complete that earlier journey without the requisite rest stops. Attempts were made to take action in the UK against the road haulage company for putting pressure on its employee to contravene safe driving regulations but these failed because the company did not fall within UK jurisdiction. It was not suggested in that court case that the driver had exceeded his hours on the night of the traffic incident.

## Analysis

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### Procedural matters

#### Normal course of business/Request under the Act

48. As outlined at paragraphs 18-21 above, the Commissioner believes that the 27 August 2005 request should have been treated as a request under the Act. The Commissioner recognises that the 27 August 2005 request was part of a dialogue between the public authority and a grieving parent seeking information about that authority's investigation in his son's death. However, the public authority reached the point where it felt unable to provide the complainant with certain recorded information and directed him to the information access provisions of the Act (see paragraph 8). At this point, it should have treated the 27 August 2005 request as a request under the Act and responded accordingly. The Act does not require requesters to make specific reference to the Act when making a request.
49. The Commissioner recognises that public authorities can find it difficult to determine whether a request for information is a request made in the normal course of business or a request under the information access provisions of the Act. The Commissioner would consider the following points as being relevant in this case
  - The 27 August 2005 request was made in writing.
  - The request was for recorded information held by a public authority
  - The public authority either no longer held the requested recorded information or was refusing to provide it because it considered that disclosure would have some sort of prejudicial effect

Given these three factors, the Commissioner believes that the public authority should have treated the 27 August 2005 request as a request for information under the Act. In reaching this view, the Commissioner also notes the definition of a "request for information" which is set out in Section 8 of the Act. It describes a

request as being one is that in writing, which states the name of the applicant and a correspondence address and which describes the information requested. Section 8 is provided in full in a Legal Annex to this Notice.

50. In failing to treat the 27 August 2005 request as a formal request under the Act it contravened the requirements of the Act in two ways.

### **Failure to confirm or deny**

51. Firstly, it failed to confirm or deny that it held the company car statements. This is a contravention of the requirements of Section 1(1)(a) of the Act. Full details of Section 1 are provided in a Legal Annex to this Notice.
52. The effect of the public authority's failure to confirm or deny that it held the company car statements is not, in the Commissioner's view, a trivial one. The complainant is seeking to determine whether or not the taking of the company car has any bearing on the events surrounding his son's death. The Commissioner believes the public authority should have explained to the complainant that it no longer held any company car statements because it had probably forwarded them to the Hertfordshire Coroner and had failed to take copies. Had he known this, the complainant could have made more informed comments about the public authority to any person conducting a professional review of the public authority's actions. This apparent failure to retain copies of investigations information is also dealt with in Other Matters towards the end of this Notice.

### **Failure to provide a timely refusal notice**

53. Secondly, it should have issued a refusal notice within the required deadline of 20 working days where it believed that it was not obliged to provide certain recorded information. It did respond within 20 working days to the request dated 8 September 2005 but it did not respond within 20 working days to the request dated 27 August 2005. The 27 August 2005 request refers to "*copies of all statements and reports repeatedly requested*". These statements are characterised in the 27 August 2005 request as "*any statements of any witness relating to the death of my son*". In the Commissioner's view, this includes the statement taken on behalf of Hertfordshire Constabulary in so far as that statement was taken at the express request of the Coroner who was conducting an inquest into the death of the complainant's son. It also includes the three statements referred to in the request of 8 September 2005, two of which were later released to him, the latter being withheld by virtue of the exemption at Section 30(1) of the Act.
54. In failing to provide a timely refusal notice in response to the 27 August 2005 request the public authority contravened the requirements of Section 17(1) of the Act. Full details of Section 17 are provided in a Legal Annex to this Notice.

## Failure to explain application of exemptions

55. In the refusal notice of 28 September 2005, it listed the exemptions that it sought to rely on. One of the exemptions cited by the public authority was Section 40(2) (Unfair Disclosure of Personal Data). Although the public authority did provide a statement as to why this exemption applied in its view, the Commissioner has a number of concerns about this statement. The Commissioner believes that the statement does not assist the complainant in understanding the public authority's view and considers that elements of the statement are confusing and contradictory.
56. The following statements give the Commissioner cause for concern. They were made in the public authority's refusal notice and repeated in its letter outlining the outcome of its internal review and in letters to the Commissioner:
- "[Section 40(2)] applies because the right given under the Act to request official information held by public authorities does not apply to personal data – any such requests become subject access requests under the Data Protection Act 1998.*
- If the personal data requested is about someone other than the applicant, there is an exemption under the Data Protection Act 1998 if disclosure would breach any of the Data Protection Principles."*
57. This explanation as to the application of Section 40(2) is confusing and, in parts, wholly incorrect. The public authority appears to be trying to explain the application of Section 40(1) before explaining how Section 40(2) applies.
58. Section 40(1) applies when the information requested is the personal data of the requester. Individuals cannot access their own personal data via the Act, but may obtain it under the subject access provisions of the Data Protection Act 1998 ("DPA98"). Public authorities should initiate their subject access procedures where a requester asks for their own personal data under the Act.
59. The Commissioner is not certain why the public authority referred to the application of Section 40(1) in the first sentence quoted above because it is not relevant to the complainant's request.
60. The public authority's statement "*the right given under the Act to request official information held by public authorities does not apply to personal data*" is incorrect as a matter of law. While you cannot access your own personal data under the Act, you may very well be able to obtain other people's personal data under the Act provided disclosure would not breach any of the data protection principles of DPA98. This is the effect of Section 40(2).
61. The statement "*there is an exemption under the Data Protection Act 1998 if disclosure would breach any of the Data Protection Principles*" is also a somewhat confusing statement. Where disclosure would breach any of the data protection principles, an exemption under the Act (that is, the Freedom of Information Act 2000) applies, namely, Section 40(2). No exemption under DPA98 is engaged. In any event, the data protection principles do not provide

exemptions under DPA98. They offer guiding principles for appropriate and lawful handling of personal data to ensure, e.g., fairness, adequacy, security and accuracy. Disclosure of personal data under the Freedom of Information Act 2000 can be fair and not in breach of any of the data protection principles in many circumstances.

62. In providing an unclear explanation as to the application of Section 40(2), the Commissioner considers that the public authority has not satisfied the requirements of Section 17(1)(c).

## Exemptions

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63. The public authority has cited 4 exemptions in relation to this information, Sections 44, 40(2), 38 and 30.
64. The Commissioner's investigation has focussed on whether or not the exemption at Section 30(1) (Investigations information) applies in this case and, where it does apply, whether or not the public interest in maintaining this exemption outweighs the public interest in disclosure. Full details of this exemption are given in a Legal Annex to this Notice.

### Section 30(1) – Investigations Information

65. Section 30(1) applies to a particular class of information, namely information held at any time by a public authority for the purpose of an investigation which the public authority has a duty to conduct with a view to ascertaining whether a person should be charged with an offence. In this case, the investigations are as follows: the public authority's investigation into the incident relating to the company car; and the public authority's investigation (in collaboration with Hertfordshire Constabulary) into the alleged threat of violence against the complainant's son prior to his sudden death.
66. The Commissioner is satisfied that all the information in question is held by the public authority for the purpose of an investigation and that the information is therefore caught entirely by the scope of Section 30(1) – details of which are given in the Legal Annex to this Notice.

### The Public Interest Test

67. In deeming the Section 30(1) exemption as class based rather than prejudice based, Parliament determined that there was an inherent harm in disclosing information of this class or type. However, Parliament also determined that even where the exemption is engaged, the information itself should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner therefore went on to consider the balance of public interest also known as the "public interest test".
68. The complainant has raised several points in favour of disclosure in this case:

- The public authority's refusal to provide him with all the requested information has made it difficult for him to contribute in a meaningful way to any internal or external investigation into its alleged shortcomings.
  - The public authority has not investigated properly the events surrounding his son's death and the alleged falling out with an associate. The complainant asserts that this is, at best, due to incompetence and, at worst, a deliberate tactic to avoid pursuing a particular individual. He asserts the strong public interest in ensuring that public authorities operate in a transparent and accountable way.
  - He is frustrated that the lorry driver only received a £750 fine plus costs for an offence not related to the traffic incident and that the driver's employer could not be pursued for alleged breaches of health and safety legislation because it was not subject to UK law. He believes that other individuals could and should be called to account for his son's death and the public authority has failed to give him and his family justice. Its refusal to provide him with the requested information denies him the opportunity to seek legal redress himself.
69. While recognising a public interest in transparency and accountability, the public authority has raised several points in favour of maintaining the exemption as follows:
- Information relating to criminal investigations will rarely be disclosed under the Act. It would only be considered where it would aid the prevention and detection of crime or the apprehension of offenders. None of these objectives would be achieved in this case and may, in fact, undermine current and future investigations.
  - Where disclosure reveals investigation or interview tactics this could undermine the current and future enforcement role of the police service thus causing damage to the service and to the community
  - Release of this information could affect the flow of information to the service because there would be a failure to protect identities leading to informants and victims refusing to contact the police. This would inhibit the service's ability to carry out its public functions.
  - In summary, it is not in the public interest to disclose information that may compromise the public authority's ability to fulfil its core function of law enforcement, the protection of life, the prevention and detection of crime and the maintenance of peace.
70. The Commissioner's guidance on this exemption can be viewed at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/section\\_30\\_investigations\\_13\\_oct\\_06.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_30_investigations_13_oct_06.pdf).

In considering the public interest test, the guidance states as follows:

*"For this exemption, it will involve weighing the harm that may be caused to an investigation against the wider public interest in disclosure. A critical issue is likely to be the timing of disclosure. The public interest in the disclosure of information is likely to be weaker while an investigation is being carried out. However, once*

*an investigation is completed, the public interest in understanding why an investigation reached a particular conclusion, or in seeing that the investigation had been properly carried out, could well outweigh the public interest in maintaining the exemption.*

*Similarly, the public interest is likely to outweigh the disclosure of most information about investigations which, having been suspended, may be reopened. There tends to be considerable public interest in criminal cases and in seeing that justice is done. There will be occasions when this factor favours disclosure, for instance where there is a well reported suspicion that justice was not done either to an accused person or a victim. In some cases, this may shift the balance of public interest in favour of the disclosure of information about completed cases or those which have been abandoned with no reasonable prospect of being reopened. However, there will be other cases where disclosure should not take place because it could prejudice the right to a fair trial.*

*Public authorities should not assume that they should not release all information relating to ongoing investigations. Much will depend on the effect of disclosure. There will be a stronger case for maintaining the exemption where the confidentiality of the information is critical to the success of the investigation. In cases where a prosecution has collapsed for reasons of procedural failure or mismanagement on the part of the investigating or prosecuting authority, there will be a stronger public interest argument in favour of the disclosure of information about this and other, similar investigations."*

71. The Commissioner also notes the Information Tribunal judgement in the case of *Toms v The Information Commissioner* which dealt with the application of Section 30(1). The Tribunal stated, with regard to the consideration of the public interest in relation to s.30(1) that:

*"In striking the balance of interest, regard should be had, inter alia, to such matters as the stage or stages reached in any particular investigation or criminal proceedings, whether and to what extent the information has already been released into the public domain, and the significance or sensitivity of the information requested."*

72. The Information Tribunal also indicated that in considering the public interest test it had had regard to the White Paper which preceded the introduction of the 2000 Act: *Your Right To Know: The Government's Proposals for a FOI Act* (Cm.3818, 11 December 1997). The Information Tribunal stated:

*"Although the Act as enacted differs in some respects from the model propounded in the White Paper [the Commissioner assumes this refers to the fact that Parliament determined that Section 30 should be qualified by a public interest test and should not be absolute], the following extract is relevant.*

*'[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law*



*enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt. Because of this, the Act will exclude information relating to the investigation and prosecution functions of the police, prosecutors, and other bodies carrying out law enforcement work such as the Department of Social Security or the Immigration Service. The Act will also exclude information relating to the commencement or conduct of civil proceedings”.*

73. Taking all the above points into account, the Commissioner therefore approached his analysis of the public interest in this case by first considering the following questions:

- What stage has the investigation reached, is it ongoing, suspended or completed?
- Is there a well-reported suspicion or evidence that justice was not done in relation to the young man's death.
- Is confidentiality critical to the success of the investigation?
- Has a prosecution collapsed because of a procedural failure or mismanagement on the part of the investigating authority?
- Is any of the information already in the public domain?
- Is the withheld information significant to the investigation?
- Is the withheld information sensitive?

**What stage has the investigation reached, is it ongoing, suspended or completed?**

74. The investigation into the earlier incident involving the complainant's son's company car was revisited as a consequence of the investigation into the complainant's son's death. However, the Commissioner understands that this investigation has ceased and no further action is proposed. As outlined above, the public authority no longer holds the company car statements and therefore could not disclose them in any event.

75. The public authority's investigation into the threat of violence allegedly made before the complainant's son's death has also ceased. The Commissioner notes that the complainant is pressing for the investigation into his son's death to be revisited. He is seeking access to the withheld information because he believes that his son's death and events surrounding it have not been properly investigated. He is extremely determined and is exploring every possibility to achieve his twin goals of having the matter reinvestigated and of having the public authority called to account for alleged incompetence.

76. The Commissioner has seen no evidence to indicate that the investigation is to be reopened. He notes the Hertfordshire Coroner's comment, reported in the local newspaper *“I cannot see any profit in making further enquiries into this”*. In the absence of any other information, he has concluded that the investigation is closed but with little prospect of being reopened at this time.

**Is there a well-reported suspicion or evidence that justice has not been served in relation to the young man's death?**

77. The Commissioner was able to find several reports on UK local newspaper websites and on an Irish news website relating to this case due in no small part to the complainant's determination to find answers to what he sees as unresolved questions about his son's death. The complainant also wishes to draw attention to what he sees as inadequacies in the criminal justice system. To date only one person has been prosecuted in relation to the events of 26 July 2003. This was the driver of the lorry (see paragraph 46) who was prosecuted for unrelated tachograph inconsistencies that came to light during the investigation into the young man's death. That court case and the narrative verdict recorded by the Coroner have also been the subject of media reports.
78. A judicial process has been followed but it is clearly the view of the complainant that justice has not been served. There has been an investigation and there has been an inquest. Neither has resulted in someone directly being called to account for the young man's death. Neither has resulted in a definitive conclusion that the young man died as a result of his own actions. In the absence of such a conclusion, it is wholly understandable that the complainant would be dissatisfied and distressed by the fact that no one has been judged accountable for his son's death or that the full circumstances of his death have not been determined. However, in the Commissioner's view, the fact that no definitive conclusion has been reached does not, in this case, lend particular weight to the suspicion that justice has not been served.
79. If the Commissioner had been able to identify from the withheld information anything which would suggest that justice has not been served, i.e., that there is a definitive explanation for the young man's death but that the public authority is concealing it for some reason, he would have considered this to be a powerful factor favouring disclosure. The complainant's private interest in knowing the truth about his son reflects a wider public interest in ensuring public confidence in the police. However, the Commissioner did not identify anything in the withheld information which suggested that a definitive explanation for the young man's death was being concealed.

**Is confidentiality critical to the success of the investigation?**

80. Much of the withheld information relates to information collected from individuals who knew the deceased and who know people allegedly involved in the incident in 2003 involving the deceased man's car. Personal testimonies from a relatively small circle of friends and associates appear to have played an important part in the investigation to date.
81. Where personal testimonies play a key part in an investigation, there is a public interest in ensuring that the flow of information is carefully controlled by the police to ensure maximum effectiveness. No individual suspected of involvement in a criminal act should have access to other people's testimonies until this is required by due legal process or such other time as the police consider it appropriate. If they have premature access to such information, they could modify their

responses to any future questioning accordingly. While both investigations here are apparently closed, the Commissioner recognises the strong public interest in ensuring the police retain control over the flow of information obtained from witnesses. The Commissioner also notes that these events are fairly recent. He considers that this adds weight to the public interest in keeping individuals' statements confidential. In the Commissioner's view, it is too early to conclude with any degree of certainty that no significant harm would be caused by disclosure.

82. The Commissioner has therefore concluded that confidentiality is critical to the success of the investigation.
83. While the Commissioner recognises the complainant's compelling need to find out what happened to his son, it is important to remember that disclosure under the Act is disclosure to the public at large. If the public authority were to release this information to the complainant under the Act, it must also release it under the Act to any other person who requests it irrespective of their possible motives.

**Has a prosecution collapsed or not been taken forward because of a procedural failure or mismanagement on the part of the investigating authority?**

84. The complainant has raised his concerns about the public authority's competence and about the competence of Hertfordshire Constabulary. The complainant argues that disclosure would assist him in challenging the competence of both public authorities. He is concerned that the peer investigation referred to at paragraph 44 would not be genuinely independent and that he should be allowed to see for himself whatever information is held in order to contribute to and to challenge the direction of the peer investigation or any subsequent investigation.
85. As far as the Commissioner can gather from the correspondence submitted by the complainant, a professional standards investigation has recently been conducted by an officer of Essex Police. Essex Police is a neighbouring police force and the Commissioner understands that, where appropriate, professional standards investigations may be conducted by an officer of a neighbouring force rather than the force or forces against whom a complaint has been made. This follows a national policy encouraging local resolution of complaints against police forces where that is appropriate. The Commissioner also understands that such investigations may be followed by an IPCC investigation depending on the peer investigation findings.
86. The Commissioner recognises that an adverse report following the peer investigation or an IPCC investigation about the public authority's competence could evidence that there has been a procedural failure or mismanagement by the public authority. However, the Commissioner would also note that no report had been delivered at the time the request was refused in September 2005. His decision about whether or not the public authority has handled the request in accordance with its obligations under the Act must, as a matter of law, relate to the circumstances at the time of its refusal and the internal review of the refusal. If there was no report by Essex Police, adverse or otherwise, at the time of the refusal or the review of the refusal, it is not possible to analyse whether or not the

public authority should have considered such a report as a public interest factor favouring disclosure.

87. The Commissioner recognises that from the complainant's point of view this could be termed a "chicken and egg" situation – progress on Point A depends on progress on Point B which, in turn, depends on progress on Point A. The complainant seeks disclosure of information under the Act to evidence his complaint about the public authority's competence. However, he does not have evidence of an adverse report to strengthen his argument for disclosure of the information under the Act in the first place. The complainant would further argue that delays at the Commissioner's office have made it even more difficult to obtain the information he believes he needs to make timely submissions to the peer investigation.
88. While the Commissioner sincerely regrets the delays that have occurred in the handling of this case, he is not persuaded that the complainant has otherwise been unable to put his concerns to the public authority or to the peer investigation.
89. The Commissioner also notes that the peer investigation or any subsequent IPCC investigation is inevitably wider than his own investigation. The Commissioner's investigation is confined to analysing how the information access provisions of the Act apply to a discrete set of information caught by the scope of the complainant's request. The outcome of those other investigations may give weight to the argument for disclosure but the Commissioner is bound by the limits of his remit and cannot himself fully investigate whether there has been mismanagement by the public authority.
90. Having examined the withheld information, the Commissioner is unable to identify anything which gives further weight to the allegation that the public authority has fallen short of its obligations and performance standards in terms of the investigation it conducted. It is clear from information in the public domain that the Hertfordshire Coroner stayed the inquest into the young man's death because he wanted an interview to be conducted with an individual who allegedly made the threats. The Coroner appears to have raised concerns that this had not already been done. A record of this interview is included in the withheld information. There is nothing in this record that suggests to the Commissioner that it was not conducted properly. The argument that it should have been conducted earlier, as the Coroner seemed to suggest, does not, in the Commissioner's view strengthen the argument for disclosure now that it has been conducted.
91. In relation to the public authority's earlier investigation of the company car incident, the Commissioner is satisfied that the record of the interview of the same individual is no longer held by the public authority. This apparent failure to retain relevant information is dealt with in Other Matters at paragraph 104 below. This apparent failure also does not, of itself, strengthen the argument for disclosure of what has been retained.

**Is any of the information already in the public domain?**

92. As noted above, the complainant's concerns have been widely reported in local media (including online versions). These reports do include considerable detail about the investigation gleaned, the Commissioner assumes, either from the complainant or from the inquest. However, the specific information requested has not been put into the public domain.

**Is the withheld information significant to the investigation?**

93. The Commissioner is satisfied that the information is significant to the investigation. It includes the statements of individuals with relevant knowledge of events.

**Is the withheld information sensitive?**

94. A considerable portion of the information would satisfy the definition of sensitive personal data found in Section 2 of the Data Protection Act 1998 in that it relates to allegations of criminal activity directed at one or more identifiable individual. As such, it requires particularly careful handling by the organisation holding it, in this case, the public authority. At this point, the Commissioner would comment on the provisions of Section 40(2). If disclosure of information under the Act would contravene one of the data protection principles of DPA98, such information is exempted from disclosure under the Act. In this case, the Commissioner considers that the first data protection principle would be contravened by disclosure under the Act. There are three elements to the first data protection principle where the processing of sensitive personal data is concerned. If one of these three elements is not satisfied then disclosure would contravene that principle. The three elements are as follows:
- The requirement to process personal data fairly and lawfully
  - The requirement to satisfy a DPA98 Schedule 2 condition for processing personal data in general
  - The requirement to satisfy a DPA98 Schedule 3 condition for processing sensitive personal data in particular.
95. The Commissioner's attention in this case is immediately drawn to the third element listed above. He has considered all the possible conditions for processing sensitive personal data and is unable to identify one which could be satisfied in relation to the sensitive personal data in question. He has decided that one of the three elements of the first data protection principle cannot be satisfied, he considers that disclosure of this information would contravene the first data protection principle. He has therefore concluded that, notwithstanding any consideration of the balance of public interest in relation to Section 30, the sensitive personal data contained in the withheld information is absolutely exempt from disclosure under Section 40(2). Section 40 is provided in full in a legal annex to this Notice.

### Section 30 – Public Interest Test Conclusions

96. The Commissioner recognises the complainant's fervently held wish to establish conclusively what happened to his son. He also recognises the wider public interest in ensuring confidence in the investigation process where there has been a sudden death in unclear circumstances.
97. Arguably, disclosure of the withheld information could assist in understanding that process in general and in particular as it applied to this case. The complainant also believes it would assist him in pursuing the legal proceedings that he has indicated he wishes to instigate. No further action in relation to this case appears to be envisaged by the public authority. It could be argued that this diminishes the potential for harm which might flow from disclosure in this case. Where harm is significantly diminished, the argument for maintaining the exemption is weaker.
98. However, the Commissioner is not persuaded that the potential for harm has diminished sufficiently for him to order disclosure of information of this class. The withheld information is significant to the investigation. The investigation occurred relatively recently and, in the Commissioner's view, it is too early to conclude with any degree of certainty that no significant harm would be caused by disclosure. As outlined above, he acknowledges a strong public interest in allowing the police to control the flow of information provided in witness statements and believes that this is a particularly relevant factor here. He recognises that there may well be cases where investigations information that has only recently been gathered could and should be disclosed under the Act but he does not believe that this is such a case.
99. The Commissioner is therefore satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### Section 30 – Information disclosed privately

100. As noted in paragraph 15 and elsewhere, the public authority made a disclosure to the complainant of certain information "*as a gesture of goodwill*". For completeness, the Commissioner would comment that the information disclosed in this way would also be exempt from disclosure to the public under the Act by virtue of Section 30 for the reasons outlined above.

### The Decision

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101. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The application of Section 30(1) to all of the requested information.



102. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority failed to confirm or deny that it held certain of the requested information
  - The public authority failed to provide a refusal notice within the statutory time limit of 20 working days
  - The public authority did not properly explain the application of Section 40(2) in either its refusal notice or in its letter outlining the outcome of its internal review.

### Steps Required

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103. Although the public authority should have confirmed or denied whether it held the company car statements at the time of the request, the Commissioner believes it would serve no useful purpose to require them to do so now. The Commissioner requires no steps to be taken.

### Other matters

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104. The Commissioner understands that, prior to the request, some of the statements taken in connection with the investigation were not retained and the authority is unable to explain why this is (paragraph 41 refers). The authority has assured the Commissioner that records management has since improved and that this problem should not arise in future. In addition, the authority provided a copy of the force's policy on the retention and disposal of information. Having reviewed this document, the Commissioner considers that it does not constitute an adequate statement of policy on the issue of records retention. As such the Commissioner believes that the authority would benefit from obtaining further advice and guidance from the Records Management Advisory Service at The National Archives (see contact details below).

Records Management Advisory Service (RMAS)  
National Advisory Service  
The National Archives  
Kew  
Richmond  
Surrey  
TW9 4DU  
rmanadvisory@nationalarchives.gov.uk

105. The Commissioner would hope that this will lead to improvements in records management polices and therefore compliance with the Section 46 Code of Practice.

## Right of Appeal

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106. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.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 28<sup>th</sup> day of February 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

Extracts from the Freedom of Information Act 2000

### Section 1 – General right of access to information held by public authorities

- (1) 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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) 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.
- (4) 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.
- (5) 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).
- (6) 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”.

### Section 8 – Request for Information

- (1) In this Act any reference to a “request for information” is a reference to such a request which—
  - (a) is in writing,
  - (b) states the name of the applicant and an address for correspondence, and
  - (c) describes the information requested.

- (2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request—
- (a) is transmitted by electronic means,
  - (b) is received in legible form, and
  - (c) is capable of being used for subsequent reference.

### **Section 17 - Refusal of request**

- (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

- (2) Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

- (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

- (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Section 30 – Investigations Information**

- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
  - (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
    - (i) whether a person should be charged with an offence, or
    - (ii) whether a person charged with an offence is guilty of it,
  - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
  - (c) any criminal proceedings which the authority has power to conduct.

### **Section 40 - Personal information**

- (1) 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.
- (2) 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.
- (3) 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.
- (4) 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).

(5) 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).

(6) 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.

(7) 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.