

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 6 August 2008**

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
Whitehall  
London  
SW1A 2AH

### Summary

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The complainant wrote to the Foreign and Commonwealth Office to request the names and job titles of the UK and Russian diplomats who were expelled as a result of the diplomatic dispute that followed the murder of Alexander Litvinenko in London in 2006. The public authority refused to disclose the information relying on the exemption in section 40 of the Act (personal information). The Commissioner has investigated the complaint and has found that the requested information constitutes personal data and its disclosure would breach the first data protection principle which requires that personal data be processed fairly and lawfully. The Commissioner has decided that the public authority dealt with the complainant's request in accordance with the Act and requires no steps to be taken.

### 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 July 2007 the complainant wrote to the public authority to request the following:

*Please disclose the names and job titles of:*

- (a) the Russian Federation Embassy or Consular staff in London or elsewhere in the United Kingdom, and*

*(b) the United Kingdom Embassy or Consular staff in Moscow or elsewhere in the Russian Federation,*

*who have been, or who are shortly being expelled, following the diplomatic incident over the failure to extradite or prosecute the suspect Andrei Lugovoi in the radioactive Polonium 210 murder case of British citizen Alexander Litvinenko.*

3. The public authority responded to the complainant on 20 August 2007. It confirmed that it held the requested information but said that the information was being withheld under section 40 of the Act (personal information). It explained that section 40 applied because the requested information constituted personal data the disclosure of which would contravene the data protection principles. It said that in this case it believed that disclosure would breach the first data protection principle which requires that personal data shall be processed fairly and lawfully. It was, in the opinion of the public authority, the fairness aspect of the principle which would be breached by disclosure. It explained that in such circumstances section 40 confers an absolute exemption and that therefore there was no public interest test to apply.
4. The complainant wrote back to the public authority on 23 August 2007. He said that he did not believe that the names and job titles he had requested constituted personal data. He asked the public authority to provide him with advice and assistance that would help him to amend or modify his original request. If the public authority was still minded to refuse his request then he asked it to carry out an internal review of its handling of his request.
5. The public authority wrote to the complainant on 4 October 2007 and presented the findings of the internal review. At this point the public authority upheld the decision to withhold the names and job titles of the expelled diplomats under section 40(2) and 40(3) of the Act. It said that the information constituted personal data and its release could compromise the individuals concerned and that this was as applicable to the Russian diplomats as to the British diplomats.

## **The Investigation**

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### **Scope of the case**

6. On 8 October 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to withhold the names and job titles of the expelled diplomats under section 40 of the Act.
7. The complainant set out his arguments on why the section 40 exemption did not apply to the information he requested. He also highlighted a case heard at the Information Tribunal which he believed supported his argument that the information should be released.

## Chronology

8. The Commissioner wrote to the public authority with details of the complaint on 20 May 2008. At this point the Commissioner invited the public authority to provide him with its comments on why disclosure of the requested information would breach the first data protection principle. He also asked it to confirm whether the information had been previously disclosed or otherwise placed in the public domain. Finally, the Commissioner invited the public authority to provide him with any further representations in support of its decision to withhold the requested information.
9. The public authority responded to the Commissioner on 25 June 2008. It said that the names of the expelled diplomats were clearly personal data and that it also considered their job titles to be their personal data because disclosure of this information would allow their identities to be revealed, particularly to other staff within the public authority. It added that it had been extremely careful not to release their names even within the public authority, except to those with an operational need to know.
10. The public authority also provided the Commissioner with some background information to the events leading up to the expulsion of the diplomats. It explained that both the British Government and the government of the Russian Federation had been very careful not to release the identities of the people involved.
11. The public authority said that disclosure would not be in accordance with the first data protection principle. It said that this was because disclosure would, in its opinion, be neither fair nor meet one of the conditions in schedule 2 of the Data Protection Act 1998. It explained that, in applying the exemption, its aim was to protect those individuals (and their families) who were expelled from Moscow from further pressures and press interest, and also from any stigma arising from the expulsions. It said that this is why it believed that disclosure would be unfair.
12. The public authority recognised that in certain circumstances there is a legitimate interest in knowing the identities of officials, for example, where senior civil servants are accountable for high profile projects. However in this case it said that any interest in the identities of the diplomats expelled as a result of the Litvinenko diplomatic dispute could be described as a "curiosity" rather than "a legitimate interest that would further a common good". The public authority referred to a decision of the Information Tribunal when it had commented on the difference between what is in the public interest and what is of interest to the public.
13. The public authority said that the legitimate interest, or common good, at issue in this case is the action of expulsion itself and not the personal data of the people involved in the diplomatic dispute. It said that processing the personal data of the individuals involved (through disclosure to the complainant) would not further that legitimate interest.
14. The public authority added that the Russian Federation had been equally careful not to release the names and positions of the individuals involved and it said this was a long standing diplomatic custom in such circumstances.

## Findings of fact

15. In 2006 Alexander Litvinenko, a Russian with British nationality, was killed in London in a case of suspected poisoning. A Russian national, Andrei Lugovoi was suspected of involvement in the killing and attempts were made by the British government to bring him to trial in the UK.
16. On 16 July 2007 the Foreign Secretary announced the expulsion of 4 Russian diplomats from the Russian embassy in London in response to the Russian Government's failure to provide a satisfactory response to requests by the UK government for assistance in seeing Mr Lugovoi brought to trial in the UK. In response the Russian Federation announced on 19 July 2007 that it was expelling 4 British diplomats from the British embassy in Moscow.

## Analysis

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17. A full text of the relevant statutes referred to in this section is contained within the legal annex.

## Exemption

### Section 40 – Personal Data

18. The public authority has refused to disclose the names and positions of the British and Russian diplomats by relying on the exemption in section 40(2) of the Act. Under section 40(2) information will be exempt if it constitutes the personal data of someone other than the person making the request and its disclosure would contravene any of the data protection principles set out in schedule 1 of the Data Protection Act 1998.

### Is the information personal data?

19. In order for this exemption to be engaged it is first necessary to establish if the information constitutes personal data. Personal data is defined in the Data Protection Act 1998 as data which relate to a living individual who can be identified from those data or from those data and any other information in the possession of, or likely to come in to the possession of, the data controller. In this case the data controller is the public authority.
20. The Commissioner is satisfied that the names of the expelled diplomats, given that they clearly relate to living individuals, are personal data. The Commissioner also accepts that the job titles constitute personal data because they also relate to living individuals and were they to be released they could enable the specific individuals to be identified, especially by staff within the public authority, as the public authority has itself noted.

21. The Commissioner accepts that the information requested constitutes the personal data of living individuals other than the applicant. However for the section 40(2) exemption to apply the public authority would need to show that disclosure would contravene the data protection principles as set out in the Data Protection Act 1998.

### **The first data protection principle**

22. The public authority has said that it believes that disclosure would contravene the first data protection principle. The first data protection principle provides that:

*“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.*

23. The Commissioner agrees that it is the first data protection principle that is relevant in this case.
24. The public authority has argued that processing the personal information of the individuals in question, through disclosure of their identities to the complainant, would be unfair. The public authority has argued that disclosure would be unfair because:
- Disclosure would subject the expelled diplomats and their families to undue pressure and press interest.
  - Disclosure could lead to the expelled diplomats suffering from a stigma arising from the expulsions, e.g. it may be assumed that they had been expelled as a result of some wrongdoing.
  - Disclosure of the information would not meet one of the conditions in schedule 2 of the Data Protection Act 1998.
25. In *Awareness Guidance 1* the Commissioner suggested factors that may be relevant when considering the concept of fairness. In this case the Commissioner has given consideration to the following:
- Does the personal data relate to an individual's public or private life?
  - Do the individuals have an expectation that their personal data would not be released?
  - Would processing cause any unnecessary or unjustified distress?
26. The Commissioner is of the opinion that disclosing personal data is generally less likely to be considered unfair in cases where the personal data relates to an individual's public or professional life rather than their private life. The threshold

for releasing professional information will generally be lower than that in releasing information relating to an individual's private or home life.

27. Whilst the Commissioner is of the opinion that individuals employed in a role where they are performing a public function should expect more information about them to be disclosed, he feels that the circumstances of this case are such that the expelled diplomats, both British and Russian, would not reasonably expect their identities to be revealed.
28. It must be stressed that a diplomatic expulsion of this kind is an extraordinary occurrence. The British Government only resorted to expelling the 4 Russian diplomats after their attempts at securing Russian assistance in the Litvinenko affair had failed. Clearly the situation in which the expelled diplomats found themselves, a situation essentially not of their making, was far from routine. There is an argument that were the identities of people performing a public role revealed it would improve accountability and that these individuals should expect information about their work to be made available. However, in this case the diplomats involved were expelled as part of a wider diplomatic dispute and there is no suggestion that the diplomats who were expelled were chosen because of their personal conduct.
29. Given the circumstances it would be reasonable for the expelled diplomats to assume that their identities would not be revealed to those without an operational need to know. This is especially true given what the public authority has described as the "long standing diplomatic custom", of which the diplomats would no doubt be aware, that the identities of expelled diplomats are not disclosed, thus adding to the expectation of anonymity.
30. The complainant has suggested that the information he has requested is of an anodyne nature, i.e. the names and job titles of diplomats employed by the public authority in Moscow and their counterparts and that this is information that one might expect to be made readily available. However it is important to stress that what has actually been requested are the names and job titles of diplomats expelled as a result of a very high profile diplomatic dispute. The murder of Alexander Litvinenko and the subsequent diplomatic expulsions generated a significant amount of media interest and the Commissioner is of the opinion that were the identities of the diplomats to be revealed there would be a very real risk that they would be subject to undue press interest or pressure to the extent that disclosure could be considered unfair.
31. The public authority has also suggested that they may be stigmatised at having been expelled. The public authority has not shown any evidence to justify its concern and the Commissioner makes no comment on this point one way or another. However he does feel that given that the diplomats involved were expelled as a result of a situation over which it appears they had no control, they should be protected as far as possible from any adverse consequences. It would not be unreasonable to suppose that their careers, given the sensitivity of their roles, could be disadvantaged in some way were their identities to be revealed.

32. The complainant has argued that the identities of the expelled diplomats will be known to other governments with embassies in Moscow and London and to the foreign press corps. Therefore he has suggested that the public authority's decision to refuse his request is unjustified. The Commissioner sees no contradiction between the public authority's decision to withhold the names of the diplomats and the fact that this information may be known to diplomatic staff that would have an operational need to know this information. Equally, the fact that a relatively small group of journalists may have speculated on the identities of the diplomats concerned is not in itself a reason to order wider disclosure of the information.
33. The complainant has highlighted the decision of the Information tribunal in *Ministry of Defence v Information Commissioner and Mr R Evans [EA/2006/0027]* in support of his position. In this case the Tribunal decided that the Ministry of Defence should release the details of staff at the Defence Export Services Organisation, including staff operating in sensitive areas overseas. The Commissioner believes that the circumstances in that case were quite different to the circumstances in this case. In that case the Tribunal's decision was influenced by the fact that staff details were already widely available. The Commissioner rejects the complainant's argument that the decision in the Ministry of Defence case somehow acts as a precedent which he is obliged to follow.
34. The Commissioner is satisfied that the names and job titles of the expelled diplomats constitutes personal data and disclosure would constitute unfair processing in breach of the first data protection principle.
35. Section 40(2) of the Act is an absolute exemption and therefore the Commissioner has not undertaken an assessment of the public interest test.

## The Decision

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36. The Commissioner's decision is as follows:
  - The public authority dealt with the complainant's request in accordance with the Act by correctly withholding the names and job titles of the expelled diplomats under section 40(2).

## Steps Required

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37. The Commissioner requires no steps to be taken.

## Right of Appeal

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38. 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 6<sup>th</sup> day of August 2008**

**Signed .....**

**David Smith  
Deputy Commissioner**

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



## Legal Annex

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### Freedom of Information Act 2000

**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.”