

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 February 2009

Public Authority: National Offender Management Service (NOMS) (as part of the Ministry of Justice)

Address: Open Government Unit
Abell House
John Islip Street
London
SW1P 4LH

Summary

The complainant sought access to information concerning the issuing of a tariff certificate to a prisoner under the Criminal Justice Act 1991 ('the CJA'). The tariff appeared to have been set retrospectively in line with that Act. However, the relevant schedule to the CJA was not enacted until a date some months after the certificate was signed which the complainant was therefore seeking to validate. He also sought the name of the signatory who the public authority claimed had been given power to sign the certificate under the auspices of the Carltona principle which the complainant asserted was not legally possible. Following the death of the prisoner, which happened during the course of this investigation, a redacted copy of the certificate was supplied to the complainant by the public authority.

The Commissioner has decided that the public authority breached section 17(1)(c) in its first refusal notice and 17(1)(a), (b) and (c) in its subsequent two refusals. It breached 17(3) and 17(1)(b) in its internal review. The Commissioner has also decided that section 40(2) was inappropriately cited and that the public authority should have applied section 40(5)(b)(i) to the requested information. The complaint is not upheld.

The Commissioner's Role

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.

2. At the time of the request the National Offender Management Service (the "NOMS") was accountable to the Home Office. However, responsibility for the NOMS passed to the Ministry of Justice in April 2008. Therefore the public authority for the purposes of this decision notice is in fact the Ministry of Justice. However this notice refers to the NOMS as if it were the public authority.

Background Information

2. The complainant is a relative of a girl who was sexually assaulted and murdered in the 1960s. The perpetrator was found guilty of manslaughter on the grounds of diminished responsibility. During the trial the judge stated that the perpetrator should never be allowed to be at liberty and should go to prison for the rest of his life.
3. The Commissioner is aware that the complainant has been in correspondence with the NOMS for a number of years regarding the perpetrator of the crime and details of his term of imprisonment. It is clear that the public authority has provided information to the complainant, prior to the implementation of the Act, in his capacity as a relative of the victim and legitimately interested party. This information is not necessarily known to the wider public.

The Request

4. The complainant's prior knowledge has informed the requests that he has made and the way that they have been phrased, i.e. with an assumption that specific material is in fact held by the public authority. The Commissioner has ensured that this notice is drafted to protect the anonymity of both the perpetrator and the complainant in view of the sensitivity of the information involved.
5. On 16 January 2005 the complainant made his first request under the Act to the Lifer Review & Recall Section of the Home Office, now part of the NOMS. The request referred to the perpetrator by name and specified that he required the following information:
"In a letter from the Prison Service ... I was informed that a 10 year tariff was set in June 1992 in accordance with Paragraph 9 of Schedule 12 to the Criminal Justice Act 1991.

Please provide me with these further details:-

1. *The name of the official who set the tariff in 1992.*
 2. *The department of the Home Office in which the official was employed at the time the tariff was set.*
 3. *The position of the official in this department.*
 4. *The name of the Secretary of State responsible for the department in which this official was employed at this time.*
 5. *If the Secretary of State who was responsible for setting this tariff, and who delegated this function to an official, was not the Home Secretary please provide details of the transfer of function under the Ministers of the Crown Act 1975.*
 6. *If the Secretary of State who was responsible for setting the tariff transferred this function to another minister please provide details of the transfer under the above Act.*
 7. *Please provide a copy of the certificate issued by the Secretary of State as required under Paragraph 9 of Schedule 12 of the Criminal Justice Act 1991. “*
6. In its response of 27 January 2005 the public authority stated that it had no more information to add and that it had already explained as fully as possible the policy in force at the time the tariff was set and the administrative procedures. It further refused to provide a copy of the certificate which evidenced the tariff ('the certificate') and stated it was classed as the perpetrator's personal data so was exempt under section 40(2).
7. In a subsequent letter dated 2 February 2005 the complainant stressed that if the public authority was claiming that a tariff was set in accordance with the Criminal Justice Act 1991 ("the CJA") then evidence must be available to verify this or it would surely be invalid. He further stated that the information he wanted concerned procedures followed when setting the tariff and how the laws had been applied. He did not consider this information to be the personal data of the perpetrator.
8. In its response dated 10 February 2005 the public authority stated that it believed the certificate was the perpetrator's personal data and was therefore exempt. It further stated that it believed that it had supplied as much information as it could and that the Act did not specify that the information had to be provided in the form of a copy of the actual document.
9. The complainant made a further request directly to the Home Secretary on 21 August 2005. In this he reiterated that he required all aspects of the tariff to be addressed and that he also wanted a copy of the actual certificate. He raised the following questions:

1. *What is the explanation for a certificate being issued by an official specifying a 'relevant part' under Paragraph 9 to Schedule 12 of the Criminal Justice Act 1991 on the 29th June 1992 when Paragraph 9 was not brought into force until the 1st October 1992 by Statutory Instrument 1992/33?*
 2. *Did the Home Secretary transfer or delegate the function of setting the relevant part under Schedule 12 of the Criminal Justice Act 1991 to another Minister in this case?*
 3. *If the Home Secretary did transfer or delegate the function to another Minister please:-*
 - a) *name the Minister, and*
 - b) *name the ministry he controlled.*
 4. *What was the name of the official who issued the certificate under schedule 12 of the above Act?*
 5. *What was the position or office held by the official within the ministry in which he was employed?*
10. This letter was transferred by the Home Secretary to the public authority. The Commissioner would point out that at that time the public authority was accountable to the Home Office. In view of the fact that the public authority was responsible for offender management including such issues as tariffs it was identified as the part of the Home Office that would hold any relevant material. The complainant raised concerns about the way in which his request to the Home Secretary was processed which are mentioned further in the scope section of this decision notice. The public authority wrote to the complainant on 19 September 2005 and referred to its previous refusals.
11. On 27 October 2005 the complainant wrote to the Information Commissioner. His correspondence was acknowledged on 4 November 2005 and he was advised that his case was awaiting allocation.
12. Unfortunately the Commissioner did not advise the public authority that a complaint had been received until 10 August 2006. The public authority requested further information about the complaint which was provided on 17 August 2006.
13. On 22 August 2006 the public authority telephoned the Commissioner to advise that it had not formally dealt with the complainant's correspondence under the terms of the Act. However, the Commissioner notes that previous correspondence did refer to the personal data exemption in section 40(2) which indicates that they had in fact been considered under the Act, a stance which was taken in its refusals of 27 January 2005, 10 February 2005 and 19 September 2005. It was therefore advised by the Commissioner to review its handling of the request and

- issue a formal response so that the Commissioner could investigate any outstanding issues.
14. The Commissioner wrote to the complainant on 10 August 2006, 11 October 2006, 21 December 2006 and 1 March 2007 to apologise for the delay in investigating his case which was due to the volume of cases he had received.
 15. On 9 May 2007 the Commissioner wrote to both parties to advise them that he was commencing his investigation.
 16. The public authority eventually sent out an Internal Review on 28 June 2007, almost ten months after the Commissioner agreed it could undertake one. It upheld its original reliance on section 40(2) and clarified that this was in relation to both the perpetrator's personal data and the name of the certificate's signatory. With this response it provided some information which was within the scope of the complainant's request, including a redacted copy of the tariff certificate. At this stage it also introduced the exemption in section 38(1)(a) in respect of the name of the signatory.

The Investigation

Scope of the case

17. As mentioned above, the complainant made his initial request to the public authority on 16 January 2005 and a further request to the Home Secretary on 21 August 2005. The request sent to the Home Secretary was transferred to the public authority as it would have held any relevant recorded information. It is important to clarify that both requests were for information about the perpetrator's tariff and the way in which it was set.
18. The complainant raised concerns that a reply to his request of 21 August 2005 was not issued directly from the Home Secretary. However the Home Secretary is not a separate public authority, he or she is responsible for the Home Office which for the purposes of the Act is a public authority. At the time of the request the National Offender Management Service was accountable to the Home Office. The Home Secretary identified that any information of relevance would have been held by the NOMS and therefore appropriately referred the request to it for a reply.
19. The Commissioner agreed to consider the request to the Home Secretary as part of his investigation of this case. However his investigation was to focus on whether in fact the public authority held information within the

- scope of that request rather than the Home Secretary. As explained above, whilst the request was phrased slightly differently, it was essentially asking for the same information. The Commissioner has made further comments about the request to the Home Secretary in the other matters section of this notice.
20. The substantive issue that the Commissioner has considered and made a decision about is whether, at the time of the request, the public authority should have confirmed or denied that it held any information of relevance to the requests of 16 January 2005 and 21 August 2005.
 21. It is important to clarify that the scope of the decision as set out above is considerably narrower than the issues the Commissioner has investigated since May 2007. This is partly because he has changed his approach in light of clarification from the Information Tribunal ('the Tribunal') about the time at which the public authority's compliance with the Act must be assessed. It is also because he has recently reconsidered his approach to cases where the applicant is aware of the existence of information which constitutes third party data but the wider world is not. The chronology section below records the investigation as it was carried out and explains how the scope changed over time.
 22. The Commissioner recognises that the information sought by the complainant relates to a serious and emotive issue. He also acknowledges that the time it has taken to investigate this case and the various different avenues the investigation has followed have been upsetting and frustrating for the complainant. This has in part been due to the Commissioner's own evolving policies and interpretation of the Act. Nevertheless the impact on the complainant is extremely regrettable and something for which the Commissioner wishes to make a public apology. He also recognises that the scope of the decision in this notice is unlikely to satisfy the complainant, however it is in line with the provisions of both the Act and the Data Protection Act 1998 ('the DPA') both of which are regulated by the Commissioner.

Chronology

23. At the point that the Commissioner allocated this case for investigation the public authority had advised the complainant that it had previously provided all the information it could about the tariff setting process applied in the perpetrator's case. This was explained in the public authority's response to the complainant dated 27 January 2005. The Commissioner understands that this information had been given to the complainant prior to the Act's implementation. It refused to supply a copy of the certificate on the basis that it was the perpetrator's personal data.

24. The Commissioner reviewed the correspondence when the case was still awaiting allocation and contacted the public authority to ask it to carry out an internal review. The public authority reviewed its handling of the complainant's requests. The complaint was eventually allocated for investigation and on 9 May 2007 the Commissioner contacted the public authority to ask for a copy of the internal review he had asked it to carry out. The review had not in fact been completed but it was carried out and eventually communicated to the complainant on 28 June 2007. At that stage the public authority decided to supply a redacted version of the certificate with the name of the signatory and paragraph 3 removed. It also provided further responses regarding the process followed and those involved in issuing the certificate.
25. On 5 and 27 July 2007 the Commissioner wrote to the complainant to ascertain whether the further information provided to him on 28 June 2007 satisfied his requirements and whether he was willing to withdraw his complaint.
26. On 2 July 2007 the complainant was advised by the National Probation Service, again in his capacity as a relative of the victim, that the perpetrator had died.
27. The complainant contacted the Commissioner on 8 August 2007 to explain that he was not willing to withdraw his complaint and that in view of the perpetrator's death he did not consider that the public authority could continue to refuse to provide him with a copy of the certificate. This was because the DPA only applied to living individuals and, therefore, disclosure could not now breach the data protection principles.
28. In an effort to informally resolve this case, the Commissioner contacted the public authority on 23 August 2007 and asked if it would now be prepared to release paragraph 3 of the certificate in light of the fact that the perpetrator had now died. He also requested more information about the basis for the public authority's refusal to comply with the request and the information that it held that was within the scope of it. He chased a response to this by telephone on 27 September 2007 and also on 5, 8 and 12 October 2007. He was told that a response had been sent on 11 October 2007 but that it must not have been received due to the postal strike. The Commissioner requested a copy of the reply via email but it did not arrive.
29. The public authority advised the Commissioner that it had also written to the complainant on 11 October 2007 and had now disclosed a copy of the certificate with only the name of the signatory redacted, along with a further document about transitional prisoners which was relevant to the other elements of the request. The complainant later advised the

- Commissioner that the certificate including paragraph 3 was never received. A copy was eventually re-sent to the complainant on 26 June 2008.
30. As he had still had no response to his queries regarding the information held and the basis of the refusal in the letter of 23 August 2007 the Commissioner issued an Information Notice on the public authority on 16 October 2007.
 31. On 23 October 2007 the Commissioner received an emailed response from the public authority. This included a copy of a letter to him dated 11 October 2007 which he had not previously received. It also evidenced two attempts to email a response on 16 and 22 October 2007 which had unfortunately been sent to an incorrect email address.
 32. The letter dated 11 October 2007 stated that the public authority had written to the complainant:

“enclosing a full copy of the certificate issued to [the perpetrator] in on [sic] [xx June 1992] with the name of the official who signed the certificate redacted... We have reversed our position on this due to the death earlier this year of [the perpetrator].”
 33. The letter did not fully answer the questions that the Commissioner had raised on 23 August 2007. On 24 October 2007 the Commissioner wrote to the public authority to advise it that its response of 11 October 2007 was inadequate and that the remaining queries from 23 August 2007 were still subject to his Information Notice. He also raised further questions in light of the information that had been provided. At that point the Commissioner's intention was to make a decision about whether the public authority had supplied all the relevant material about the tariff setting exercise in the perpetrator's case which was within the scope of parts 2 to 7 of the 16 January 2005 request and parts 1 to 3 and 5 of the 21 August 2005 request. He also intended to decide whether or not the name of the official who signed the certificate should have been released as this was the only outstanding piece of information within it that the complainant had not received.
 34. On 13 November 2007 the public authority asked the Commissioner for an extension to the time limit engaged by the Information Notice. This was because it had decided to cite the exemption at section 36 and was therefore seeking ministerial approval. The Commissioner did not grant permission and the public authority was advised that its intended introduction of section 36 had no bearing on the information requested in the information notice. The time deadline was confirmed as being 15 November 2007.

35. A response to the Information Notice was faxed to the Commissioner on 15 November 2007. It mentioned that it was now considering the application of Section 36(2)(c) in respect of the signatory of the certificate.
36. On 22 November 2007 the complainant wrote to the Commissioner. He raised further issues regarding his correspondence to the Home Secretary being transferred to the public authority as he believed this should have been treated as a separate complaint and a decision should be made about the Home Secretary's compliance with the Act. The Commissioner has commented on this in the other matters section below.
37. On 7 December 2007 the public authority wrote to the complainant with a further explanation regarding the signatory of the certificate and the authority under which it was signed though it contended that this information was technically outside of the scope of the requests. The Commissioner telephoned the public authority and stated that he did not believe this was a clear explanation. The public authority maintained its stance that the explanation was adequate and that the extra information was in fact outside the scope of the requests.
38. In correspondence to the Commissioner dated 11 December 2007 the complainant advised that he had not received the certificate which the public authority said had been sent on 11 October 2007. He further advised that he needed recorded information to explain the legality of the delegation of the tariff by the Home Secretary to the Prison Minister and then further to the prison official.
39. On 31 December 2007 the complainant again wrote to the Commissioner. He expressed concerns about the public authority's explanation of how the Home Secretary had delegated power to the Prison Minister under the Carltona principle. These concerns were about the legality of these actions which are outside of the Commissioner's remit. However the concerns did raise questions about whether the complainant had been given information which was in fact within the scope of his requests i.e. whether it was relevant and if all pertinent material held by the public authority was actually supplied.
40. On 10 March 2008 the public authority contacted the Commissioner to advise that it had now had its application of section 36 cleared by the Minister. It clarified that this was only in relation to the name of the signatory of the certificate.
41. On the 22 May 2008 the Commissioner raised further queries with the public authority. He clarified what information the complainant required and asked for details to support the recent citation of section 36.

42. In its response of 23 May 2008 the public authority provided the requested information regarding section 36. It provided no further responses stating that it believed all the queries had been answered in its earlier correspondence.
43. On 10 June 2008 the Commissioner wrote to the complainant to clarify the scope of this particular complaint. He explained that he was intending to look at the following issues:
 - 1) *Whether or not a full version of the certificate should have been released, in particular the name of the person who signed it.*
 - 2) *Whether information is held which explains how power to sign the certificate was delegated from the Home Secretary to the Prison Minister and from there to the official within the department.*
 - 3) *Whether information is held which explains how it was possible to issue the certificate prior to the relevant schedule of the CJA coming into force.*
44. The Commissioner also chased a fuller response from the public authority in respect of his queries of 22 May 2008. Further responses were received from the public authority on 12 June 2008.
45. The complainant agreed to the Commissioner's clarification of the scope of his investigation on 12 June 2008 along with the following specific emphasis:
 - 1) *it is particularly important that the length of the tariff that is being certified is revealed.*
 - 2) *the statutory power of the Home Secretary to sign the certificate also involves the transfer of that function to the Prison Minister as detailed in my letter dated 31st December 2007 page 2.*
 - 3) *Paragraph 9 of schedule 12 came into force on 1st Oct 1992. Other paragraphs of that schedule came into force either earlier or later.*
46. At this point the complainant raised concerns about the fact that the Commissioner was going to consider the public authority's application of section 36 despite its very late introduction. On 25 June 2008 the Commissioner advised the complainant that in light of the Tribunal decision in the case of *the Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* he had reconsidered this matter and decided not to accept the late introduction of section 36. In the aforementioned case the Tribunal explained that a decision should be made on a case by case basis about whether or not it or the Commissioner should consider late exemptions. It added that, "*it was not the intention of Parliament that public authorities*

should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations”.

47. Until the aforementioned Tribunal decision the Commissioner had made decisions about a public authority's compliance with the Act at a number of points in time, including the point at which the request was received right through to the time of the internal review or the time the case was received by his office. However, the Tribunal clarified in the DBERR case that *“the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA”* (paragraph 110). Therefore the Commissioner revised his approach to ensure that in all cases he would make decisions about whether or not a public authority complied with the Act at the stage specified by the Tribunal. This was in line with what the complainant had been advised at the early stages of the investigation albeit that during the course of the case various changes in circumstances were taken into account when trying to resolve the matter informally.
48. At a very late stage of his investigation, the Commissioner reconsidered the issues that need to be addressed in cases such as this one. This was in the light of his experience working with a number of cases involving third party data where the applicant is aware of the existence of information because of their personal dealings with the authority. The issues that he had determined must be addressed and his analysis of them are set out in the section below.

Analysis

49. The right of access in section 1(1) of the Act is in two parts and states the following:
- “(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 this is the case, to have that information communicated to him”.
50. On 27 January 2005, the public authority responded to the request of 16 January 2005, stating that it had provided as much information as possible about the policies relating to the tariff and that the certificate itself could not be supplied because it constituted the perpetrator's personal data and was exempt under section 40(2). Although there was no explicit statement

- confirming that the requested information was held, this is implied in the response and particularly the application of section 40(2). It is also noted that the request of 16 January 2005 references the fact that the complainant was advised of the existence of information in previous correspondence during 2004 which was prior to the Act's implementation in 2005.
51. As the DPA regulator the Commissioner has determined that it is necessary for him to first consider whether in fact the public authority should have complied with section 1(1)(a) of the Act when responding to the complainant or if it should have relied upon section 40(5)(b)(i) and refused to do so. This section provides an exemption if providing the confirmation or denial would in itself breach one of the data protection principles. If he concludes that it should have done he will not go on to consider the authority's compliance or otherwise with section 1(1)(b).
52. In taking this approach the Commissioner is aware that at times he may reach the conclusion that a public authority should not confirm or deny if it holds information under the Act, even though the applicant is already aware whether it does. However, this is because the test that he is required to carry out is whether confirmation can be given to any member of the public, not simply the applicant. Individuals interact with public authorities for numerous reasons, for example because they are in receipt of their services. As a result they will inevitably have different levels of knowledge about what information exists and their dealings with the authority are likely to inform their requests for information. In some cases it may be possible for public authorities to confirm the existence of information privately to the applicant whereas it may be inappropriate to disclose such information to the wider public under the Act. For the sake of clarity, the Commissioner's remit is simply to consider whether or not the public authority has complied with the Act, he cannot make decisions about any private disclosure the authority may decide to make to an individual.

Section 40 – personal information

53. When considering whether the public authority should have in fact refused to confirm or deny on the basis that section 40(5)(b)(i) applied the Commissioner must consider the following questions:
- Would confirming or denying whether information exists constitute a disclosure of personal data? If so, whose personal data?
 - If confirming or denying would involve the disclosure of personal data would this breach any of the data protection principles? If so, which one(s) and why?

Would confirming or denying whether information exists constitute the disclosure of personal data? If so, whose personal data?

54. Section 1(1) of the DPA defines personal data as follows:
“Personal data “ means data which relate to a living individual who can be identified-
- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes an expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual”.
55. Section 2 of the DPA provides that,
“sensitive personal data” means personal data consisting of information as to –
- (a) the racial or ethnic origin of the data subject,
 - (b) his political opinions
 - (c) his religious beliefs or other beliefs of a similar nature,
 - (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
 - (e) his physical or mental health or condition
 - (f) his sexual life,
 - (g) the commission or alleged commission by him of any offence, or
 - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings”
56. The Commissioner is satisfied that the public authority could not comply with section 1(1)(a) in respect of any of the elements of the requests that are the subject of this decision notice without revealing to the public whether or not the perpetrator had in fact been issued with a tariff certificate. He is satisfied that this information constitutes the perpetrator’s sensitive personal data. The requests reference the perpetrator by name, the information relates specifically to him and whether a certificate exists or not is information about his term of imprisonment and the administrative processes followed in his particular case. As the perpetrator can be identified from the information, the existence of a certificate details the intentions of the data controller in respect of him and it is about the disposal of the sentence of the court in the proceedings of the crime against the complainant’s relative. It therefore constitutes his sensitive personal data as defined under sections 1(1) and 2(h) of the DPA.
57. The Commissioner is aware that the perpetrator was named in the media at the time he was sentenced. The complainant has supplied copies of press cuttings from the 1960s which indicate the perpetrator’s name and

record the judge's comments when sentencing. He is also aware that there are a number of records related to the case and dating from the late 1960s which are held by the National Archives. Some of the records are open to the public but others transferred by the Director of Public Prosecutions have been closed until 2045, due to the distressing and graphic content.

58. However, the Commissioner has been unable to locate any information in the public domain at the time of the request about the perpetrator's term of imprisonment and any changes to it or conditions applied to it after the trial. Therefore confirming or denying the existence of a tariff in this case would result in the disclosure of information that is not already in the public domain. Specifically, it would confirm whether or not a certificate was issued and would reveal whether or not the prisoner was still alive and imprisoned at least as late as 1992.

Would complying with section 1(1)(a) breach any of the data protection principles? If so, which one(s) and why?

59. Section 40(5) states that,
"The duty to confirm or deny –
(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
(b) does not arise in relation to other information if or to the extent that either –
(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
60. The relevant subsection in this case is section 40(5)(b)(i). The Commissioner must consider whether confirming or denying the existence of any of the requested information, other than under this Act, would breach any of the data protection principles. There would be no data protection issue in acknowledging the existence of general policies applicable to the tariffs required by the Criminal Justice Act 1991 and in all likelihood such general information could be released to the public. The Commissioner notes that information about general procedures was released to the complainant both before 2005 and during the course of the

investigation. However, the effect of confirming or denying in this case would be to disclose whether or not a tariff existed due to the way the requests were phrased.

First data protection principle

61. The Commissioner considers the first data protection principle to be the relevant one in this case. This states 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
in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.
62. Therefore in order for sensitive personal data to be disclosed under the Act, four criteria have to be met:
- Disclosure must be fair;
 - Disclosure must be lawful;
 - Disclosure must meet at least one of the conditions in Schedule 2; and
 - Disclosure must meet at least one of the conditions in Schedule 3.
63. Given the nature of information which falls within the definition of ‘sensitive personal data’ the conditions set out in Schedule 3 set what can be seen as a high threshold which has to be met in order for information to be disclosed, particularly when compared to the conditions contained in Schedule 2.
64. Therefore, the Commissioner’s approach when considering whether sensitive personal data should be disclosed under the Act is to begin by considering whether any of the conditions in Schedule 3 can be met rather than to start by considering whether disclosure is fair, lawful or a condition in Schedule 2 can be met. Clearly with regard to disclosure of sensitive personal data, it is academic if disclosure is fair, lawful and a Schedule 2 condition can be met if the higher test of meeting a Schedule 3 condition cannot be met. Both of these Schedules can be found in the attached legal annex.
65. In the Commissioner’s opinion the majority of the conditions listed in Schedule 3 are irrelevant to the consideration of this case – for example the second condition which deals with processing for employment purposes and the eighth principle which deals with the processing of sensitive personal data for medical purposes. The conditions that the Commissioner believes may be relevant to this request are the first, third, fifth, seventh and tenth. He has addressed each in turn below.

66. The Commissioner is not aware that the perpetrator has 'explicitly consented' to the disclosure of the sensitive personal data that would result through compliance with section 1(1)(a). Therefore the first condition in Schedule 3 is not met.
67. The Commissioner does not believe that advising the public whether or not the perpetrator in this case had a tariff certificate would constitute processing that is necessary in order to 'protect the vital interests of... the data subject or another person' as required by the third condition. In the Commissioner's opinion, the term 'vital interests' implies a situation involving life and death – e.g. the disclosure by an employer of a member of staff's sensitive personal data maybe required in a medical emergency.
68. There are a number of public interest arguments in favour of confirming or denying in this case that could be made, such as increased transparency. Moreover, the complainant has alleged that the public authority has not complied with the law in various ways when dealing with the perpetrator's term of imprisonment. The Commissioner recognises the gravity of the allegations and the seriousness of the complainant's concerns, however he does not consider that the compliance with section 1(1)(a) in this case and in effect disclosure to the wider public could be accurately described as 'vital'.
69. The Commissioner is not aware that the existence or otherwise of a certificate has been made public as a result of steps deliberately taken by the data subject. In fact, save for the existence of an amount of information within the National Archives and the press articles from the 1960s provided by the complainant, the Commissioner is not aware of any further information in the public domain between the 1960s and the date of the request. Therefore the fifth condition is not met.
70. The seventh condition addresses circumstances where processing is necessary for the administration of justice, for the exercise of any functions conferred on any person by or under any enactment or for the exercise of functions of the Crown, a Minister or a government department. The Commissioner is not aware that the processing of this information would be necessary for any of these reasons. It is important to clarify that compliance with the requirements of the Act cannot be used as basis for satisfying this condition because section 40(5)(b)(j) refers to confirmation or denial apart from under the Act. Therefore the seventh condition is not met.
71. The tenth condition in Schedule 3 provides that sensitive personal data can be processed in circumstances specified in an order made by that the Secretary of State.

72. An order specifying different circumstances relevant to the tenth condition of Schedule 3 was made by the Secretary of State on 17 February 2000. This is known as the Data Protection (Processing of Sensitive Personal Data) Order 2000 and came into force on 1 March 2000. The full text of the circumstances set out in the order is available in the attached legal annex. The Commissioner does not consider any of the circumstances can be met in this case. He does not consider seven of the circumstances to be relevant as they relate to processing for the discharge of functions such as counselling, the carrying out of insurance business or determining eligibility for benefits and the monitoring of equal opportunities. The first and second circumstances refer to the processing being necessary for the purposes of the prevention or detection of an unlawful act or the discharge of functions designed to protect the public from malpractice, improper conduct or mismanagement in the administration of any body. These circumstances are not met as disclosure in these circumstances is not necessary for these functions. Whilst the complainant's concerns are serious and the Commissioner understands how emotive the issues are he does not consider that there is evidence to demonstrate that disclosure is necessary for such functions.
73. In view of the comments above, the Commissioner is satisfied that the public authority should have refused to comply with section 1(1)(a) of the Act on the basis of section 40(5)(b)(i). This is because the effect of complying with that section is to confirm whether or not the perpetrator had a certificate. This would constitute the disclosure of his sensitive personal data and would breach the first data protection principle because none of the conditions in Schedule 3 of the DPA can be met.

Procedural matters

Section 17

74. The public authority's original refusal of 27 January 2005 cited section 40(2) in respect of the prisoner's personal data saying that disclosure is prohibited under this exemption. This statement is misleading as the disclosure is only exempt if it breaches any of the principles of the Data Protection Act (DPA). It did not go on to explain this and did not offer any explanation as to which principle/s would be breached. The Commissioner finds this to be a breach of section 17(1)(c).
75. The complainant's letter of 2 February 2005 should have been treated as a request for an internal review. The public authority should therefore have conducted an internal review and advised the complainant accordingly.

Instead, its subsequent response of 10 February 2005 was a further refusal letter. Both this refusal and the later refusal of 19 September 2005 failed to make any reference to an exemption and were therefore in breach of section 17(1)(a), (b) and (c).

76. None of its refusal notices of 27 January 2005, 10 February 2005 and 19 September 2005 included details of any complaints procedure. However, this was rectified at the internal review stage. In view of this later rectification the Commissioner finds that there is no breach of section 17(7)(a).
77. In its internal review of 28 June 2007 the public authority cited section 40(3) in respect of the signatory. The late introduction of this exemption breaches section 17(3). Additionally, subsection (3) of section 40 refers to the first condition that needs to be satisfied in order for section 40(2) to apply and only follows from the application of that subsection. In this case the public authority should have cited section 40(2) and explained that this applied by virtue of 40(3)(a)(i). In failing to correctly specify section 40(2) it breached the requirements of section 17(1)(b).
78. The public authority introduced the exemption at section 38(1)(a) during its internal review. This late introduction is in breach of section 17(3).
79. The public authority also sought to introduce the exemption at section 36(2)(c) at a late stage of the investigation. This late introduction is in breach of section 17(3).
80. The Commissioner has not ordered any remedial steps in relation to these breaches of section 17 in view of the contents of this notice. He also notes that the section 17(7) breach was remedied by the public authority at the internal review stage. He has made additional comments about the refusal notice in the other matters section below.
81. The Commissioner would also like to highlight that the public authority is already in receipt of a Practice Recommendation under section 48(1) of the Act in respect of its poor request handling procedures. This can be viewed online at:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/noms_s45_pr_final_4_mar_08.pdf

Section 38

82. As the Commissioner has decided that the exemption at section 40(5)(b)(i) applies to the requested information he has not gone on to consider the citing of this section.

The Decision

83. The public authority breached section 17(1)(c) in its first refusal notice and section 17(1)(a), (b) and (c) in the following two refusal notices. It also breached section 17(3) and 17(1)(b) in its internal review.
84. The Commissioner's decision is that the public authority was not in fact obliged to comply with section 1(1)(a) of the Act by virtue of section 40(5)(b)(i).

Steps Required

85. The Commissioner does not require any steps to be taken.

Other Matters

86. As explained above, the Commissioner is required to make a decision based on the circumstances at the time the request was made. As the perpetrator has now died and the DPA only applies to living individuals, it follows that if the complainant made a further request section 40(5)(b)(i) could not apply on the same basis. That said, to the extent that any information requested may also relate to other individuals who are still living, section 40 could still theoretically apply in respect of those people.
87. During correspondence with the Commissioner the complaint raised various issues which the Commissioner feels it is important to cover in this Notice. These can be summarised as follows:
- The complainant's belief that he could request the information under sections 34 and 35 of the DPA
 - The complainant's belief that the Home Secretary had breached the Act by transferring the request to the public authority
 - The invalidity of an internal review which is made 2 years after his complaint

Sections 34 and 35 of the DPA

88. Sections 34 and 35 of the DPA are included in the Legal Annex at the end of this Notice.

89. Section 34 of the DPA relates to information available to the public by or under any enactment. It specifically relates to data which the data controller is obliged to make available to the public, for example the Register of Births, Deaths and Marriages. The Commissioner understands that the public authority is not obliged to make the requested information available by or under any enactment and therefore this section is not relevant. It should be noted that the obligations placed on the authority under the Act cannot be used as a basis for satisfying this section of the DPA as disclosure must be considered otherwise than under the FOIA.
90. Section 35 of the DPA was cited by the complainant as he believes he can request information under this section when the disclosure is required “by or under an enactment, by any rule of law, to obtain legal advice, and for establishing, exercising, or defending legal rights.” As in relation to section 34, obligations to comply with the Act cannot be used as the basis for arguing that section 35 applies. The Commissioner has not been provided with evidence that disclosure in this case is necessary for any of these purposes.

Transferring the request

91. The Commissioner’s interpretation of the Act is that the public authority itself is responsible for replying to requests rather than the “holder of the office”. Therefore, regarding the transfer of the request from the Home Secretary to the appropriate Home Department, the Commissioner’s interpretation is that the Home Secretary is not a public authority required to respond to requests personally, it is the Home Office that is the public authority in those circumstances. The meaning of the term “holder of any office” in section 3(1)(a) is with regard to institutions such as the Information Commissioner’s Office which is a public authority as an office as opposed to the Commissioner being a public authority in his own right. The transfer of the correspondence was therefore the appropriate action on both occasions.

The internal review

92. The Commissioner understands that it may be difficult for the complainant to accept that the internal review, which was provided 18 months after his complaint to the Commissioner, has been deemed admissible. However, it must also be noted that there is no legal deadline for undertaking any such review, although the Commissioner’s current guidance would expect one within 40 days.
93. The Commissioner also notes that there has been much correspondence in this case, over many years, and that the public authority did actually

advise him at a relatively early of his investigation that an internal review had never been formally conducted.

94. Section 50(2) of the Act allows the Commissioner not to progress a case unless an applicant has exhausted the public authority's complaints procedure, provided one is in place. Where there is good cause he will use his discretion and make a decision without an internal review being done. However, as the public authority indicated that it would carry out an internal review in this case, albeit very late, the Commissioner decided to accept it.

Right of Appeal

95. 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

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 18th day of February 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Data Protection Act 1998

Schedule 2 - Conditions relevant for purposes of the first principle: processing of any personal data

- 1 The data subject has given his consent to the processing.
- 2 The processing is necessary—
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- 4 The processing is necessary in order to protect the vital interests of the data subject.
- 5 The processing is necessary—
 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

Schedule 3 - Conditions relevant for purposes of the first principle: processing of sensitive personal data

- 1 The data subject has given his explicit consent to the processing of the personal data.
- 2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.
(2) The Secretary of State may by order—
 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 3 The processing is necessary—
 - (a) in order to protect the vital interests of the data subject or another person, in a case where—
 - (i) consent cannot be given by or on behalf of the data subject, or
 - (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or

- (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.
- 4** The processing—
 - (a) is carried out in the course of its legitimate activities by any body or association which—
 - (i) is not established or conducted for profit, and
 - (ii) exists for political, philosophical, religious or trade-union purposes,
 - (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
 - (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
 - (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.
- 5** The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.
- 6** The processing—
 - (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
 - (b) is necessary for the purpose of obtaining legal advice, or
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
- 7** (1) The processing is necessary—
 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under an enactment, or
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.(2) The Secretary of State may by order—
 - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
 - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.
- 8** (1) The processing is necessary for medical purposes and is undertaken by—
 - (a) a health professional, or
 - (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.
- 9** (1) The processing—
 - (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
 - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and

- (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.
- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.
- 10** The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.

The Data Protection (Processing of Sensitive Personal Data) Order 2000 – Circumstances in which Sensitive Personal Data may be processed

- 1** (1) The processing -
 - (a) is in the substantial public interest;
 - (b) is necessary for the purposes of the prevention or detection of any unlawful act; and
 - (c) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice those purposes.
- (2) In this paragraph, "act" includes a failure to act.
- 2** The processing -
 - (a) is in the substantial public interest;
 - (b) is necessary for the discharge of any function which is designed for protecting members of the public against-
 - (i) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person, or
 - (ii) mismanagement in the administration of, or failures in services provided by, any body or association; and
 - (c) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the discharge of that function.
- 3** (1) The disclosure of personal data -
 - (a) is in the substantial public interest;
 - (b) is in connection with -
 - (i) the commission by any person of any unlawful act (whether alleged or established),
 - (ii) dishonesty, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person (whether alleged or established), or
 - (iii) mismanagement in the administration of, or failures in services provided by, any body or association (whether alleged or established);
 - (c) is for the special purposes as defined in section 3 of the Act; and
 - (d) is made with a view to the publication of those data by any person and the data controller reasonably believes that such publication would be in the public interest.
- (2) In this paragraph, "act" includes a failure to act.
- 4** The processing -
 - (a) is in the substantial public interest;
 - (b) is necessary for the discharge of any function which is designed for the provision of confidential counselling, advice, support or any other service; and

- (c) is carried out without the explicit consent of the data subject because the processing -
 - (i) is necessary in a case where consent cannot be given by the data subject,
 - (ii) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of the data subject, or
 - (iii) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the provision of that counselling, advice, support or other service.

5 (1) The processing -

- (a) is necessary for the purpose of -
 - (i) carrying on insurance business, or
 - (ii) making determinations in connection with eligibility for, and benefits payable under, an occupational pension scheme as defined in section 1 of the Pension Schemes Act 1993[2];
- (b) is of sensitive personal data consisting of information falling within section 2(e) of the Act relating to a data subject who is the parent, grandparent, great grandparent or sibling of -
 - (i) in the case of paragraph (a)(i), the insured person, or
 - (ii) in the case of paragraph (a)(ii), the member of the scheme;
- (c) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of that data subject and the data controller is not aware of the data subject withholding his consent; and
- (d) does not support measures or decisions with respect to that data subject.

(2) In this paragraph -

- (a) "insurance business" means insurance business, as defined in section 95 of the Insurance Companies Act 1982[3], falling within Classes I, III or IV of Schedule 1 (classes of long term business) or Classes 1 or 2 of Schedule 2 (classes of general business) to that Act, and
- (b) "insured" and "member" includes an individual who is seeking to become an insured person or member of the scheme respectively.

6 The processing -

- (a) is of sensitive personal data in relation to any particular data subject that are subject to processing which was already under way immediately before the coming into force of this Order;
- (b) is necessary for the purpose of -
 - (i) carrying on insurance business, as defined in section 95 of the Insurance Companies Act 1982, falling within Classes I, III or IV of Schedule 1 to that Act; or
 - (ii) establishing or administering an occupational pension scheme as defined in section 1 of the Pension Schemes Act 1993; and
- (c) either -
 - (i) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of the data subject and that data subject has not informed the data controller that he does not so consent, or

- (ii) must necessarily be carried out even without the explicit consent of the data subject so as not to prejudice those purposes.
- 7 (1)** Subject to the provisions of sub-paragraph (2), the processing -
- (a) is of sensitive personal data consisting of information falling within section 2(c) or (e) of the Act;
 - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons -
 - (i) holding different beliefs as described in section 2(c) of the Act, or
 - (ii) of different states of physical or mental health or different physical or mental conditions as described in section 2(e) of the Act,with a view to enabling such equality to be promoted or maintained;
 - (c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and
 - (d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.
- (2) Where any individual has given notice in writing to any data controller who is processing personal data under the provisions of sub-paragraph (1) requiring that data controller to cease processing personal data in respect of which that individual is the data subject at the end of such period as is reasonable in the circumstances, that data controller must have ceased processing those personal data at the end of that period.
- 8 (1)** Subject to the provisions of sub-paragraph (2), the processing -
- (a) is of sensitive personal data consisting of information falling within section 2(b) of the Act;
 - (b) is carried out by any person or organisation included in the register maintained pursuant to section 1 of the Registration of Political Parties Act 1998[4] in the course of his or its legitimate political activities; and
 - (c) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.
- (2) Where any individual has given notice in writing to any data controller who is processing personal data under the provisions of sub-paragraph (1) requiring that data controller to cease processing personal data in respect of which that individual is the data subject at the end of such period as is reasonable in the circumstances, that data controller must have ceased processing those personal data at the end of that period.
- 9** The processing -
- (a) is in the substantial public interest;
 - (b) is necessary for research purposes (which expression shall have the same meaning as in section 33 of the Act);
 - (c) does not support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject; and
 - (d) does not cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person.
- 10** The processing is necessary for the exercise of any functions conferred on a constable by any rule of law.

Section 34

Personal data are exempt from—

- (a) the subject information provisions,
- (b) the fourth data protection principle and section 14(1) to (3), and
- (c) the non-disclosure provisions,

Section 35

Disclosures required by law or made in connection with legal proceedings etc

- (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.
- (2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—
 - (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
 - (b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

Freedom of Information Act 2000

Section 1

- (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.

Section 17

- (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.
- (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.

- (7)** A notice under subsection (1), (3) or (5) must—
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 38

- (1)** Information is exempt information if its disclosure under this Act would, or would be likely to—
- (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.

Section 40

- (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 [1998 c. 29.] 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.”