

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 October 2009**

**Public Authority:** Bedfordshire Police

**Address:** Woburn Road  
Kempston  
Bedfordshire  
MK43 9AX

### Summary

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The complainant requested from Bedfordshire Police a copy of the file relating to the murder of [named individual]. Bedfordshire Police refused the request citing the exemptions at sections 40(2) (personal information), 30(1)(a)(i) or (ii) and (b) (investigations and proceedings conducted by a public authority), 31(1)(a), (b) and (c) (law enforcement), 32 (court records) and 38 (health and safety). During the course of the Commissioner's investigation, Bedfordshire Police confirmed that it was only relying on the exemptions in sections 40(2), 32 and 38. The Commissioner has investigated and found that the whole file is exempt by virtue of section 40(2). Accordingly, he 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.

## Background

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2. The requested information relates to a murder which was committed in 1974. The murder file, the subject of this request for information, was opened and closed in 1974, the murder having been solved during the course of the year.
3. Prior to the complainant making his request for information there had been correspondence between the complainant and Bedfordshire Police about the file. Some of this correspondence pre-dates the introduction of the Freedom of Information Act.
4. The Commissioner understands that, prior to him making his request for information, Bedfordshire Police had made arrangements for the complainant to view the contents of the file in question and that a viewing (in the presence of a member of Bedfordshire Police) had taken place on at least one occasion. These viewings were conducted outside of the Act.
5. The complainant made his request for information as a result of becoming aware that Bedfordshire Police was considering destruction of the file. This was in accordance with its disposal policy.
6. A book about criminal investigation and, in particular, how forensic science helps the detective to find the murderer and prove the case, was published in 1986. This book includes a chapter on the murder which is the subject of this request for information.

## The Request

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7. On 8 September 2006, the complainant contacted Bedfordshire Police by email, the title of the email being '*The complete file of [named individual]*'. In his email the complainant wrote:

*'In the absence of a reply to my last email, please treat this email as a request under the Freedom of Information Act for a full copy of the file. I am quite happy to discharge you reasonable costs as regards copies. I will confirm my request in*

*writing though under the Act this is not of course necessary.'*

8. The complainant also wrote to Bedfordshire Police on the same day. In his letter, headed '*In the matter of [named individual]*', he wrote:

*'Further to my email please treat this letter as a request under the Freedom of Information Act 2000 for the full file. As indicated in my email I am more than happy to meet any reasonable costs incurred in copying.'*

9. Bedfordshire Police responded on 4 October 2006. It disclosed some information, citing the exemptions at sections 40(2) (personal information), 30(1)(a)(i) or (ii) and (b) (investigations and proceedings conducted by a public authority), 31(1)(a), (b) and (c) (law enforcement) and 38 (health and safety) as its reasons for withholding the remainder.
10. The complainant wrote to Bedfordshire Police on 14 October 2006 appealing the decision not to disclose all of the information he had requested. In support of his request for an internal review of the decision to withhold the information, the complainant argued that:
- he has already viewed the withheld material and noted its contents, therefore disclosure has occurred;
  - the case is over 30 years old;
  - the material is already in the public domain, evidence having been given in court;
  - the case was extensively reported in the press;
  - no consideration appears to have been given as to whether or not any witnesses still living will consent to the disclosure;
  - third party details can be redacted;
  - old working practices and methods cannot impact on operational effectiveness; and
  - the material has been used in the publication of a book.
11. Bedfordshire Police replied on 9 January 2007 confirming that, having considered the request under the Act, its original decision regarding the information available to the complainant remained unchanged. It additionally cited the exemption in section 32 (court records).

## The Investigation

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### Scope of the case

12. On 18 January 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 following points:
  - whether Bedfordshire Police correctly applied the exemptions cited;
  - whether the exemptions at sections 32 and 30(1) apply as the records are historical records by virtue of section 62; and
  - if the review procedure adopted by Bedfordshire Police was lawful.
13. The complainant has made submissions as to his interest in the requested information in this case being disclosed. However, while the Commissioner understands the complainant's personal reasons for wanting disclosure of the information contained within the file, the Commissioner must take into account the fact that neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant to the consideration of a freedom of information request. He must consider whether or not it is appropriate for the requested information to be released to the general public.

### Chronology

14. Following an unsuccessful attempt at informal resolution, the Commissioner wrote to Bedfordshire Police on 10 November 2008, in accordance with his powers under section 50 of the Act, asking for a response to his questions regarding the withheld information and in relation to Bedfordshire Police's internal review process.
15. Having not received a response, the Commissioner wrote to Bedfordshire Police on 16 December 2008. In this correspondence, he advised the public authority of his powers to issue an Information Notice and informed it that he would consider issuing such a Notice if a response was not received within the timescale specified.

16. Bedfordshire Police responded on 19 December 2008, confirming that the Commissioner's letter was being acted upon and advising that it required further time in which to collate the information required to respond to his questions.
17. On 23 January 2009 the Commissioner received a comprehensive response to his questions, with a copy of the murder investigation file being received on 30 January 2009.
18. On 11 February 2009, the Commissioner wrote to Bedfordshire Police asking further questions about its application of the exemptions. The Commissioner also raised the issue of the book that the complainant referred to and asked Bedfordshire Police for its comments in this respect.
19. The Commissioner contacted Bedfordshire Police again on 12 March 2009 as he had not received a response. Bedfordshire Police responded the same day acknowledging the need to provide a comprehensive response.
20. On 17 April 2009, in a telephone call to the Commissioner's Office, Bedfordshire Police advised it was again considering the option of a private agreement regarding disclosure to the complainant.
21. Bedfordshire Police wrote to the complainant on 11 May 2009 proposing a confidentiality agreement and seeking the complainant's agreement in principle to this approach.
22. The complainant contacted the Commissioner on 17 May 2009 to advise that, having been contacted by Bedfordshire Police regarding a confidentiality agreement, he had declined its offer. He confirmed that he wished the matter to be progressed as a complaint under section 50 of the Freedom of Information Act.
23. On 23 July 2009, Bedfordshire Police made a further disclosure, withholding the remainder of the requested information under sections 40(2) (personal information), 32 (court records) and 38 (health and safety).
24. On 1 August 2009, having had the opportunity to consider the disclosed information, the complainant contacted the Commissioner to advise that he was not satisfied with the fact that some of the requested information was still being

withheld. He confirmed that he wished the Commissioner to continue with his investigation.

## Analysis

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### Exemptions

25. Where a public authority seeks to rely on several exemptions, the Commissioner considers that in many cases it will be appropriate to consider absolute exemptions (ones not subject to the public interest test) first. If he decides that absolute exemptions have been incorrectly applied, he will then move on to consider qualified exemptions.
26. In this case, the Commissioner has first considered whether or not it was appropriate for Bedfordshire Police to cite the exemption in section 40(2).

### Section 40(2) - Personal information

27. Section 40(2) of the Act is an absolute exemption which relates to the personal information of persons other than the requestor.

*'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.'*

28. Section 40(2) together with the condition in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of information falling within the definition of personal data contained in section 1(1) of the Data Protection Act 1998 (the DPA) would breach any of the data protection principles.
29. A full text of sections 40(2) and 40(3)(a)(i) can be found in the Legal Annex at the end of this Notice.
30. In order to reach a view on Bedfordshire Police's arguments in relation to this exemption, the Commissioner has first considered whether the withheld

information is the personal data of third parties.

### **Is the information personal data?**

31. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

*'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 any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

32. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.

33. The Commissioner notes that the information withheld by Bedfordshire Police is a murder investigation file comprising:

- witness statements;
- statements from police officers involved in the investigation;
- forensic reports;
- photographic evidence;
- operational policing records; and
- correspondence and other miscellaneous paperwork related to the investigation.

34. Having considered the withheld information, the Commissioner is satisfied that the contents of the file constitute information that falls within the definition of 'personal data' as set out in section 1(1) of the Data Protection Act 1998 as it comprises personal data relating to the perpetrator, witnesses, police officers involved in the investigation and other individuals.

35. The Commissioner notes that, while references are inevitably made to the murder

victim within the requested information, information about deceased individuals is not covered by the definition of personal data within the Data Protection Act. However, due to the nature of the request, information within the scope of the request which relates to the murder victim is inextricably linked to information relating to identifiable, living individuals to the extent that it cannot effectively be separated from it. He has therefore concluded that information about the victim cannot be disclosed without identifying a living individual.

36. The Commissioner has next gone on to consider whether the information constitutes sensitive personal data.

### **Is the information sensitive personal data?**

37. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA, ie 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,*
- (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.’*

38. In respect of the individuals, other than the perpetrator, whose personal data is contained within the file, the Commissioner is satisfied that the withheld information does not comprise their sensitive personal data.
39. However, the Commissioner is satisfied that, in relation to the perpetrator, the requested information satisfies the definition of sensitive personal data under section 2(g) and (h).



40. Further, he is satisfied that the entire file can be considered as being the sensitive personal data of the perpetrator as the purpose behind the very existence of the file is the investigation of the murder. In this respect, the Commissioner is satisfied that there is no evidence to suggest that any other individual was ever considered a suspect in this crime.
41. Having accepted that the information requested constitutes the sensitive personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

### **Will disclosure breach one of the data protection principles?**

42. If disclosure would contravene any of the data protection principles set out in the DPA, the section 40(2) exemption will apply by virtue of section 40(3)(a)(i).
43. In this case, Bedfordshire Police has argued that disclosure of the information would contravene the first data protection principle.
44. The first data protection principle states:

*'Personal data shall be processed fairly and lawfully and in particular shall not be processed unless*

- a) at least one of the conditions in DPA 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'.*

45. As stated above, the Commissioner is satisfied that all of the personal data within the file is the sensitive personal data of the perpetrator. The Commissioner has therefore initially considered whether one of the conditions in schedule 3 can be met. (A copy of the schedule can be found in the Legal Annex to this Decision Notice). He has considered the conditions in Schedule 3 first as, in his view, these conditions are more difficult to meet than those in Schedule 2.
46. The complainant has argued that the requested information is already in the public domain, evidence having been given in court and the case having been widely reported in the media. He therefore considers that it is appropriate for Bedfordshire Police to disclose the information.

47. The complainant has also referred to the publication of a book in support of his arguments in favour of disclosure, reasoning that the author of the book must have had access to the file. The complainant has argued that '*the publication of the case details in a book militates against the reasons advanced for not allowing for release of the case file*'.
48. The Commissioner is aware that there has been media coverage of the murder. The Commissioner has also taken account of the fact that a book, one chapter of which quotes details relevant to the murder file, was published many years prior to the introduction of the Act. However, he has been unable to ascertain the circumstances in which the information was obtained, nor whether any conditions were applied to the information that was disclosed.
49. While the Commissioner takes the view that most exemptions under the Freedom of Information Act will not usually apply to information which is in the public domain, that general position does not apply to information which constitutes personal data (and is therefore subject to section 40 of the Act). The reason is that personal data is subject to the separate legal regime of the Data Protection Act, which focuses on legitimate 'processing'.
50. Having considered the conditions listed in schedule 3, the Commissioner has formed the view that none of these conditions can be met. Accordingly, the Commissioner considers that the disclosure of this information would be in breach of the first principle of the DPA. Therefore, he is satisfied that the exemption in section 40(2) of the Act is engaged in respect of the information relating to the perpetrator and provides an exemption from disclosure.
51. As the Commissioner has decided that a schedule 3 condition for the disclosure of this information cannot be met, and therefore that disclosure would be in breach of the first principle of the DPA, he has not gone on to consider whether there is a schedule 2 condition or whether disclosure would be fair or lawful.
52. Since section 40(2) is an absolute exemption no public interest test applies, and the Commissioner has therefore concluded that it was appropriate for Bedfordshire Police to have withheld the requested information.
53. In reaching his conclusion, the Commissioner is mindful of the fact that the

exemption under the Act for personal information remains, regardless of its status as an historical record.

### **Other exemptions**

54. Since the Commissioner has concluded that Bedfordshire Police withheld the information appropriately by virtue of section 40(2) of the Act, he does not propose to reach any conclusion in this Decision Notice regarding Bedfordshire Police's application of the exemptions in sections 32 and 38.

### **The Decision**

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55. The Commissioner's decision is that Bedfordshire Police dealt with the request for information in accordance with the Act.

### **Steps Required**

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56. The Commissioner requires no steps to be taken.

### **Other matters**

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57. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
58. On the matter of complaints procedures, the section 45 Code of Practice states:

*'57. Where the complaint concerns a request for information under the general right of access, the review should be handled by a person who was not a party to the original decision, where this is practicable. If this is not possible (for example in a very small public authority), the circumstances should be explained to the applicant'.*

59. The complainant brought the matter of Bedfordshire Police's review procedure to the Commissioner's attention as it appeared to him that the original decision maker was also involved in the review process.
60. In this respect, Bedfordshire Police advised the Commissioner that reviews *'will be directed to an internal panel that will meet as occasion demands'*. The panel will comprise *'senior members of staff with a knowledge and understanding of the FOIA including the Assistant Chief Constable'*.
61. In this case, Bedfordshire Police has confirmed that the appeals panel, approved by the Assistant Chief Constable, comprised members of staff trained in the Act *'accompanied by [the Freedom of Information and Policy Manager]'*. The Commissioner notes that this manager was the signatory of both the initial refusal letter and the internal review response sent to the complainant.
62. Bedfordshire Police is clearly aware of its responsibility under the Code but on this occasion failed to act accordingly. The Commissioner therefore advises that Bedfordshire Police reviews its relevant policies and procedures to ensure that it carries out any training necessary to ensure that the appropriate staff are fully aware of these policies and procedures
63. Furthermore, Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time

taken exceed 40 working days.

64. In this case, the complainant's internal review request was made on 14 October 2006 and Bedfordshire Police issued its decision on 9 January 2007. Whilst he recognises that in this case the delay occurred before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 50 working days for an internal review to be completed.
  
65. The Commissioner is aware that the complainant has previously been granted access to the file outside the remit of the Act. He is also aware that a confidentiality agreement in this case has been offered but declined. The Commissioner, recognising the personal circumstances in which the request was made, is unable to comment on whether a confidential agreement between the two parties remains as an option given his decision that the information is not suitable for disclosure to the public at large.

## Right of Appeal

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66. 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).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 27<sup>th</sup> day of October 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### S.40 Personal information

**Section 40(1)** provides that –

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

**Section 40(2)** provides that –

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

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

**Section 40(3)** provides that –

*'The first condition is-*

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

**DATA PROTECTION ACT (1998)**  
**SCHEDULE 1 THE DATA PROTECTION PRINCIPLES**  
**PART I THE PRINCIPLES**

**SCHEDULE 1** provides that –

*'1 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.'*

**SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA**

**SCHEDULE 2** provides that –

*'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**

**SCHEDULE 3** provides that –

*'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.'*