

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 3 November 2009

**Public Authority:** Chair of Governors  
**Address:** Drayton Manor High School  
Drayton Bridge Road  
London  
W7 1EU

### Summary

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The complainant requested information about the name of the “source” of a questionnaire that had been used by the public authority. The public authority refused to disclose this information relying on section 40 of the Act. Having clarified with the complainant the scope of the request, the Commissioner has found that the public authority did not hold any recorded information at the time of the request. The public authority has therefore breached section 1(1)(a) of the Act in wrongly confirming that it held information. The Commissioner also believes that the public authority breached section 16(1) as it failed to ask for clarification when there was more than one objective meaning to the request. The public authority also failed to meet the requirements of section 17(1)(b) in failing to cite fully an exemption that it relied upon. It also failed to meet the requirements of section 17(7)(a) and (b) by failing to provide details of its appeal procedures and the right to complain to the Commissioner in its refusal notice. However, as the Commissioner has found that the public authority did not hold the requested information he requires no remedial steps to be taken in this case.

### The Commissioner’s Role

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1. The Commissioner’s duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the “Act”). This Notice sets out his decision.

### The Request

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2. To understand the context of this request, it is important to note the contents of a letter to the complainant from the legal representative of the public authority dated 28 September 2007. This letter was a detailed response to the complainant’s

complaint about the contents of a questionnaire 'What kind of citizen are you?'  
This letter stated the following:

*'The questionnaire was not produced by a member of the School's staff, and was obtained as a resource from a specialist teacher in Citizenship.'*

3. After receiving this letter, on 16 October 2007 the complainant asked further questions about its source and made the following request in accordance with section 1 of the Act:

*"I would like to know the source of the questionnaire and how long it has been in use. The letter states it was not produced by a member of staff. Please could you let me know where it came from so I can ensure it is not being distributed in other schools. I would like this information as soon as possible."*

4. On 8 November 2007 the public authority issued a refusal notice to the complainant. It informed her that:

*"In refusing to provide this information, the School relies upon Section 40 of the Act, on the ground that to disclose the source would contravene Section 6(1) of Schedule 2 to the Data Protection Act 1998."*

5. In an undated letter, the complainant then wrote to the public authority and requested an internal review of her request for information.

6. On 12 December 2007 the public authority replied to this request for internal review. It informed her that:

*"I do recognise that this is a matter about which there might be argument, and that this might be of a technical legal nature. However, in the form sent under cover of your letter of 14 November 2007 asking for this matter to be considered by the Governors' Complaints Panel you did not say why the legislative exemption does not apply. In the circumstances, it is hard to see how a Panel can take matters further."*

7. On 1 April 2008 the Commissioner called the public authority to inform it that it was not necessary for the complainant to specify a reason why she wanted an internal review and asked if it wished to conduct a further internal review. The public authority indicated that it had waived its right to internal review and that the Commissioner would be able to investigate the complaint on that basis.

## The Investigation

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### Scope of the case

8. On 9 January 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant

specifically asked the Commissioner to consider whether the public authority was right not to disclose the source of the questionnaire to her. The complainant also provided the Commissioner with the questionnaire itself in order to show the context to the request. The other element of the request about how long the questionnaire has been used was adequately answered by the public authority.

9. On 3 April 2008 the Commissioner wrote to the complainant to confirm with her that the scope of this investigation was:

*'The source of the questionnaire entitled 'What kind of Citizen are you?'*

10. The Commissioner considers that there is an objective ambiguity inherent in the word 'source' contained in the request. During the investigation of the case the Commissioner went back to the complainant for clarification on this point. The complainant informed him that she wanted to find out the identity of the intellectual creator or original author of the questionnaire. This Decision Notice is drafted on the basis that the request for information had this meaning.
11. On 4 April 2008 the complainant called the Commissioner and informed him that she might accept the source organisation of the questionnaire instead, if it would provide enough information for her to be sure that her concerns about the questionnaire could be pursued. She also wished to make sure that the questionnaire had not been passed to any other schools. The Commissioner has defined the source organisation as the organisation for which the author of the questionnaire produced worked. This Decision Notice is drafted on that basis.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## **Chronology**

13. On 4 March 2008 the public authority wrote to the Commissioner and informed him of the context of the request, including the press coverage it had received about this issue.
14. On 6 March 2008 the Commissioner contacted the public authority and asked whether it would either conduct an internal review of the complaint or waive its right to do one.
15. On 1 April 2008 the Commissioner called the public authority. He was told that the complainant had been consulted and that she would be happy for the Commissioner to look at the complaint immediately and it was content to waive its right to internal review. On 3 April 2008 the Commissioner wrote to the complainant to set out the scope of his investigation as stated above.
16. On 4 April 2008 the complainant called the Commissioner and informed him that she might withdraw the complaint if the public authority were to disclose the source organisation of the questionnaire. On 9 April 2008 the Commissioner asked the public authority to consider if this information could be provided.

17. On 7 May 2008 the public authority informed the Commissioner that it was prepared to release 'London Borough of Lewisham' as the source organisation. The public authority released this information to the complainant on the same day. The disclosure was made prior to the public authority considering in detail what recorded information that it held.
18. On 12 May 2008 the complainant called the Commissioner and informed him that she was not satisfied with this response. This was because the size of the London Borough of Lewisham meant that she would have been unable to follow up her concerns about the possible further dissemination of the questionnaire. On 13 May 2008 the Commissioner called the complainant and informed her that he would move on to investigate the exemptions in detail. He also contacted the public authority to inform it that the informal resolution had not been successful and that it should expect a letter about its application of the exemptions.
19. On 13 May 2008 the Commissioner asked the public authority detailed questions about the questionnaire's structure, as well as the exemption that it had relied on.
20. The Commissioner called the public authority on 23 June 2008 to chase up a response to this letter. He was informed by the public authority that in trying to respond to his detailed questions it felt that it did not have any recorded information that would allow it to establish who the source of the questionnaire was. It told the Commissioner that it had initially provided to him information created by current staff members taking an educated guess about who may have been the source of the questionnaire. The public authority informed the Commissioner that it would prepare responses to his questions within the next fifteen days.
21. The Commissioner chased a response to his letter by calling the representative of the public authority on 18 July 2008, 29 July 2008, 10 August 2008, 11 August 2008, 12 August 2008 and 26 August 2008.
22. On 1 September 2008 the Commissioner followed this up by informing the public authority that if he did not receive a response to his initial letter dated 13 May 2008 within ten working days he would be inclined to issue an Information Notice under section 51 of the Act.
23. On 12 September 2008 the public authority provided the Commissioner with detailed answers to his questions. Within this response the following was stated:

*"The school is open to the principle set out towards the end of your letter, namely that it asks the source whether they are happy to have their identity revealed. However, the School is not certain of the source, in the sense of the individual concerned. It has emailed the person believed to be the author, but has received no response..."*

*The knowledge of the identity of this person is simply that of the staff at the School, and forms no part of any formal written record..."*

*We believe that the source of the questionnaire is also the author, but this has been difficult to verify as the person has left the institution where they worked as a specialist teacher in Citizenship and has not been able to be contacted...*

*It has not been conclusively proven that the person in the School believes to be the source is in fact so. Given the questionnaire arrived at the School by the circuitous route (via a member of staff acquiring the scheme of work [lesson package] and resources at another school) it is impossible to say for sure without confirming with the author whether it has been altered or retyped before its use at this school."*

24. On 30 September 2008 the Commissioner emailed the complainant about the interpretation of the request. In particular he noted that there was more than one objective meaning of the request, and he asked her to provide some clarification. The complainant responded on the same day and clarified that she was seeking to establish who the author of the questionnaire was, and which organisation they belonged to. The Commissioner notes that without knowing who the author is it is not possible in this case to obtain information about the organisation they represent.
25. On 16 December 2008 the Commissioner asked further questions of the public authority to ensure on the balance of probabilities, that no relevant recorded information was held.
26. The Commissioner chased a response on 20 January 2009, 19 February 2009 and 4 March 2009. The public authority finally responded to the Commissioner's questions on 27 March 2009.

### **Findings of fact**

27. The questionnaire was entitled 'What kind of citizen are you?'
28. It was used as a teaching aid for Year 11 Citizenship at the public authority.
29. The resource is a bespoke resource and the public authority does not believe that it is commercially available either to other schools or to the general public.
30. The questionnaire was part of a series of four lessons dealing with what it means to be a citizen (living together as a community in one's own country and beyond) and understanding how society works.
31. The questionnaire attempted to facilitate consideration of what the student response would be in certain situations, whether or not they had a view and what the implications of their choices were. The issues that arose were then discussed as a class.
32. The public authority has agreed to redraft the questionnaire should it be used again in the future.

33. The public authority in this case has no relevant retention and/or disposal scheme.

## Analysis

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### Is the information held by the public authority?

34. To assist clarity in this Notice the Commissioner has defined the terms of the request in paragraphs 10 and 11. In order to understand the Commissioner's decision it is important to note that there is a possible distinction between the person who brought the questionnaire into the public authority and the author of the same questionnaire. While both people can be seen as the 'source' of the said questionnaire, the Commissioner has clarified with the complainant that she meant the author of the questionnaire. The Commissioner's investigation therefore is based on whether the public authority holds any recorded information about who the author of the questionnaire is and the organisation that they worked for.
35. The Commissioner must first consider whether the public authority holds any recorded information that is relevant to the request for information. In doing so, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether, on a balance of probabilities, the information was held.
36. The public authority has informed the Commissioner that it believed that it did not hold any relevant recorded information at the time of the request. The public authority told the Commissioner that it had initially provided to him information created by current staff members taking an educated guess, after receiving the request, about who may have been the source of the questionnaire.
37. Subsequently, the public authority claimed it did not hold any recorded information about the author of the questionnaire, and no conclusive evidence about who the source of the questionnaire was. It also informed the Commissioner that there was no written record of who the author of the questionnaire was.
38. In order to assist in the search for recorded information, the Commissioner might have expected the public authority to speak to the relevant person who brought the resource into the public authority, in order to establish if the public authority did hold recorded information about the author of the questionnaire. However, in this case the teacher who was responsible for bringing the questionnaire to the public authority no longer worked for it. The public authority has informed the Commissioner that it tried to contact the former employee, explaining the context of the complaint and initially asking for consent to release their name to the

public, should they be the author of the questionnaire, but had not received any response. These efforts accounted for some of its delays in responding to the Commissioner.

39. The public authority also made some further points:

- *'The resource is a bespoke (word processed) resources, and is not part of a published scheme of work. No name of identifying features were present on the resource allowing identification of the author. It is only through interviewing the member of staff who had brought the resources to the school that information regarding the source [would be] determined.*
- *The resource and Scheme of Work to which the resource belonged, were immediately withdrawn from use pending thorough scrutinisation [\*sic] in light of the initial concern raised. During a subsequent review of the Citizenship curriculum, in response to a complaint, all Schemes of Work and resources were scrutinised and evaluated. At no point did any recorded information relating to the origin of the resource or its author come to light.*
- *There is no register of where teaching materials are obtained from. It is standard practice throughout the profession for a member of staff to produce materials for a lesson(s) to fulfil learning objectives. It is a professional skill for someone to achieve Qualified Teaching Status (QTS) that they must plan for progression and "designing effective learning sequences within lessons and across a series of lessons" (Professional Standards For Teachers TDA 2007).'*

40. The Commissioner has considered the nature of the questionnaire in detail and is satisfied that it is unlikely that the public authority would record information about the author of the source. This is because the primary purpose of the questionnaire is to engage the children in debate and it would appear sensible for the public authority to delegate obtaining teaching materials to the teacher who is conducting the lessons (i.e. the former employee).

41. There would seem to be a contradiction between the public authority's present position and its initial reliance on an exemption. This contradiction can be partly attributed to the ambiguity of the word 'source'. The Commissioner is satisfied that the public authority held recorded information that identifies the teacher who brought in the questionnaire, but did not hold information as to who the author of the questionnaire was.

42. Due to the detail above, the Commissioner has determined that on the balance of probabilities the public authority did not hold any recorded information relating to the request at the date on which that request was made.

## Section 1(1)(a)

43. Section 1(1)(a) (full copy in the legal annex attached to the end of this Notice) states that any person making a request for information to a public authority is entitled to be informed in writing by that public authority whether it holds any information of the description specified in the request.
44. The Commissioner believes that in order to meet with the requirements of section 1(1)(a), if a public authority does not hold the specified information at the date of the request, the correct response under the Act would be to deny holding the information. In this case, in incorrectly informing the complainant that it held the information and citing an exemption, the Commissioner has found that the public authority has breached section 1(1)(a) of the Act.
45. As no relevant information was held by the public authority at the date of request the Commissioner has not gone on to consider the application of section 40(2).

## Section 17

46. Section 17 of the Act (full copy in the attached legal annex) provides the requirements for what should be included by a public authority within its refusal notice. In light of the Information Tribunal Decision in *King v Department for Work and Pensions* [EA/2007/0085] the Commissioner now determines whether there have been procedural breaches at the time of the internal review and if there has been no review (as in this case), then at 20 working days from the date of the request.

47. Section 17(1) of the Act states:

*"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 this exemption applies."*

48. On 8 November 2007 the public authority cited section 40 of the Act as its reason for withholding the requested information. In failing to specify in full section 40(2) when incorrectly citing this exemption in its refusal notice, the public authority breached the requirements of section 17(1)(b).

49. Section 17(7) of the Act states:

*"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 request for information or state that the authority does not provide such a procedure, and*
- (b) contain particulars of the right conferred by section 50.”*

50. The Commissioner is also satisfied that the response dated 8 November 2007 breached section 17(7)(a) and (b) of the Act as it did not provide details of the public authority's complaint procedures or details of the right to complain to the Commissioner.

## **Section 16**

51. Section 16(1) (full copy in the attached legal annex) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
52. During the investigation the Commissioner formed the view that there were at least three interpretations as to what the word 'source' refers to in the context of the request. These interpretations were:
- (1) the intellectual creator or original author of the questionnaire;
  - (2) the person who first brought the questionnaire into the school;
  - (3) the last person to amend the questionnaire, if it has evolved since it was originally drafted.
53. The Commissioner wrote to the complainant to clarify which of the above interpretations she was referring to in her request to the public authority. The complainant informed him that she meant the first interpretation.
54. The Commissioner's view is that in cases such as this, where the meaning of the request is not clear, a public authority is obliged to seek clarification from an applicant, in line with the requirements of section 16 (its obligation to provide advice and assistance). He refers to paragraphs 8 and 9 of his section 45 Code of Practice on this issue, which state that:
- 8. *'A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.'*

9. *Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.'*

55. The Commissioner considers that the public authority did not seek to clarify the request from the applicant. The Commissioner therefore finds that the public authority has breached its obligations under section 16(1) of the Act. However, he does not require the public authority to take any further steps, as during the investigation he determined that it does not hold any information relevant to what was requested by the complainant in this case.

## The Decision

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56. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act.

- Section 1(1)(a) – the public authority has wrongly confirmed that it held recorded information in its refusal notice, when it did not hold such information.
- Section 16(1) – the public authority has failed to clarify with the complainant what was meant by the word 'source'. The word had a number of objective meanings and the public authority should have clarified what was meant by the complainant.
- Section 17(1)(b) – the public authority failed to fully cite the exemption that it was relying on in its refusal notice.
- Section 17(7)(a) and (b) – the public authority failed to offer the complainant an internal review, indicate what its internal review procedure was or indicate that the complainant could appeal to the Commissioner.

57. However the Commissioner is satisfied that the public authority did not hold recorded information relating to the request at the time the request was made.



## Right of Appeal

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62. 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 3rd day of November 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

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

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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

### **Section 16 - Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

## Section 17 – Refusal of Request

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

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

(2) Where—

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

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

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

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

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

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

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

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(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 40 – Personal information**

**Section 40** provides that –

(1) ‘Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.’

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] 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 [1998 c. 29.] 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).

...

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.