

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 14 October 2009**

**Public Authority:** Newcastle College  
**Address:** Rye Hill Campus  
Scotswood Road  
Newcastle Upon Tyne  
NE4 7SA

### Summary

---

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to Newcastle College (the "College") for information relating to staff surveys that were conducted at the College in 2005, 2006 and 2007. The College refused the complainant's request as it stated that the provision at section 12 of the Act was applicable and that the information was exempt from disclosure by virtue of sections 40(2) and 41 of the Act. During the course of the Commissioner's investigation, the College withdrew its application of section 12 and section 41 of the Act but applied the exemption contained at section 36(2)(b)(i) and (ii) and 36(2)(c) of the Act. The Commissioner considers that some of the requested information is not held by the College under section 1(1)(a) of the Act. The Commissioner has reviewed the withheld information and considers that the College correctly applied the section 40(2) exemption to withhold some of the requested information. The Commissioner also considers that the College correctly applied the exemption contained at section 36(2)(b)(ii) to withhold some of the requested information. The Commissioner considers that the College incorrectly applied section 36(2)(b)(i) and section 36(2)(c) as it did not provide sufficient arguments to establish that disclosure would or would be likely to inhibit the free and frank provision of advice or would or would be likely to prejudice the conduct of public affairs. The Commissioner also considers that the College breached section 1(1)(a), section 1(1)(b), section 10(1) and sections 17(1)(a)(b) and (c) in its handling of the request.

### 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.

## The Request

---

2. The Complainant made a request on 4 October 2007 to the College. The complainant asked the College to provide him with the following information:-
  - A complete set of results for the 2005 Newcastle College staff survey. The complainant stated that he would appreciate it if the College could provide the result by School/Section and by College. The complainant asked the College to include all staff comments which he understood had been made anonymously.
  - A complete set of results for the 2006 Newcastle College staff survey. The complainant stated that he would appreciate it if the College could provide the result by School/Section and by College. The complainant asked the College to include all staff comments which he understood had been made anonymously.
  - A complete set of results for the 2007 Newcastle College staff survey. The complainant stated that he would appreciate it if the College could provide the result by School/Section and by College. The complainant asked the College to include all staff comments which he understood had been made anonymously.
  - A copy of the minutes for all Board of Governors and Senior Management Team meetings during which the 2005, 2006 or 2007 staff surveys were an agenda item.
3. On 12 October 2007 the College wrote to the complainant and stated that it held information relevant to the scope of the request. However it asked for some clarification in relation to the request.
4. On 19 October 2007 the complainant wrote to the college to clarify his request. The complainant stated that staff surveys were conducted in 2005, 2006 and 2007. He explained that an analysis of the results was carried out and results obtained by school and section/division/service/department/college. The complainant stated that figures were produced which represent % satisfaction levels for staff in each of these areas. He explained that they included number of respondents, percentage of eligible staff and highlighted areas which may become and were significant issues. He explained that the survey also allowed staff to anonymously provide comments on specific aspects of working life at the college. He clarified that it was copies of all of this information he required. The complainant reiterated his request for copies of the minutes for all Board of Governors and Senior Management Team meetings during which the 2005, 2006 or 2007 staff surveys were an agenda item.
5. On 15 November 2007 the College responded to the complainant's request for information. The College stated that the complainant had requested a 'complete' set of results. It explained that since the analysis and interpretation of the staff survey was part of the

management process across the College, a literally 'complete' response could only be provided with significant investigation. It clarified that there was no single consolidated set of all outcomes currently available for any of the last three years. It stated therefore that the cost of compiling and providing the complainant with 'complete' results would be in excess of £450. The College therefore stated that it was not obliged to comply with the request by virtue of section 12 of the Act and in accordance with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

6. The College went on to state that the complainant specifically requested copies of comments provided by staff during the course of the respective surveys. It explained that the comments were provided anonymously, thereby inputting a duty of confidence. Despite the anonymity it stated that it believed it was likely that both current and recent former employees would be able to identify the originators of some of the comments. It suggested that to obtain consent from all of the contributors would be impractical and to provide a redacted version of the comments would be of no value. It therefore stated that the information was exempt under section 41 of the Act as it was provided in confidence.
7. The College stated that the complainant had indicated that he wished to receive the analysis by School and any other sub-division in use by the College. The College explained that for the purposes of the survey the analysis was completed by School and Service department.
8. The College stated that it was concerned over the significant likelihood of the manager responsible for each School and Service (whose personal performance might be inferred from the analysis), being identified through the name of the department or the number of respondents for the department. It stated that in view of the College's duty of confidentiality to its staff, it was prevented from releasing this information in an unredacted format. It explained that to do so would amount to an unauthorised disclosure of personal data relating to third parties under section 7 of the Data Protection Act 1998 (DPA).
9. It acknowledged that there was a public interest in disclosure being made as far as possible and that suitably redacted information would provide details of the variation of results between Schools and Services without individuals being identified. Therefore the College provided the complainant with the following information:-
  - Overview of staff survey results dated:
    - 31 January 2006
    - 19 September 2006 (it stated that this report indicated that a previous report was made in October 2005 but this is an error).
  - Analysis of staff survey July 2005, showing results by College, School

and Service. It stated that this table showed the percentage satisfaction level for each question and the percentage satisfaction for groups of questions which formed sections of the survey. It explained that the names of Schools and Services and the number of respondents for each department had been redacted.

- Analysis of staff survey July 2006, showing results by College, School and Service. It stated that this table showed the percentage satisfaction level for each question and the percentage satisfaction for groups of questions which formed sections of the survey. It explained that the names of Schools and Services and the number of respondents for each department had been redacted.
- Analysis of staff survey July 2007, showing results by College, School and Service. It stated that this table showed the percentage satisfaction level for each question and the percentage satisfaction for groups of questions which formed sections of the survey. It explained that the names of Schools and Services and the number of respondents for each department had been redacted.
- Minutes of all Senior Management Team meetings concerning the 2005, 2006 or 2007 staff survey.
  - 3 June 2005
  - 14 October 2005
  - 13 January 2006
  - 28 July 2006
  - 29 September 2006
- Minutes of all Board of Governors meetings concerning the 2005, 2006 or 2007 staff survey.
  - 31 January 2006
  - 19 September 2006

The College confirmed the staff survey was not an agenda item at meetings of the Senior Management Team or the Board of Governors during 2007. It confirmed that the survey is now a routine part of the management process and consideration of the results is distributed across the College.

10. The College therefore summarised that it was withholding the following information relevant to the scope of the complainant's request:-
- Provision of 'complete' results would require investigation of outcomes and resultant investment of time across the College at a cost greater than the statutory £450 threshold.
  - Disclosure of staff comments would give rise to the significant risk of a breach of confidentiality towards College staff.
  - Disclosure of the names of Schools and Services, or the number of

respondents for each School and Service, in the analysis of survey results would enable the managers of those departments to be identified and would amount to unauthorised disclosure of third party information contrary to the Data Protection Act 1998.

11. On 28 November 2007 the complainant wrote to the College and asked it to conduct an internal review. In particular the complainant queried the authenticity of the minutes he had been provided with. He also queried how the College had determined that anonymous comments were confidential since he noted that a number of staff comments had been included in some of the 2005 minutes he had been provided with. The complainant asked the College to explain why supplying a 'complete' set of results would exceed the £450 cost threshold and finally he queried the reasons for applying an exemption to redact the names of the Schools and Service Departments, the numbers of respondents for Schools and Service Departments and the question in the 2006 and 2007 surveys, "I work in.....?".
12. On 18 December 2007 the College wrote to the complainant with the result of the internal review it had carried out. The College confirmed the authenticity of the minutes the complainant had been provided with.
13. The College also explained that it had a duty to its staff to maintain the anonymity of members of staff who provided comments in response to the staff survey. It stated that it believed it had achieved this in its overview reports which highlighted frequently occurring messages. It also stated that it believed that disclosure of the full sets of comments would present the risk that individuals might be identified by the focus of their comments or by their manner of expression. It stated that the capacity to identify individuals would naturally be greater for current and former employees, therefore once in the public domain, the information would potentially be accessible to all and expose the college to the risk of prosecution under the Data Protection Act. The College stated that identification of each particular group of staff would also identify the manager responsible for each group. It explained that detailed analysis of the staff survey by manager is personal data and confidential to the performance appraisal process. It provided the complainant with further detail as to why the £450 cost limit would be exceeded to provide him with a 'complete' set of results.

## **The Investigation**

---

### **Scope of the case**

14. As the Complainant was dissatisfied with the result of the internal review he made a formal complaint to the Information Commissioner's Office on 11 February 2008.

15. During the course of the Commissioner's investigation the College withdrew its application of section 12 and section 41 and therefore this has not been addressed in this Notice. Furthermore the College had only provided the complainant with the sections of the minutes requested which referred to the staff surveys of 2005, 2006 and 2007. During the course of the Commissioner's investigation the College released the full versions of the minutes requested with some redactions. The complainant confirmed to the Commissioner that he was now satisfied with the College's disclosure in respect of his request for the minutes. Therefore this aspect of the complainant's request has not been considered any further in this Notice.
16. The Commissioner has therefore considered the College's application of the exemption contained at section 40(2) of the Act. During the course of the Commissioner's investigation the College also applied the exemption contained at section 36(2)(b)(i) and (ii) and 36(2)(c) of the Act to prevent disclosure of this information. The Commissioner has therefore also considered the College's application of section 36(2)(b)(i) and (ii) and 36(2)(c). Finally during the course of the Commissioner's investigation the College confirmed that it only held staff comments for the 2006 staff survey under section 1(1)(a) of the Act.
17. The withheld information which is the subject of this investigation can be split into two categories. The first is the redacted statistical results of the staff surveys of 2005, 2006 and 2007 and the second is staff comments made in response to those surveys. In this case the Commissioner has deemed it most appropriate to deal with the statistical results under the exemption contained at section 40(2) of the Act, the 2006 comments under the exemption contained at section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Act and the 2005 and 2007 comments under section 1(1)(a) to determine whether or not they are held.
18. The Commissioner notes that whilst section 40(2) and the various provisions of section 36 were applied to the statistical results as well as the staff comments that were held, he has chosen not to deal with the staff comments under section 40(2). This is because although potentially the staff comments could be classed as personal data the Commissioner nor the College is able to conclude definitively which comments could identify individual staff members. This is because it is very much dependent on local knowledge within particular departments of the College of which neither the Commissioner nor the College has sufficient awareness to come to such conclusions.

## **Chronology**

19. On 12 March 2009 the Commissioner wrote to the College in order to obtain a copy of the withheld information and the College's further arguments in relation to its application of section 12 and the

exemptions contained at sections 41 and 40(2) of the Act.

20. On 9 March 2009 the College provided the Commissioner with a copy of the withheld information. The College provided further arguments in relation to its application of section 12 and its application of the exemption contained at section 40(2) of the Act. The College withdrew its application of the exemption contained at section 41 of the Act and applied the exemption contained at section 36(2)(b)(i) and (ii) and 36(2)(c) of the Act to the withheld information. The College provided the Commissioner with a letter from the Principal, the qualified person, detailing her reasoning as to why she believed section 36(2)(b)(i) and (ii) and 36(2)(c) was applicable in this case.
21. On 15 April 2009 the Commissioner wrote to the College in relation to its application of section 12 in order to determine what the college meant by a "full set of results". The College subsequently explained to the Commissioner that it had meant that there was a possibility that meetings may have been held within individual departments in which the survey may have been discussed and in relation to which minutes could be held. The College stated that it did not know if such minutes were held but to determine whether or not they were held this would exceed the relevant £450 cost limit and therefore it would not be obliged to comply with the request under section 12. On 30 April 2009 the complainant clarified to the Commissioner that he did not believe that such departmental minutes would fall within the scope of his request. The College therefore agreed that section 12 would not apply in this case.
22. The Commissioner continued to exchange correspondence with the College in order to gain further supporting arguments in relation to its application of the exemptions contained at section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) in relation to the staff comments in the surveys and the redactions made to the statistical survey results. During the course of this correspondence the College confirmed that some of the staff comments requested were not held and therefore the Commissioner also investigated whether or not some of the information was held under section 1(1)(a) of the Act.

## Analysis

---

### Substantive Procedural Matters

23. Section 1(1) of the Act states that:

*"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.”*

24. The Commissioner has considered whether the College has complied with section 1(1)(a) of the Act by stating that it did not hold the staff comments for the 2005 and 2007 staff surveys. In order to do this the Commissioner has considered whether this information is held by the College.
25. The Commissioner asked the College to explain why it held staff comments for the 2006 staff survey but not for the 2005 and 2007 staff surveys. The College explained that staff comments were gathered in 2005 but these were accidentally deleted prior to the complainant making his request. It explained that its servers are backed up daily as a matter of routine but the backups are not stored indefinitely. It explained that the storage devices for backups are used in rotation and on each day the oldest backup is overwritten. As a result it explained that data cannot be restored unless the loss is detected within a few days. In this case it clarified that the accidental deletion of the data was detected after a longer time so could not be restored using the backups. The problem leading to the accidental loss was associated to a particular server and other data was also affected.
26. In relation to the 2007 staff survey, the College explained that staff comments were never held as the format of the survey was changed in that year. It clarified that staff comments were not gathered in 2007 and have not been gathered since.
27. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that “there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records”. It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner will apply in this case.
28. In discussing the application of the balance of probabilities test, the Tribunal stated that, “We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been

disclosed.” The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.

29. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office* (EA/2007/0110). In this case Mr Ames had requested information relating to the September 2002 “Iraq’s Weapons of Mass Destruction” dossier. The Tribunal stated that the Iraq dossier was “...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...” However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not “...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...” Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessarily mean that information is held.
30. In coming to a conclusion upon this case the Commissioner has taken into account the explanation provided by the College relating to the 2005 staff comments and detailed at paragraph 23. The Commissioner is mindful of the Tribunal decisions highlighted above. The Commissioner considers that on the balance of probabilities the staff comments for 2005 are not held by the College. This is due to the limited amount of time the College has to identify data loss in order to retrieve it. In this case the College has confirmed that the data loss was not detected in time, and so on the balance of probabilities this information is not held.
31. In relation to the 2007 comments the College has confirmed that from 2007 staff comments were no longer collected as part of the staff survey. As the College has explained that free text comments were not requested as part of any staff survey from 2007 onwards the Commissioner is satisfied on the balance of probabilities that staff comments for 2007 were never held.

## Exemptions

### Section 40(2)

32. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*“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.”*

33. Section 40(3)(a)(i) of the Act states 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),”*

34. The full text of section 40 can be found in the legal annex attached to this decision notice.

35. In this case the College has argued that the statistical staff survey results constituted the personal data of the respondents to the survey and of the managers of those respondents and was therefore exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i). It stated that this was because to release this information would breach the data protection principles. However the College determined that the statistical results could be anonymised by redacting the names of the departments at the top of each column of results and the numbers of respondents from each of those departments. The Complainant does not however consider that the statistical results are of use due to the redactions applied by the College. This is explained in detail below at paragraph 36.

36. In order to reach a view on the College's arguments the Commissioner has first considered whether an unredacted version of the statistical results would constitute the personal data of a third party. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- a. from that data, or
- b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

37. In this instance the information is the statistical results of the College's staff surveys for 2005, 2006 and 2007 which are broken down by departments. The College has provided this information to the complainant but redacted the names of the departments at the top of each column of the results along with the numbers of respondents from each of those departments. Upon viewing the statistical results the Commissioner believes that in an unredacted format some of the

information would constitute the personal data of third parties due to for example small numbers within departments and in relation to some departments a 100% response rate. However the Commissioner does consider that it would be possible to anonymise the information in an alternative way to that chosen by the College which would enable the names of the departments and numbers of respondents to remain unredacted. However due to the information which the College provided to the complainant prior to the commencement of the Commissioner's investigation it has rendered it impossible to anonymise the results in an alternative way. This is because the complainant has information in his possession which could be used in conjunction with any further disclosure of information ordered by the Commissioner to enable him to be able to identify some respondents along with their responses to the staff surveys. Therefore the Commissioner considers that if he were to order disclosure of the statistical results, even in an alternative anonymised format, some respondents along with their responses could be identified from the statistical results, due to information the Complainant has in his possession, which was disclosed to him under the Act and therefore into the public domain. For this reason the Commissioner considers that respondents and their responses could be identified from some of the statistical results of the staff surveys and as those results can't be anonymised due to other information within the public domain, the results would constitute the personal data of some of the respondent's to the staff surveys.

38. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The College has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
39. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following:-

#### **How was the information obtained?**

40. The Commissioner considers that the information was obtained by the College by asking members of staff to complete the staff surveys. This enabled the College to compile the table of statistical results of the responses received.
41. The Commissioner is mindful that the College confirmed to him that the staff surveys were conducted anonymously via an IT based system. Furthermore it explained that the system used provided no way for respondents to be identified either by system users or IT staff.

### **Likely Expectation of the Data Subject**

42. The College has argued that the staff surveys were carried out anonymously and therefore the respondents would have had a reasonable expectation that results from which some respondents and their responses could be identified would not be disclosed into the public domain. Furthermore the College has argued that the results are the personal data of managers at the College as a number of questions within the survey relate to staff's perceived performance of managers. Again the College has suggested that managers would not expect this information to be disclosed into the public domain.
43. The Commissioner does not consider that respondents would have expected the results, from which some respondents and their responses could be identified, would be disclosed into the public domain. Furthermore the Commissioner does not consider that managers would have expected this information to be disclosed into the public domain as it relates to their performance as managers at the College.

### **The effect of disclosure on the Data Subject**

44. The College has suggested that disclosure of the statistical results would cause distress for some of the data subjects involved due to the impact it may have on their reputation both inside and outside of the College.
45. The Commissioner's Awareness Guidance 1 covering Section 40 Personal Information, states that public authorities should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account."

46. The above Guidance can be accessed at the following:

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf)

The Commissioner considers that as the College's concerns relate to the professional reputations of senior management, it is less likely that it would be unfair to disclose this information. The withheld information

does not specifically relate to the performance of individual senior managers. Whilst the statistical results may demonstrate the levels of staff satisfaction within a department as a whole this cannot be said to relate directly to the performance of individual managers.

47. However the Commissioner does consider that disclosure of the statistical results from which some respondents could be identified could cause those respondents distress in a personal capacity. Those respondents may not wish the statistical survey results to be disclosed within the public domain and therefore within the College community, as some respondents may be identifiable along with their responses. This may be particularly relevant in relation to the questions about the respondent's perception of management.
48. After considering the arguments put forward by the College and the withheld information itself, the Commissioner considers that taking into account the likely effect on the respondents, the likely expectations of the respondent's and the reasons why the information was obtained, disclosure of the withheld information would be unfair and therefore the section 40(2) exemption was correctly applied in this case. Since the Commissioner considers disclosure of this information would be unfair he has not gone to consider whether a schedule 2 condition can be met.

### **Section 36(2)(b)(i) and (ii) and 36(2)(c)**

49. Sections 36(2)(b)(i) and (ii) state that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

50. A full text of section 36 is available in the Legal Annex at the end of this Notice.
51. As section 36(2)(b)(i) and (ii) and section 36(2)(c) were applied late in this case and not until the commencement of the Commissioner's investigation, he first asked the College to explain why this exemption was applied late in this case.
52. The College explained that from the time the request was made its underlying concern had been constant. This concern was that a lack of

respect for confidentiality would undermine the opportunity for frank feedback from staff and this would in turn undermine the effectiveness of processes for which frank communication is essential. It conceded that initially it had applied section 41 to withhold the information. However after the Commissioner's investigation had commenced the College realised that section 41 may not be the appropriate exemption to rely upon in relation to information provided by employees. The College reviewed its application of section 41 which led to its application of sections 36(2)(b)(i) and (ii) and 36(2)(c).

53. Upon considering the College's reasons behind its late application of sections 36(2)(b)(i) and (ii) and 36(2)(c) the Commissioner has chosen to exercise his discretion to accept the late reliance on this exemption in this case. In doing so he has taken account of the comments of the Information Tribunal in the case of Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth EA/2007/0072. The Tribunal questioned "whether a new exemption can be claimed for the first time before the Commissioner" and concluded that the Tribunal (and presumably the Commissioner) "may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case". The Tribunal also 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".
54. Factors which the Tribunal has accepted as being reasonable justifications for the application of exemptions before the Commissioner and/or the Tribunal for the first time include:
- Where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure (Bowbrick v Nottingham City Council EA/2005/0006 and DBERR decision referenced above).
  - Where the authority has correctly identified the harm likely to arise from disclosure but applies these facts and reasoning to the wrong exemption (King v Information Commissioner and the Department for Work and Pensions).
  - Where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution (Ofcom EA/2006/0078).
  - Where the refusal notice was issued at an early stage of the implementation of the Act when experience was limited, although this factor is likely to become far less relevant in the future (DBERR decision referenced above).

55. In this case the Commissioner considers the second justification referred to above is applicable in this case. This is because although the College had originally applied a different exemption its arguments had remained consistent throughout. Therefore the Commissioner does not consider the qualified person would have been influenced by circumstances other than those prevalent at the time of the request in reaching his opinion. The Commissioner will therefore consider whether sections 36(2)(b)(i) and (ii) and 36(2)(c) were correctly applied in relation to the staff comments made in response to the 2006 staff survey.
56. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank provision of advice. Information may be withheld under section 36(2)(c) if its disclosure in the reasonable opinion of the qualified person, would or would be likely to prejudice the conduct of public affairs. Upon considering the opinion of the qualified person, the factors the qualified person took into account when coming to the opinion and the withheld information itself, the Commissioner does not believe there is any indication that disclosure would or would be likely to inhibit the free and frank provision of advice or prejudice the conduct of public affairs. The Commissioner is unable to determine that the qualified person's opinion was reasonable in relation to the application of section 36(2)(b)(i) or section 36(2)(c). The Commissioner has however gone on to consider the application of section 36(2)(b)(ii).
57. Information may be withheld under section 36(2)(b)(ii) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to prejudice the free and frank exchange of views for the purposes of deliberation. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC (EA/2006/0011 & EA/2006/0013)* that, "On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable..." (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, "...in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at..." (paragraph 64) "...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

58. Determining whether section 36(2)(b)(ii) was correctly engaged by the College requires the Commissioner to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the

Commissioner must:

- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was objectively reasonable and reasonably arrived at.
59. According to the College, the Principal and Chief Executive is the qualified person for this purpose, and a copy of the opinion was provided to the Commissioner which was dated 9 April 2009. The Commissioner is satisfied that she was a qualified person for the purposes of section 36 at the time that the opinion was given.
60. The qualified person explained that in this case disclosure of this information has a potential for significant damage to the free and frank exchange of views within the College. The qualified person explained that staff shared their views in the belief that confidentiality would be maintained and she believed that disclosure may cause widespread cynicism about any future requests for staff views. It explained that the processes that this may undermine included lesson observation, performance appraisal, quality review, performance monitoring and internal audit. The qualified person explained that these vital processes could not function effectively if staff feared their views and advice may be disclosed into the public domain. She explained that this effect may be wide ranging because all parts of the organisation are subject to these processes. She concluded that there may be a severe prejudicial effect on the capacity to improve the core function of teaching and learning in addition to the full range of support functions if staff were perturbed from expressing their views freely and frankly. She explained that as an experienced College Principal of a College that has been awarded Grade 1 for its last two Ofsted inspections, its capacity to continue to improve relied heavily upon the processes described above and on staff participating in those processes freely and frankly.
61. The College explained that the qualified person took the following into account when coming to the reasonable opinion set out above:
- The potential for damage that would result from a campaign by someone hostile to the organisation making use of the information.
  - The belief held by staff that the confidentiality of comments would be maintained and the cynicism about future requests for views that would result from disclosure of the full set of comments.
  - The wide ranging effect that would result from inhibition of the frank exchange of views in key processes across the organisation.

- The severe prejudicial effect on the capacity to improve the core function of teaching and learning in addition to the full range of support functions.

The College confirmed that although the reasonable opinion was given after the Commissioner's investigation had commenced, the opinion was based upon factors which would have applied at the time when the request was made.

62. Upon considering the above, the Commissioner accepts that it was reasonable to conclude that disclosure would reveal free and frank exchanges of views and that this would or would be likely to lead to staff being less willing to discuss issues in a free and frank nature in the future when responding to College initiatives which require staff input. This is because staff would be concerned that such discussions may be placed into the public domain and may also identify who said what in some cases. The Commissioner also accepts that staff input is vital in maintaining and improving the College's core functions. If the free and frank exchange of views by staff were undermined this would be likely to prejudice the College in the conduct of its core functions. Despite the College confirming that staff comments are no longer collected during the staff survey, the Commissioner considers that staff input could potentially be sought in relation to future College initiatives. The Commissioner considers that future initiatives would include similar consultation exercises analogous to the staff survey which would go beyond input as an everyday part of an employee's job role. The Commissioner considers that the opinion is objectively reasonable and reasonably arrived at.
63. Before moving on to consider the public interest test, the Commissioner also notes that the College has not clearly identified whether it considers the prejudice would or would be likely to occur. The Commissioner is therefore mindful of the Tribunal decision in McIntyre in which it was stated that:
- “...in the absence of designation as to the level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.”
64. The Commissioner has therefore proceeded upon the basis that the lower prejudice threshold applies, that the prejudice would be likely to occur, in the absence of evidence to the contrary.
65. The Commissioner has taken into account the summary of key issues which were considered by the qualified person in relation to the application of section 36(2)(b)(ii). These primarily concerned the likely prejudicial effect of disclosure on the frankness and candour of staff participation in internal discussions to improve the quality of the College as an employer and in the performance of its functions. The Commissioner is therefore satisfied that the opinion of the qualified

person is reasonable in respect of the staff comments for 2006 and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) was correctly engaged.

66. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke Appeal)*,<sup>1</sup> where the Tribunal considered the law relating to the balance of the public interest in cases where the section 36 exemption applied.<sup>2</sup> The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2) (b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives full weight to the qualified person's reasonable opinion that there would, or would be likely to be, some prejudice to the effective conduct of public affairs if this information were to be disclosed.

### **Public interest arguments in favour of disclosing the requested information**

67. The College has argued that there is a general argument for disclosure to promote transparency, accountability and participation. However, it suggested in this case disclosure of all individual comments would do very little to promote transparency, accountability and participation. It explained that this is because the College has already disclosed to the complainant summary information about the feedback from staff which identifies the areas for improvement as well as positive themes. This provides a basis for informed public debate about the feedback the College received from its staff without damaging the operation of the College.
68. The College also explained that it could be suggested that disclosure of the comments could enhance discussions in relation to the issues raised and decision making generally. However, the basis for

---

<sup>1</sup> Appeals Numbers: EA/2006/0011 and EA 2006/0013

<sup>2</sup> at paragraphs 81 – 92.

discussions and decision making generally would be more likely to benefit from information about the themes which emerged from the staff comments rather than the specific comments of individuals.

69. Finally the College explained that it could be argued that it would be in the public interest to enable the public to verify that the summary information reflected the detailed comments. As there is no evidence that the summary information does not reflect the detailed comments, the College suggested that this argument is weakened.
70. The Commissioner recognises that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make, particularly in this case based upon the views of College staff. He also accepts that there is public interest in the disclosure of information which would enhance debate on particular issues which may be raised within the collective comments. Finally he accepts that there is a strong public interest in disclosing information where to do so would help determine whether public authorities have acted, or are acting appropriately. The Commissioner also considers that disclosure would provide the public with information as to the staff's perceptions of how well the College is performing its functions which may enhance public confidence in the College.

#### **Public interest arguments in favour of maintaining the exemption**

71. The College has explained that disclosure of all the individual comments would undermine processes which underpin the College's capacity to operate, to improve and to achieve high standards. This prejudicial effect on operations and the resulting damage to the service provided by the College would be against the public interest.
72. The College also explained that disclosure would have a negative impact on staff and internal relations through the betrayal of the trust staff placed in the College when they gave their feedback in confidence.
73. Finally the College explained that disclosure could lead to wider cynicism amongst public sector employees that any invitation to provide views in confidence at work might not be honoured by their employer. The possible inhibition of the free and frank exchange of views within other public bodies might prejudice the provision of service more generally.
74. The Commissioner agrees with the College that frank and honest internal discussion including the exchange of views is essential in enabling the College to identify how efficiently it is fulfilling its functions and how it could improve. Therefore there is a strong public interest in staff providing their views and suggestions freely and frankly which enables all staff to input into the decisions that are ultimately made within the College. In relation to the College's suggestion that

disclosure would cause wider cynicism within the public sector in relation to the provision of views with an assurance of confidence, whilst the Commissioner considers that this is a possibility he does not consider that the extent of harm would be great and therefore this argument is weakened.

### **Balance of the public interest arguments**

75. The Commissioner agrees with the College's public interest arguments in favour of disclosure relating to openness, transparency, accountability, enhancement of public debate and demonstrating the accuracy of other information within the public domain. He also considers that disclosure may enhance public confidence in the College. However the Commissioner has also borne in mind that summary information has been provided to the complainant which goes some way to achieve the public interest consideration listed above. The Commissioner is aware that the summary information provided identifies collective themes contained within the comments rather than specific views put forward by individuals.
76. The Commissioner considers that there is a strong public interest in any public sector organisation achieving a high standard of performance in the discharge of its functions. The Commissioner considers that staff input through staff surveys or similar consultations is inherent in this process. Whilst there may be potential for disclosure of this type of information to have a wider negative impact in relation to the free and frank exchange of views within any public sector organisation, the extent of harm in this wider context would be minimal and therefore this particular argument is weakened. The Commissioner has therefore given less weight to this wider impact argument.
77. In this case summary information which reflects the main themes of the comments has been disclosed which goes some way to meeting the public interest arguments in favour of disclosure highlighted above. The Commissioner considers that the extent of harm in relation to the undermining of staff confidence in providing their views which in turn may impact upon the College's ability to discharge its functions to its full potential is great. The Commissioner has therefore given considerable weight to these arguments presented by the College. The Commissioner therefore considers that the public interest in favour of disclosure of the 2006 staff comments does not outweigh the public interest in maintaining the exemptions contained at section 36(2)(b)(ii) of the Act.

### **Procedural Requirements**

#### **Section 1(1)(a)**

78. Whilst the Commissioner's conclusion is that the staff survey comments for 2005 and 2007 are not held this was not communicated

to the complainant within the College's refusal notice or within the internal review. Therefore the Commissioner considers that the College breached section 1(1)(a) in its handling of this request as it did not deny that this information was held within the statutory time for compliance.

### **Section 1(1)(b)**

79. Whilst the Commissioner's conclusion in relation to the statistical survey results was that section 40(2) was applied correctly in light of the disclosures the College had previously made, he is aware that at the time of the request prior to any disclosure having been made a fuller disclosure would have been possible. The Commissioner therefore considers that the College breached section 1(1)(b) in its handling as at the time of the request a fuller disclosure could have been made. However in light of disclosures made prior to the Commissioner's investigation section 40(2) was upheld and therefore no steps will be required to make the fuller disclosure.

### **Section 10(1)**

80. Section 10(1) of the Act provides that:-

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

81. The Commissioner has considered whether or not the College complied with section 10(1) of the Act.
82. As the College did not deny that the survey comments for 2005 and 2007 were not held within the statutory time for compliance, it breached section 10(1) of the Act in its handling of the request.

### **Section 17(1)**

83. Section 17(1) states that –

*"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."*

84. The Commissioner has considered whether the College has complied with section 17(1)(a), (b) and (c) of the Act.
85. In this case the College did not apply the exemption contained at section 36(2)(b)(i) and (ii) of the Act until the Commissioner's investigation had commenced. Therefore whilst it had stated that the 2006 staff comments were exempt, it had not specified that this information was exempt under section 36(2)(b)(i) and (ii) or why.
86. In relation to the College's application of the exemption contained at section 40(2) of the Act to the statistical staff survey results for 2005, 2006, and 2007, the College again did state that this information was exempt but did not specify which exemption applied and did not adequately explain why to the complainant.
87. The Commissioner therefore considers that the University breached section 17(1)(b) and (c).

## **The Decision**

---

88. The Commissioner's decision is that the College does not hold staff comments for the 2005 and 2007 staff surveys under section 1(1)(a) of the Act.
89. The Commissioner considers that the College correctly applied the exemption contained at section 40(2) of the Act in order to withhold the statistical results of the staff surveys for 2005, 2006 and 2007.
90. The Commissioner considers that the College correctly withheld the staff comments for the 2006 staff survey under section 36(2)(b)(ii).
91. The Commissioner considers that the College breached section 1(1)(a) section 1(1)(b), section 10(1) and section 17(1)(b) and (c) in its handling of the request.

## **Steps Required**

---

92. The Commissioner requires no steps to be taken.

## Right of Appeal

---

93. 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 14th day of October 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

---

### General Right of Access

**Section 1(1)** provides that -

“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 1(2)** provides that -

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

**Section 1(3)** provides that –

“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.”

**Section 1(4)** provides that –

“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.”

**Section 1(5)** provides that –

“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).”

**Section 1(6)** provides that –

“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”.”

### **Time for Compliance**

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or

- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

### **Refusal of Request**

**Section 17(1)** provides that -

“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.”

**Section 17(2)** states –

“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.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to

any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

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

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

**Section 17(4)** provides that -

“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.

**Section 17(5)** provides that –

“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.”

**Section 17(6)** provides that –

“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.”

**Section 17(7)** provides that –

“A notice under section (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.”

**Prejudice to effective conduct of public affairs.**

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 36(3)** provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

**Section 36(4)** provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

**Section 36(5)** provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
  - (i) the public authority, or
  - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
  - (i) a Minister of the Crown,
  - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
  - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

**Section 36(6)** provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling

- within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

**Section 36(7)** provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

**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.”

**Section 40(4)** provides that –

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

**Section 40(5)** provides 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) he 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).”

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
"data subject" has the same meaning as in section 1(1) of that Act;  
"personal data" has the same meaning as in section 1(1) of that Act.