

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 August 2009

Public Authority: The Judicial Appointments Commission
Address: 3rd Floor
Steel House
11 Tothill Street
London
SW1H 9LH

Summary

The complainant requested information about different attributes of applicants who had applied for the Recordship contest in a specific geographic area and how far they had progressed in that process. He asked nine questions that would provide breakdowns including the numbers of applicants by ethnic group. The public authority applied section 22(1) in relation to a number of the questions and section 40(2) in relation to others. The information that was withheld under section 22(1) was published before the Commissioner commenced his investigation and was not considered in this case. The Commissioner has considered the application of section 40(2) to the outstanding information and has determined that the public authority was correct in its application in this case. He did however find procedural breaches of sections 10(1) and 17(1). He requires no remedial steps to be taken.

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.

Background

2. The Judicial Appointments Commission is an independent public body that selects candidates for judicial office. The application process relevant to this request was for appointments as a Recorder on the Northern, North Eastern, and Wales Circuits. The posts are part-time and the successful candidates would be

expected to sit for 15 to 30 days a year. Applicants are eligible if they have been qualified as a solicitor or a barrister for at least 10 years.

3. The process has two stages. The first stage is to submit an application form and do a qualifying test. From this information the public authority shortlists candidates and invites them to the second stage, which consists of assessment days. The decision is then made about who to appoint from the results of these assessment days.

The Request

4. The request was submitted to the Judicial Appointments Commission. It became a public authority for the purposes of the Act by virtue of section 61(2), schedule 12, part 2, paragraph 36(3) of the Constitutional Reform Act 2005. This came into force on 3 April 2006.
5. On 14 December 2008 the complainant requested the following information from the public authority in accordance with section 1(1) of the Act:

'I refer to the Recordship 2008; Northern, North-Eastern and Wales Circuits competition...

1. *Overall, how many applications did the JAC receive?*
2. *(i) How many applicants described themselves as 'female'?*
(ii) Of those female applicants, how many:
 - a. passed the test on 10 March 2008, and*
 - b. were selected for appointment?*
3. *(i) How many applicants described themselves as of 'white' ethnicity?*
(ii) Of those applicants, how many:
 - a. passed the test on 10 March 2008, and*
 - b. were selected for appointment?*
4. *(i) How many applicants described themselves as of 'mixed' ethnicity?*
(ii) Of those applicants, how many:
 - a. passed the test on 10 March 2008, and*
 - b. were selected for appointment?*
5. *(i) How many applicants described themselves as of 'Asian or Asian British' ethnicity?*
(ii) Of those applicants, how many:

- a. *passed the test on 10 March 2008, and*
 - b. *were selected for appointment?*
 6. (i) *How many applicants described themselves as of 'Black or Black British' ethnicity?*
 - (ii) *Of those applicants, how many:*
 - a. *passed the test on 10 March 2008, and*
 - b. *were selected for appointment?*
 7. (i) *How many applicants described themselves as of 'Chinese or Chinese British' ethnicity?*
 - (ii) *Of those applicants, how many:*
 - a. *passed the test on 10 March 2008, and*
 - b. *were selected for appointment?*
 8. (i) *How many applicants described themselves as of 'Any other background'?*
 - (ii) *Of those applicants, how many:*
 - a. *passed the test on 10 March 2008, and*
 - b. *were selected for appointment?*
 9. (i) *How many applicants described themselves as 'solicitors'?*
 - (ii) *Of those applicants, how many were selected for appointment?'*
6. On 11 February 2009 the public authority issued a response. It confirmed that it held the information requested. It said that it was applying section 22 to questions 1, 2, 3, 8 and 9 as it intended to publish the information on its website at a future date. It said it would publish the information on 20 February 2009, although it was to publish the global BME (Black, Minority, Ethnic) figures and not a specific ethnic breakdown. It said that it believed that the public interest favoured withholding the information in order to enable the established pre-approval procedures to operate. In relation to 4, 5, 6 and 7 it said that the very small numbers would enable individuals to be identified and therefore it was applying section 40(2) to this information alongside section 41(1). When applying section 41(1) it said that the information was sensitive personal data and to release it would be an actionable breach of confidence. It also said that it felt that the public interest favoured withholding the information in this instance.
7. On 15 February 2009 the complainant emailed the public authority and asked it to conduct an internal review.
8. On 27 May 2009 the public authority informed the complainant of the results of its internal review. It stated the principle concern in this case was that section 40(2) applied to the information. This was because the information consisted of very

small numbers that would lead to people being identified. It provided an explanation about how information about ethnicity is defined as sensitive personal data and that it felt that no schedule 3 conditions could be satisfied in this case. It referred to the Commissioner's guidance. It did not comment on its application of section 22(1) or section 41(1).

The Investigation

Scope of the case

9. On 19 March 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - He had at that stage received no response to his request for an internal review.
 - The public authority's arguments about section 22(1) were circular and erroneous.
10. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The complainant accepted that the information for parts 1, 2, 3, 8 and 9 was now published and that he had received this information.
11. On 17 August 2009 the complainant indicated that he understood that the scope of the Commissioner's case was the application of section 40(2) to parts 4, 5, 6 and 7 of the original request.
 4.
 - (i) *How many applicants described themselves as of 'mixed' ethnicity?*
 - (ii) *Of those applicants, how many:*
 - a. *passed the test on 10 March 2008, and*
 - b. *were selected for appointment?*
 5.
 - (i) *How many applicants described themselves as of 'Asian or Asian British' ethnicity?*
 - (ii) *Of those applicants, how many:*
 - c. *passed the test on 10 March 2008, and*
 - d. *were selected for appointment?*
 6.
 - (i) *How many applicants described themselves as of 'Black or Black British' ethnicity?*
 - (ii) *Of those applicants, how many:*

- e. *passed the test on 10 March 2008, and*
 - f. *were selected for appointment?*
 - 7. (i) *How many applicants described themselves as of 'Chinese or Chinese British' ethnicity?*
 - (ii) *Of those applicants, how many:*
 - g. *passed the test on 10 March 2008, and*
 - h. *were selected for appointment?'*

Chronology

- 12. On 26 June 2009 the public authority provided the Commissioner with a copy of the withheld information. It explained that it was relying on sections 22, 40 and 41.
- 13. On 28 July 2009 the Commissioner contacted the public authority on the telephone to make enquiries about the nature of the withheld information.
- 14. Later on the same day the Commissioner sent his opening letter to the complainant. He attempted to set a clear scope for his investigation. He explained that he will not consider information that has already been provided and ensured that the complainant had access to the information for 1, 2, 3, 8 and 9. He therefore proposed to set his scope as questions 4, 5, 6 and 7. He explained his remit and the way that section 40(2) operates and provided a preliminary view in this case.
- 15. On 5 August 2009 the complainant provided the Commissioner with a response to his letter by email. He explained at this stage that he did not believe that the information published was the information that he requested and therefore wanted the Commissioner to look at section 22(1). He also said that he did not believe that the information requested for questions 4, 5, 6 and 7 was personal data and asked the Commissioner to issue a Decision Notice.
- 16. Later on the same day the Commissioner replied to this response. He focussed on the information that had been provided and asked the complainant to inform him why he considered this information was different from what he requested in order to allow him to address the complainants concerns. The Commissioner said that he would move to draft a Decision Notice in respect of the section 40(2) issues. He also spoke to the complainant on the telephone on 17 August 2009 to address his concerns about section 22 directly.
- 17. On 17 August 2009 the complainant responded in writing and informed the Commissioner that he was now satisfied that the information provided for parts 1, 2, 3, 8 and 9 was the information he had requested for those parts. He informed the Commissioner that he still wanted a Decision Notice to be issued in respect to the outstanding questions 4, 5, 6 and 7; as he did not believe that the numbers constituted personal data.

Analysis

Exemption

18. The public authority has argued that disclosure of the numbers would involve disclosing sensitive personal data as the number of persons that constituted these minorities was so small that these individuals could be identified. It then stated that it believed that it would contravene one of the data protection principles of the Data Protection Act 1998 ("DPA"). As such it would be exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i). Section 40 is set out in full in a Legal Annex to this notice.
19. The complainant has argued that individuals cannot be identified from the requested information and that the numbers were not personal data.
20. The public authority's main arguments centred on the application of the first data protection principle. It believes that disclosure of the personal data in question would be unfair and would not satisfy one of the conditions for processing listed in Schedule 2 of DPA. It also said that the information was sensitive personal data and that it was unable to satisfy one of the conditions listed in Schedule 3 of DPA. These arguments are considered in more detail below.
21. In analysing the application of section 40(2), the Commissioner therefore considered a) whether the information in question was personal data and b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

Is the information personal data?

22. Personal data is defined in section 1 of the DPA as data
"which relate to a living individual who can be identified from those data or those and other information in the possession of or which is likely to come into the possession of the data controller and includes expressions of opinions about the individual and indications of the intentions of any other person in respect of that individual".
23. In this case whether the numbers in this context would be the personal data of any living individual was contentious and the arguments of each side were considered in detail by the Commissioner.
24. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "Determining what is personal data" which can be accessed at:
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf
25. From his guidance there are two questions that need to be answered in the affirmative when deciding whether the information if disclosed to the public would constitute the personal data of individuals:

- (i) *Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?*
- (ii) *Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?*

26. It is clear that statistical information relating to the ethnicity and success of applicants, if linked to identifiable individuals, is the personal data of those applicants. The question to be determined is whether a living individual can be identified from that data if the information is disclosed to the public.

27. The Commissioner considers that truly anonymised data is not personal data and thus there is no need to consider the application of the data protection principles. The Commissioner considers that even where the data controller holds the additional 'identifying' information, this does not prevent them from anonymising that information to the extent that it would be possible to identify any living individual from that information alone and thus that information would no longer be personal data. The test of whether information is truly anonymised is whether a member of the public could identify the individuals by cross-referencing the data with information or knowledge already available to the public. This approach is supported by paragraphs 24 and 25 of Lord Hope's judgement in the House of Lords' case of the Common Services Agency v Scottish Information Commissioner (2008) UKHL 47,

"..Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection."

28. The Commissioner does not consider the withheld information in this case to be truly anonymous. The reasons for this is that the breakdown asked for is of very small numbers and within the limited population of barristers and solicitors of more than 10 years experience there are only a small number of individuals of the ethnicities that have been asked about. Therefore revealing whether there were applications from these minority groups and in particular whether they are successful or not would be likely to reveal information that can be tied to a specific individual and would therefore constitute a release of personal data.

29. The Commissioner is also satisfied that the individuals are alive and the information is therefore about living individuals.

30. In the light of the above, the Commissioner is satisfied that the numbers which are contained within the withheld information constitute the personal data of these individuals they relate to. The Commissioner is also of the opinion that the information relates to those individuals' racial and ethnic origin and therefore that this information constitutes those individuals' sensitive personal data (as per section 2(a) of the Data Protection Act). The Commissioner then considered whether disclosure would contravene the first data protection principle.

Would disclosure contravene the first data protection principle?

31. The first data protection principle has two main components and, in cases involving sensitive personal data, there is an additional component. These are as follows:
- A requirement to process all personal data fairly and lawfully;
 - A requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
 - A requirement to satisfy at least one DPA Schedule 3 condition for processing sensitive personal data.
32. All three requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first principle.

Would disclosure be fair and lawful?

33. It is important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030)) confirmed that, “*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*” (paragraph 52): http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf.
34. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individuals’ reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - Whether such an expectation would be countered by any accompanying expectation that this sort of information would be available;
 - Whether information in the public domain reduces the expectation of privacy in this case;
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals and whether the individuals have refused to consent to disclosure; and
 - Legitimate interests of the public in knowing about the process that is in force; the necessity for the public to have confidence in the JAC

appointment process; and the legitimate interests of the public in identifying the severity and scope of problems, if they exist.

35. The public authority stated that it believed that the release of the withheld information would be unfair to the data subjects. It does not think that the data subjects would have had a reasonable expectation of the withheld information being released in this case. Instead there was an expectation of confidentiality and privacy especially given that the public authority had undertaken to keep this information confidential except for research and statistical purposes. The Commissioner, having looked at the nature of the information, is convinced that the reasonable expectations are a persuasive factor in indicating that the release of this information would be unfair.
36. The Commissioner's guidance on the application of section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

37. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act. The information requested in this case would however have been expected to be withheld as it connects intimately to those individuals' private lives.
38. The Commissioner has considered whether there would be an accompanying expectation that this sort of information would be made available. The Commissioner believes that there is a reasonable expectation that the information would be made available in a format where minority representation can be monitored in the format of BME category, but due to the small number of individuals involved, not a further breakdown of this group. This would show how effectively the diversity policy is operating yet mean that no individual applicant can be directly identified by virtue of his ethnicity.
39. The Commissioner has considered whether the information in the public domain would make the disclosure of these figures fairer. The Commissioner notes that the global BME figures have been made available. However the Commissioner does not believe that this enhances the fairness of disclosure in this case.
40. The Commissioner has considered in detail the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified damage or distress to the individuals involved. Having considered the nature of the information the Commissioner is satisfied that the release of it could potentially cause unnecessary and unjustified damage

or distress to the individuals in this case, in particular those who could be identified from the disclosure of the information and had not been appointed.

41. In finally considering the legitimate interests of the public, the Commissioner notes that the public authority has released information about the number of applicants of BME origin already and how they progressed through the process. The Commissioner appreciates that it is important that the public authority can be seen to be taking action when issues become apparent but does not see this factor as favouring further disclosure that would outweigh the individuals' reasonable expectations of privacy in this case.
42. In considering how the factors balance, the Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subjects. The central reason for this conclusion is that the legitimate expectations of the individual are that the information would not be provided and the overriding of these expectations cannot be justified in this case. As the release of the information would be unfair, the first data protection principle would be contravened and the information therefore engages the section 40(2) exemption.
43. Therefore, the Commissioner is not required to assess whether a Schedule 3 condition can be met, but he has elected to do so in this case, given that the information that has been requested is sensitive personal data.
44. He has examined the relevant conditions and notes that there are three possibilities. The first is condition 1, the second condition 2(1) and the third is condition 9.
45. The first condition requires explicit consent of the data subject. In this case there has been no such consent. Therefore this condition is not satisfied.
46. The second condition applies where the processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment. In this case the data controller is obliged to monitor their functions and policies for any adverse impact on race equality. The information already provided does show that the public authority is monitoring this issue. The Commissioner does not believe that the further disclosure is necessary in this case and therefore this condition is not satisfied.
47. The ninth condition applies where the processing:
 - (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
 - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
 - (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

48. In this case the Commissioner does not believe that the further processing is necessary for the purpose of identifying the existence or absence of equality of opportunity. Nor does he consider that were the information to be disclosed it would be disclosed in a way that provides appropriate safeguards for the rights and freedoms of the data subjects. He does not therefore believe that this condition is satisfied either.
49. Having therefore examined all the relevant conditions in Schedule 3 the Commissioner has not found one that can be satisfied. Therefore the exemption can be applied on this basis alone.
50. Given that the disclosure of the information would be unfair and would also fail to satisfy any Schedule 3 condition, there is no need for the Commissioner to consider whether the release would also be unlawful, or if the processing of the personal data would meet one of the conditions of Schedule 2 of the DPA.
51. The Commissioner therefore upholds the public authority's application of section 40(2) [by virtue of section 40(3)(a)(i)] in relation to parts 4, 5, 6 and 7 of the original request.
52. As the Commissioner has decided that section 40(2) was applied correctly in this instance, he does not need to go on to consider the application of section 41(1).

Procedural Requirements

Section 10(1)

53. Section 10(1) states:

'... 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.'

54. The information request in this case was made on 14 December 2008. The public authority failed to comply with section 1(1) until 11 February 2009. In failing to provide a response compliant with section 1(1) within 20 working days of receipt of the request, the public authority breached section 10(1).

Section 17(1)

55. In *Bowbrick v Information Commissioner* [EA/2005/2006] at paragraph 69, the Tribunal confirmed that failing to issue a refusal notice within twenty working days is a breach of section 17(1) of the Act. It stated in relation to the case it was looking at that:

"the Council failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of [the] request. It therefore failed to comply within its duty under s17(1) of FOIA within the time limit prescribed by that section."

56. 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.”*

57. In this case the public authority received the request on 14 December 2008 and failed to provide any response until the 11 February 2009. The time taken to issue a refusal notice exceeds the statutory deadline of twenty working days. The Commissioner therefore finds that, in exceeding this statutory time limit, the public authority breached section 17(1) of the Act.

The Decision

58. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The application of section 40(2) [by virtue of section 40(3)] to items 4, 5, 6 and 7 from the original request dated 14 December 2008.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 10(1) and section 17(1) in failing to provide its refusal notice within twenty working days of receiving the request for information.

Steps Required

59. The Commissioner requires no steps to be taken.

Other matters

60. Although this does not form part of this Decision Notice the Commissioner wishes to highlight the delays in providing an internal review. Part VI of the section 45

Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the public authority exceeded 20 working days and the case was not exceptionally complex. The Commissioner will monitor the situation and expects that future internal reviews are conducted within the timescales laid out in his guidance.

Right of Appeal

61. 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.
Website: 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 24th day of August 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

The Freedom of Information Act 2000

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

(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.

...

Section 10 - Time for compliance with request

(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid 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.

(3) 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 17(1) – 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.'

Section 40 – Personal information

- (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).
- (6) 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 [1998 c. 29.] Data Protection Act 1998 shall be disregarded.
- (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.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
 - (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);
- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means data which relate to a living individual who can be identified—
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a)

organisation, adaptation or alteration of the information or data,

(b)

retrieval, consultation or use of the information or data,

(c)

disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)

alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 - Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.