

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 25 March 2010**

**Public Authority:** Department for Employment and Learning  
**Address:** 39 – 49 Adelaide Street  
Belfast  
Northern Ireland  
BT1 8 FD

### Summary

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The complainant requested information relating to an investigation into an allegation of fraud at East Antrim Institute. The public authority disclosed some of the information requested but withheld other information citing sections 40 and 41 of the Act. As a result of the Commissioner's intervention some information was disclosed to the complainant. The remaining withheld information was exempted under section 40 and 41 of the Act.

The Commissioner finds that some of the information requested is the personal data of the complainant and as such is exempt by virtue of section 40(1) of the Act. The Commissioner considers that the public authority correctly applied section 40(2) of the Act to the remaining information it withheld in this case. However, the Commissioner recorded a number of procedural breaches in relation to the public authority's handling of the request.

### The Commissioner's Role

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

## Background

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2. The complainant in this case is a former employee of East Antrim Institute for Further and Higher Education (the Institute). Following a disciplinary hearing held in January 1999 and an appeal hearing held in June 1999 the complainant was summarily dismissed. The complainant took a claim for unfair dismissal to the Industrial Tribunal with the Institute eventually admitting liability.
3. In 2002, the complainant made a number of allegations of fraud against the Institute concerning preparation for an audit in 1997. As part of her complaint, the complainant had supplied a number of names to the Institute and suggested they be interviewed regarding her allegations. The Institute subsequently interviewed some of those persons named. The complainant's allegations were investigated by the Department for Employment and Learning (DEL) and the matter was referred to the Police Service of Northern Ireland. The police investigation failed to establish any case to answer. The allegations also featured in her Tribunal hearings.

## The Request

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4. On 18 October 2007, the complainant made a freedom of information request to DEL. The request was as follows:

"According to Ms McGinley, Permanent Secretary, DEL, in respect of allegations of fraud at the East Antrim Institute, the Department's actions included:

interviewing [the complainant] and four other personnel named by her.

I wish to know the following:

1. Who were the four other personnel named by [the complainant]?
2. When were they interviewed?
3. Where were they interviewed?
4. By whom were they interviewed?
5. What questions were put to them?
6. What answers did they give?
7. Was the information gleaned passed on to any other person/organisation? If so, to whom and when?

8. What steps, if any did the Department take to ascertain the accuracy of the information gleaned?

I also wish to have a copy of the two evidence packs which were compiled and referred to the fraud squad for assessment”.

5. On 12 November 2007, DEL wrote to the complainant to advise that it had completed its search for the information requested. DEL provided the complainant with information in relation to questions 2, 4, 7 and 8. However, DEL withheld information relating to questions 1, 3, 5 and 6 and information relating to the two evidence packs citing sections 40 and 41 of the Act.
6. On 19 November 2007, the complainant requested that DEL conduct an internal review of her information request. The complainant argued that DEL had misapplied exemptions 40 and 41 of the Act, and that much of the information was in any case already in the public domain.
7. On 2 January 2008, DEL advised the complainant it had carried out a formal internal review of its decision. DEL was satisfied that the information it held in relation to questions 1, 3, 5 and 6 of the complainant’s original request would identify the individuals concerned. DEL was of the view that these individuals would have no expectation that this information would be released, therefore disclosure would be unfair. On this basis DEL upheld its decision that this information was exempt by virtue of section 40(2) of the Act. The review allowed the release of the two evidence packs, with some information redacted under sections 40(2) and 41 of the Act. These packs had previously been withheld in their entirety under section 41 of the Act.

## **The Investigation**

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### **Scope of the case**

8. On 11 January 2008, the complainant wrote to the Commissioner to complain about DEL’s response to her information request. The complainant explained her request advising the Commissioner that she was seeking access to the transcripts of interviews conducted in relation to her allegations of fraud, in effect the information contained in questions 1, 3, 5 and 6 of her request. The complainant maintained to the Commissioner that the subject matter of these interviews would have related to individuals’ official duties, and that the interview transcripts ought to be released.

9. Following internal review and during the course of the Commissioner's investigation, DEL had released some of the information it had previously withheld. Therefore the Commissioner's investigation in this case focused on DEL's decision to withhold the interview transcripts as clarified by the complainant.

## **Chronology**

10. On 9 September 2008, the Commissioner wrote to DEL outlining the nature of the complaint. The Commissioner asked DEL a number of detailed questions in relation to its handling of the information request and requested a copy of the withheld information.
11. On 18 September 2008, the Commissioner met with DEL. During the meeting DEL advised that it did not in fact hold the information at question 3 of the complainant's request, namely where the interviews took place. DEL also advised that it did not hold information in relation to question 5 of the request, namely what questions were put to the witnesses. Following the Commissioner's intervention, on 18 September 2008, DEL wrote to the complainant to advise of this.
12. At this stage the Commissioner engaged with the complainant in an attempt to informally resolve the matter. However, the complainant did not wish to pursue this option and requested that the Commissioner proceed to a formal decision in the case. The complainant indicated that much of the information requested was already in the public domain. The complainant explained that the substance of her allegations of fraud, and the names of the individuals involved, featured prominently in the hearing of her Industrial Tribunal case and that this "ought to reduce the perceived sensitivity of the content of the interviews". The complainant was not suggesting that the content of the interviews themselves were in the public domain and confirmed that she had not obtained any information about the interviews from any other source.
13. On 18 February 2009, the Commissioner asked DEL to provide further explanation of its reasoning behind its reliance on the section 40(2) exemption. The Commissioner also referred to DEL's letter dated 18 September 2008 in respect of the information not held and asked DEL to provide more evidence to this effect.
14. On 6 March 2009, DEL wrote to the Commissioner providing additional information on its reliance on section 40(2) of the Act and the steps it had taken to establish what information was held. This exercise established that certain information was held relating to where one of the interviews took place. It also established that questions were not put to three of the interviewees, they were asked to simply share any

information that could assist with the investigation. DEL agreed to release this information to the complainant. DEL also advised the Commissioner that the fourth interviewee had been asked to comment on two specific areas of the investigation. DEL was of the view that if these questions were released it would identify the interviewee and therefore section 40(2) also applied to the information in respect of this individual.

15. On the 8 May 2009, the Commissioner wrote to the complainant to update her on the progress of the investigation and in a final attempt to informally resolve the matter.
16. On the 24 May 2009, the complainant replied to the Commissioner and put forward a number of points highlighting why information should be disclosed and requesting a Decision Notice be issued in respect of this request.
17. On 4 August 2009 the Commissioner emailed DEL with some additional enquiries in relation to its view on the impact of the complainant's industrial tribunal hearings and the interviewees' expectations of confidentiality. DEL replied to the Commissioner on 28 August 2009.

### **Findings of fact**

18. Allegations of fraud at East Antrim Institute were raised in the complainant's Industrial Tribunal case.
19. Case file records of Industrial Tribunals and Fair Employment Tribunals are Court Records held by the Office of Industrial Tribunals and Fair Employment Tribunals (OITFET). OITFET is responsible for the administration and organisation of the tribunals. The staff are provided by the Department for Employment and Learning (DEL) and the team is led by the Secretary of the Tribunals.

### **Analysis**

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#### **Substantive Procedural Matters**

20. The text of all the statutory provisions referred to in this section can be found in the Legal Annex at the end of this Notice.

## Exemptions

### Section 40: personal data

21. Section 40(1) provides an exemption for information that constitutes the personal data of the applicant, as defined in section 1 of the Data Protection Act 1998 (the DPA). Section 1 of the DPA defines personal data as:

“...data which relate to a living individual who can be identified:

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

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

22. Section 40(2) provides an exemption for information which is the personal data of any individual other than the applicant, where disclosure would contravene any of the data protection principles as set out in schedule 1 to the DPA.

### Section 40(1)

23. It does not appear to the Commissioner that DEL considered whether any of the withheld information related to the applicant. However, having viewed the withheld information in this case the Commissioner considers that several paragraphs of information are the personal data of the complainant. This information comprises third party comments and opinion and is contained in three of the four withheld transcripts of interviews obtained from staff as part of DEL’s investigation. This information relates to the individuals who were interviewed, but it also relates to the complainant in this case. Therefore under section 1 of the DPA it is also personal data relating to the complainant.
24. Information which is personal data relating to the applicant is exempt under section 40(1) of the Act because the DPA provides an alternative route of access. Section 40(1) provides an absolute exemption, therefore there is no requirement to conduct a public interest test.
25. The Commissioner recognises however that the complainant may have access rights to this information under section 7 of the Data Protection Act 1998 (the ‘DPA’). This is referred to as the right of subject access. However, in this case, the Commissioner does not believe that it is

likely that DEL could disclose the information in question without breaching section 7(4) of the DPA.

## Section 40(2)

26. DEL has withheld information relating to questions 1, 5 and 6. This comprises the names of those interviewed, the questions put to the interviewees and the information they provided to the investigators in relation to the allegations of fraud. DEL considered that this information constituted personal data relating to the individuals concerned, and advised the Commissioner that those individuals made it clear that they did not wish their identity to be disclosed.
27. The Commissioner is of the view that that the individuals would be identifiable from this information and therefore he is satisfied that it is the personal data of those third parties. Such information is exempt if either of the conditions set out in section 40(3) or 40(4) are met. The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the data protection principles.
28. DEL argued that disclosure of the information provided by the four interviewees would be unfair, and would thus breach the first data protection principle which states:

“Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –

  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.
29. The Commissioner’s guidance on section 40 notes that the concept of fairness is not easy to define. However the guidance suggests the sort of issues which should be considered when establishing whether it would be unfair to pass on information without the consent of the data subject would include:
  - Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
  - Would the third party expect that his or her information might be disclosed to others?
  - Has the person been led to believe that his or her information would be kept secret?

## Expectations of the interviewees

30. DEL has explained that the information was obtained on a confidential basis as part of an investigation into an allegation of fraud at the Institute. DEL has asserted that those interviewed provided the relevant information to the investigators in the expectation that it was for the sole purpose of investigating allegations of fraud and with an explicit assurance that any information provided would be treated confidentially. The Commissioner has seen evidence that individuals were in fact given this assurance by the investigators.
31. However, the complainant argued that the information requested related to public employees who were interviewed about matters relating to their official duties. The complainant referred to the Commissioner's Awareness Guidance 1 on Personal Data which compared information relating to the private or public lives of an individual and stated that information relating to private lives was likely to deserve protection whereas information about someone acting in an official capacity should normally be provided on request unless there is some risk to the individual concerned.
32. The complainant also referred to the Commissioner's Decision Notice FS50065043 dated 31 May 2006 which related to a report into the handling of a grievance matter. In that case the Commissioner was of the view that those individuals named in the report were named purely in respect of their official positions and that the principal function of section 40 was to protect personal data relating to private lives rather than public ones.
33. The Commissioner considers that in this case the information contained within the interview transcripts clearly relates to staff members' personal views and opinions on allegations of fraud against Institute staff rather than information that directly concerns their roles and decision making processes. Whilst some of the staff may expect their role would be subject to public scrutiny, the Commissioner is of the view that the withheld information in this case would not assist the public in such scrutiny, but would be contrary to the expectations of the individuals concerned. Further, given the nature of the information, the Commissioner believes that its release into the wider public domain would be likely to cause considerable distress to all concerned.
34. On the basis of the above the Commissioner accepts that it would be reasonable to assume that those involved would have had an expectation that their information was provided in confidence and would not be disclosed to a wider audience, other than as part of the fraud investigation. Therefore the Commissioner has also considered

the negative impact the release of witness interview transcripts would have on future internal investigations. The Commissioner accepts that disclosure of the withheld information into the public domain would have the effect of seriously undermining confidence for staff involved in future DEL investigations.

### **Information in the public domain**

35. The Commissioner has also considered the impact of the complainant's Industrial Tribunal hearings on the expectation of confidentiality in relation to the interview transcripts. The complainant was of the view that much of the withheld information was already in the public domain. The complainant advised the Commissioner that the substance of her fraud allegations and the names of those involved featured prominently in the Industrial Tribunal hearing (see paragraph 19 above) and that she believed this ought to reduce the perceived sensitivity of the content of the interviews. The complainant stated that she was not suggesting that the content of the interviews themselves was in the public domain and the complainant confirmed that she had not obtained any information about the interviews from any other source.
36. The Commissioner notes that Industrial Tribunal decisions are available from the OITFET website and through a public register of decisions; therefore Tribunal decisions are in the public domain. It is DEL's view however that the confidentiality of the interview transcripts has not diminished due in any part to the Industrial Tribunal proceedings.
37. The Commissioner considers that an important distinction should be made between information disclosed in a public judgment or decision, and the investigatory information which has not previously been made public. Just as witness evidence given in open court may be in the public domain, the information initially provided by these witnesses when they are interviewed is not. In this case the information obtained by DEL was forwarded to the Police Service of Northern Ireland (PSNI) who having conducted their own investigation concluded there was "insufficient evidence to found a successful prosecution, or even warrant a criminal investigation<sup>1</sup>". The matter was subsequently introduced into the complainant's Industrial Tribunal proceedings. It should be noted that the Industrial Tribunal made it clear it did not regard the complainant's unfair dismissal remedies hearing as the appropriate vehicle to review or second-guess the findings of the departmental and police investigations into the allegations of fraud.
38. In light of the above, the Commissioner does not consider that the publication of the Industrial Tribunal decision means that the

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<sup>1</sup>The Industrial Tribunals - Decision on Review 03750/99UD; 03751/99BC (Para. 5.21)

information contained within the interview notes is necessarily in the public domain. The Commissioner is of the view that the publication of the Industrial Tribunal decision has no bearing on whether witness interview notes, obtained in confidence, should be disclosed into the public domain.

39. Having considered the information involved and the purposes for which it was generated, the Commissioner has concluded that DEL has applied the Act appropriately in withholding the information under section 40. He has concluded that it would be unfair and therefore a breach of the first Data Protection Principle to disclose it. Accordingly he has decided that the information is exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i).
40. As the Commissioner has determined that disclosure of the information would be unfair he has not considered whether any other data protection principles would be breached if the information was disclosed. The fact that the first data protection principle would be breached is itself sufficient for the Commissioner to conclude that the information should be withheld.

### **Other exemptions claimed**

41. Although DEL applied more than one exemption to the requested information as the Commissioner has found that the section 40 exemption has been correctly applied he has not considered the application of section 41 of the Act.

### **Procedural requirements**

#### **Section 1(1)(a): information not held and section 10(1): time for compliance**

42. Section 1 of the FOIA provides:

“(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 the information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

43. Section 10(1) of the FOIA provides:

"...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."

44. It is the Commissioner's view that information must be provided to the applicant in such a way that they can determine whether the public authority's response is satisfactory and that they can identify which information corresponds to which element of the request (where relevant). Public authorities must address individual elements of requests if they do not hold information in respect of those elements, in order to make clear to the applicant what information they do and do not hold.
45. In this case the complainant submitted her request on 18 October 2007 and DEL responded on 12 November 2007. The response, whilst within the statutory time limit for compliance, failed to specifically confirm which parts of the requested information were in fact held. During the course of the Commissioner's investigation it transpired that certain information relating to questions put to the interviewees was not held. Therefore the Commissioner finds DEL breached section 1(1)(a) and 10(1) of the Act in not making this clear to the complainant within the statutory time for compliance.
46. Furthermore, it is the Commissioner's view that DEL breached section 1(1)(b) and 10(1) of the Act by failing to provide information that was held (the evidence packs) to the complainant within the statutory time for compliance.

### **Section 17: refusal notice**

47. The public authority's internal review letter of the 2 January 2008 went on to state that disclosure of the witness statements would constitute an actionable breach of confidence but did not specify the exemption in question as required under section 17(1)(b) of the Act. The Commissioner finds that DEL breached section 17(1)(b) of the Act.

### **The Decision**

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48. Notwithstanding the above, 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 public authority correctly withheld some information under section 40(2) of the Act.

49. 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 failed to identify the personal data relating to the complainant, which is exempt under section 40(1) and the request for access to which should have been treated as a Subject Access Request under the DPA.
- The public authority breached sections 1(1)(a) and 10(1) by failing to specifically confirm or deny which of the information requested was held within 20 working days.
- The public authority breached sections 1(1)(b) and 10(1) by failing to provide the 'evidence packs' to the complainant within 20 working days.
- The public authority breached section 17(1)(b) as it did not provide an adequate explanation of its application of the section 41 exemption in its internal review letter dated 2 January 2008 as required under the Act.

### **Steps Required**

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50. The Commissioner requires no steps to be taken.

## Right of Appeal

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51. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
Leicester  
LE1 8DJ

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 25<sup>th</sup> day of March 2010**

**Signed .....**

**David Smith  
Deputy Commissioner and Director of Data Protection**

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

## Legal Annex

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### **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.

### 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.

### **Section 17 - Refusal of request**

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

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

### **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).

## **Section 1 (1) of the Data Protection Act 1998**

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”

## **Section 7 - Right of access to personal data**

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and  
(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received—

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

(3) A data controller is not obliged to comply with a request under this section unless he is supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request and to locate the information which that person seeks.

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

- (a) any duty of confidentiality owed to the other individual,
- (b) any steps taken by the data controller with a view to seeking the consent of the other individual,
- (c) whether the other individual is capable of giving consent, and
- (d) any express refusal of consent by the other individual.

(7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

(10) In this section—

“prescribed” means prescribed by the Secretary of State by regulations;

“the prescribed maximum” means such amount as may be prescribed;

“the prescribed period” means forty days or such other period as may be prescribed;

“the relevant day”, in relation to a request under this section, means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in subsection (3).

(11) Different amounts or periods may be prescribed under this section in relation to different cases.