

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 June 2010

Public Authority: London Borough of Waltham Forest
Address: Town Hall
Forest Road
London E17 4JF

Summary

The complainant requested a copy of the council's anti-fraud team's report concerning the payment of £240,000 to a private contractor employed to run the authority's education service. The council refused disclosure of the report under s22, s31(1)(g), s40(2) and s43(2) of the Act. The Commissioner decided that the exemptions at s22 and s31(1)(g) were not engaged. He also used his discretion not to consider the exemption at s43(2) as the council failed to rely upon it until during the course of his investigation. The Commissioner found the exemption at s40(2) to be engaged and identified items of personal data that required redaction prior to disclosure of the report. The Commissioner found that the council failed to comply with s10(1), s17(1), s17(1)(b) and s(17)1)(c) of the Act.

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. An external contractor, EduAction Ltd, was employed by the council to run its educational service. From 2004 to 2006 the company was paid £240,000 from the Neighbourhood Renewal Fund (later the Better

Neighbourhood Initiative) in order to reduce exclusions from schools in targeted areas of the borough. In September 2006 whistleblowers informed the council that the company had not used the money for its intended purpose. The council's audit and anti-fraud team investigated the alleged irregularities and reported its findings in July 2007.

The Request

3. On 22 April 2008 the complainant requested the following information from the council:

"...a copy of the London Borough of Waltham Forest's internal Audit and Anti-Fraud Team's report".

4. In a refusal notice of 22 May 2008 the council informed the complainant that the report was exempt from disclosure via section 22 of the Act (information intended for future publication) and by virtue of sections 30(1)(a) and (b), 30(2)(a)(i) and 30(2)(b)(iv) (investigations and proceedings conducted by public authorities).
5. The council advised the complainant that it intended to publish the 2007 report subject to any data protection issues. However, it maintained that it was unreasonable to disclose the information at this stage as there were matters still to be resolved concerning EduAction's response to the report's findings.
6. The complainant appealed on 29 May 2008 and on 1 July 2008 the council's internal review upheld its decision to withhold the report under sections 22 and 30 of the Act. The council also stated that the exemptions at section 31(1)(b) and 31(1)(h) (law enforcement) were engaged in respect of parts of the report with the relevant purposes specified to be those at sections 31(2)(a) and 31(2)(b).

The Investigation

Scope and chronology

7. The complainant wrote to the Commissioner on 1 August 2008 to complain about the way his request for information had been handled by the council. He was concerned that the report had been completed and a summary of its findings passed to EduAction in May 2007 with the request that it respond to a number of outstanding questions. He has ascertained that the council made the decision not to place the

- report into the public domain until EduAction's managers had responded to these questions but as yet the report had still not been released. The complainant had explained to the council that it had no obligation to consult with EduAction employees when deciding whether the report should be disclosed. The complainant highlighted that EduAction had already had almost a year to respond to the council's questions and that this was far too long a period of time.
8. On 21 September 2009 the Commissioner asked the council to provide him with a copy of the information in order to ascertain whether it had been withheld appropriately.
 9. The council provided the Commissioner with a copy of the 2007 report. On reading the report the Commissioner is satisfied that it represents the concluded view of the anti-fraud team's investigation at that time. Whilst the report's front page states "draft status" this is because the management recipient of the report is required to sign it off as per normal practice.
 10. The council informed the Commissioner that further reports were drawn up in July 2008 and May 2009. This was largely at the behest of complaints from EduAction and because other whistleblowers had come forward with additional allegations. EduAction's complaints related to the council's processing of the report and whether the company had been afforded sufficient opportunity to respond to its findings. However, the purpose of this decision notice is to consider the complainant's request for the 2007 report. It does not extend to consideration of any subsequent reports.
 11. The council informed the Commissioner on 6 October 2009 that as far as allegations against EduAction's employees were concerned the company considered that the report should be exempt from disclosure. Although the company had not cited a specific exemption under the Act, the council understood the company's position to be that commercial interests applied. The company later confirmed its position to the Commissioner. The council subsequently submitted that information in the report relating to the allegations and findings against EduAction employees was exempt from disclosure under s43(2) of the Act. The council also cited s40(2) in order to withhold personal data within the report.
 12. The council informed the Commissioner that issues concerning allegations against EduAction employees had been referred to the police in July 2008. On 19 May 2009 it was decided by the Crown Prosecution Service that there was insufficient evidence to prosecute.

13. As the council had not referred in its submission to the Commissioner to its earlier application of s30 and s31 to withhold the report, he queried whether the authority remained reliant on those exemptions. The Commissioner advised the council that where s30 might apply it was not permissible to make use of s31.
14. The council subsequently clarified its position. It confirmed its consideration that information relating to allegations and findings against EduAction was exempt from disclosure via s43(2) of the Act and it submitted that otherwise it was exempt by virtue of s31(1)(g) together with the purposes at s31(2)(a) and/or (b). The council no longer relied on the exemption at s30 in order to withhold the information.

Analysis

Exemptions

Section 31

15. The council relied on s31(1)(g) of the Act in order to withhold the 2007 report. This provides that information is exempt if its disclosure would or would be likely to prejudice the exercise of the council's functions for specified purposes. The council specified the purpose at s31(2)(a), that of ascertaining whether any person has failed to comply with the law and / or the purpose at s31(2) (b), that of ascertaining whether any person is responsible for improper conduct.
16. The council argued that the withheld information related to an investigation which the council had conducted in exercise of its statutory functions and in particular its statutory audit function. It maintained that the investigation was conducted for the purposes of ascertaining whether EduAction and council officers had failed to comply with the law including possible fraudulent action or were responsible for improper conduct.
17. The Commissioner queried the appropriateness of the council's application of s31(1)(g). This was on the basis that generally the Commissioner considers that in order for a public authority to assert that it had particular *functions* it would need to have responsibilities vested in it by statute. Section 31(1)(g) requires that any such functions must be for the purposes specified in section 31(2). In the Commissioner's view, bodies with functions to ascertain compliance with the law or to monitor improper conduct are generally considered to be law enforcement or regulatory bodies.

18. The Commissioner therefore asked the council to explain why it considered that it was carrying out a relevant function when investigating the alleged irregularities. In his view most organisations would investigate matters if they believed they had been defrauded in order to see whether money could be recovered, however, they would not be doing this as a function but because it was in their interests to do so.
19. The council explained that the investigation was a necessary part of its duties to manage and protect public funds and that therefore it fell within the audit powers provided by s151 of the Local Government Act 1972 (LGA) which states that, *"...every local authority shall make arrangements for the proper administration of their financial affairs and shall secure that one of their officers has responsibility for the administration of those affairs."*
20. The council also quoted s111 of the LGA which states that, *"...a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate or is conducive or incidental to the discharge of any of their functions."*
21. The authority added that systems of internal control were required by the Accounts and Audit Regulations 2003 (as amended). Regulation 4 necessitates responsibility, *"for ensuring that the financial management of the body is adequate and effective and that the body has a sound system of internal control which facilitates the effective exercise of that body's functions and which includes arrangements for the management of risk."*
22. The Commissioner accepts that the council has functions under sections 111 and 151 of the LGA. In reaching this conclusion he notes the findings of the House of Lords in the case of *Hazell v LB of Hammersmith and Fulham [1992] 2. A.C.1*. In that judgment Lord Templeman stated that he *"agreed with the Court of Appeal [1990] 2 Q.B. 697, 785C that in section 111 the word "functions" embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions. Accordingly a local authority can do anything which is calculated to facilitate or is conducive or incidental to the local authority's function of borrowing"*.
23. However having examined the three pieces of legislation detailed by the council, the Commissioner has concluded that none confer upon the authority a function to ascertain whether a third party has failed to comply with the law or is responsible for improper conduct. In his view

all organisations would investigate matters if they believed they had been defrauded in order to ascertain whether money could be recovered, however, they would not be doing this in connection with a function relevant for the purposes of section 31(1)(g) but would be doing so because it was in their interests. Whilst the council conducted an internal investigation and formed the view that a fraud had been committed it then relayed its suspicions to the police and it was the function of the police to ascertain whether someone had failed to comply with the law.

24. In light of the above, the Commissioner has concluded that the exemption at s31(1)(g) for the purpose at s31(2)(b) is not engaged. He has therefore not proceeded to consider the public interest test in respect of the exemption.

Section 43

25. The council relied on s43(2) in order to withhold the report. When it originally withheld the report, the council did not consider its findings to be commercially sensitive. Nor did the council consider that any part of the report was commercially sensitive when it came to review the matter. It was only during the Commissioner's investigation that the council submitted that parts of the report should be withheld on grounds that disclosure of its findings against EduAction employees might prejudice the company's commercial interests.
26. From the council's correspondence with the Commissioner, he ascertained that the argument for withholding the report on grounds that its disclosure could cause commercial prejudice to EduAction had originated from the company itself. Then on 19 March 2010 the Commissioner received representations from the company itself that it considered the exemption at s43 applied. In its letter to the Commissioner, the company outlined its concerns relating to the council's processing of the report, the council's administration of the contract and whether the company had been afforded sufficient opportunity to respond to the report's findings. However, the company did not explain (anymore than the council had) how or to what extent disclosure might be commercially detrimental to its interests.
27. The Commissioner is not obliged to consider exemptions which have been raised before him for the first time. The Tribunal in the case of *Department for Business, Enterprise and Regulatory Reform v ICO and Friends of the Earth (EA/2007/0072)* concluded that he may exercise his discretion to do so. In this instance the Commissioner has decided not to consider the council's late application of the s43 exemption. In reaching this decision he has taken into account the fact that the request was submitted well after the initial implementation of the Act

and when public authorities had considerable experience of dealing with requests. He has noted that the council provided no arguments as to why the Commissioner should exercise his discretion and consider its late reliance upon s43. The council submitted on 6 October 2009 that in view of the serious nature of the council's findings against EduAction there was a risk that disclosure could prejudice the company's commercial interests. The council did not explain how or to what extent disclosure might be detrimental to the company's interests. Therefore s43 has not been considered further in this decision notice as has not received sufficient justification for considering the late claiming of the exemption.

Section 22

28. The council relied on s22 of the Act in order to withhold the information. In its refusal notice of 22 May 2008 the authority informed the complainant of its commitment to publish the report subject to data protection issues and subject to it not prejudicing the council's ability to take action in respect of its findings.
29. On 28 May 2008 the complainant reminded the council that it was approaching a year since the anti fraud report had been completed and that no relevant action appeared to have been taken.
30. The Commissioner considers that for the exemption at s22 to be engaged the public authority's intention to publish must already exist at the time the request was received. In respect of whether or not the intention existed, it is relevant to note that two months earlier the complainant had requested other documentation relating to the 2007 report. In reply the council had explained that EduAction had decided to commission its own investigation of the matter but the company had then chosen not to fully disclose its findings. The council had queried this with EduAction and was awaiting the company's response. Consequently, the council's position was that release of the 2007 report rested on the conclusion of these queries. The council referred to this correspondence with the complainant as being indicative of its intention to disclose the report.
31. In the Commissioner's view, this correspondence with the complainant does not constitute substantive evidence that there was a settled intention to publish the report before the request was received. There is a distinction between providing an applicant with information in response to a request once the public authority might perceive the information to be no longer sensitive and a council's settled decision to proactively disseminate or publish that information. The council's delay in disclosure was entirely related to its perceived sensitivities of the report rather than to any planned programme for publication. The

Commissioner is not persuaded, in view of this, that the council in fact had a clear intention to publish any or all of the report at the time the information was requested.

32. The Commissioner has concluded that as there was not a clear intention to publish the report at the time of the request the exemption at s22 of the Act is not engaged. Therefore he has not proceeded to consider the public interest test in respect of the exemption.

Section 40

33. The council submitted that personal data in the report relating to EduAction employees, council officers and peripheral individuals is exempt from disclosure via s40(2) of the Act.
34. For the exemption at s40(2) to apply the requested information must fall within the definition of personal data. Personal data is defined in s1 of the Data Protection Act 1998 (DPA) as data which relates to a living individual who can be identified:
- from that data or
 - from that data and other information which is in the possession of or is likely to come into the possession of the data controller or any other person in respect of the individual. It includes any expression of opinion about the individual and any indication of intentions of the data controller or any other person in respect of the individual.
35. Having reviewed the information the Commissioner is satisfied that the personal information referred to in paragraph 32 of this notice falls within the description of personal data as defined in s1 of the DPA.
36. He also considers that as some of this information is related to allegations of fraud it falls within the category of sensitive personal data as set out in s2(g) of the DPA.
37. The Commissioner has considered whether disclosure of the names of all peripheral individuals within the report, the names of EduAction employees, council officers, job titles and other information (e.g. very specific allegations) from which individuals can be identified would be in breach of the first data protection principle. The first data protection principle states that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in schedule 2 is met. In the case of sensitive personal data one of the conditions in schedule 3 must also be met.

38. Release of information under the Act has to be considered as a disclosure to the wider world and not to the requestor alone. The Commissioner believes that in this instance disclosure of most of the information would be unfair as the individuals concerned have not given their consent to disclosure and they did not have a reasonable expectation that this personal information would be released into the public domain.
39. However, this does not mean that if public authorities create a policy to say that no or only limited information will be disclosed, that this is determinative. The reasonableness of that expectation should be analysed so that even if a data subject accepts the public authority's assurance, the Commissioner will consider whether the reasonable person would have such an expectation bearing in mind all other circumstances of the case. The Commissioner will consider whether the data subject's expectation is objectively reasonable. Although the information relates to a public role and some senior positions, the Commissioner finds that it was objectively reasonable for the individuals to expect that their relationship with allegations of this nature would not be disclosed. The Commissioner also finds that disclosing personal data about individuals' involvement with the investigation would be likely to cause them significant distress.
40. As indicated in paragraph 35 of this notice some of the information falls under s2g of the DPA as it relates to the alleged commission of an offence. As such, by its very nature, this is deemed to be information that individuals regard as the most private information about themselves. The Commissioner notes that disclosure of this type of information is likely to have a very strong detrimental or distressing effect on the individuals concerned.
41. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the certain personal data if it can be argued that there is a more compelling public interest in disclosure. Whilst the Commissioner notes the strong legitimate public interest in this case he believes it would not fair or proportionate to override the interests of the data subject when the public interest can be met by disclosing a redacted report. The Commissioner therefore considers that it would be unfair to disclose the some of the personal data and all of the sensitive personal data. Disclosure of some the personal data would breach the first data protection principle.
42. The Commissioner considers that names and job titles of some staff mentioned in the report can be disclosed and disclosure of this information would be fair. He considers that there would be different expectation from senior staff responsible for producing the report or

responsible for actions and recommendations. There is a significant public interest in providing information to the public showing which senior staff took responsibility for the investigation and its outcomes. The Commissioner also considers that schedule 2 paragraph 6 of the DPA would be met. Disclosure would be necessary to meet the legitimate public interest in disclosure, and would be proportionate to the limited prejudice to the rights and freedom of the data subjects.

43. The Commissioner therefore considers some items of personal information to be exempt from disclosure under s40(2) of the Act. The information that can be redacted is set out in a marked up copy of the report that will be sent to the council.

Procedural Breaches

44. The council sought to rely upon exemptions it had not cited to the complainant. The authority failed to state in its refusal notice that the exemptions at s31(1)(g) and s43(2) of the Act were applicable to the requested information. It also did not explain to the applicant why the exemptions applied. In failing to do so the council breached s17(1)(b) and (c) of the Act.
45. The council failed to disclose the information within 20 working days. In failing to do so the council breached s10(1) of the Act.
46. The council's refusal notice failed to specify the exemption at s40 (2) upon which it relied to withhold some of the information. In failing to do so the council breached s17(1)(b) of the Act.
47. The council failed to cite s31(1)(g), s40(2) and s43(2) within 20 working days of receiving the request. By failing to do so the council breached s17(1) of the Act.

The Decision

48. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it failed to comply with its obligations under section 1(1)(b).
49. The council incorrectly applied the exemptions at s22 and s31(g) in order to withhold the information. The Commissioner did not consider the council's application of s43 made during his investigation. However, the council correctly applied the exemption at s40(2) to some of the personal data contained within the information.

50. The Commissioner found the council to have breached s10(1), s17(1), s17(1)(b) and s17(1)(c) of the Act.

Steps Required

51. The Commissioner requires that the council shall within 35 calendar days of the date of this decision notice disclose the information requested by the complainant after redacting the personal data from the report, as indicated in a marked up version of the report the Commissioner will provide to the public authority with this notice.

Failure to comply

52. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

53. 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.

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 sent.

Dated the 30th day of June 2010

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex

Freedom of Information Act

Section 1 states that:

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

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

(3) Where a public authority—

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

(b) has informed the applicant of that requirement,

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

(4) The information—

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

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

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

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

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

Section 10 states that:

(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.

(4) 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.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Section 17 states that:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is

exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

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

(2) Where—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Section 22 states that:

(1) Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

Section 30 states that:

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
- (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny 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) or (2).

(4) In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.

(5) In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,

- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(6) In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence.

Section 31 states that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out

of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

Section 40 states that:

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

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

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

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

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

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

(5) The duty to confirm or deny—

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

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

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject’s right to be informed whether personal data being processed).

(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

Section 1 states that:

“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, or
- (d)
does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“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 states that:

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.