

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 21 December 2010**

**Public Authority:** Birmingham City Council  
**Address:** The Council House  
Birmingham  
B1 1BB

### Summary

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The complainant made a number of requests for information to the public authority and referred the following three to the Commissioner:

- (1) A report concerning the recruitment process relating to a named individual;
- (2) Any recorded information in respect to the searches with the Insolvency Service concerning a specified allegation about the named individual; and
- (3) The named individual's Curriculum Vitae.

It provided a redacted version of the information it held for (1) but applied sections 40(2) and 42(1) to the remainder. It explained in its internal review that the information, if held, should be disclosed for (2), but later explained it held no relevant recorded information for (2). The public authority withheld the information it held for (3), applying section 40(2).

The Commissioner has found that for (1) he supports the application of sections 21(1), 40(2) and 42(1) to some parts of the withheld information. For (2), he considers on balance of probabilities that the public authority did not hold any relevant recorded information at the date of the request, and for (3), that the public authority applied section 40(2) correctly. He also found a number of procedural breaches. He orders that the information which was incorrectly withheld be disclosed in 35 calendar days.

### 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. A complaint was made about how a specified individual was appointed. The issue was investigated and resulted in the report which forms part of this request. There is a connection between the organisation that this report concerns and the public authority. The organisation was created in a joint venture, one of the parties being the public authority. It is managed by a company independently of the public authority that has no role in its day to day business. The organisation's Cabinet is comprised of representatives from the parties who created it and the public authority's role is solely to appoint its representatives to that Cabinet. It follows that the employees of the organisation are not public servants, although the organisation is partially funded by public funds.
3. The complainant is concerned about the underlying issue and wants to view the relevant information to understand the integrity of the report and what was done by the public authority to address his concerns.
4. The Commissioner cannot provide too much detail about the specific allegations that have been made, as to do so would be unfair to the individual concerned. He has however carefully considered the public authority's arguments about why it has withheld information in this case.

## The Request

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### *Request one*

5. On 1 July 2009 the public authority explained that it had considered the complainant's allegations and referred them appropriately. As a result an investigation was undertaken and a report produced which led to it not questioning further the appointment of [individual redacted].
6. On 2 July 2009 the complainant requested a number of items including:

*'a copy of the report that [was] mentioned in your email'*

7. On 28 July 2009, 14 August 2009 and 11 September 2009 the public authority acknowledged the request and explained that it would require more time to consider the public interest test.
8. On 18 September 2009 the public authority responded. It provided a redacted version of the report and but withheld the remainder because it believed it was exempt, but provided no other detail. On the same day, the complainant explained that he wanted the whole report.
9. On 24 September 2009 the public authority explained why information had been redacted. It relied on two exemptions:
  1. Section 40(2): it explained that this exemption allowed it to withhold information where it concerns identifiable individuals and would breach the Data Protection Act ("DPA"). It incorrectly stated that the exemption was qualified, however it did state correctly that the main consideration was whether it would be fair in all the circumstances to identify an individual and whether disclosure would cause unwarranted damage or distress to them. It explained that this includes that person's safety and detriment to their career, but not embarrassment or legitimate criticism. It explained that no consent had been given in this case and had come to the conclusion that reproducing the unsubstantiated allegations would have an impact on that individual's private life. It also explained that there was in its view no legitimate public interest in the withheld information and that no Schedule 2 condition of the DPA could be satisfied to justify disclosure.
  2. Section 42(1): the public authority explained that this exemption applied to legally privileged material, that the information withheld under the exemption was Counsel's opinion and that it met the definition of material created for the purpose of providing or obtaining legal advice. It explained correctly that this exemption was qualified, so it required a public interest test to be conducted. It explained that in its view the public interest lay in maintaining the confidentiality of the legally privileged material because it would ensure fair administration of justice and good decision making. In addition, it stated that the prospect of future litigation could not be ruled out.

It provided information about its internal review procedure and explained that the complainant could approach the Commissioner if he was not satisfied with the internal review, providing his details.
10. On the same day the complainant expressed dissatisfaction with the investigation that was conducted and explained that in his view there was no legal professional privilege because there was no legal case

pending from his enquiries. The Commissioner regards this expression of dissatisfaction as a request for an internal review.

11. On 25 September 2009 the public authority reiterated that it had explained the procedure for issuing a refusal notice and asked the complainant to contact the relevant individuals should he want an internal review. Later that day, the complainant wrote again to the public authority to express further dissatisfaction.
12. On 11 October 2009 the public authority wrote to the complainant. It explained that it was preparing to conduct an internal review and invited the complainant to make any further submissions.
13. On 17 December 2009 the public authority communicated the results of its internal review, confirming that it believed that it had applied both section 42(1) and section 40(2) appropriately.

*Requests two and three*

14. On 24 September 2009 the complainant requested more information from the public authority in accordance with section 1(1) of the Act:

*Request two*

*'In section 2.7.3 (page 12) of the attached report you sent me on the 18 September 2009 it states that:*

*"Enquiries were made through the Insolvency Service and by carrying out directors searches BLANK however no evidence was found to support the allegation that he [individual redacted] was [accusation redacted]".*

*Please send me the original documents recording these activities and all communications with the Insolvency Service'*

*Request three*

*'Please also send me the C.V. of [individual redacted] when he applied for the [post redacted]'*

15. On 25 September 2009 the complainant reiterated request two:

*'Again please send me evidence of the activity of the Insolvency Service concerning the [accusation redacted] of [individual redacted], and any searches of databases containing the names of company directors for the same.'*

16. On 30 September 2009 the public authority acknowledged receipt of the requests and on 21 October 2009 it issued a response. In respect of request two, it explained that it did not hold any record of its communications with the Insolvency Service. It did explain that it carried out directors searches, but that it believed that this information was available to the public and was exempt through section 21 of the Act. In respect of request three, it explained that it viewed the individual's CV as being exempt from disclosure by virtue of section 40(2) [third party personal data]. It explained that it believed it applied because disclosure would not accord with any of the conditions in Schedule 2 of the DPA and consequently would not accord with the first data protection principle. It confirmed that it did not believe that there was a legitimate interest in its disclosure and that it did not have consent from the data subject. It provided its internal review details.
17. Further correspondence ensued which resulted in it being clear that the complainant had requested an internal review into the handling of these requests.
18. On 17 December 2009 the public authority communicated the results of its internal review. It explained that for request two, it believed that recorded information ought to exist and be provided to the complainant. It said it would refer the request back to the service area to consider whether relevant recorded information was held. It explained that for request three, it believed that section 40(2) applied.
19. Later that day the public authority communicated the result of the search for further information for request two:

*'Further to the outcome of the internal review I can confirm that an online search using the Insolvency Service was completed. However, no relevant information was found and therefore no information was recorded.'*

## **The Investigation**

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### **Scope of the case**

20. On 13 October 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- He was concerned about the integrity of the redacted report and whether it reflected the contents of the unredacted version as he believed that the dates did not match;
  - He was deeply concerned about the behaviour of [individual redacted] and this was the reason for his concern;
  - He was very concerned about the public authority's conduct in addressing his requests; and
  - Other evidence about [individual redacted] shows wrongdoing such that he believed that it was his duty to pursue this matter.
21. On 22 October 2009 the complainant contacted the Commissioner to explain that he was unclear why the public authority was protecting private interest by having it masquerade as public interest, and on 20 December 2009 he contacted the Commissioner again to explain that he was not happy with the results of his internal review.
22. On 28 January 2010 the complainant contacted the Commissioner to say that he was curious about whether the offence found in section 77 of the Act was appropriate in this case.
23. On 12 February 2010 the complainant confirmed he was content that the scope of this case was limited to the following three elements:
1. *The full unredacted report about the investigation into the recruitment of [individual redacted] ('Request 1' for the remainder of this Notice).*
  2. *Any recorded information that relates to the section of the report that concerns the enquiries made through the Insolvency Service about [Individual redacted] that led to no evidence being found to support the [allegation redacted] ('Request 2').*
  3. *[Individual redacted]'s CV when he applied for that position ('Request 3').*
24. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
- On 29 April 2010 the public authority released the paragraph numbers it was withholding in Request 1, and redacted

paragraph 2.7.3 differently on the Commissioner's instruction. As this information was provided it will not be considered further by the Commissioner.

- On 14 July 2010 the public authority released two redactions in paragraph 2.1.1 and redacted versions of the appendices of the report in Request 1. As this information was provided it will not be considered further by the Commissioner.

25. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

26. As noted above, the Commissioner, complainant and public authority exchanged considerable correspondence before the complaint became eligible to be considered substantively. In this section the Commissioner is only focussing on the correspondence that related to his investigation of the substantive complaint.
27. On 22 December 2009 the Commissioner wrote to the complainant and the public authority to explain that he had received an eligible complaint, and on 12 February 2010 he wrote to the complainant to explain that the case had been allocated to a caseworker. He asked the complainant to confirm the scope of his investigation.
28. The complainant replied on the same day, raising further questions. The Commissioner responded, explaining the limits of his remit. The complainant confirmed that he was content that the scope of the case focussed on the three items outlined above in paragraph 23.
29. On 15 February 2010 the Commissioner wrote to the public authority to explain the scope of his investigation and asked to be provided with the withheld information for Requests 1 and 3. He also asked the public authority to explain its position in respect of Request 2.
30. On 2 March 2010 the Commissioner received the withheld information and the explanation of its position with regard to Request 2. Further correspondence ensued.
31. The Commissioner contacted the public authority on 14 April 2010, asking it to redact part of the report differently to avoid confusion, and also to provide the complainant with the paragraph numbers that had been redacted. This was agreed to, and the public authority released the information on 20 April 2010.

32. On 26 April 2010 the complainant and the Commissioner exchanged emails and the complainant provided further reasons why he believed that the information should be disclosed.
33. On 6 May 2010 the Commissioner contacted the public authority about another inconsistency in how the information had been redacted and asked it to disclose information redacted in paragraph 2.1.1 of the report. The public authority explained that it would do. On the following day he wrote to the public authority with detailed enquiries about the position that it had taken, asking for a response in twenty working days.
34. The public authority contacted the Commissioner on 9 and 16 June 2010 to ask for an extension to the time to answer his enquiries. This was allowed.
35. On 6 July 2010 he received the public authority's response, and he asked the authority to disclose the information that it no longer believed was exempt. This consisted of information to which it had applied exemptions but it no longer believed was exempt, and other information that it had failed to consider for disclosure prior to the Commissioner's involvement. This information was disclosed on 14 July 2010.

## **Analysis**

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### **Substantive Procedural Matters**

#### *What recorded information is held?*

36. There is no dispute concerning the information held for Requests 1 and 3. However, there is dispute about whether any relevant information was held at the date when Request 2 was made. This section of the Notice provides the Commissioner's view in relation to that element.
37. When investigating cases involving a disagreement as to whether or not further information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.



38. He has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the same case. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
39. The Commissioner has applied this standard of proof to the case and has considered the scope, quality, thoroughness and results of the search/es, plus any other explanations as to why the information was not held:

*The searches undertaken*

40. The Commissioner considers that the request (although partially redacted in this notice) was clear in scope and the information held in respect of it would be readily identifiable had it been held. The Commissioner is satisfied that the public authority understood what was being asked for, although it explained that the information was not retained.
41. The Commissioner accepts that the request relates to the public authority's activities at time of its investigation into the allegations against the individual concerned. The time period when the information would have been held is therefore also known.
42. The public authority has explained to the Commissioner the process that it undertook to gather the evidence for this part of the report and that this was based on the memory of the individual who undertook the work. The individual responsible for the search has explained that he believed he made an online search, but no records were kept of the search because its results were negative.
43. The public authority explained to the Commissioner that it had checked both the individual's records and the complaint file. The searches proved negative.

*Other reasons offered by the public authority to explain why the information was not held*

44. The public authority has explained that because the result of the search was negative, it believed that there was no reason for it to keep recorded information about the search.

45. The public authority noted that its filing procedures and retention policy would not have required it to keep the requested information, if held.
46. The public authority stated that the apparent contradiction between the findings of its internal review and the email from the service area was not a contradiction at all. It explained that it had no doubt that it had conducted such a search, but that it did not hold relevant recorded information about it (apart from the outcome outlined in the report itself).

### *Conclusion*

47. In conclusion, the Commissioner is satisfied that the searches conducted were reasonable and the public authority's arguments why it does not hold any relevant recorded information are convincing. He is satisfied on the balance of probabilities that, at the time of the request, there was no recorded information held on the enquiries made through the Insolvency Service about the individual concerned which in turn led to no evidence being found to support the particular allegation.
48. He therefore finds that the public authority has complied with its obligations under section 1(1)(a) in correctly denying that it held relevant recorded information for Request 2.

## **Exemptions**

### ***Section 21(1)***

49. While the complainant did not ask the Commissioner to consider the Experian Director & Secretary's report as part of his analysis of Request 2, it appeared that the same report was contained within the appendices of the report for Request 1 (which were not originally considered by the public authority). The Commissioner has therefore decided to consider the operation of section 21(1) to this information.
50. Section 21(1) provides that:

*'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'*

51. The thinking behind the exemption is that if there is another route by which someone can obtain information there is no need for the Act to provide the means of access.

52. In this case the public authority has provided a redacted copy of the Experian Director & Secretary's report to the complainant. This showed that it comprised part of the report for Request 1. It had redacted all personal information from this report; however, it had included the title of the report and made clear that it accorded with the standard format for such reports.<sup>1</sup>
53. The Commissioner accepts that all the remaining information contained within the Experian report is publicly available from Companies House.
54. He considers that the way that the information has been redacted will enable a member of public to be certain that he would receive all the information contained within the report. He finds that section 21(1) can now be applied appropriately to the remainder of the report. However, the public authority failed to explain exactly what the searches were until after its internal review. Its failure to provide adequate explanation constitutes a breach of section 17(1)(c).

### **Section 40(2)**

55. The public authority has explained that in its view it is not obliged to provide information about the CV or a number of the redactions of the report that it made under section 40(2). This is because the release of this information would be unfair to the data subject, so the disclosure would contravene the first data protection principle. In its view, it follows that section 40(2) applies to that information.
56. In analysing the application of section 40(2), the Commissioner has 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.*

57. Section 40(2) operates as an absolute exemption and has no public interest component. Therefore no public interest test is required.

#### *Is the information personal data?*

58. Personal data is defined in section 1 of DPA as data '*which relate to a living individual who can be identified—*
- (a) from those data, or*

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<sup>1</sup>The format of the report can be found at the following link (correct as of 7 September 2010): [http://www.experian.co.uk/bi/sp\\_dir\\_sample.html](http://www.experian.co.uk/bi/sp_dir_sample.html)

*(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.'*

59. In 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](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)
60. The Commissioner notes that the withheld information here amounts to:
1. A report concerning allegations made about a specific individual; and
  2. A Curriculum Vitae of that individual.
61. The Commissioner accepts that all the information relates to the specified individual and is therefore their personal data. He also considers that there is no way that in the context of this case any of the information can be disclosed in a manner that avoids revealing the individual's identity.
62. The withheld information also includes an email in respect of the allegations which prompted the report, and three telephone numbers of other individuals contained within its appendices. The email is the personal data of the individual who made the allegation as well as of the specified individual, while the private phone numbers of the third parties amount to those individuals' personal data.

*Would disclosure contravene the first data protection principle?*

63. The first data protection principle has two main components. These are as follows:
- The requirement to process all personal data fairly and lawfully; and
  - The requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data.
64. Both 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.

65. The Commissioner considers that it is necessary to divide the information into five categories in order to consider the operation of the first data protection principle. They are:

- Category 1 - Information concerning accusations and allegations about [individual redacted] :- [paragraphs 1.2, 1.6, 2.1.2, 2.1.4 (redactions 2-4), 2.3.5, 2.7 (title), 2.7.1, 2.7.3, 2.7.4, 2.7.5, 2.8 (entire section) and 3.5 of the report in Request 1, and paragraphs 2, 5, and 6 of Appendix A];
- Category 2 – Other personal information (this is considered more fully in the confidential annex) :- [Title page Appendix B redaction, paragraphs 1.1, 1.4, 2.1.1, 2.1.4 (redaction 1), 2.2 (title), 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.3 (title), 2.3.1, 2.3.2, 2.3.3, 2.4 (entire section), 2.6.1, 3.1, 3.2, 3.3 of the report in Request 1, and paragraph 1, 4 and 12 of Appendix A];
- Category 3 - [Individual redacted]'s Curriculum Vitae (Request 3 of this investigation);
- Category 4 – Original email containing certain allegations [Appendix B (except the telephone numbers)];
- Category 5 - Telephone numbers of individuals found in Appendix B and C of the report.

*Would disclosure be fair?*

66. When deciding whether the disclosure of information is fair, the Commissioner's general approach is to balance the consequences of any disclosure and the reasonable expectations of the data subject with general principles of accountability and transparency.

67. The Commissioner will consider each of the five categories of information in turn.

*Category 1 data*

68. The complainant contends that this category of information is of considerable public interest and should be provided. The public authority argues that the disclosure of this information would be unfair to the data subject.

69. The public authority has provided the Commissioner with a note from the data subject that was contemporaneous with the original request

- for the report. The individual believed that it was private information which should not be disclosed to the public. Indeed, he explained that he was concerned about potential damage and distress from its disclosure, particularly given previous experiences. The Commissioner is satisfied that this note provides evidence that damage and distress would be likely to result from disclosure of the Category 1 data. He will consider this matter further in paragraph 76 below. He also notes that the communication clearly shows the expectations of the individual, although, this does not mean that the expectation is necessarily reasonable.
70. The Commissioner has therefore carefully considered whether these expectations are reasonable. While assessing reasonableness, it is necessary to consider the nature of the withheld information. He considers that the accusations and allegations were serious and concerned an issue that would be expected to remain private between employer and employee (and the public authority in this case). He notes that information relating to an investigation into the conduct of an employee may be the subject of great anxiety to the individual concerned. The public authority has explained that in its view that it was reasonable to expect that the information recorded in the course of an investigation and produced in the format of a conclusive report would not be placed into the public domain.
71. Paragraph 2 explains the detailed position in relation to how the public authority is connected to the organisation to which this report relates. The Commissioner believes that there is less expectation of transparency with regard to employees who are not public servants than to those who are. However, [individual redacted] was placed into a senior role in charge of public funds and should therefore expect some scrutiny of his role.
72. In his guidance, the Commissioner has drawn a distinction between information about the public and private life of an employee and has emphasised that information relating to public functions should be subject to greater scrutiny than information about an individual's private life. This is because it is only in an individual's public role that his decisions or actions may affect the population he serves and for which he should be accountable. However, the Commissioner feels that he could not draw such a clear distinction in this case. This is because the nature of the information extends beyond that of the individual's official capacity and into his private affairs.
73. In addition it should be noted that the report was marked as being 'private and confidential'. The Commissioner has carefully considered the nature and structure of the report and considers that the

information withheld under Category 1 could reasonably be expected to remain private. The Commissioner recognises that the individual would expect the safeguarding of his personal information, not least as he had expressly refused to give his consent for disclosure.

74. In this case there are competing interests that have influenced the Commissioner's decision-making on this matter. On the one hand is the promotion of transparency in the workings of a publicly accountable authority, and particularly information about a senior-ranking individual of a connected organisation. On the other is the interest that defends an individual's right to privacy.
75. The Commissioner has no doubt that as a senior ranking individual of a connected organisation, that person would have recognised that his actions would be subject to a greater level of scrutiny. Previous Decision Notices issued by the Commissioner have taken the line that there should be a lower expectation of privacy when information concerns a senior individual. In addition, there is considerable public speculation on the matter. However, the Commissioner appreciates that even amongst senior individuals there is an expectation of privacy between an employee and employer in respect of allegations and accusations of this sort.
76. The public authority has argued that disclosure of the information would be likely to lead to further damage and distress to the individual. It explained that in its view it was possible that the release of the report, irrespective of its outcome, may lead to unwarranted inferences and provide him with fewer employment opportunities in the future. In addition the public authority has explained that it has statutory duties and responsibilities to ensure that staff have a safe working environment and that it has a positive duty not to damage their health. The Commissioner also recognises that such disclosure could jeopardise the trust that an employee may have with their employer which allows a free and frank working relationship; a trust that rests on an employee's expectation that their employer (and associated bodies) will protect their personal data. The Commissioner has concerns that the damage and distress specified would be real and significant in this case. He believes that this strongly suggests that disclosure would be unfair to the data subject.
77. The Commissioner also recognises that public authorities have a duty to properly regulate the behaviour and actions of their employees. When considering the public interest in this information he appreciates that it is important that the public authority should be seen to be taking transparent action when it investigates allegations about

individuals, but he does not see this factor as favouring further disclosure to the extent that it would outweigh the individual's privacy.

78. 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 subject. The main reason for this conclusion is that the legitimate expectations of the individual are that the information would not be provided and overriding 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.
79. As the Commissioner has found that disclosure would be unfair and therefore in breach of the first data protection principle there is no need to go on 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.
80. The Commissioner therefore upholds the public authority's application of section 40(2) in relation to the Category 1 data.

#### *Category 2 data*

81. The public authority has expressed concerns about revealing the nature of this information. The Commissioner has therefore considered this part of his analysis in a confidential annex which will be provided to the public authority.
82. The outcome of his analysis in the confidential annex is that he believes the information was withheld incorrectly and should be disclosed to the public.
83. He believes that its disclosure would be fair, lawful and accord with condition 6 of Schedule 2 of the DPA. This means that the processing would accord with the first data protection principle. The public authority was incorrect to apply section 40(2) to this information and it should now be disclosed.

#### *Category 3 data*

84. In considering fairness, the Commissioner must consider the expectations of the data subject at the date of the request, however the expectations can be informed by the circumstances at the time when the information was provided to the public authority. The CV itself states that it is to be considered in confidence, and the Commissioner considers it to be a reasonable expectation that this



information would be held in confidence and only used for recruitment purposes. The data subject has confirmed to the Commissioner that at the date of the request this was his expectation. The Commissioner's guidance states:

*"If information from the application form will be used for any other purpose than to recruit for a specific job or passed to anyone else, make sure that this purpose is stated on the application form."*

85. The Commissioner considers that the personal data relates to the private life of individuals and there is a legitimate expectation that personal data submitted to a potential employer will be processed in confidence and only used for the purposes for which it was collected. The Commissioner considers that there is a clear expectation on the part of all job applicants when they apply for a job that the potential new employer will keep the fact of the application and the content of their application form confidential in order to safeguard their existing employment where appropriate. The Commissioner is satisfied that there continues to be an expectation that the CV will remain confidential even after an application proves to be successful.
86. On the basis of the above the Commissioner accepts that the applicants would have expected that information provided in their CV would not be placed in the public domain. However, simply because an individual has an expectation that information held about them will not be disclosed, this does not necessarily mean that this expectation is a reasonable one.
87. The Commissioner's guidance on 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 life. The guidance 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.'*

88. The Commissioner considers that the applicant's information contained in the withheld information can reasonably be described as information about their personal life. Whilst the information contains details of their educational qualifications and work experience this is in relation to a

job application rather than an undertaking in an official or work capacity. The Commissioner also notes that the individual has not consented to disclosure.

89. The Commissioner considers that unnecessary or unjustified damage or distress would be likely to ensue if an applicant's personal details were placed in the public domain. In addition, it may lead to potential issues around identity theft. It would not be possible to redact the CV without revealing the individual's personal data and the Commissioner is of the belief that the CV itself is inherently private.
90. The Commissioner has considered that there may be legitimate public interest in knowing whether a successful applicant has accurately represented their work history. However, overall the Commissioner is satisfied that the disclosure of the CV would be unfair and would breach the first data protection principle. This information is therefore exempt under section 40(2) of the Act.

#### *Category 4 data*

91. Category 4 relates to the email evidence which led to the original decision to compile a report in respect of the issues that arise in the Category 2 data. The public authority explained that it believed that special considerations should apply because it was a confidential email submitted by another individual under its whistle-blowing policy.
92. The Commissioner has considered the rationale of that policy and is satisfied that the individual who made the allegation would have had no expectation of this information being disclosed to the public. He considers that disclosure would be unfair to the individual who made the allegation and would therefore breach the first data protection principle. As a consequence the information is exempt from disclosure under section 40(2) of the Act.

#### *Category 5 data*

93. Category 5 covers the mobile phone numbers of three individuals. The public authority stated that disclosure of the withheld information would be unfair to the data subjects whose numbers they were. It did not think that the data subjects would have reasonably expected the information to be released in this case. Instead there was an expectation of confidentiality and privacy. The Commissioner considers that these reasonable expectations are persuasive in indicating that the release of this information would be unfair. He notes that individuals' mobile phone numbers tend to be regarded as more private than their

work numbers, and that these numbers are not already in the public domain.

94. The Commissioner believes that the public have a general expectation that they will not have access to individuals' mobile numbers without their consent and that the disclosure of those numbers to the public would very possibly, cause unwarranted damage and/or distress to those individuals. He also believes that the disclosure of these numbers would serve no public purpose.
95. He is therefore satisfied that the disclosure of those numbers would be unfair and would contravene the first data protection principle. Section 40(2) has therefore been applied appropriately to this category of information.

### **Section 42(1)**

96. Section 42(1) of the Act is worded as follows:

*"Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information"*

97. The concept of legal professional privilege (LPP) has been considered by a number of Information Tribunals. In *Bellamy v The Information Commissioner (The Secretary of State for Trade and Industry)* [EA/2005/0023] ('Bellamy') it was defined as: -

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client."* (Paragraph 9)

98. The principle of legal professional privilege was considered in detail by the House of Lords in *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)* [2004] UKHL 48, where Lord Rodger explained the policy reasons for the principle in respect to legal advice:

*'If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client,*

*communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available."*

(Paragraph 54)

99. The public authority applied section 42(1) to a number of paragraphs in the redacted report of Request 1. Two of these paragraphs were also covered by the Category 1 considerations at section 40(2) (paragraphs 68 – 80 above), and the Commissioner found that they were withheld correctly under that section. As only one exemption needs to be applied correctly in order to withhold information, the Commissioner has not considered these two paragraphs further.
100. The remaining paragraphs may usefully be divided into three groups: -
1. Part of the content of external legal advice that was included by the report writer (paragraphs 1.3, 1.7, 2.5 and 3.4 of the report)
  2. A summary of the external legal advice (paragraphs 4.1 and 4.2 of the report)
  3. The internal legal advice received about accusations about [individual redacted] (paragraph 2.9 of the report)
101. Section 42(1) is a qualified exemption, which means that the Commissioner must first consider whether the exemption is engaged and then, where it is engaged, he must go on to consider whether or not the balance of public interest favours the maintenance of the exemption. The Commissioner will consider each of the three groups of information individually within this two step approach.

***Is the exemption engaged?***

102. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending, and litigation privilege where litigation is contemplated or pending.
103. The category of privilege which the public authority is relying on to withhold all three classes of information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated

litigation. It was considered in detail in the *Three Rivers* case above and it explained that there were three requirements for material to engage legal professional advice privilege. The Commissioner has adopted this approach in this case and these factors can be summarised as follows:

1. It must be between a qualified lawyer in their professional capacity and a client. This is a requirement of fact.
  2. It must be created with the sole or dominant purpose of obtaining or providing legal advice. This is a requirement of fact.
  3. It must be confidential. This is a requirement of law.
104. The public authority explained that the first set of paragraphs comprised an extract of legal advice it had obtained from external counsel about the subject matter of the report. It was commissioned from a qualified lawyer in their legal capacity and therefore satisfied the first requirement. It was created with the sole purpose of providing legal advice, and so satisfies the second requirement. The information was treated as confidential, had only been disclosed to those people who were the subject of the report, had been kept securely and had not been disclosed to the public. The Commissioner is satisfied that the information in these paragraphs can be deemed to be confidential, that the confidentiality of the advice remains and that the exemption is engaged for these paragraphs.
105. The public authority explained that the second group of paragraphs comprised a summary of the content of the external legal advice.
106. The public authority pointed to the Ministry of Justice's exemption guidance on section 42 which states that "*it should also be remembered that LPP may apply to a summary of legal advice, even where the source of that summary is not the advising lawyer*"<sup>2</sup>. It also quoted Mr Justice Mann in *USP Strategies v London General Holding Ltd* [2004] EWHC 373 (Ch), which held that privilege extends to material which:
- 'Evidences or reveals the substance of legal advice'*.
107. It explained that the Information Tribunal in *M Shipton v Information Commissioner and National Assembly of Wales* [EA/2005/0028] also followed this approach when it said that a civil servant's submission to

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<sup>2</sup><http://www.justice.gov.uk/about/docs/foi-exemption-section42.pdf> at paragraph 20

a Minister which also summarised legal advice which had been received was covered by LPP.

108. Having considered the second set of paragraphs, the Commissioner is of the view that their disclosure would reveal the substance of the legal advice received from the external legal advisers. He believes that the exemption is engaged for this information for the same reason as the information in the first set of paragraphs.
109. The public authority explained that the third set of information, ie paragraph 2.9 of the report, related to internal legal advice between the organisation and professional legal advisors it employed. The Commissioner is satisfied that the fact the advice was in-house does not change the public authority's ability to claim that the information was privileged. This accords with the decision of the Information Tribunal in *Calland v Financial Services Authority* [EA/2007/0136] in which it was stated that in-house lawyers deserved the same protection as external ones. The Tribunal stated that:

*'Such a result accords with the general policy giving rise to LPP. Just the same requirements for confidentiality and candour exist where an employed lawyer gives advice as when it comes from a member of the independent professions' (paragraph 35).*

110. The Commissioner is satisfied that the advice was commissioned from a qualified lawyer in their legal capacity and therefore satisfied the first requirement. It was created with the sole purpose of providing legal advice and so satisfies the second requirement. It explained that the information had been treated confidentially and had only been disclosed to the relevant individuals, and that it had kept the information secure and had not disclosed any of it to the public. The Commissioner is satisfied that the information withheld in this third group can be considered confidential and that the exemption at section 42 is engaged.

### ***The public interest test***

111. Section 42(1) is a qualified exemption and therefore subject to a public interest test. As the exemption is engaged, the Commissioner will go on to consider the public interest test. The Commissioner believes that the weight of public interest arguments is the same for all three sets of information and he will therefore conduct a single public interest test.

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

112. In arguing that the public interest favoured withholding this information, the public authority reiterated the fact that the courts do not distinguish between private litigants and public authorities in the context of legal professional privilege. Just as there is a public interest in individuals being able to consult their lawyers, there is also a public interest in public authorities being able to do so. Therefore the need to be able to share information fully and frankly with legal advisers for the purposes of obtaining legal advice applies to public authorities just as much as it does to individuals. The public authority went on to highlight the following specific public interest arguments in favour of not disclosing the requested information falling within the scope of section 42(1).
113. It explained that public authorities need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice may well include arguments in support of the final conclusion as well as counter arguments. As a consequence it may well set out the perceived weaknesses of the public authority's position. Without such comprehensive advice, the quality of the public authority's decision making would be lessened as it would not be fully informed, and this would not be in the public interest.
114. Disclosure of legal advice would significantly prejudice the public authority's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge, and indirectly by reducing the reliance placed on its advice having been fully considered and presented without fear or favour. Neither of these scenarios would be in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter might result in poorer decision-making because the decisions taken might not be fully informed.
115. The Commissioner acknowledges that there is considerable public interest in the proper administration of justice and the concept of legal professional privilege plays an important role in maintaining this. For example the Commissioner has considered Lord Taylor of Gosforth CJ's obiter dictum on this point in *R v Derby Magistrates Court, Ex p B* [1996] AC 487:

*'The principle that runs through all of these cases... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client [in this case, the*

*Home Office], must be sure that what he tells his lawyer in confidence will never be revealed without his consent'.*

116. The public authority concluded that although section 42(1) is a qualified exemption, given the substantial public interest in maintaining the confidentiality of legal professional privileged material, it is likely to only be in the 'most exceptional circumstances' that this will be outweighed by the public interest in disclosure. It explained that it regarded the advice as being live at the date of the request because the content of the advice might require further action. The Commissioner accepts that the advice could be regarded as live as it was recent and there was a possibility of litigation arising.
117. While the Commissioner does not accept that the 'most exceptional circumstances' are required, he does acknowledge the strength of the arguments advanced by the public authority. Indeed, there is a significant body of case law to support the view that there is a strong element of public interest built into section 42(1). The Commissioner notes that the public authority cited the Information Tribunal in *Bellamy* which stated:

*'there is a strong public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases ...for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'* (at paragraph 35)

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

118. These factors must be balanced against the arguments in favour of disclosing the legal advice; Parliament did not intend the exemption contained at section 42(1) of the Act to be used absolutely. Indeed the Tribunal's decision in the case of [Mersey Tunnel Users Association v Information Commissioner and Merseytravel](#) [EA/2007/0052] ('Mersey Travel') underlines this point. In this case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel, in particular the Tribunal weighted accordingly the fact that the legal advice related to an issue of public administration (rather than individual interests or criminal matters), also the public interest in disclosure was strengthened because the advice related to the issues which affected a substantial number of people.



119. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities, or in this case what the legal advice said about the recruitment of the individual. Disclosure of the legal advice would assist the public's understanding of the authority's decision and the reasons why it was made, and would provide greater accountability. To extrapolate further, it could be argued that the benefits of democracy depend to some extent on the public availability of relevant information.
120. The public authority also recognised that there was a public interest in the public knowing whether or not legal advice had been followed. In its view the factual position is rarely so simple and this was a case where the advice was complex and involved the fine balancing of risks. It considered that there was less of a necessity for the public to know that it had followed the advice it had received because the facts of the situation were complex. However the Commissioner is not convinced that the public interest is mitigated by complexity.
121. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the public authority's position.
122. In addition the Commissioner has considered the number of people who would be affected by the measure at the heart of the legal advice and whether further weight should be given to the public interest factors that favour disclosure on that basis, as was the case in *'Mersey Travel'*. He notes that the legal advice concerns [individual redacted], his family and other individuals who may have concerns about how the public authority operates. However, the number of individuals is not of the same magnitude as in *'Mersey Travel'* and therefore this factor does not add additional weight in this instance.

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

123. The Information Tribunal in *Calland* explained the Tribunal's approach when considering the balance of the public interest in this exemption (at paragraph 37):

*'What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023 , is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.'*

124. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. In *Dr Thornton v Information Commissioner* (EA/2009/0071)<sup>3</sup>, the Tribunal usefully distilled the High Court's approach into six principles:

1. there is a strong element of public interest inbuilt into the exemption;
  2. there need to be equally strong countervailing factors for the public interest to favour disclosure;
  3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
  4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
  5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
  6. the most obvious cases where the public interest is likely to undermine legal professional privilege is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.
125. In this case the Commissioner believes that the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege is important. He notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of the protection that might be expected. He considers that this case represents the kind of circumstances that were envisaged as covered by the exemption in section 42(1).
126. The Commissioner has seen the withheld information. In the context of the sixth bullet point above, in his view it does not raise for him any concerns that the public authority may have misrepresented advice

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<sup>3</sup> At paragraph 15.

received, pursued a policy which appears to be unlawful or clearly ignored unequivocal advice.

127. The Commissioner has considered the weight of the public interest factors in disclosure. He believes that there is real public interest in accountability on the facts of this case, but has not been convinced that they are so strong as to override or equal the public interest in maintaining the exemption in this case.
128. For the above reasons, he is satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure and therefore determines that the exemption found in section 42(1) has been applied correctly.

### **Procedural Requirements**

129. Section 10(1) requires that a response which accords with section 1(1)(a) is provided to all requests for information within twenty working days. In this case the public authority took more than twenty working days to state whether it held the report and therefore the Commissioner has found a breach of section 10(1) of the Act.
130. Section 10(1) also requires that a response which accords with section 1(1)(b) is provided to all requests for information within twenty working days. In this case the public authority took more than twenty working days to provide the non exempt information and the Commissioner therefore finds a breach of section 10(1) of the Act.
131. In failing to issue a refusal notice within twenty working days for the remainder of the report, he finds a breach of section 17(1) of the Act. He also notes that the information about the exemptions that the authority applied was provided after the redacted report itself, and that this led to some confusion.
132. The public authority also failed to indicate which exemptions were being applied to the redactions when it released the redacted report to the complainant. In failing to explain what exemption was applied for each redaction it breached section 17(1)(c).
133. The public authority also extended the time to consider the public interest test without specifying the exemption that it was relying on. The Commissioner believes that this failed to accord with good practice and also breached section 10(3) of the Act.

134. Finally, the Commissioner does not believe that the public authority considered the appendices of the report for disclosure until his involvement. The failure to do this was a further breach of sections 1(1)(b), 10(1), 17(1), 17(1)(a) and 17(1)(b).

## The Decision

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135. 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:

- *It correctly withheld under section 40(2) the information identified to fall in categories 1, 3, 4 and 5 in this Notice;*
- *It was entitled to withhold the information to which it applied section 42(1);*
- *It was entitled to withhold some information under section 21(1); and*
- *It correctly confirmed that it held no relevant recorded information for Request 2.*

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

- *It incorrectly withheld the information identified to fall in category 2 in respect of section 40(2);*
- *It breached section 10(1) of the Act because it failed to issue a response that complied with section 1(1)(a) in twenty working days;*
- *It breached section 10(1) of the Act because it failed to comply with section 1(1)(b) in twenty working days;*
- *It breached section 10(3) of the Act because it extended the time to conduct a public interest test without specifying the exemption that was relied upon;*
- *It breached section 17(1) of the Act because it failed to issue a suitable refusal notice in twenty working days;*

- *It breached section 17(1)(c) of the Act as it failed to explain which exemptions applied to the redactions; and*
- *It failed to consider the appendices of the report until the Commissioner's involvement and this meant there were further procedural breaches of 1(1)(b), 10(1), 17(1), 17(1)(a) and 17(1)(b).*

## Steps Required

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137. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- *It should disclose the information identified as category 2 information to the complainant.*

138. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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

## Right of Appeal

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140. 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 sent.

**Dated the 21<sup>st</sup> day of December 2010**

**Signed .....**

**Anne Jones  
Assistant 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.

(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 - Refusal of request**

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Section 21 - Information accessible to applicant by other means**

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

## **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.

## **Section 42 – Legal professional privilege**

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

## 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, 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.