

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: Electoral Commission
Address: 3 Bunhill Row
London
EC1Y 8YZ

Summary

The complainant made a number of requests for information relating to the public authority's investigation of Bearwood Corporate Services Ltd and donations to the Conservative Party. The public authority disclosed some of the requested information. However, it also relied upon sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2), 41(1) and 42(1). After investigating the case the Commissioner decided that the requested information was exempt under section 30(1)(a)(i). However, the Commissioner considers that the public authority failed to meet the requirements of section 17.

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. In October 2008 the public authority began an initial enquiry into donations made to the Conservative Party by Bearwood Corporate Services Ltd ("Bearwood"). In January 2009, following receipt of information from various involved parties and an assessment of information already in the public domain, the public authority opened an investigation, in order to determine whether these donations had been in breach of the Political Parties, Elections and Referendums Act 2000

("PPERA"). The public authority explained that the relevant requirements of the PERA in relation to this investigation were,

"...Before accepting a donation, a party must make sure it takes all reasonable steps to verify or ascertain the identity of the donor, and that the donor is 'permissible'. A permissible donor is, in the case of an individual, someone who is registered on the electoral register. In the case of a company a permissible donor must be, among other things, carrying on business in the United Kingdom at the time of the donation.

...Where an individual gives a donation to a party but is passing on that donation on behalf of someone else – in other words acting as an agent – the agent must notify the party that they are an agent and the party must ensure that the donor, rather than the agent, is a permissible donor.

...The party has 30 days from receipt of a donation to ascertain the identity of the donor and check that the donor is permissible. Where the party is unable to do so within 30 days, it cannot accept the donation.

...Where a party has accepted a donation which it was prohibited from accepting, the Commission may seek a court order that an amount equal to the impermissible donation be forfeited."¹

3. The public authority's investigation focused on:

- whether Bearwood was a permissible donor;
- whether the donations were correctly reported as coming from Bearwood, rather than an agent for someone else, including its parent company Stargate Holdings or Lord Ashcroft; and
- whether the Conservative Party had fulfilled its compliance duties, in particular its duty to be certain who the donor was before accepting the donations.

4. On 4 March 2010 the public authority announced the outcome of this investigation by issuing a press release and a case summary.² It stated that:

¹ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/87219/Case-summary-Bearwood-Corporate-Services.pdf

² The press release is available at: <http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases->

- in relation to the question of whether Bearwood was a permissible donor, it had concluded that Bearwood met the permissibility requirements for making political donations;
- in relation to the question of whether the donations were correctly reported as coming from Bearwood, it had concluded that, on the evidence before it, there was no basis to conclude that the donor was anyone other than Bearwood; and
- in relation to the question of whether the Conservative Party had fulfilled its compliance duties, it had decided that there was insufficient evidence to conclude, on the balance of probabilities, that the Conservative Party was uncertain as to the identity of the donor when accepting the donations.

Therefore the public authority concluded that no breach of PPERA had been established and that accordingly no legal action in relation to the Conservative Party would be taken. However, it noted that it had asked to meet party officials to ensure that they were clear about their responsibilities when complying with the law.³

5. In addition to this, in the case summary the public authority explained that,

*"The Commission's powers are limited, notably that it does not currently have the power to require anyone to attend an interview, and only has the power to require the provision of documents from a party and its officers, but not from reported donors or others. Within the limits of its current powers, the Commission conducted a thorough investigation. It obtained and considered a large volume of documents, including a substantial quantity of internal documents provided by the Conservative Party. The Commission asked various officers and staff within the party to attend interviews on a voluntary basis, but these requests were not agreed to."*⁴

[donations/bearwood-corporate-services-limited](https://www.electoralcommission.org.uk/donations/bearwood-corporate-services-limited). The case summary is available at: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/87219/Case-summary-Bearwood-Corporate-Services.pdf

³ <http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-donations/bearwood-corporate-services-limited>

⁴ <http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-donations/bearwood-corporate-services-limited>

The Request

6. The complainant contacted the public authority on 9 March 2010 and made a number of requests. These requests were for:

Request 1

"Information concerning the report put to the Electoral Commission's board in the case of Bearwood Corporate Services, all drafts, how many drafts exist, the discussions that took place within the board, any voting breakdown, minutes of the meeting, and details of how changes to the final report were amended and recorded."

Request 2

"Information concerning legal advice to the Electoral Commission in the case of Bearwood Corporate Services including, but not limited to advice on potential criminal offences, how many different legal opinions were sought, how many counsel were used and the reasons for using different counsel."

Request 3

"Information concerning advice from professional experts including accountancy experts to the Electoral Commission in the case of Bearwood Corporate Services."

Request 4

"Information concerning communications, contacts and meetings between the Electoral Commission and outside agencies including Government departments, the Crown Prosecution Service, the tax authorities and police in the case of Bearwood Corporate Services."

Request 5

"In the case of Bearwood Corporate Services (BCS): whether interviews were requested with staff and/or representatives of BCS and its parent companies in the UK and Belize – the reasons behind that decision, and any responses; how the Commission was satisfied about control and ownership of these companies; how the Commission was satisfied that no agency arrangement was in place; how the Commission was satisfied that the company was carrying on business; whether an interview was requested of Lord Ashcroft – and the reasons behind that decision, and any

responses: whether Lord Ashcroft was asked to provide documents showing ownership, control and interest in these companies- and the reasons behind that decision, and any responses."

Request 6

"In the case of Bearwood Corporate Services, whether the registered treasurer of the Conservative Party was asked how he was in no doubt as to the identity of the donor, and responses, and any reasons why this information is omitted from the published case summary."

These will be referred to as requests (1) to (6) throughout the rest of this notice.

7. Following an exchange of correspondence the public authority provided a substantive response on 1 April 2010.
8. In relation to request (1) it confirmed that it held relevant information and directed the complainant to the press release and a case summary that were available on its website. It confirmed that it held further information, but this was exempt from disclosure under sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2), 41(1) and 42(1). It also noted that if these exemptions were not applicable, it would seek to rely upon section 36 to withhold this information.
9. In relation to request (2) the public authority again confirmed that it held relevant information. It provided the complainant with details of how many different legal opinions were sought, how many counsels were used and the reasons for using different counsel. However, in relation to the other information that it held that fell under this request it stated that this was exempt under section 42(1).
10. In relation to request (3) the public authority again confirmed that it held relevant information. However, this was exempt from disclosure under sections 30, 31 and 40(2).
11. In relation to requests (4), (5) and (6) it confirmed that it did hold relevant information. However, this was exempt from disclosure under sections 30, 31, 40, 41 and 42.
12. The complainant wrote to the public authority on 6 April 2010 and requested an internal review of this decision.
13. The public authority carried out an internal review and responded on 11 May 2010. It stated that after reviewing its response it upheld its previous use of sections 30(1)(a), 31(1)(g), 40(2), 41(1) and 42(1) in relation to all of the requests.

The Investigation

Scope of the case

14. On 28 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the public authority was correct to withhold the information he had requested.
15. During the investigation of the case the public authority provided a detailed breakdown of which exemption it was seeking to rely upon in relation to each request. In particular, it clarified that it was seeking to rely upon section 30(1)(a)(i) in relation to all of the withheld information. It also stated that if the Commissioner did not believe that section 30(1)(a)(i) applied to any of this information, it would seek to rely upon sections 31(1)(g) and 31(2)(a) in the alternative. Despite being asked by the Commissioner to confirm whether it was also being relying upon section 36 in relation to some or all of the withheld information, the public authority did not do so. Consequently, the Commissioner has proceeded on the basis that the public authority is not relying upon section 36.
16. Therefore the scope of this case has been to consider whether the public authority was correct to rely upon the following exemptions:
 - Request (1) – sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2) and 41(1).
 - Request (2) – sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2) and 42(1).
 - Request (3) – sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2) and 41.
 - Request (4) – sections 30(1)(a)(i), 31(1)(g), 31(2)(a) and 41.
 - Request (5) – sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2) and 41.
 - Request (6) – sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2) and 41.
17. In addition to this the Commissioner has also considered whether the public authority has complied with the procedural requirements of section 17.

Chronology

18. The Commissioner wrote to the public authority on 12 November 2010 and asked for a copy of the withheld information. He also asked it to provide him with submissions to support its use of sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2), 41(1) and 42. He noted the reference in the refusal notice to section 36, and asked the public authority to confirm whether it was also seeking to rely upon this exemption in relation to any of the requested information. He asked for a response by no later than 13 December 2010.
19. The public authority contacted the Commissioner by email on 25 November 2010. It informed him that it anticipated that it would not be able to meet the deadline for a response, but that it would provide a response by the end of December or sooner if possible.
20. The Commissioner emailed the public authority on 6 January 2011 and noted that he had not yet received a substantive response. He informed the public authority that unless he received a response by no later than 21 January 2011 he would consider issuing an information notice under section 51 of the Act. The public authority acknowledged receipt of this email on the same day.
21. The public authority emailed the Commissioner on 21 January 2011 and informed him that it was unable to provide a substantive response by the deadline he had given. It informed him that it aimed to provide a response as soon as possible.
22. The Commissioner emailed the public authority on 24 January 2011 and informed it that he would not grant a further extension to the deadline for a response. He would therefore issue an information notice in relation to this case. This was confirmed in a subsequent telephone conversation with the public authority on the same day.
23. On 25 January 2011 the Commissioner issued an information notice under section 51 of the Act.
24. On 22 February 2011 the public authority provided the Commissioner with a copy of the withheld information. It also provided a detailed breakdown of which exemption it had applied to which request. In particular, it confirmed that it was seeking to rely upon section 30(1)(a)(i) in relation to all of the withheld information. It also said that if the Commissioner did not believe that section 30(1)(a)(i) applied to any of this information, it would seek to rely upon sections 31(1)(g) and 31(2)(a) in the alternative. It also clarified that it intended to rely upon section 40(2) in relation to all the withheld information, except for the information that came under request (4). Despite being asked by the Commissioner to confirm whether it was also relying upon section 36 in

relation to some or all of the withheld information, the public authority did not do so.

Analysis

Exemptions

25. The public authority has relied upon sections 30(1)(a)(i), 31(1)(g), 31(2)(a), 40(2), 41(1) and 42(1) to withhold the requested information in this case. The Commissioner will consider the application of each of these exemptions in turn.

Section 30(1)(a)(i)

26. Section 30(1)(a)(i) states that,

"...information held by a public authority is exempt information if it has 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..."

The full text of section 30 can be found in the legal annex at the end of this notice.

27. Section 30 is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage it. If the information in question falls within the class of information set out in the exemption, the exemption is engaged.
28. As noted above, the public authority has applied this exemption to all of the withheld information. This information is held by the public authority for the purpose of its investigation into donations made by Bearwood to the Conservative Party.
29. The public authority has stated that in this case it considered whether offences had been committed under sections 54(7), 56(3) and 61 of the PPERA. Under section 145 of the PPERA the public authority has the function of monitoring compliance with the restrictions imposed under parts III to VII of that Act. Sections 54(7), 56(3) and 61 all fall within part IV. Therefore the public authority has the function of monitoring compliance with sections 54(7), 56(3) and 61 and consequently the investigation was one that the public authority had the duty to conduct.

30. The public authority has acknowledged that it would not itself bring any charges against any person. Instead, having carried out its investigation, if it believed that an offence had been committed a referral would be made to either the police or the Crown Prosecution Service which would then bring any charge. As to what effect, if any, this has on the question of whether the exemption is engaged, the Commissioner notes that section 30(1)(a)(i) refers only to an investigation with a view to it being ascertained whether a person should be charged with an offence; this wording gives no suggestion that it is essential that any charges would be brought by the same public authority that carried out the investigation. The view of the Commissioner is, therefore, that the fact that the public authority would not itself bring any charge does not prevent this exemption being engaged here.
31. On the basis of the wording of sections 54(7), 56(3), 61 and 145 of the PPERA, the Commissioner accepts that the investigations carried out by the public authority and referred to in the request were of the type described in section 30(1)(a)(i). Therefore the Commissioner considers that this exemption is engaged in relation to all of the withheld information.
32. Section 30(1)(a)(i) is a qualified exemption and is therefore subject to a public interest test. The Commissioner has first considered the public interest in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

33. The Commissioner recognises that there is a public interest in openness and accountability. The public authority has recognised that there is a public interest in it properly enforcing the restrictions of the permissibility of donations to political parties imposed by the PPERA. The Commissioner considers that the disclosure of the withheld information would increase public understanding of whether the public authority has carried out its duties to enforce this legislation. This would lead to greater accountability for the public authority's decision making process.
34. In the particular circumstances of this case, the decisions made by the public authority relating to its investigation of Bearwood and the donations to the Conservative Party attracted a significant amount of media attention, and were a matter of considerable public debate. Given the nature of the requests in question in this case, the Commissioner considers that the withheld information would be of great assistance in further informing that public debate. This would be in the public interest.

35. In particular, the Commissioner notes that in both the press release and the case summary the public authority made several references to the limited powers at its disposal for regulating the PPERA. Given the purpose and importance of the PPERA the Commissioner considers that it is in the public interest to increase public understanding of the public authority's regulatory powers, and to facilitate a public debate on that issue. He considers that the withheld information would contribute to both of these factors.

Public interest arguments in favour of maintaining the exemption

36. The Commissioner notes that when considering the public interest in favour of maintaining section 30(1)(a)(i) consideration should be given to protecting what is inherent in the exemption – the effective investigation and prosecution of crime. This requires:

- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- the maintenance of independence of the judicial and prosecution processes;
- preservation of the criminal court as the sole forum for determining guilt;
- allowing the investigating body space to determine the course of an investigation; and
- the protection of information that deals with specialist investigatory techniques.

37. The public authority has argued that the restrictions on the permissibility of donations to political parties imposed by the PPERA are an important part of the legal framework governing elections and political campaigning. In order to maintain public trust and confidence in the political system it is important that these restrictions are upheld. Therefore, it has argued, there is a significant public interest in upholding the practical effectiveness of its regulatory powers.

38. It has added that in order to carry out its inquiries in an effective and efficient manner, it tries to ensure the cooperation of individuals and entities from which it seeks to obtain information. Those individuals and entities have a reasonable expectation that the information they provide will not be disclosed to the public at large. If the withheld information was disclosed under the Act it would make them reluctant to co-operate

in the future, and may also prejudice the future cooperation of other such individuals and entities.

39. The public authority has added that,

"...the co-operation of the regulated community and other enforcement agencies is an important element in our ability to conduct our statutory functions. It is particularly important to ensuring we are able to obtain information in a timely manner through co-operation. As our investigations rely on gathering evidence from these organisations it is clearly in the public interest that we maintain their co-operation and avoid releasing information that could prevent exchange of relevant information in the future and have the effect of hindering our ability to conduct our statutory functions."

40. In the refusal notice, and the published case summary, the public authority made several references to its limited powers. In particular, it noted that whilst it did have the power to obtain information from some 'regulated entities and officers of regulated entities' (in this case the Conservative Party and its officers), it was limited to this small group. In many other circumstances it had to rely upon the voluntary cooperation of bodies or individuals. Indeed, in the case summary it noted that during its investigation most of the individuals and entities who provided information did so on a voluntary basis – including Bearwood and Lord Ashcroft.⁵ Again, disclosure of the withheld information would make individuals and entities reluctant to voluntarily co-operate in the future. This would not be in the public interest.

41. The public authority has also pointed out that the request was made only a few days after the investigation was closed. It has pointed out that at that time the investigation could have been re-opened if additional information came to light, and disclosure of this information would have been likely to prejudice any future investigation. It would not be in the public interest to prejudice any re-opened investigation by the disclosure of the withheld information in this case.

Balance of the public interest arguments

42. In reaching a decision as to the balance of public interest arguments, the Commissioner has been mindful of the particular circumstances of this case.

⁵ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/87219/Case-summary-Bearwood-Corporate-Services.pdf.

43. The Commissioner considers that the public interest arguments in favour of disclosure are weighty. The withheld information in this case directly relates to a high profile investigation into donations made to the Conservative Party. Both the investigation and the outcome of the investigation attracted considerable media attention, and were a matter of significant public debate at the time of the request. This debate focused on both the matter under investigation by the public authority, and the wider issue of financial donations made to political parties.
44. In addition to this, and as noted above, the published case summary makes several references to the limited powers available to the public authority for carrying out its regulatory duties under the PPERA (see paragraph 5). Taking this into account, the Commissioner also considers that at the time of the request the effectiveness of the investigation and the functions of the public authority were also a matter of public debate. Given the important role of the PPERA in the 'legal framework governing elections and political campaigning' the Commissioner considers that informing that debate was a particularly weighty public interest factor in favour of disclosure.
45. The public authority has argued that the public interest in greater transparency and accountability is reduced because it has already placed information in the public domain in the form of the press release and case summary (see paragraph 4 above). The public authority has suggested that the withheld information would add little to public understanding of its investigation or of its work generally.
46. The Commissioner does not accept this argument. He accepts that the press release and the case summary give some detail of the matters considered by the public authority in its investigation, the steps taken and the reasons for its decisions. However, he considers that given the broad scope of the request, the withheld information would give a considerable insight into the public authority's investigation, and more generally into the way in which it carries out its regulatory duties.
47. The Commissioner considers that there is a strong public interest in increasing the transparency of the public authority's investigation into the donations in question; and also into informing the public debate surrounding the investigation, the effectiveness of the regulation of the PPERA, and the wider issue of the funding of political parties. The Commissioner considers that the disclosure of the withheld information would be of considerable assistance in further informing that public debate.
48. However, this has to be balanced against the public interest in favour of maintaining the exemption.

49. In particular, the public interest in disclosure has to be balanced against the public interest in avoiding prejudice to the functions set out in section 30(1)(a)(i), i.e. the effective investigation and prosecution of crime. In order to reach a view on the weight to give to this public interest argument the Commissioner has taken into account the following factors:
- the stage of the investigation at the time of the request;
 - whether and to what extent the information has already been put into the public domain;
 - the significance or sensitivity of the information; and
 - the age of the information.
50. In relation to the first of these factors, the Commissioner notes that the investigation in question was complete at the time of the request. Therefore, the disclosure of the withheld information would not have been harmful to an ongoing investigation. However, the public authority has pointed out that the investigation had only been concluded five days before the request was made and therefore, at the time of the request, there was a possibility that the investigation could have been re-opened had new information come to light. The Commissioner considers that the possibility of this occurring was slight as the public authority had already conducted a thorough investigation during which it had interviewed a number of individuals. Moreover, the Commissioner is of the view that because of the Act's assumption in favour of disclosure a public authority would need to demonstrate that there is a real possibility of a case being re-opened in order for this argument to carry any real weight.
51. In relation to the second of these factors, the Commissioner notes that the public authority has itself drawn his attention to the information that it has put into the public domain about its investigation into the donations in question. He notes that the press release and the case summary do outline the overall issues faced by the public authority, and the steps that it took in order to come to a conclusion on those issues. However, given the scope of the questions asked in requests (1) to (6) the Commissioner considers that the withheld information goes into considerable detail as to all aspects of the investigation into the donations in question – to a much more detailed level than the information already published by the public authority. Given this, the Commissioner considers that the withheld information has not already been put into the public domain. The public interest in maintaining the exemption is therefore not undermined by the availability of information already in the public domain.

52. In relation to the significance and sensitivity of the information, the Commissioner considers that if the withheld information, whilst relating to the investigation, was of no particular significance to it, this would reduce the likelihood of harm occurring to the investigatory process through the disclosure of this information. Conversely, he considers that the greater the significance of the information, the greater the likelihood of harm to the investigatory process, should that information be disclosed. In reaching a view on this, the Commissioner has considered the withheld information in detail.
53. The Commissioner notes that the questions asked by the requestor cover, in considerable detail, various aspects directly relating to how the public authority investigated the donations in question; what information was obtained from various third parties; what legal and expert advice it took into account; any communications with other regulators; and how it reached the final decisions it did. Taking this into account, he considers that the withheld information has a particular and central significance to the investigation in question.
54. Finally, in relation to the age of the information, the Commissioner notes that at the time of the request the public authority's investigation had only just been concluded. As noted above, the public authority has provided little evidence that the investigation might have been reopened. However, the Commissioner has also noted that given the close significance of this information to the investigation, the potential for harm to the public authority's investigatory process would be greater as this would reveal more up to date information about the way in which it investigated cases.
55. Therefore, bearing in mind these factors, the Commissioner considers that the public interest in avoiding prejudice to the functions set out in section 30(1)(a)(i) is particularly weighty.
56. Despite the strong public interest factors in favour of disclosure, the Commissioner considers that the public interest factors in favour of maintaining this exemption are particularly significant. In particular, the Commissioner is mindful of the inherent public interest in protecting information obtained during the course of a criminal investigation. Where Parliament has entrusted a particular statutory body with a specific investigatory and regulatory role in relation to matters of great public importance, the Commissioner considers that it is very much in the public interest that the discharge of those functions by such a body should not be impeded by concerns over the potential subsequent disclosure of information given voluntarily in the course of and for the purposes of a criminal investigation.

57. In addition to this, given the significance of the withheld information to the public authority's investigation, the Commissioner considers that the disclosure of this information would have been likely to have prejudiced its investigatory functions. Given this, the Commissioner finds that the public interest in avoiding prejudice to the public authority's ability to conduct future investigations particularly weighty and significant.
58. Taking this into account the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 30(1)(a)(i) outweighs the public interest in disclosure. Therefore the information in question should be withheld.

Section 40

59. The public authority has relied upon sections 40(2) and 40(3)(a)(i) in order to withhold all of the information that it holds in relation to request (1).
60. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied. The condition listed at section 40(3)(a)(i) applies where the disclosure of the information to any member of the public would contravene any of the data protection principles.
61. Although the Commissioner has not gone on to consider the application of this exemption to the withheld information he notes that, given the nature of the public authority's investigation, much of that information will contain the personal data of third parties. Furthermore, given that this was an investigation into potentially criminal offences, it is highly probable that some of this information is also the sensitive personal data of some individuals (as set out in section 2 of the DPA). Therefore it is highly likely that much of the withheld information would be exempt under section 40(2).
62. The full text of section 40 can be found in the legal annex at the end of this notice.

Procedural Requirements

63. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within twenty working days 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.

64. Although the public authority informed the complainant that it was seeking to rely upon section 40(2), the Commissioner notes that the public authority did not fully specify, in either the refusal notice or the internal review, which of the conditions of section 40(3) it believed was satisfied. In failing to do this, the public authority did not comply with the requirements of section 17(1)(b).
65. The full text of section 17 can be found in the legal annex attached to the end of this notice.

The Decision

66. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act in that:
- It correctly relied upon section 30(1)(a)(i) to withhold all of the requested information.
67. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority failed to meet the requirements of section 17(1)(b).

Steps Required

68. The Commissioner requires no steps to be taken.

Right of Appeal

69. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

70. 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.

71. 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 29th day of June 2011

Signed

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

Legal Annex

Section 17

- (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 section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 30

- (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 40

- (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 Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (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 Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of

that Act (data subject's right to be informed whether personal data being processed)."

(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 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 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."