

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2011

Public Authority: The Crown Prosecution Service
Address: 50 Ludgate Hill
London
EX4M 7EX

Summary

In 2009 Baroness Uddin was interviewed by the Metropolitan Police with regards to whether she had committed an offence under the Theft Act 1968 or the Fraud Act 2006 in claiming Parliamentary expenses. In March 2010 the Crown Prosecution Service (CPS) announced that having considered the case carefully it had concluded that there was insufficient evidence to bring criminal charges against Baroness Uddin. The complainant in this case submitted a request to the CPS for a copy of Baroness Uddin's verbal interview with the Metropolitan Police. The CPS refused to provide the copy of the interview transcripts on the basis that they were exempt from disclosure on the basis of sections 30(1)(c) and 41(1) and furthermore that the majority of the information was also exempt from disclosure on the basis of section 40(2). The Commissioner has reviewed the requested information and has concluded that all of it constitutes Baroness Uddin's sensitive personal data and that its disclosure would breach the first data protection principle. The requested information is therefore exempt from disclosure on the basis of section 40(2) of the Act.

The Commissioner's Role

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

Background

2. On 3 May 2009 The Sunday Times printed an article which alleged that for the purposes of expense claims made under House of Lords rules, Baroness Uddin had designated her main residence as a flat in Kent which neighbours said had been unoccupied for years.¹
3. On the same day, Mr Angus Robertson MP complained to the House of Lords about Baroness Uddin's alleged conduct. On 5 May 2009 it was announced that the Clerk of the Parliaments, as Accounting Officer, would carry out an initial investigation into the allegations. Meanwhile the Metropolitan Police had decided to investigate whether Baroness Uddin had committed an offence under the Theft Act 1968 or the Fraud Act 2006. The Clerk of the Parliaments suspended his own investigation into Baroness Uddin until the criminal process had been concluded.
4. On 12 March 2010 the CPS announced that having considered the case carefully it had concluded that there was insufficient evidence to bring criminal charges against Baroness Uddin.²
5. Following this announcement, the House of Lords re-commenced its investigation and focused on Baroness Uddin's claims for night subsistence and travel. The sub-Committee on Lords Conduct concluded that Baroness Uddin had wrongly claimed the sum of £125,349.10 and as a result she be suspended from the House of Lords for three years or until she had repaid this sum, whichever was the later, and also make a personal statement of apology to the House of Lords. Baroness Uddin appealed the outcome of this investigation to the Lords Privileges and Conduct Committee which upheld the finding that Baroness Uddin had wrongly claimed the above sum which she was not entitled to.³

¹ ['The deserted Kent flat that earned baroness £100,000'](#)

² Keir Starmer's QC, Director of Public Prosecutions, announcement that there would be no charges in relation to Baroness Uddin's claims for parliamentary expenses can be viewed here http://www.cps.gov.uk/news/press_releases/111_10/index.html

³ These reports can be found here <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldprivi/39/3904.htm> and here <http://www.publications.parliament.uk/pa/ld201011/ldselect/ldprivi/39/3902.htm>

The Request

6. The complainant sent a letter to the CPS on 29 March 2010 in which he expressed his dissatisfaction with its decision not to bring charges against Baroness Uddin. In this letter he wrote 'I would appreciate a copy of her interview [i.e. Baroness Uddin's interview with the Metropolitan Police], under the Freedom of Information Act.'
7. The CPS provided the complainant with a response to his letter on 31 March 2010 but this response did not address his information request. The complainant therefore repeated this request in a further letter to the CPS dated 5 April 2010 in which he made it clear that under the Act he wished to be provided with a copy of Baroness Uddin's verbal interview with the Metropolitan Police.
8. The CPS contacted the complainant on 13 April 2010 in order to acknowledge receipt of his request dated 5 April 2010.
9. The CPS provided the complainant with a substantive response to his request on 5 May 2010. In this response the CPS explained that all of the requested information was exempt from disclosure on the basis of section 30(1)(c) of the Act. The CPS also explained that the majority of the information contained in the interview was personal data, a large proportion of this being sensitive personal data because it consisted of information as to the commission, or alleged commission, of an offence. The CPS explained why it believed that disclosure of both classes of personal data, i.e. sensitive and non-sensitive, would breach the first data protection principle and thus it had concluded that this information was exempt from disclosure on the basis of section 40(2) of the Act.
10. The complainant contacted the CPS on 9 May 2010 and asked it to conduct an internal review of this decision.
11. On 7 July 2010 the CPS informed the complainant of the outcome of the internal review. The review concluded that the exemptions contained at sections 30(1)(c) and 40(2) had been applied correctly and furthermore that the requested information was also exempt from disclosure on the basis of section 41(1).
12. The complainant contacted the CPS again on 18 July 2010 in order to express his dissatisfaction with this outcome and asked the CPS to return to him a copy of the relevant papers so that he could submit them to the Commissioner.
13. The CPS provided the complainant with these papers in a letter dated 3 August 2010 and noted that 'Should you appeal to the Information

Commissioner's Office they will contact us directly for all relevant information relating to your request'.

The Investigation

Scope of the case

14. On 22 July 2010 the Commissioner received a letter from the complainant asking him to review the CPS' decision to withhold the information that he had requested.
15. The Commissioner contacted the complainant on 13 September 2010 and apologised for the delay in acknowledging receipt of this complaint; this delay was due to the high volume of correspondence which his office had recently received. In his letter the Commissioner explained that in order to progress this complaint he needed the complainant to provide him with a copy of his request, the CPS' response, his request for an internal review and the CPS' internal review outcome.
16. The complainant provided the Commissioner with copies of the relevant correspondence on 23 September 2010. The complainant noted that the letter he received from the CPS dated 3 August 2010 had indicated that the Commissioner, rather than the complainant, would take responsibility for seeking relevant correspondence from a public authority following receipt of a complaint.

Chronology

17. The Commissioner contacted the CPS on 5 October 2010 and asked it to provide him with a copy of the information that the complainant had requested.
18. After acknowledging receipt of this correspondence, the CPS contacted the Commissioner on 5 November 2010 and explained that it would be happy to provide him with a copy of the withheld information but in light of the sensitivity of the information it was only prepared to provide it to the email account of a named individual on the 'gsi' network.
19. The Commissioner contacted the CPS on 16 November 2010 and provided such an email address.
20. The CPS provided the Commissioner with the withheld information on 17 November 2010.

21. The Commissioner contacted the CPS again on 18 November 2010 and asked to be provided with a complete copy of the refusal notice as the copy he was in possession of was incomplete.
22. The CPS provided this document on the same day.

Analysis

Exemptions

Section 40 – personal data

23. The CPS has argued that the majority of the information contained in the interview transcripts constituted Baroness Uddin's personal data and a large proportion of this personal data constituted sensitive personal data because it consisted of information as to the commission, or alleged commission, of an offence.

24. Section 1 of the Data Protection Act 1998 (DPA) defines personal data as:

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

a) from those data, or

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

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

25. Section 2 of the DPA states that:

'In this Act "sensitive personal data" means personal data consisting of information as to...

...(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings'.

26. The Commissioner has considered the content of the interview transcripts which constitute the requested information and is of the opinion that **all** - not just the majority – of this information constitutes Baroness Uddin's personal data and moreover all of the requested information constitutes her sensitive personal data. This is because the

Commissioner believes that the entirety of the interview transcripts relate directly to Baroness Uddin and clearly all of the transcripts consist of information about the allegations that she had committed an offence under section 17 of the Theft Act 1968 or the Fraud Act 2006. Therefore the Commissioner believes that all of the requested information, not just the majority of the information, has the potential to be exempt from disclosure on the basis of section 40(2) of the Act.

27. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the DPA.
28. The CPS argued that disclosure of the requested information (or the parts which it considered to be personal data) would breach the first data protection principle which states that:

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

 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.’
29. The CPS argued that as the information contained in the interview transcripts was provided by Baroness Uddin as part of a criminal investigation she had a reasonable expectation that the information she provided would be held in confidence and thus would not be disclosed to the public. To do so would therefore be unfair. The CPS also explained that it was satisfied that none of the conditions in schedule 2 of the DPA could be met.
30. In deciding whether disclosure of personal data, including sensitive personal data, would be unfair the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 ECHR;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and
 - even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
31. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in a case involving the MP's expenses the Information Tribunal commented that:
- '79. ...in relation to the general principle application of fairness under the first data protection principle, we find:
- (..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'⁴
32. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
33. In general, in respect of sensitive personal data, given the very nature of such information, i.e. information that individuals regard as the most private information about themselves, in the Commissioner's opinion it is more likely that disclosing it will be unfair to the data subjects to

⁴ The Corporate Officer of the House of Commons v Information Commissioner & Norman Baker MP (EA/2006/0015 & 0016)

which the information relates. This is because disclosure of such information is very likely to have a distressing or detrimental effect.

34. With regard to the specific circumstances of this case, the Commissioner agrees with the CPS that Baroness Uddin would have had a clear and strongly held expectation that the transcripts of her interviews with the Metropolitan Police would not be disclosed under the Act. Whilst the Commissioner accepts that the details of an individual's interviews with the police may be repeated in any future court case, it is clearly the established practice of police forces (and the CPS) not to disclose complete transcripts of interviews. Thus any individual, either a suspect or a witness in a case, has a reasonable expectation that the complete transcript of their interview would not be disclosed.
35. In respect of the consequences of the disclosing the information the Commissioner believes that although certain details concerning the allegations about Baroness Uddin have been placed into the public domain, both via the media and the official House of Lords' reports referenced above, disclosure of the requested information would be likely to result in additional damage and distress. The Commissioner has reached this conclusion based upon both the content of the requested information and also the context in which the information was created. That is to say, it would clearly be distressing to any individual who is subject to investigation by the police to have details of their interviews with the police disclosed be it either via disclosure of entire interview transcripts or simply extracts from such transcripts. Furthermore, regardless of the findings of the House of Lords' investigation, the Commissioner has to take into account the decision of the CPS to drop the charges against Baroness Uddin and in his opinion disclosure of the interview transcripts would, in the context of the criminal charges, 're-open' a matter which Baroness Uddin could have legitimately considered to be closed.
36. Nevertheless, the Commissioner acknowledges that there is a generic public interest, albeit a weighty one, in disclosure of information surrounding cases where the Parliamentary expenses system may have been abused. This interest is based on the trust that the public places in the members of the Houses of Parliament, both elected and unelected, and the expectation that the public is therefore entitled to have that these members will conduct themselves with honesty and integrity. With regard to the specifics of this case the Commissioner believes that the need for transparency and accountability attracts further weight given the amount of money that Baroness Uddin was alleged to have inappropriately claimed and furthermore the fact that the allegations were so serious that the police actually investigated the circumstances in which the claims were made. Furthermore, the

Commissioner believes that it would be in the public interest to disclose the withheld information if it could provide further details regarding the CPS' decision not to press charges against Baroness Uddin; it is clear that the complainant, and others, disagree with the decision that Baroness Uddin would not face a criminal trial.

37. However, despite the weight that these public interest arguments attract, given Baroness Uddin's strongly held (and reasonable) expectation that the interview details would not be disclosed and the detrimental consequences of disclosure, the Commissioner has concluded, albeit narrowly, that it would be unfair to disclose the requested information. Therefore the Commissioner does not need to consider whether any of the conditions in Schedule 2 or 3 are met.
38. In light of his findings in respect of section 40(2) the Commissioner has not gone on to consider whether the CPS was also entitled to withhold the information on the basis of sections 30(1)(c) and 41(1).

Procedural Requirements

39. The complainant originally submitted his request to the CPS on 29 March 2010. This request was repeated on 5 April 2010 in light of the CPS' response to him dated 31 March 2010 which did not make reference to his information request. Section 17(1) of the Act requires that any public authority which relies on an exemption to refuse a request must provide the applicant with a refusal notice stating this within 20 working days of the date of the request. In the circumstances of this case the CPS failed to issue a refusal notice within 20 working days of 29 March 2010 and therefore breached section 17(1) of the Act

The Decision

40. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The information falling within the scope of the complainant's request is exempt from disclosure on the basis of section 40(2) of the Act.
41. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - By failing to issue a refusal notice within 20 working days following the receipt of the request dated 29 March 2010 the CPS breached section 17(1) of the Act.

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

44. 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.
45. 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 23rd day of February 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds

information of the description specified in the request, and

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

Section 1(2) provides that -

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

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

Time for Compliance

Section 10(1) provides that –

“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.”

Refusal of Request

Section 17(1) provides that -

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

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

Investigations and proceedings conducted by public authorities

Section 30(1) provides that –

“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.”

Personal information

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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.”

Information provided in confidence

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would

constitute a breach of confidence actionable by that or any other person.”

Data Protection Act 1998

Part I

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

“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;

2) Sensitive personal data.

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

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

(b) his political opinions,

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

(d) whether he is a member of a trade union (within the meaning of the **M1** Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.
2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

Schedule 3

Conditions relevant for purposes of the first principle: processing of sensitive personal data

1. The data subject has given his explicit consent to the processing of the personal data.

2. (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

3. The processing is necessary—

(a) in order to protect the vital interests of the data subject or another person, in a case where—

(i) consent cannot be given by or on behalf of the data subject, or

(ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or

(b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

4. The processing—

(a) is carried out in the course of its legitimate activities by any body or association which—

(i) is not established or conducted for profit, and

(ii) exists for political, philosophical, religious or trade-union purposes,

(b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,

(c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and

(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6. The processing—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7. (1) The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.