

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 18 October 2011**

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### **Summary**

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The complainant made a request for background notes to 45 Parliamentary Questions about the Tasker Report. The MoJ provided some of the requested information but withheld the remainder under section 36(2)(b) of the Freedom of Information Act 2000. It made a late introduction of section 40(2) at the internal review stage. The Information Commissioner found that some of the information was correctly withheld under section 36(2)(b), and that section 40(2) was correctly applied to some of the information. The Commissioner requires the MoJ to disclose some of the information withheld under sections 36 and 40. He also found procedural breaches of the Act.

#### **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. This was a refined request, stemming from a Decision Notice issued by the Commissioner under reference FS50202964. The complainant had previously asked for copies of any briefing notes held about the Tasker Report and the MoJ had calculated that the costs for disclosing the information would exceed the statutory limit, established by section 12 of the Act. The Decision Notice accepted the MoJ's costs calculations but directed the MoJ to comply with section 16(1) by assisting the complainant to submit a revised or refined request for information which

it might be able to respond to within the limits provided by section 12 of the Act. The MoJ suggested that the complainant refine her focus to the background notes to specified Parliamentary Questions, which she agreed to do.

## The Request

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3. On 31 January 2010 the complainant made a request to the MoJ for background briefing notes to 45 Parliamentary Questions (PQs) submitted to Maria Eagle, the Prisons Minister. The 45 PQs are identified in Annex A.
4. On 26 February 2010 the MoJ wrote to the complainant saying that it was in a position to provide the background notes to 20 of the 45 PQs, which it enclosed. It stated that parts of the remaining background notes were exempt under section 36(2)(b) and that it required until 26 March 2010 to consider whether the public interest favoured disclosing or withholding that information.
5. On 12 April 2010 the MoJ wrote to the complainant. It disclosed the remaining briefing notes that it held, some of which contained redactions under section 36(2)(b)(i) and (ii). It set out the public interest arguments that it had considered in reaching its decision.
6. On 3 May 2010 the complainant wrote to ask for an internal review of the decision to redact information.
7. On 9 July 2010 the MoJ wrote to the complainant with the outcome of its review. It disclosed some information which it had previously redacted under section 36(2)(b). It upheld its decision to withhold the remainder. One PQ, 87787, was marked as being exempt under section 40 as well as section 36, but the MoJ made no reference to this late introduction of section 40 in its covering letter to the complainant, and offered no explanation as to why it applied.

## The Investigation

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### Scope of the case

8. On 25 August 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether exemptions had been appropriately applied:

*"Some information has been provided but it has been redacted. I do not believe [the MoJ] are entitled to withhold this information."*

### Chronology

9. On 8 March 2011 the Information Commissioner wrote to the MoJ, setting out details of the complaint and asking for a response, together with unredacted copies of the withheld information, within 20 working days. He asked specific questions about the application of section 36 and section 40.
10. There followed an exchange of correspondence, with the MoJ querying whether it had already sent unredacted copies of the information to the Commissioner. When it became evident that it had not, the MoJ stated that it would not be able to collate and provide the response within the specified time limit.
11. It eventually responded on 19 April 2011.

#### **Section 36**

12. The MoJ provided the Commissioner with what it claimed were unredacted copies of the withheld information and a copy of its submission to the Minister (the qualified person for the purposes of section 36(2)) regarding the engagement of the exemption at section 36. It provided chilling effect arguments in respect of its application of section 36, stating that the exemption had been applied to ensure that confidential briefing material speculating about the possible reasons or motives behind the submission of particular PQs remained confidential.

#### **Section 40**

13. The MoJ stated that section 40 had been applied because it considered certain information (names and other identifying information) to be personal data and that it would be unfair to the data subjects and not within their expectations to release this information in response to the request. It cited three PQs as examples of redactions having been made

for this reason, one of which, PQ 87787, being the only section 40 redaction that had been notified to the complainant and which the MoJ described as containing '*sensitive data*'.

14. On 19 July 2011 the Information Commissioner wrote to the MoJ.

***Redacted Information***

15. The Commissioner identified discrepancies between information which, in its previous letter, the MoJ had claimed was withheld information, and what had actually been disclosed to the complainant. He identified seven PQs where the MoJ had claimed that redactions applied, when in fact the information had been disclosed to the complainant in its letters of 12 April 2010 and 9 July 2010.

***Section 36***

16. The Commissioner noted that while most of the redactions indicated under section 36 did appear to relate to speculation about the motives behind the PQs, in three instances the information redacted under section 36 clearly did not. The Commissioner asked the MoJ to provide more information about what information the qualified person was asked to consider when giving an opinion on whether disclosure would or would be likely to inhibit the matters set out in section 36(2)(b).

***Section 40***

17. The MoJ had failed to clearly identify to the Commissioner what information it considered was covered by section 40(2). Of the three examples it cited in its letter of 19 April 2011, the first item had in fact been disclosed to the complainant in its internal review of 9 July 2010 and the last had been identified only as redacted under section 36 in the disclosed documents.
18. The Commissioner advised the MoJ to specify precisely which items of information it considered to be covered by the exemption at section 40 and to address the question of why disclosure of the information would be likely to be unfair, particularly in view of the seniority of some of the individuals concerned. He asked for a response by 9 August 2011.
19. The MoJ spoke to the Commissioner by telephone on 26 July 2011. It explained that the discrepancies identified by the Commissioner had occurred because it could not locate a coherent record of precisely what information it had disclosed to the complainant in response to her request. The Commissioner agreed to send the MoJ a copy of the information that he held, with the redacted information marked up, which he had pieced together by comparing the information supplied to

him by the MoJ with that supplied by the complainant. This was sent to the MoJ on 26 July 2011.

20. On 16 August 2011 the Commissioner telephoned the MoJ and requested that it provide a response to his letter of 19 July 2011. On 22 August 2011 and again on 26 August 2011 the MoJ emailed the Commissioner indicating that it was still not in a position to respond. It finally responded on 9 September 2011.

### ***Section 36***

21. The MoJ confirmed that the QP had only viewed the submission when giving her opinion and that the decision as to precisely what information should be redacted was left to the relevant policy officials in the MoJ business areas. It confirmed that it still considered the application of section 36 to be appropriate in all the instances that it had indicated.

### ***Section 40***

22. The MoJ stated that it had applied section 40(2) to redact information from the disclosures it made to the complainant on 26 February 2010 and 12 April 2010. When asked, the MoJ clarified that the redactions in respect of 26 February 2010 amount to two instances where the name and contact number of the member of staff who prepared the background note were redacted, although exemption 40(2) was not cited. It did not specify what information it had redacted from the documents sent on 12 April 2010, merely stating that information had been redacted where it constituted the individuals' personal data, and that in most cases this information fell within a set of information also exempt under section 36.

## **Analysis**

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### **Exemptions**

#### **Section 36 - prejudice to effective conduct of public affairs**

23. The MoJ cited the exemption at section 36(2)(b)(i), which provides an exemption for information the disclosure of which would, or would be likely to, inhibit the free and frank provision of advice; and section 36(2)(b)(ii), which provides the same in relation to the free and frank exchange of views for the purposes of deliberation. This exemption can only be cited where the reasonable opinion of a specified qualified person ('QP') is that this exemption is engaged.

24. Consideration of this exemption is a two-stage process; first, it must be engaged, for which the Commissioner must conclude that the opinion of the QP is objectively reasonable. Secondly, the exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
25. Turning first to whether the exemptions are engaged, sections 36(2)(b)(i) and (ii) can be cited only where the reasonable opinion of a specified QP is that the inhibition described in these sections would be at least likely to result. The QP for each public authority is either specified in the Act, or is authorised by a Minister of the Crown. In reaching a conclusion as to whether these exemptions are engaged, the Commissioner will cover the following:
  - who the QP is for the public authority;
  - whether the QP gave an opinion in respect to the information in question;
  - when the opinion was given; and
  - whether the opinion was reasonably arrived at and reasonable in substance.
26. Section 36(5)(a) of the Act establishes that the QP in relation to information held by the MoJ is any Minister of the Crown. The Prisons Minister, Maria Eagle, acted as QP in relation to the complainant's request, a written submission having been presented to her on 31 March 2010. The MoJ have supplied an email chain which confirms that the opinion was given on 8 April 2010. This was prior to the date of the refusal notice.
27. Turning to whether this opinion was reasonably arrived at, the issue here is the process undertaken by the QP in forming their opinion. If, for example, the QP had formed their opinion on the basis of a toss of a coin, the Commissioner would conclude that the opinion had not been reasonably arrived at. In this case the MoJ has confirmed that the opinion was based on a written submission provided to the QP, a copy of which has been provided to the Commissioner.
28. An important factor when considering whether the opinion was reasonably arrived at is what the QP understood about the withheld information and the factors favouring applying the exemption. If the QP did not view the entirety of the withheld information in question the Commissioner would generally expect that they are provided with a briefing that describes the content of the information in enough detail to

inform the opinion and the relevant factors that should have been taken into account when forming an opinion.

29. The written submission asked the QP to agree to the application of section 36(2)(b) to withhold parts of the background notes that contain the views and opinions of policy officials. It stated that the parts of the background notes it wished to redact are those parts in which officials speculate as to the reasons why an MP had tabled PQs about the Tasker enquiry and which go on to detail the nature of the speculation. It set out the nature of the inhibition it foresaw if the information was released:

*"We are satisfied that parts of the background notes to the parliamentary questions to the Minister contain the views and opinions of officials which engage this exemption as they would be less willing to be this candid in the future if this information was released. The quality of future advice provided to Ministers by officials in background notes concerning parliamentary questions could be compromised as they will be less candid when expressing opinions and views on relevant issues."*

30. The submission also stated:

*"There are also redactions where individuals are named, or could be identified which is standard practice."*

31. However, some of the information exempted by the MoJ under section 36(2)(b) is clearly not what was described in the submission to the QP (speculation about the motivation behind the tabling of certain PQs); the sections recommended for redaction do not cover this information.
32. The Commissioner does not, therefore, accept that the opinion of the QP covered these redactions and so concludes that neither of the exemptions provided by section 36(2)(b) is engaged in relation to the redactions identified in respect of the three PQs (PQ125304, PQ 175194, PQ 173676).
33. The Commissioner has considered the content of the withheld information covered by the QP's opinion. Much of it is clearly of a free and frank nature. The Commissioner accepts that it was an objectively reasonable opinion that disclosure of the information would be likely to result in inhibition to others when engaging in the future provision of advice or views for the purpose of deliberation. Therefore the exemption provided by section 36(2)(b)(i) and (ii) is engaged in relation to this information. The Commissioner also accepts that in terms of this information the opinion was reasonably arrived at.

34. The specific information which the Commissioner considers is not engaged by sections 36(2)(b)(i) and (ii) is set out in a separate confidential annex sent with this Notice to the MoJ only. The steps specified later in this Notice should be carried out on the basis of this annex.

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

35. The Commissioner has concluded that some of the withheld information is exempt under sections 36(2)(b)(i). This being a qualified exemption, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
36. In the case of *Guardian & Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption "*involved a particular conundrum*", noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (paragraph 88).
37. In the Tribunal's view, the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, "*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*" (paragraph 91). This means that whilst the Commissioner should give due weight to the reasonable opinion of the QP when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition to the free and frank provision of advice and the exchange of views.

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

38. On the issue of the severity and extent of the inhibition resulting from disclosure of PQ briefing notes, the view of the Commissioner is that the severity of future inhibition would be likely to vary according to the sensitivity of the subject matter and/or the content of the information. In this case, the information consists of briefing notes containing free



and frank discussions related to particular PQs. The Commissioner accepts that the subject matter and the particular content of the information in question are sensitive. He accepts that if it were to be disclosed in this case then the likely inhibition in future cases would be severe enough to damage the quality of the advice given by officials when briefing Ministers in similar scenarios, which would in turn affect the quality of the responses provided to PQs.

39. The Commissioner would accept that it is vital that a public authority be able to brief a Minister in a free and frank manner in order that the Minister may have the fullest possible understanding of a situation when composing a response to a PQ. The Commissioner would also accept that any inhibition sufficient to affect the quality and candour of the advice supplied would result in an impact upon the value and integrity of the PQ system.
40. The passage of time is also a relevant factor when considering the public interest in maintaining the exemption. While the Commissioner accepts that there would be significant effects from disclosure, these effects would be diminished, to some extent, by the passage of time (2-4 years) between the requests and the date the information was created.

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

41. Turning to those factors that favour disclosure of the information, the Commissioner recognises that there will be public interest about the running of Wandsworth Prison, given that it has been the subject of public criticism in several government commissioned reports. He accepts that there is legitimate public interest in certain information relating to the administration of Wandsworth Prison being released. He also considers that it can be argued that it would increase the public's trust in the parliamentary process if the MoJ released the advice Ministers received in background notes when answering parliamentary questions. Added to this factor relating to the specific information in question is the general public interest in improving the transparency and openness of the public authority.

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

42. The Commissioner has recognised there is a legitimate public interest in disclosure on the basis of the subject matter of the information in question. Added to this is the general public interest in the openness and transparency of the public authority. The Commissioner has also considered to what extent the actual content of the information would illuminate public debate on an important issue. He has concluded that this does not create a very significant public interest case for disclosure,

beyond the general importance for openness and transparency about prisons and the problems at the prison in question.

43. Having accepted as reasonable the opinion of the QP that inhibition relevant to section 36(2)(b)(i) would be likely to result through disclosure, and having found that this inhibition would be likely to occur frequently and be of some severity and extent, he must afford appropriate weight to the public interest in avoiding this outcome. Although the Commissioner has considered the passage of time, other factors such as the sensitivity of the information mean there is still significant weight to be placed on the maintaining the exemption. Having done so, he finds that the public interest in the maintenance of the exemption outweighs the public interest in disclosing the redacted information.

#### **Section 40 – Personal information**

44. The MoJ cited the exemption at section 40(2) of the Act. Section 40(2) specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles.
45. In this case, the Commissioner notes that most of the personal data contained in the requested information is covered by redactions made under section 36, which the Commissioner has accepted. Any personal data is therefore not at risk of being disclosed to the complainant, albeit because of section 36 rather than section 40(2). He has therefore decided that, except in respect of the three specific PQs 87787, 125304 and 175194 it is not necessary to consider whether such information might also be exempt under section 40(2).

#### ***PQs 87787, 125304 and 175194: is the information personal data?***

46. The MoJ cited section 40(2), which provides an exemption for information which is the personal data of any individual, aside from the requester, and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process; first, it must be established whether the information constitutes the personal data of any individual aside from the requester and, secondly, it must be considered whether disclosure of this personal data would be in breach of any of the data protection principles.

47. In considering whether the information requested is “personal data”, the Commissioner has taken into account his own guidance on the issue. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable.
48. PQs 87787, 125304 and 175194 include the names of individuals together with other information about them. Following the definition at 1(1) this information does constitute personal data.
49. However, the fact that the information constitutes personal data does not automatically exclude it from disclosure. It is also necessary to determine whether disclosure would contravene any of the data protection principles. The MoJ argued that the names of the individuals and accompanying information about them are exempt as disclosure would breach the first data protection principle, which is that it would be unfair to release the information.
50. The first data protection principle states:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*  
*(a) at least one of the conditions in schedule 2 is met, and*  
*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*
51. The Commissioner’s general approach to cases involving personal data is to consider the fairness element first. Only if he believes that disclosure would be fair would he move on to consider the other elements of the first data protection principle.
52. In assessing fairness, the Commissioner considers the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He then balances this against general principles of accountability, transparency and legitimate public interest.

**PQ 125304 and PQ 175194**

53. The personal data here consists of payment arrangements in respect of a named individual.

***Expectations of the data subject***

54. The Commissioner’s Awareness 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. Although the guidance acknowledges that there are no hard and fast rules it 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."*

55. The Commissioner's guidance therefore makes it clear that where the information relates to the data subject's private life (ie their home, family, social life or finances) it will generally deserve more protection than information about them acting in an official or work capacity (ie their public life).
56. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. In his guidance on the section 40 exemption, the Commissioner suggests "*...if the information requested consists of names of officials, their grades, jobs or functions or decisions made in their official capacities, then disclosure would normally be made*".
57. The Commissioner considers that, although the individual was not a member of staff, he was working at a senior level and being paid by the public purse to exercise functions of a public nature. The Commissioner therefore considers it appropriate that a similar expectation of scrutiny on the part of the individual should apply.
58. The Commissioner's guidance also states that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the Act. This is because the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds. In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.
59. The MoJ stated that in reaching its decision to withhold information under section 40(2) it had taken account of the seniority of the staff in question; however, it did not explain what weighting it had accorded the

data subject's seniority in this case nor did it state whether the data subject had been asked to give consent to the disclosure.

***The effect disclosure would have on the data subject***

60. The MoJ has argued that if information about payment arrangements were to be disclosed, this would place the individual at a disadvantage in a competitive marketplace:

*"Independent contractors who have to compete in the private sector, and who [sic] payment rates for services have to be individually negotiated in competition with their competitors, have the reasonable expectation that details about agreed payments will not be disclosed. It would be unfair processing to disclose personal data which could put such individuals at a disadvantage in the competitive market and it would thus breach the Data Protection Act."*

61. The Commissioner accepts that disclosure of financial agreements between contracting parties can potentially lead to weakened negotiating positions for both parties. However, the likelihood of this occurring will very much depend upon the content and age of the information in question. In this case, the information involved is very broad (a specific rate) and no details of the total amount paid for the work is provided nor is there any way to calculate this. The arrangement was agreed in March 2007, and so at the time of the complainant's request it was around three years old. The Commissioner considers that its currency would have depleted sufficiently by this time that its disclosure would not give anything away that would be detrimental to the current negotiating position of the individual. He therefore does not accept the arguments submitted by the MoJ in this respect.
62. Although the MoJ did not raise it, the Commissioner has considered whether disclosure of the information would be unnecessarily intrusive to the data subject. On the subject of release of payment information, the Commissioner's Guidance accepts that, *"in some cases, releasing the exact salary would be significantly more intrusive than approximate salaries, for example because: the exact salary is individually negotiated rather than determined according to a known formula"*.
63. However, in this case, the information in question is not an exact salary, merely a rate of pay. No information about the total payment made to the data subject or the total time chargeable is included. While the Commissioner accepts that it may not be appropriate to release exact salary information, he does not consider that this is a bar to releasing more general information about payments made, such as payment bands or rates.

***Legitimate public interest and the general principles of accountability and transparency***

64. The MoJ did not offer any comments as to how the public interest might be served by the disclosure of the payment information.
65. The Commissioner believes there is a legitimate public interest in disclosure of information which would promote accountability and transparency in the spending of public money. In particular, the Commissioner considers that there is a legitimate public interest in knowing the payment rates for publicly-funded work, particularly where that work is being carried out by a former member of staff whose services have been retained on an ad hoc basis.

***Would disclosure of the information be fair?***

66. The Commissioner finds that there is a strong legitimate public interest in disclosure, the data subject should have had some expectation of disclosure, and disclosure would not be a severe intrusion into their privacy. The disclosure of the information contained in PQs 125304 and 175194 would not be unfair to the data subject.
67. In order for the first data protection principle to be satisfied, it is also necessary to meet at least one of the conditions for fair processing set out in Schedule 2 of the DPA. The Commissioner has focussed here on the sixth condition, which establishes a three-part test.
  - There must be legitimate interests in disclosing the information.
  - The disclosure must be necessary in the cause of that legitimate interest.
  - The disclosure must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
68. The first and third points are covered above under the consideration of fairness – there is a legitimate public interest in disclosing the information and any interference or prejudice to the rights of the data subject would not be severe.
69. As to whether it would be necessary in the cause of this legitimate interest to disclose the information, the key issue is whether this interest could be satisfied by any other means. The Commissioner finds that this information could not be obtained from another source, and that it is necessary to disclose the requested information to meet the

legitimate public interest. The Commissioner finds that that the interference, which would not be severe, can be justified and disclosure would be proportionate. Schedule 2 condition 6 of the DPA is therefore met.

70. His overall conclusion is, therefore, that the exemption provided by section 40(2) is not engaged in respect of the personal data held in respect of PQ 125304 and 175194.

### **PQ 87787**

71. The personal data in this case comprises information about a criminal offence committed by a named individual. Section 2(g) of the DPA defines such information as sensitive personal data.

#### ***Expectations of the data subject***

72. The information in question here is sensitive personal data. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Due to the sensitivity of this information, the Commissioner believes that the data subject would have a legitimate expectation that it would be held in confidence and not actively disseminated by the MoJ, except on a "need to know" basis.

#### ***The effect disclosure would have on the data subject***

73. The MoJ has not put forward any adverse consequences that would be likely to be sustained by the individual if this information were released.
74. The Commissioner has nevertheless considered whether disclosure of the information would be unnecessarily intrusive to the data subject. He has concluded that disclosure of this information into the public domain would, at the very least, be likely to have a distressing impact upon the data subject. It might also have a negative impact on any rehabilitation or monitoring strategies that the data subject might be involved in. The Commissioner considers that there is an important difference between limited disclosure of information to affected parties and the wider disclosure of information under the Act, which is to be considered as being to the world at large.

#### ***Legitimate public interest and the general principles of accountability and transparency***

75. The MoJ did not offer any comments as to how the public interest might be served by the disclosure of the sensitive personal data.

76. The Commissioner believes that there is a legitimate public interest in facilitating public scrutiny of the criminal justice system. However, he does not consider that this extends to disseminating information about individual criminal convictions simply because someone requests it. He considers that such an approach could actually be counter-productive, in that it could have a wider, detrimental effect on the relationships between offenders and the authorities which seek to rehabilitate them.

***Would disclosure of the information be fair?***

77. Therefore, the Commissioner concludes that disclosure of this information would be unfair and in breach of the first data protection principle. Having already found that this information is the personal data of the data subject his overall conclusion is that the exemption provided by section 40(2) is engaged in respect of the personal data withheld under PQ 87787.

**Procedural Requirements**

**Sections 1 and 10**

78. In failing to disclose information that the Commissioner has concluded was not exempt within 20 working days of receipt of the request, the MoJ did not comply with the requirements of sections 1(1)(b) and 10(1).

**Section 17**

79. In failing to explain in the refusal notice why section 36(2)(b) applied, when this was not clear, the MoJ failed to comply with section 17(1)(c).
80. In failing to state that section 40(2) had been applied to the information which was disclosed to the complainant on 26 February 2010 and 12 April 2010, the MoJ failed to comply with sections 17(1)(b) and 17(1)(c)
81. In failing to communicate the outcome of its consideration of the public interest test within 20 working days of issuing the refusal notice, the MoJ failed to comply with the requirement at section 17(3).



## The Decision

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82. 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 applied the exemption provided at section 36(2)(b)(i) correctly in relation to some of the withheld information.

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

- It wrongly applied the exemptions provided at sections 36(2)(b)(i) to the information identified in the confidential annex.
- It breached sections 1(1)(b) and 10(1) in failing to disclose this information within 20 working days of receipt of the request.
- It breached section 17(1)(c) by failing to state in the refusal notice why the exemption at section 36(2)(b) applied.
- It breached section 17(1)(b) and (c) by failing to state in the refusal notice that the exemption at section 40(2) had been applied, and to explain why.
- It breached section 17(3) by failing to communicate the outcome of its consideration of the public interest within a further 20 working days.

## Steps Required

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

- Disclose to the complainant the redacted information incorrectly withheld under section 36 or section 40, as identified in the confidential annex.

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

## Other matters

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87. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
88. The Code of Practice issued under section 46 of the Act (the "section 46 code") sets out the practice which public authorities should follow in relation to the creation, keeping, management and destruction of records. In relation to the types of records which should be kept, paragraph 8.1 of the section 46 code recommends that authorities should consider the following:

*"The need to explain, and if necessary justify, past actions in the event of an audit, public inquiry or investigation. For example...if an applicant complains to the Information Commissioner's Office (ICO) about the handling or outcome of an FOI request, the ICO will expect the authority to provide details of how the request was handled and, if applicable, why it refused to provide the information."*

89. During this investigation, the MoJ experienced difficulty establishing precisely what it had initially disclosed to the requester. This led it to submit arguments in favour of withholding information it had already disclosed and resulted in significant delays to the investigation. The Commissioner is concerned that the authority's practice in this case did not conform to the recommendations of the section 46 code. In future, he expects the MoJ to ensure that proper records of request handling are kept.

## Right of Appeal

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90. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

91. 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.
92. 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 18<sup>th</sup> day of October 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### 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 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **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.”

## **Duty to provide Advice and Assistance**

### **Section 16(1) provides that -**

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

## **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.”

### **Section 17(3) provides that -**

“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.”

### **Prejudice to effective conduct of public affairs.**

#### **Section 36(2) provides that –**

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation

#### **Section 36(5) provides that –**

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

### **Personal information.**

#### **Section 40(1) provides that –**

“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.”

#### **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."

**Section 40(4) provides that –**

"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)."

**Issue of code of practice by Lord Chancellor**

**Section 46(1) provides that –**

"The Lord Chancellor shall issue, and may from time to time revise, a code of practice providing guidance to relevant authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records."

## Annex A

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**Briefing notes were requested for the following Parliamentary Questions (PQ number is not shown where the requested information was supplied in full):**

1. (18 Apr 2006) **63355**

Henry Bellingham: To ask the Secretary of State for the Home Department what research was (a) commissioned and (b) progressed as a result of the performance testing exercise at HM prison Wandsworth; what conclusions were drawn; and if he will place the reports in the Library.

2. (3 May 2006) **66563, 66564**

Henry Bellingham: To ask the Secretary of State for the Home Department (1) what the operational reasons were in each case for governors at HM Prison Wandsworth to travel to (a) Japan, (b) Australia and (c) Antigua to escort repatriated prisoners back to the United Kingdom in the last 12 months; (2) what estimate he has made of the cost of (a) prison officers and (b) governor grades travelling to (i) Japan,...

3. (11 May 2006) **69236, 69237**

Henry Bellingham: To ask the Secretary of State for the Home Department (1) for what reasons the compulsory transfer may take place of prison governors to alternative establishments; (2) at what level of management in the prison service the decision compulsorily to transfer prison governor grade staff to alternative establishments is taken; and if he will make a statement.

4. (18 May 2006) **69454**

Henry Bellingham: To ask the Secretary of State for the Home Department if he will make a statement on the upgrading of governor grade positions at HM Prison Buckley Hall; on what basis the decision to upgrade was taken; whether the upgrade is permanent; from which budget the promotion is paid; and who decided (a) the basis of the upgrade and (b) the source of the finance to pay for the upgrade.

5. (6 Jun 2006) **74021**

Henry Bellingham: To ask the Secretary of State for the Home Department if he will make a statement on the grading of the role of deputy governor at HM Prison Buckley Hall.

6. (4 Sep 2006) **87787**

Henry Bellingham: To ask the Secretary of State for the Home Department what involvement the hon. Member for Wythenshawe and Sale, East had in the handling of a human resources issue at HM Prison Wandsworth in October 2004.



7. (30 Jan 2007) **110813**

Henry Bellingham: To ask the Secretary of State for the Home Department what the cost was of the investigation conducted by Mr. Ron Tasker in January 2006 into managerial corruption within HM Prison Service and the maltreatment of whistleblowers; and if he will make a statement.

8. (31 Jan 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department pursuant to his answer of 10 January 2007 to the right hon. Member for East Yorkshire, Official Report, column 630W, on the Prison Service, who the investigating officer is required to notify of any concerns relating to the Commissioning Authority that he may have during the course of an investigation; and if he will make a statement.

9. (31 Jan 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department pursuant to his answer of 10 January 2007 to the right hon. Member for East Yorkshire, Official Report, column 629W, on the Prison Service, whether a commissioning authority aware of a personal conflict of interest is obliged (a) to consult his own line manager, (b) to inform the Professional Standards Unit and (c) to inform another...

10. (7 Mar 2007) **125303**

Henry Bellingham: To ask the Secretary of State for the Home Department what assessment he has made of the recent appointments to the deputy governor posts at (a) HM Prison Whitemoor and (b) HM Prison Pentonville; whether the appointments were considered alongside the investigation conducted by Mr. Ron Tasker into performance standards issues at HM Prison Wandsworth; who was responsible for authorising the...

11. (7 Mar 2007) **125304**

Henry Bellingham: To ask the Secretary of State for the Home Department what factors he took into account in appointing the former London Area Manager to a new role within HM Prison Service; from which Department's budget within the organisation his role is financed; whether this appointment was advertised in accordance with HM Prison Service's policies and procedures and awarded as a consequence of open...

12. (23 Apr 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department who the Commissioning Authority is for (a) the investigation into staff corruption at HM Prison Pentonville and (b) the Tasker inquiry; and if he will make a statement.

13. (23 Apr 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department when he expects the Tasker Inquiry into the conduct of the previous

governor at HM Prison Wandsworth to be completed; and to whom the report will be submitted for consideration.

14. (2 May 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department on how many occasions the terms of reference of the Tasker inquiry have been (a) amended and (b) altered; how many interim reports have been produced during the lifetime of the inquiry; when the most recent interim report was produced; what the reason is for the most recent delay to the completion of the inquiry; how many extensions to...

15. (2 May 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department what the (a) target completion date was when first commissioned and (b) actual completion date is expected to be of the Tasker inquiry; and if he will make a statement.

16. (2 May 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department which member of HM Prison Service Board will have responsibility for (a) considering the content, (b) overseeing appropriate disciplinary action and (c) addressing the issues that may arise from the report by Mr Ron Tasker into the conduct of the previous Governor at HM Prison Wandsworth; and if he will make a statement.

17. (8 May 2007) **136127**

Henry Bellingham: To ask the Secretary of State for the Home Department how many people involved in the Tasker investigation have received managed moves within HM Prison Service; and if he will make a statement.

18. (10 May 2007)

Henry Bellingham: To ask the Secretary of State for the Home Department whether the Head of the Management Succession and Selection Unit in HM Prison Service was involved in the managed move of Paul Baker to the Deputy Governor position at HM Prison Pentonville; and if he will make a statement.

19. (16 May 2007)

Henry Bellingham: To ask the Minister of State, Ministry of Justice how many managed moves were announced for London (a) prison governors and (b) their deputies in each of the last two years; how many of these appointments were as a result of open competition; and if she will make a statement.

20. (5 Jun 2007) **140061 140169**

Henry Bellingham: To ask the Minister of State, Ministry of Justice (1) whether Nick Pascoe is acting as the commissioning authority for the Tasker investigation; and if she will make a statement; (2) pursuant to the answer of 8 May 2007, Official Report, column 84W, on the Prison Service, who the

commissioning officer is in respect of the Tasker investigation; and if she will make a statement.

21. (5 Jun 2007)

Henry Bellingham: To ask the Minister of State, Ministry of Justice what representations she has received from (a) Michael Spurr and (b) HM Prison Service on the Tasker investigation; if she will place in the Library a copy of those representations; and if she will make a statement.

22. (5 Jun 2007)

Henry Bellingham: To ask the Minister of State, Ministry of Justice (1) on what date Ron Tasker interviewed (a) Michael Spurr and (b) Keith Munns as part of his investigation; what subsequent recommendations Mr. Tasker made in relation to the commissioning of the investigation and to whom; what action was taken in consequence; and if she will make a statement; (2) pursuant to her answer of 2 May 2007,...

23. (5 Jun 2007) **140065**

Henry Bellingham: To ask the Minister of State, Ministry of Justice pursuant to the answer of 2 May 2007, Official Report, column 1684W, on the Tasker Inquiry, on what date the partial report was submitted and to whom; who requested the submission of the partial report; what the purpose was of the partial report; who was provided with access to the partial report; if she will place in the Library a copy of...

24. (20 Jun 2007)

Henry Bellingham: To ask the Minister of State, Ministry of Justice pursuant to the answer of 5 June 2007, Official Report, column 384W, on the Prison Service, on what date Nick Pascoe took over responsibility for the commissioning of Ron Tasker's investigation from Keith Munns; and if she will make a statement.

25. (20 Jun 2007)

Henry Bellingham: To ask the Minister of State, Ministry of Justice (1) why the head of residence at HM Prison Wandsworth was removed from her post in September 2004; and if she will make a statement; (2) why an acting 'F' grade governor at HM Prison Wandsworth was removed from his post in September 2004; and if she will make a statement.

26. (23 Jul 2007) **150961**

Henry Bellingham: To ask the Secretary of State for Justice (1) on what date Michael Spurr was interviewed as part of the Tasker investigation; and if he will make a statement; (2) pursuant to the answer of 5 June 2007, Official Report, column 390W, on the Tasker inquiry, who the previous commissioning authority referred to in the answer was; and if he will make a statement; (3) on what date (a) Keith...

27. (10 Sep 2007)

Henry Bellingham: To ask the Secretary of State for Justice whether there has been a race impact assessment of the HM Prison Service policy on managed appointments; and if he will make a statement.

28. (17 Sep 2007)

Henry Bellingham: To ask the Secretary of State for Justice how managed moves authorised by the Deputy Director General of HM Prison Service are monitored; who is responsible for monitoring them; to whom they report; and if he will make a statement.

29. (17 Sep 2007)

Henry Bellingham: To ask the Secretary of State for Justice what proportion of staff moves to (a) deputy governor and (b) governor grades were by managed appointment in each of the last five years; and if he will make a statement.

30. (8 Oct 2007)

Henry Bellingham: To ask the Secretary of State for Justice on how many promotion and selection boards the Deputy Director General of HM Prison Service sat in each of the years that he occupied the role of (a) Deputy Director General and (b) Director of Operations; and if he will make a statement.

31. (24 Oct 2007)

Henry Bellingham: To ask the Secretary of State for Justice pursuant to the answer of 2 May 2007, Official Report, column 1684W, on the Tasker inquiry, when he expects the final report to be submitted.

32. (30 Oct 2007)

Henry Bellingham: To ask the Secretary of State for Justice (1) on what date Michael Spurr was interviewed as part of the Tasker investigation; and if he will make a statement; (2) pursuant to the answer of 5 June 2007, Official Report, column 390W, on the Tasker inquiry, who the previous commissioning authority referred to in the answer was; and if he will make a statement; (3) on what date (a) Keith...

33. (30 Oct 2007) **161519**

Henry Bellingham: To ask the Secretary of State for Justice how many complaints have been received by HM prison service about the commissioning of Ron Tasker's investigation; what action was taken on receipt of these complaints; and if he will make a statement.

34. (14 Nov 2007) **163245**

Henry Bellingham: To ask the Secretary of State for Justice what the exceptional circumstances were that led the Deputy Director General of HM Prison Service to authorise the managed move of (a) Phil Riley to HM Prison Buckley Hall, (b) Paul Baker to change manager at HM Prison Pentonville, (c)

Paul Baker to Deputy Governor at HM Prison Pentonville and (d) Gary Deighton to HM Prison Service Professional...

35. (14 Nov 2007) **163246**

Henry Bellingham: To ask the Secretary of State for Justice what correspondence has been received by HM Prison Service from Ron Tasker on the commissioning of the investigation that he is carrying out; and if he will make a statement.

36. (4 Dec 2007)

Henry Bellingham: To ask the Secretary of State for Justice what information is used by the Deputy Director General of HM Prison Service in authorising managed moves; who is responsible for providing that information; how he establishes whether there are exceptional circumstances to warrant a managed move; and if he will make a statement.

37. (17 Dec 2007) **173676**

Henry Bellingham: To ask the Secretary of State for Justice what the role of the head of management selection and succession unit (MSSU) within HM Prison Service is; what responsibility the head of the MSSU has for making decisions on managed moves within the Service; and if he will make a statement.

38. (17 Dec 2007) **173762**

Henry Bellingham: To ask the Secretary of State for Justice pursuant to the answer of 14 May 2007, Official Report, column 434W, on the Prison Service, whether Paul Baker is the assistant investigator on the investigation being run by Ron Tasker; and if he will make a statement.

39. (18 Dec 2007) **175194**

Henry Bellingham: To ask the Secretary of State for Justice what payment scale is used to determine the remuneration of the previous Area Manager for London in his role of supporting the completion of the investigation by Ron Tasker; and if he will make a statement.

40. (7 Jan 2008) **175626**

Henry Bellingham: To ask the Secretary of State for Justice how many investigations by the prisons and probation ombudsman have been assisted by the lead investigator for the Tasker inquiry; and if he will make a statement.

41. (7 Jan 2008) **175627**

Henry Bellingham: To ask the Secretary of State for Justice how many inquiries into deaths in custody by the prisons and probation ombudsman have been (a) led and (b) assisted by the lead investigator for the Tasker inquiry since the inquiry was established; and if he will make a statement.

42. (7 Jan 2008) **175629**

Henry Bellingham: To ask the Secretary of State for Justice whether those conducting investigations for the prisons and probation ombudsman may also conduct investigations on behalf of HM Prison Service; and if he will make a statement.

43. (10 Jan 2008) **175625**

Henry Bellingham: To ask the Secretary of State for Justice how many briefings have been presented to Ministers on the Tasker inquiry; what the date of each briefing was; how many pages were contained in each written briefing; and if he will make a statement.

44. (15 Jan 2008)

Henry Bellingham: To ask the Secretary of State for Justice how many managed moves were authorised by Michael Spurr, Deputy Director General of HM Prison Service, in (a) 2004, (b) 2005 and (c) 2006; what proportion of these involved (i) male, (ii) female, (iii) white and (iv) ethnic minority personnel; and if he will make a statement.

45. (21 Jan 2008)

Henry Bellingham: To ask the Secretary of State for Justice how many requests under the Freedom of Information Act 2000 have been submitted to his Department relating to the (a) Tasker Inquiry and (b) Stuart investigations; and if he will make a statement.