

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 26 May 2011

**Public Authority:** The House of Commons  
**Address:** London  
SW1A 0AA

### Summary

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The complainant submitted a request to the House of Commons (the House) seeking details of how much had been paid out in compensation for accidents in each of the past three available years and for each payment a brief description of the accident; the date and level of compensation paid; the gender of the claimant and whether the claimant was a parliamentarian, staff member or member of the public. The House provided the complainant with the total amount paid in compensation for each of the years 2007 to 2009; confirmed the total number of incidents which gave rise to payments during this period was 10; described the nature of the incidents; the claimants' gender and how many of the claimants were parliamentarians, staff or members of the public. The House refused to disclose the further more detailed information on the basis that it constituted the claimants' sensitive personal data and disclosure would breach section 40(2) of the Act. The complainant argued that further details could be disclosed without the identities of the claimants being revealed. The Commissioner has concluded that the House was entitled to rely on section 40(2) to withhold the remaining information.

### 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.

## The Request

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2. The complainant submitted the following request to the House of Commons (the House) on 2 November 2010:

‘Please could I be told how much the House of Commons (and House of Lords if responsibility is pooled) has paid out in compensation for accidents in each of the past three available years.

Could this information be broken down to give a brief description, date and compensation paid for each incident, including the gender of the recipient and whether they were a parliamentarian, staff or member of the public.’

3. The House responded on 18 November 2010 and provided the complainant with the total amount of damages paid out in each of the three years 2007 to 2009. The response also confirmed that there were 10 incidents in the last 3 calendar years which gave rise to payments as a result of incidents such as slips, trips, falls, being struck by objects and collisions. The response also explained that of these 10 individuals 5 were made by males and 5 by females and furthermore 2 of them were contractor staff, 3 were House staff, 3 were members of the public and 2 were MPs. The House went on to explain that the more detailed information that the complainant had requested was being withheld because its disclosure could lead to the individuals in question being identified. Providing this information would therefore result in these individuals’ personal data being disclosed. The House explained that it believed that disclosure of this personal data – which it considered to be sensitive personal data – would breach the data protection principles and thus was exempt from disclosure on the basis of section 40(2) of the Act.
4. The complainant contacted the House on 18 November 2010 and explained that in his opinion more detailed information about the incidents in question could be disclosed without the identities of the individuals involved being revealed. He invited the House to reconsider its position on an informal basis and immediately disclose at least a breakdown of individual compensation payments by type of incident. However, if the House was not prepared to do this he asked that a formal internal review being carried out.
5. The House informed the complainant of the internal review outcome on 1 December 2010. The review upheld the position set out in the refusal notice namely that no further information could be disclosed without the identities of the individuals in question being revealed which would

result in their sensitive personal data being disclosed in breach of the data protection principles. Therefore the more detailed information held by the House was exempt from disclosure on the basis of section 40(2) of the Act.

## The Investigation

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### Scope of the case

6. The complainant contacted the Commissioner on 4 January 2011 in order to complain about the House's handling of his request. The complainant argued that in his opinion the House had failed to disclose the fullest possible breakdown of figures.

### Chronology

7. The Commissioner contacted the House on 16 March 2011 in relation to this complaint. The Commissioner asked to be provided with a copy of the information that had been withheld from the complainant along with clarification from House as to why it believed section 40(2) of the Act provided a basis to withhold this information.
8. The House provided the Commissioner with a copy of the withheld information, along with submissions which supported its reliance on section 40(2), on 25 March 2011.

## Analysis

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### Exemptions

#### Section 40(2) – personal data

9. The House has relied on section 40(2) of the Act to withhold the information that has not been provided to the complainant. This section states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA). The first principle, which is the one which is central to the consideration of this case, 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.'

10. Therefore, for section 40(2) exemption to be engaged the information being withheld has to constitute personal data which is defined by the Data Protection Act 1998 (DPA) 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.'

11. Section 2 of the DPA states that:

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

...(e) his physical or mental health or condition'.

12. In the particular circumstances of this case whether all of the requested information, or more accurately the information that has now been disclosed, is personal data as defined by the DPA is a matter of dispute between the Commissioner and the House. The Commissioner has set out the basis of these differences below before going on to consider how they affect the application of section 40(2) in this case:

13. In the Commissioner's opinion truly anonymised data are not personal data and thus can be disclosed without reference to the DPA. Before deciding whether the information is anonymised, and so can be disclosed without reference to the data protection principles, it is also necessary to consider the information which is available to the public. The test of whether the information is truly anonymised is whether a (or any) member of the public could identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case.

14. If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding

whether disclosure is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information then the information will, in the Commissioner's opinion, have been truly anonymised and can be considered for disclosure without any reference to DPA principles.

15. In the Commissioner's opinion this approach is supported by paragraphs 24 & 25 of Lord Hope's judgment in the House of Lords' case of the Common Services Agency v Scottish Information Commissioner [2008] UKHL 47, where it was said:

"...Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection..." (para 25).<sup>1</sup>

16. Whilst drafting this notice the High Court handed down its judgment in Department of Health v Information Commissioner [2011] CO/13544/2009. The judgment was handed down orally on 20 April but has not yet been promulgated in writing. Cranston J agreed with Commissioner's interpretation of Lord Hope's comments in the Common Services Agency case.
17. The House disagrees with the Commissioner's approach. In the House's opinion the correct interpretation of the DPA requires consideration to be given to the fact that the definition of personal data in the DPA makes reference to the fact that identification of an individual includes using data which is in the possession of, or likely to come into the possession of the data controller. Therefore although a data controller could disclose data which no member of the public could use to identify individuals, if the data controller held further information which would allow individuals to be identified this must necessarily make the information that has been disclosed personal data. In support of its approach, the House noted that at paragraph 26 Lord Hope stated that:

'we are concerned in this case with [the data's] status while it is still in the hands of the data controller, as the question is whether it is or is not exempt from the duty of disclosure that FOISA says must be observed by him'.

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<sup>1</sup> <http://www.parliament.the-stationery-office.com/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

18. In applying these two different interpretations to the facts of this case, in the Commissioner's opinion the information that the House has previously disclosed to the complainant can be described as truly anonymised data because no members of the general public can identify any individuals from this data. Therefore the Commissioner believes that the disclosed information does not constitute personal data as defined by the DPA.
19. Conversely the House believes that because living individuals could be identified from the information now disclosed those data and other information in its possession, the totality of the information that had been requested is personal data as defined by the DPA. In deciding what could be disclosed the House therefore considered what disclosures would be in accordance with the data protection principles and thus in line with section 40(2) of the Act. The House disclosed the extent of the data that it did on the basis that it was consistent with the principles read alongside the conditions of the first principle. In particular, as far as the data could be considered simply personal data rather than sensitive personal data, its release could be justified by the sixth condition of Schedule 2. (This sixth condition states that processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party to whom the data is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights, freedoms or legitimate interests of the data subject). In the House's view this was because the complainant was pursuing a legitimate public interest, namely that of knowing the extent to which public funds are spent in relation to personal injury claims.

*Is the information that has been withheld personal data, and if so is it sensitive personal data?*

20. As should be obvious from the House's position as described above, the House clearly considers the remaining information to be personal data. This is because using its internal accident records the information relating to each accident can be easily cross referenced to identify the individuals concerned and the injuries they sustained. Furthermore because in each case the claimant suffered some sort of injury, in the House's opinion the withheld data therefore includes information as to each claimant's physical or mental health and thus constitutes sensitive personal data.
21. The Commissioner's approach to determining whether the withheld information constitutes personal data is to apply the approach set out at paragraph 13, i.e. whether members of the public using other information or knowledge already available, could use the withheld information to identify the individuals awarded personal injury

payments. The House, without prejudice to its position that such a test was not necessary to conclude that the information was personal data, argued that the fact there had been widespread comment on some of the settlements made it possible for the complainant to deduce the identity of some of the claimants from the data which had been withheld. Equally it was reasonable to assume that the amount of any given settlement will reflect the severity of the injury and the earning potential of the victim. Disclosure of the withheld information would therefore allow the victims to be identified.

22. The Commissioner has considered the House's submissions carefully, along with an example of the widespread comment pointed out to him by the House, and having done so the Commissioner is satisfied that the withheld information can be correctly described as personal data. In reaching this conclusion the Commissioner has not necessarily decided that all members of the public could use the withheld information to identify all 10 of the recipients of the payments but he is confident that colleagues and associates of these 10 individuals could use this information identify each of them. As noted at paragraph 13 the relevant test as to whether data can be anonymised is simply whether **any** member of the public could recognise an individual from following the disclosure of requested information. Furthermore, the Commissioner agrees with the House that as the withheld information relates to the individuals' physical health or condition it can be correctly described as sensitive personal data.

*Would disclosure of the withheld information breach the DPA?*

23. Having reached this conclusion, the Commissioner simply has to decide whether disclosure of the withheld information would breach any of the data protection principles and thus be exempt from disclosure on the basis of section 40(2). The House has argued that none of the principles in Schedule 3 can be met and therefore as the withheld information is sensitive personal data its disclosure would breach the first data protection principle. The Commissioner's approach to deciding whether the first data protection would be breached if information was disclosed, even when the proposed disclosure constitutes sensitive personal data, is to focus on whether disclosure would be fair and lawful rather than focus on the conditions in Schedules 2 and 3.
24. 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?
25. 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. That is to say, the sixth principle of Schedule 2 of the DPA can still be met, and disclosure can still be fair, even if disclosure may cause some harm or distress to the data subject. (In order for sensitive personal data to be disclosed one of the conditions in Schedule 3 will also need to be met.)
26. 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 which the information relates. This is because disclosure of such information is very likely to have a distressing or detrimental effect.
27. Turning to the circumstances of this case, the Commissioner accepts that as a general rule individuals who are awarded compensation



payments by a public authority would not expect the details of these payments, including the nature of their injuries and the amount they received in compensation, to be disclosed to the general public. Such a view is dictated by the nature of such information itself – which as the House as noted in this case constitutes information about their medical condition – and the general custom and practice of organisations historically not disclosing this sort of information. Therefore in the circumstances of this case the Commissioner is satisfied that the 10 individuals in question would not have expected the withheld information to be disclosed by the House.

28. With regard to the consequences of disclosure, the Commissioner believes that it is clear that disclosure of information about an individuals' physical health and details about financial payments received in light of incidents impacting on their health, could clearly be distressing to the individuals concerned. Such a disclosure would represent a clear infringement into areas of their lives which they considered to be of a strictly personal and private nature.
29. Furthermore although the Commissioner agrees with the House that there is a legitimate interest in disclosure of information about the use of public funds in settling personal injury claims, he believes that this interest is addressed to a significant extent by the information already disclosed by the House. Moreover, given the individual's strongly held (and reasonable) expectations that the withheld information would not be disclosed and the detrimental consequences of disclosure, the Commissioner has concluded that it would be unfair to disclose the withheld information. Therefore the Commissioner does not need to consider whether any of the conditions in Schedule 2 or 3 or met in order to conclude that the withheld information is exempt from disclosure on the basis of section 40(2) of the Act.

## **The Decision**

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30. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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31. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

33. 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.
34. 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 26<sup>th</sup> day of May 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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### Freedom of Information Act 2000

#### 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"

#### 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."

## **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.