

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 November 2007

Public Authority: Ministry of Justice
Address: Selbourne House
54 Victoria Street
London
SW1E 6QW

Summary

The complainant requested from the Department of Constitutional Affairs (now the Ministry of Justice) information about Arnos Vale Cemetery and related organisations and people. Much of the information held in relation to the request was disclosed to the complainant with the remaining information withheld under several exemptions. Following the intervention of the Commissioner, the Department agreed to release a large amount of the remaining information. However, it informed the Commissioner that some of the requested information remained exempt from disclosure under section 40 (Personal information) and section 42 (Legal professional privilege). It also informed him that several additional documents that fell within the scope of the request had subsequently been discovered, to which no exemptions apply.

The Commissioner has decided that section 40 was engaged in relation to some of the withheld information and that section 42 was appropriately applied. He proceeded to conclude that all the information to which an exemption does not apply should be disclosed to the complainant (including the newly found information), aside from some information withheld under section 40 which he considers to be exempt under section 41 (Information provided in confidence). However, the Commissioner's analysis of elements of the Department's handling of the request has led him to also conclude that section 10 (Time for compliance with request) and section 17 (Refusal of request) of the Act had been breached. He has also decided that section 43(2) (Commercial interests), which was applied to some information in response to the request but no longer relied upon due to the intervening passage of time, was incorrectly relied upon in the first instance to withhold that information.

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.

The Request

2. On 16 September 2005, the complainant contacted the Department of Constitutional Affairs (DCA) to request the following information:

"Correspondence, Memoranda – Internal and with other government departments, Notes, Notes of conversations on the telephone or otherwise, Faxes, Emails and all electronic communications and all items however arising all especially with Bristol City Council and any officer thereof in any way concerning –

Arnos Vale Cemetery, The Bristol General Cemetery Company, Mr [*name redacted*], Arnos Vale Cemetery Trust, Friends of Arnos Vale Cemetery, Association for Protection of Arnos Vale Cemetery, Mr [*name redacted*], (and so far as it concerns any of the above) Commonwealth War Graves Commission and the Heritage Lottery Fund".

3. The DCA responded to the complainant on 13 October 2005, in which it confirmed that it held "information relevant to the request". However, it informed the complainant that the exemption under section 42 (Legal professional privilege) applies to the information. It then stated that it had not yet reached a decision on the balance of the public interest test under section 42 and required extra time in order to do so. It informed the complainant that it would inform him of its decision by 11 November 2005.
4. On 14 November 2005 the DCA wrote to the complainant, in which it informed him that it had "concluded that the majority of the information can be released" and enclosed this information. It also informed the complainant that it had applied the following exemptions to the remainder of the information and set out its reasons for doing so (the following are direct quotes from the DCA's letter):

5. **Section 42 – Legal Professional Privilege**

- Applies to several emails falling within the scope of the request as they contain Departmental legal advice.
- Upon considering the balance of the public interest test in disclosure and non-disclosure it was concluded that these emails should not be disclosed. This is because there is a strong public interest in protecting the confidentiality of communications between lawyers and their clients.
- It is through such security that clients are encouraged to seek legal advice. It is of extreme importance that the Government is similarly provided with such security when seeking legal advice.
- Without such a high degree of confidentiality, clients might fear that anything they say to their lawyers, however sensitive or potentially damaging, could be

revealed later and may well be deterred from seeking legal advice at all, or from disclosing all relevant material to their lawyers.

- Furthermore, although all lawyers have a professional duty to provide frank and impartial advice to their clients, there is some risk (given the nature of government lawyers' work) that disclosure of that advice may lead to a more cautious and possibly less candid approach. This could lead to decisions being made that are legally unsound.
- It is in the public interest that the decisions taken by government are taken in a fully informed legal context.

6. **Section 40(3)(i) – Personal Information**

- Other information is exempt from disclosure by virtue of section 40(3)(i). This is an absolute exemption, which prohibits the release of any information if its disclosure would contravene any of the data protection principles.
- In the view of the DCA, the disclosure of the individuals' personal data would breach the fair processing principle. Those concerned will have a reasonable expectation that their personal details will not be disclosed to the wider public without their consent. This exemption requires no public interest consideration.
- As the request was received from the Secretary of Bristol General Cemetery Company, data of a personal nature in relation to (that named individual and others) is exempt from disclosure.
- The personal information of the requestor cannot be released as a legal distinction is drawn between the requestor as an individual and the requestor as Secretary of Bristol General Cemetery Company.
- If personal information relating to the requestor is required, the requestor will need to make a "Subject Access Request" under section 7 of the Data Protection Act 1998 (details were provided to the complainant as to how to submit such a request).

7. **Section 43(2) – Commercial Interests**

- Also applies to an email dated 20 June 2003.
- Its release would prejudice the commercial interests of third parties in their position as potential purchaser and supplier of services.
- In particular, it would weaken the position of these third parties in a competitive environment by revealing commercially sensitive information. This could adversely affect their bargaining position during possible future contractual negotiations, which would be likely to result in the less effective use of public funds.

8. On 23 December 2005 the complainant contacted the DCA to request an internal review of its decision. In its request, he also put forward the assertion that "there are no commercial interests involved in Arnos Vale Cemetery now being owned by a major municipality who compulsorily purchased it to take it out of private hands and operated by a Trust approved by the Charity Commission".

9. The DCA responded to the complainant on 16 February 2006, in which it stated that it upheld the original decision as set out in the letter dated 14 November 2005. It then set out the following reasons for its decision (presented here as direct quotations):

10. **Information withheld under section 42**

- Section 42 of the Act exempts information in respect of which a claim to legal professional privilege could be maintained. The information contained in documents not disclosed pursuant to this exemption constitutes communication between lawyers and their clients, and as such is clearly exempt under this section.
- The applicability of this exemption to the relevant information was set out according to the terms of the Act in the letter of 14 November 2005. However, it had been found that more information could have been supplied with regard to the Department's consideration of the public interest in relation to this qualified exemption. While information was supplied about the factors considered as weighing against release, no information was supplied as to the factors considered to weigh in favour of disclosure.
- The Department has had regard to the general public interest in openness when assessing the public interest under this exemption. Moreover, it acknowledges that there is a public interest in members of the public being well informed about the basis on which decisions are taken by public authorities. Release of the information in question might conceivably have given the public a clearer picture of the legal basis upon which decisions have been taken in relation to matters falling within the scope of the request.
- In addition to the factors weighing against release, as set out in the letter of 14 November 2005, protection of communications between lawyers and their clients is vital if legal advice is to be sought and given on an appropriate basis. There is therefore a strong public interest in ensuring that communications between lawyers and their clients are kept confidential. This also applies to government departments and their lawyers.
- After careful consideration, it has been found that the public interest falls in favour of maintaining the application of section 42, and that the original decision to withhold the information was correct.

11. **Information withheld under section 43(2)**

- Section 43(2) of the Act exempts information the disclosure of which would, or would be likely to, prejudice the commercial interest of any person i.e. an individual, a commercial company or a public authority.
- It is considered that the redacted information contained in the email dated 20 June 2003 consists of figures which, if released, would have such a prejudicial effect. In particular, it would weaken the negotiating position of third parties by placing commercially sensitive information in the public domain. As such, it

found that the Department's original decision to exempt this information under section 43(2) was correct.

- However, information should have been supplied with regard to the Department's consideration of the public interest in relation to the applicability of this qualified exemption. Beyond that, however, it was considered difficult to see what public interest there might be in the figures in question being placed in the public domain.
- With regard to the public interest considerations falling against release, there is a strong public interest in commercial transactions being conducted on a fair footing, and in public authorities being able to secure appropriate value for money. Release of the information in question could result in damage to that ability, and indeed the ability of any potential party to a commercial transaction relating to the matter in question.
- As such, the Department's original decision to exempt the information in question under s43(2) was upheld.

12. Information withheld under section 40

- The original decision with regard to personal information relating to "Mr [*name redacted*]" and "Trustees of the Arnos Vale Cemetery Trust" has been reconsidered as it was not appreciated at the time the original request was dealt with that "Arnos Vales Cemetery Trust" was and is indeed a Charitable Trust. It is therefore registered with the Charities Commission and the names of the trustees are publicly available online.
- As a result, as these names are already in the public domain, it was considered that certain of the personal data previously redacted should be released, as to do so would not breach the data protection principles and section 40(3)(i) cannot apply. This is relevant to a single document (which the DCA subsequently disclosed to the complainant).
- However, where these names can be associated with other personal information contained in the documents, the original decision to withhold such information under section 40(3)(i) was upheld.

The Investigation

Scope of the case

13. On 28 February 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- i. In relation to commercial interests, Bristol City Council and the Trust company set up to deal with the subject matter of Arnos Vale Cemetery do not have any commercial links, certainly not in relation to a graveyard.
 - ii. We do not believe that there are no papers outside the claimed exclusion of legal advice, sought and given.
 - iii. There is no mention of an allegation that we had advertised for property development of the graveyard.
14. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

15. On 12 July 2007 the Commissioner wrote to the Ministry of Justice (MOJ) – which had since replaced the DCA – to request a copy of all the information which continues to be withheld from the complainant following the internal review, with each aspect marked to indicate the exemption which had been applied. He also invited the MOJ to submit any further representations it wishes to make on the case.
16. The MOJ responded to the Commissioner on 18 September 2007, in which it provided:
- copies of the withheld information,
 - a schedule outlining the information withheld and an explanation of the exemption applied in relation to each document,
 - documents that were released in full in the department's response to the original request of 14 November 2005, and
 - newly discovered documents.
17. The MOJ also made the following representations (quoted directly from its submission):
18. **Amount of information already released**
- The vast majority of the information held relating to the request was released in full to the complainant.
 - Of the information that was withheld, a considerable proportion of this was by virtue of section 40(2) for the purposes of section 40(3)(i) and related to the complainant himself. He subsequently made a subject access request under the Data Protection Act 1998 and as a result of this he received all of the information to which he was entitled to in accordance with the subject access provisions of the Act. As a result of the original release and the processing of the complainant's subject access request, there was only a relatively small amount of information that continued to be withheld.

19. **Re-examination of withheld information**

- Application of exemptions - In light of the Commissioner's investigation, the department had again reviewed the information withheld and the exemptions applied. The department was satisfied that the exemptions identified were appropriately applied at the time the request was made with two exceptions (details supplied).
- Passage of time – The exemptions have also been reconsidered in the light of the passage of time since the original decisions on disclosure were made. One document contains information relating to the valuations of burial records that was withheld by virtue of an exemption under section 43(2). However, given the course of events between the parties since November 2005 it was found that there is no longer any prejudice to third party commercial interests in releasing this information.

20. **Continued application of S42 exemption**

- Of the remaining information that continues to be withheld, the exemption under section 42 has been applied to legal advice from a departmental lawyer on the question of whether Bristol City Council has a right to claim ownership of the burial records. The department believes that the consideration given to the application of this exemption was fully and appropriately set out in the department's internal review together with the response to the original request.
- The department has also considered whether in light of the passage of time the balance of the public interest has changed. It was found that despite the passage of time, this exemption continues to apply. The strength of the public interest in protecting the confidentiality of communications between lawyers and clients is such that it continues to outweigh the interest in transparency of the legal basis upon which the public authorities made decisions in the matters covered by the original request.

21. **Continued application of S40(2) exemption**

- Personal data relating to individuals other than the complainant continues to be withheld under section 40(2) together with s40(3)(a)(i) of the Act. In the department's opinion disclosure of data relating to a third party would breach the fair processing principle, as there was a legitimate expectation by a third party, that this information would remain confidential.

22. **Newly discovered documents**

- As a result of research undertaken to address this complaint, the Department has found further information relating to the original request. No exemptions apply to this information.

23. Conclusion

- The only information that continues to be withheld is that relating to third parties or subject to legal professional privilege.

Analysis

Procedural matters

Section 10 – Time for compliance with request

24. Section 10 of the Act states that a public authority must comply with a request for information not later than the twentieth working day following the date of receipt.
25. The Commissioner notes MoJ's acknowledgement that it had found further information relating to the request (to which no exemptions apply) subsequent to the completion of its internal review. However, not having supplied this information to the complainant within twenty days of his request constitutes a breach of section 10 because it held this information at the time of the request, even if it is the case that it could not be found at that time.
26. Having analysed both the MoJ's representations and the information falling within the scope of the request which has been supplied to him, the Commissioner is satisfied that no other information relevant to the request is held.

Section 17 – Refusal of request

27. 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.”
28. In the case of exemptions, a public authority may only take advantage of extra time (i.e. an excess of twenty working days following the receipt of a request) to consider the balance of the public interest with regard to an exemption relied upon within the initial refusal notice.
29. The refusal notice of 14 November 2005 relied solely upon the exemption under section 42 to withhold the requested information. The Commissioner notes that the DCA applied the additional exemptions under sections 40 and 43(2)

subsequent to the issuing of the refusal notice. This constitutes a breach of section 17.

Exemptions

Section 40 – Personal information

30. The provisions of section 40 can be found in the legal annex.
31. As the MoJ subsequently disclosed to the complainant information relating to the himself, the Commissioner did not consider whether the exemption under section 40 was correctly applied to this information. However, information which constitutes the personal data of the complainant is exempt by virtue of section 40(1) not section 40(2), as claimed by the DCA in paragraph 18.
32. The Commissioner therefore proceeded to assess whether personal information relating to individuals other than the complainant, which continues to be withheld under section 40, constitutes an appropriate application of the exemption.
33. Whether information can be determined to be “personal data” depends on whether a particular individual(s) can be identified by that information, together with how that information is held. Section 1(1) of the 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 intentions of the data controller or any other person in respect of the individual”
34. However, in order for information to be withheld under the subsections applied by the then DCA, it must also be that case that disclosure of that information would contravene any of the data protection principles. The principle that the DCA stated that disclosure would contravene is fair processing principle, for the reason that those concerned will have a reasonable expectation that their personal details will not be disclosed to the wider public without their consent
35. For this information to be legitimately withheld from disclosure under this exemption, the information will need to be exempt by virtue of section 40(2) because one of the conditions provided by section 40(3) is satisfied. This differs with the inaccurate interpretation provided by the Department, which stated that the information “was withheld under section 40(2) *together with* s40(3)(a)(i)”. The Commissioner therefore proceeded to assess whether the information was correctly withheld with regard to the correct interpretation of section 40.
36. The Commissioner has decided that section 40 was incorrectly applied to the redactions made to the following information (listed by reference to the document schedule provided to the Commissioner):

- i. Document 18 – First and second redactions
 - ii. Document 22
 - iii. Document 52 – First redaction
 - iv. Document 59

37. In the case of these redactions, the Commissioner accepts that disclosing the requested information by reference to individuals would constitute the release of personal data to which section 40 refers.

38. However, the Commissioner notes that these redactions clearly relate to individuals in their professional / public capacity as either employees of public authorities involved in the matters under discussion or in the (public) capacity of a trustee of an organisation. The Commissioner also noted the roles of those individuals and the matters referred to by reference to them, which he did not consider to be sensitive or confidential in nature.

39. The Commissioner therefore believes that even though the information consists of personal data, its disclosure would not be unfair to those individuals and consent by those individuals for this information to be released is therefore not necessary. This is because the Commissioner does not believe that, for the reasons he has stated, it is reasonable for these individuals to expect that such references to them will be withheld from disclosure under the Act.

40. In order for personal data to be released into the public domain, a condition under schedule 2 of the DPA must be met. The Commissioner considers condition 6 to facilitate the release of the data in this case. It states that:

“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.”

41. The Commissioner has also decided that section 40 cannot be applied to the following redaction. However, in this instance, his reason is because it does not identify any individual (either directly or indirectly) and therefore does not constitute personal data:
 - i. Document 21

42. Two redactions contain the names of deceased individuals in a way which does not identify any related living individuals. As the Data Protection Act does not relate to the deceased and, in legal terms, the deceased cannot have ‘personal data’, the Commissioner has further decided that section 40 was incorrectly applied to the redactions in the following documents:
 - i. Document 3
 - ii. Document 52 – Second redaction

43. However, the Commissioner believes that the above references engage the exemption under section 41 of the Act.

44. 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.”

45. In order to determine whether disclosure of the withheld information would constitute an actionable breach of confidence (which in itself would be sufficient for the information to be withheld under section 41), the Commissioner took the following considerations into account:

- Whether the information has the necessary quality of confidence about it;
- The circumstances under which the information was provided;
- Whether disclosure of the information would be to the detriment of the party to whom the duty of confidence is owed.

46. The Commissioner considers that this information does have the necessary quality of confidence because of the nature of the information itself, the circumstances in which the references were made and what the Commissioner considers from the information to be an implicit understanding that this information would not be placed in the public domain. He therefore believes that disclosure in this case would constitute an actionable breach of confidence on the part of relatives of those individuals to whom this right passes on the death of the subject. Furthermore, in this case he does not consider there to be a public interest defence to breach of confidence, which would have allowed the exemption under section 41 to have been overridden. In his consideration, the Commissioner was guided in his analysis by the decision of the Information Tribunal in *Mrs P Bluck v Information Commissioner and Epsom and St Helier University NHS Trust* [EA2006/0090], which ruled on the matter of access to records of the deceased.

47. The Commissioner does accept the application of section 40 to the redactions made to the following documents, for the reasons given by the Department:

- i. Document 18 – Third and fourth redactions
- ii. Document 34
- iii. Document 37
- iv. Document 53

48. The Commissioner notes that the above references relate to individuals in their private capacity, relating to matters of a private nature. He therefore considers this information to be such that its disclosure would be unfair to those individuals and constitute a breach of the data protection principle relating to fairness.

Section 42 – Legal Professional Privilege

49. The Commissioner notes that section 42 has continued to be applied in order to withhold legal advice to Bristol City Council from lawyers on the question of whether Bristol Council has a right to claim ownership of the burial records (submitted to the Commissioner as 'Document 17'). He therefore proceeded to analyse whether the exemption was appropriately applied to this information and disregarded the information which the Department no longer considers to be exempt under this provision.
50. Section 42 of the Act provides that –
- “(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”
51. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
52. There are two types of privilege – legal advice privilege and litigation privilege. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
53. On the basis of this analysis and having studied the information withheld from the complainant under section 42, the Commissioner is satisfied that the exemption is engaged. He also considers there to be no evidence that the privilege has been waived. However, section 42 is a qualified exemption and therefore subject to the public interest test. The Commissioner has therefore undertaken an assessment of the public interest test in relation to the disclosure of this information.
54. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated that: “There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling

considerations would need to be adduced to override that inbuilt public interest.” It concluded that “it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...” (paragraph 35). In summary, legal professional privilege was referred to as being “a fundamental condition” of justice and “a fundamental human right”, not limited in its application to the facts of particular cases. It also confirmed that when considering the public interest it is not relevant to consider the number of individuals affected by the issue. (paragraph 35) The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale. (paragraph 35)

55. Against the arguments for maintaining the exemption in this case, the Commissioner considered a number of public interest arguments in favour of disclosure, namely:
- Informing debate on key issues, including allowing the public to feed into key policy decisions
 - Promoting accountability for decisions
 - Promoting probity
 - Helping people understand and challenge decisions affecting them
56. The Commissioner considers all the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. However, when relating this to the circumstances under which he considers the section 42 exemption to hold, coupled with the nature of the advice provided in this case, the Commissioner is not persuaded that the arguments for disclosure are sufficient to overcome the high threshold required for the disclosure of information to which section 42 is engaged.
57. On balance, the Commissioner concluded that in this case the public interest in disclosing this information was not sufficiently strong to outweigh the public interest in maintaining the exemption under section 42(1).

Section 43(2) – Commercial interests

58. The Commissioner notes that the MoJ is no longer relying upon the exemption under section 43(2), which was applied to information relating to the valuation of burial records. However, because the MoJ's modified position is as a result of the passage of time since the request was received rather than a reconsideration of whether the exemption should have originally been used, the Commissioner considered it necessary to assess whether the application of section 43 was made in accordance with the Act. He also considers this course of action to be appropriate because the complainant believes that this information should have been released to him at the time of his request.
59. Section 43(2) provides that –
- “Information is exempt information if its disclosure under this Act would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).”

60. The Commissioner notes that the information to which section 43(2) was applied constitutes commercial information which relates to the commercial interests of third parties. The then DCA stated that disclosure of the information at the time the request made would:

“...weaken the position of these third parties in a competitive environment by revealing commercially sensitive information.....(which) could adversely affect their bargaining position during possible future contractual negotiations, which would be likely to result in the less effective use of public funds.”

61. Having considered the information in question, the Commissioner believes that disclosure of the information would not have been likely to result in the less effective use of public funds. However, he does accept that putting the information into the public domain at the time of the request would have been likely to prejudice the commercial interests of third parties by adversely affecting their bargaining position in respect of the burial records. As such, the Commissioner is satisfied that section 43(2) was engaged in respect of this information at the time of the request.

62. However, section 43 is a qualified exemption. Section 2(2) of the Act states that where a qualified exemption is engaged it may only be maintained where:

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

As such, the Commissioner proceeded to analyse the public interest in maintaining the exemption against that in the disclosure of the information in question.

63. The Commissioner disagrees with the DCA's assertion, as re-produced in paragraph 11, that “it was considered difficult to see what public interest there might be in the figures in question being placed in the public domain.” He accepts that there is a public interest in third parties not being undermined in a bargaining process. However, in taking into account the circumstances of this case, the Commissioner believes that this public interest argument for maintaining the exemption is outweighed by the public interest in:

- understanding the objective value of these burial records,
- facilitating the accountability and transparency of public authorities for decisions taken and the reasons behind those decisions, and
- promoting accountability in the spending of public money.

64. The Commissioner therefore considers that, in response to the complainant's initial request, the DCA should have released the information to which section 43 was engaged

The Decision

65. 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:
- i. The application of section 40 (Personal information) to the redactions referred to in paragraph 47 of this Notice.
 - ii. The application of section 42 (Legal professional privilege) to the legal advice on the question of whether Bristol City Council has a right to claim ownership of burial records.
66. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. The subsequent discovery of documents falling within the scope of the request means that certain information held in relation to the request was neither supplied to the complainant nor withheld from disclosure under a provision of the Act. This constitutes a breach of section 10 (Time for compliance with request).
 - ii. As the refusal notice did not detail all the exemptions the Department applied, section 17 (Refusal of request) of the Act was breached.
 - iii. The application of section 40 to the redactions referred to in paragraphs 36, 41 and 42 of this Notice.
 - iv. The balance of the public interest under section 43(2) (Commercial interests).

Steps Required

67. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- i. Disclose to the complainant all the information it no longer considers to be exempt from disclosure.
 - ii. Disclose to the complainant all the 'newly discovered documents'.
 - iii. Disclose to the complainant the information redacted from the following documents (as referred to in correspondence with the Commissioner):

Documents: 18 (first and second redactions), 21, 22, 52 (first redaction), 59.

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

Failure to comply

69. 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.

Right of Appeal

70. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 28th day of November 2007

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

Section 40 - Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

Reference: FS50108240



Information Commissioner's Office

"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act.