

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 9 March 2009

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

### Summary

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The complainant requested details of compensation awards made to each of a list of named individuals for miscarriage of justice claims. The public authority refused the request on the basis that sections 40(2) (third party information) and 41 (information provided in confidence) applied as it was personal data and was also held on the understanding that the contents would remain confidential. It further held that section 12 (cost of compliance exceeds appropriate limit) applied, as to locate, extract and redact the information in some of the cases would exceed the appropriate limit.

The Commissioner finds that in all cases the information requested would be the personal data of either those named individuals or other named parties and that to confirm or deny the information is held would in itself breach the first data protection principle. The public authority should therefore have cited section 40(5)(b)(i) and declined to confirm or deny whether it held any of the requested information.

The public authority's refusal notice did not refer to the sub-section of the exemption claimed. The Commissioner therefore finds that it breached section 17(1)(b) by introducing the relevant sub-section outside the statutory 20 working day period.

### 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 The complainant, through his solicitor, originally made a request to the public authority on 7 December 2004 for:

*"...all the awards of all the previous miscarriage's [sic] of justice cases for basic and aggravated damages.*

*We of course do not require details of the actual persons as they can remain anonymous but we would like*

- *The Length of sentence*
- *Offence*
- *Any aggravated features".*

3. It was further stated: *"We would only use this information in the course of this application and of course not without consent"*. The application referred to was a claim for compensation which the solicitor was actively processing on behalf of the complainant.
4. The public authority responded on 14 December 2004 and explained that the request was too wide-ranging and would need to be more closely defined. It suggested that if the complainant were to refine the request to a specific number of cases then it would be reconsidered.
5. As the above letters were exchanged prior to the Act coming into force, the Commissioner will not give consideration to them. They are provided here simply as background to the request that is the subject of this investigation.
6. On 9 February 2005 a refined request was made as follows: *"[I] would therefore be grateful for specific information on basic and aggravated damages in the following miscarriage of justice cases: [a list of 22 names followed this paragraph]"*. This is the first request which was made after the Act came into force.
7. The public authority refused the request by letter of 9 March 2005 on the basis that to comply would exceed the cost limit. The letter suggested that the public authority might be able to consider the request if it were further refined but that it was likely that the section 40 exemption would apply if this were done.
8. On 24 March 2005, the complainant's solicitor asked how the records were held and how much it would cost to request the information held on one of the cases. This was responded to by the public authority on 14 April 2005 when it was explained that the information was held within the final assessments on individual claimants' files. It further explained that:

*"The Assessor has not, as a matter of practice, prior to the judgement in [named case], provided a breakdown of basic and aggravated damages in*

*all of his assessments and we are unable to advise which cases have received such a breakdown as this information is not centrally monitored."*

The response did not specify the cost of providing the information held in relation to any one individual but did state that the information amounted to personal data and was exempt from disclosure under section 40 of the Act.

9. The complainant's solicitor again wrote to the public authority on 25 April 2005 and expressed his disbelief at the public authority's calculation of costs. He also put further arguments in favour of disclosure and requested an internal review.
10. The outcome of the internal review was provided on 22 August 2005. It found that section 12 did not apply in respect of actually retrieving the information; however, it also explained that the information was not held in the appropriate format in some of the cases and that to locate it, extract it and present it in a suitably redacted form so as to protect the identity of the individual would exceed the cost limit. It also clarified that it was relying on subsections (2) and (3)(a)(i) of section 40 and it introduced section 41 as a further relevant exemption.

## The Investigation

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### Scope of the case

11. On 25 November 2005 the complainant's solicitor contacted the Commissioner to complain about the way the information request had been handled. He specifically argued that this type of information should be placed in the public domain so that other claimants could refer to and rely on it. He further stated that: *"The offer to provide redacted information is not acceptable because absent the relevant facts of each application the amount of the award takes one nowhere."*
12. During the course of his investigation the Commissioner ascertained that the complainant's solicitor was already in possession of one of the assessments requested having previously handled that particular claim. The request for this particular assessment was therefore withdrawn.
13. The Commissioner is therefore considering whether there should have been a full unredacted disclosure of the remaining assessments.

### Chronology

14. The Commissioner contacted the public authority on 22 May 2007. In this letter, the Commissioner asked for further information from the public authority in terms of how compliance with the request would exceed the cost limit. The public authority was reminded at this time of the Commissioner's view that the time taken to redact information may not be taken into account when calculating the time spent on complying with the request. The Commissioner also asked for more detailed argument from the public authority in support of the exemptions claimed.

15. The public authority responded to the Commissioner by letter of the 3 July 2007. It detailed its arguments in relation to the exemptions claimed and stated its position again in relation to the cost limit in so much as it still felt that time taken to redact exempt and/or irrelevant information could be taken into account when calculating whether the limit had been reached. Within this letter, the public authority estimated the time as one hour per file and that this included redaction.
16. The Commissioner contacted the public authority by telephone to discuss the contents of this letter and to request further information to assist with the investigation. This was followed up in an email of 19 July 2007 requesting copies of some of the information and confirming the Commissioner's position with regard to not including the cost of redaction when calculating costs.
17. The public authority responded by letter of 17 August 2007 providing copies of some of the information along with further submissions to support its case and more arguments as to why it felt that the costs limit applies to redaction time.
18. The Commissioner raised further queries with the public authority on 16 May 2008.
19. The Commissioner telephoned the complainant's solicitor on 19 May 2008 and clarified that any disclosure would be to the world at large and not just to him for his own purposes. He also invited the solicitor to submit any further arguments as to why the information should be disclosed. The Commissioner chased a response on several occasions and, on 28 July 2008, the complainant's solicitor advised that he still wanted the Commissioner to make a decision but he submitted no further views.

## Findings of Fact

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20. Claims for miscarriages of justice are made to the Office for Criminal Justice Reform. Further information about making a claim can be found on the Criminal Justice System's website (link: [http://www.cjsonline.gov.uk/the\\_cjs/how\\_it\\_works/wrongful\\_conviction/](http://www.cjsonline.gov.uk/the_cjs/how_it_works/wrongful_conviction/)). This includes the following statements:

*"When a conviction is quashed (the guilty decision of the court has been reversed after an appeal) the Lord Chancellor and Secretary of State for Justice will consider applications for compensation. Any application must be made under the statutory provisions outlined below. Outside of these statutory provisions there is no entitlement to compensation in respect of a quashed conviction other than by pursuing a civil action through the courts."*

*"The Lord Chancellor and Secretary of State for Justice takes the final decision as to whether the applicant qualifies for payment. An independent assessor determines the amount of the award in all cases. It is not normal*

*practice for the Lord Chancellor and Secretary of State for Justice to publish details of individual awards.”*

21. The public authority had previously advised the complainant's solicitor that when an applicant is advised that they are eligible to apply for compensation they are sent correspondence to advise what will happen next. An extract of such a response was provided to the complainant's solicitor which included the following statements in respect of publicity:

*“In the interests of a successful applicant, the Office for Criminal Justice Reform will not normally make any public or other statement about the amount of an award in a particular case. Where he has reason to believe that any civil proceedings are being, or may be pursued, the Home Secretary will notify the quantum of compensation awarded by the Assessor, for use strictly in any such proceedings, to the defendants involved. The purpose of this procedure is to prevent a double recovery.”*

*“Generally speaking no individual applicant will be identified by name. The Office for Criminal Justice Reform will advise enquirers, for example from the press, to contact the applicant, his solicitors or other agent. The Office for Criminal Justice Reform should be advised whether or not the applicant wishes this practice to be followed. Government Ministers have responsibility for accounting for public expenditure and the Home Secretary must therefore be ready to answer any such specific queries by Members of Parliament. However, it is not normal practice to reveal the names of individuals receiving compensation. Nevertheless, the Office for Criminal Justice Reform cannot undertake to prevent press queries or reports.”*

22. Compensation payments are made by the Home Secretary based upon an assessment by the Independent Assessor. As explained above, applicants are advised by the public authority that it will not normally publicise details of any such payments. However, applicants are not obliged to accept the offer made and may bring an action through the Courts. In such circumstances, the final judgment is published in the same manner as other civil matters. In such instances the public are therefore able to gain access to some information regarding the level of awards being made.
23. An example of such a judgment is the case of *The Independent Assessor - v – O'Brien and Hickey [2004] EWCA Civ 1035*. This case puts much information about how compensation claims are assessed into the public domain. However, full details of the original awards, and how they were calculated, are not publicly available and are not part of the available judgment.

## Analysis

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### Procedural matters

#### Section 17 – refusal of request

24. Section 17(1) of the Act provides that:

*'A public authority which ... is to any extent relying:*

- *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.'*

25. The public authority's initial refusal notice in this case did not refer to the sub-section of the exemption claimed. Although this was rectified at the internal review stage the Commissioner finds that the public authority is in breach of s17(1) as the sub-section being relied upon was introduced outside the statutory 20 working day period.

### Exemptions

#### Section 40(5)(b)(i) - exclusion from the duty to confirm or deny

26. Although the public authority failed to consider this subsection, the subject matter of the case prompted the Commissioner to consider whether the public authority would have been excluded from the duty imposed on it by the provisions of section (1)(1)(a) by virtue of the provisions of section 40(5)(b)(i).

27. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the Act if to do so would breach the data protection principles. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) (i.e. the duty to confirm or deny that the information is held) if complying with that duty would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (the "DPA") or would do so if the exemptions in section 33A(1) of that Act were disregarded.

28. The DPA defines personal information 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.'*

29. The Commissioner is of the view that whether or not compensation was received as a result of an individual application for compensation, either by an individual or their beneficiary where they are deceased, would be information which constituted the personal data of that individual.
30. He would therefore like to clarify that even responding to this request would reveal whether or not compensation claims either had or had not been made or received which in itself would be further processing of personal data. This has resulted in him considering the case in a different manner to the public authority.
31. In light of the above, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request the public authority would have been excluded from the duty imposed by section 1(1)(a), i.e. the duty to inform a requester whether it holds information of the description specified in the request, and, if that is the case, to have that information communicated to him.
32. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying a claim had been made would contravene any of the data protection principles.

**Would complying with section 1(1)(a) contravene the first data protection principle?**

33. The first data protection principle states in part: *'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met....'*
34. In considering whether or not confirming or denying compensation had been claimed would contravene the first data protection principle, the Commissioner has taken into account the reasonable expectations of any potential named applicant (or a beneficiary), the legitimate interests of the public, and the rights and freedoms of any named applicant (or a beneficiary).
35. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40(5), the Commissioner is satisfied that in the context and background in which compensation claims are submitted by any applicants, or third parties, they would have a reasonable expectation of privacy and would not expect the public to have access to information which discloses whether or not they made a claim and the details of that claim. The application forms which are supplied to potential award recipients actually stipulate that:

*"[i]n the interests of a successful applicant, the Office for Criminal Justice Reform will not normally make any public or other statement about the amount of an award in a particular case."*

36. They further state that: “[g]enerally speaking no individual applicant will be identified by name...” and “it is not normal practice to reveal the names of individuals receiving payments of compensation.”
37. The Commissioner understands that the public has a legitimate interest in knowing that an individual who has had their sentence quashed has access to adequate compensation in an attempt to recompense them for their ordeal. However, he also has to consider the individual involved and their right to privacy. Whilst it may be true that the release of the information would also be useful for other people seeking to claim damages for a miscarriage of justice, the Commissioner does not believe that this public interest outweighs the unfairness to the data subjects involved. In many cases their private lives have already been exposed to scrutiny by the public and media and he believes that it would be unfair for them to suffer further intrusion.
38. The compensation scheme has already been closely scrutinised in civil proceedings, such as in the case referred to in paragraph 23 above. This has ensured that the processes involved are more open and some of the factors that are taken into consideration by the Assessor are documented. The Commissioner believes that the content of such judgments provide much background information which serves to keep the public informed and to encourage debate.
39. The Commissioner is satisfied that disclosing whether or not named parties made or received claims for compensation is not necessary for the purposes of the legitimate interests pursued by the public. He believes that that such a disclosure would be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the parties in question. If anonymised, random cases had been requested then he may have found differently but the request was for named and fully unredacted cases.
40. The Commissioner is satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the fairness element of the first data protection principle. Given this he has not gone on to consider the other data protection principles.
41. The Commissioner therefore finds that the public authority was not obliged to have responded to the complainant’s request in accordance with the duty imposed on it by the provisions of section 1(1)(a), because of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial without having considered these rights, even where section 40 has not been cited by the public authority.



**Section 12 – cost of compliance exceeds the appropriate limit**  
**Section 41 – information provided in confidence**

42. As he finds that the information is exempt by virtue of section 40(5) the Commissioner has not gone on to consider sections 12 or 41.

**The Decision**

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43. By citing the relevant sub-section of the exemption relied on outside the statutory time for compliance the Commissioner finds that the public authority breached section 17(1)(b).
44. The Commissioner finds that section 40(5) should have been applied and the public authority should neither have confirmed nor denied whether any information was held.

**Steps Required**

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45. The Commissioner requires no steps to be taken.

**Other Matters**

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46. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

***Internal review***

47. The internal review was requested on 25 April 2005 but the outcome was not communicated until 22 August 2005. The Commissioner has issued guidance to public authorities that an internal review should take no longer than 20 working days to complete and that, even in exceptional circumstances, it should take no longer than 40 working days.. In this case the review took almost four months and although the above mentioned guidance was not in place at the time, the Commissioner feels that length of time, regardless of the circumstances, is unacceptable. (This guidance can be found on his website at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_good\\_practice\\_guidance\\_5.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf))
48. The public authority stated within its internal review that “*Locating and extracting this specific information and presenting it in a suitably redacted form... is likely to take over 3.5 days.*” The Commissioner’s initial investigatory letter to the public authority specifically stated that the time taken to redact information could not be included when calculating the cost of responding and he asked for a detailed

breakdown of how the costs would be incurred should the public authority still wish to apply section 12.

49. The public authority did not provide such a breakdown in subsequent correspondence, rather it continued to pursue its argument that it felt redaction could be taken into account when calculating the cost limit. The Commissioner has clearly stated his position with regards to the issue of redaction and has published guidance on the issue which can be found on his website at: [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/practical\\_application/redactingandextractinginformation.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/redactingandextractinginformation.pdf)

### ***Section 35(2) DPA***

50. The complainant's solicitor has also argued that disclosure of the requested information is warranted under section 35(2) of the DPA. (The full text of this section is included in the legal annex at the end of this Notice). The Commissioner would like to clarify that the DPA is a separate access regime with different provisions to this Act. However, he feels it is important to stress that a public authority is not obliged to disclose personal data pursuant to a request made by a third party under section 35(2). It must decide whether it believes such disclosure would be justified and, in this case, it did not believe that it was.

## Right of Appeal

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51. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

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 9<sup>th</sup> day of March 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### Freedom of Information Act 2000

#### **Section 1(1) – general right of access** 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 17(1) – refusal of request** 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 40 - personal information** provides that –

**(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;
  - "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.

## **Data Protection Act 1998**

### **Section 35 - disclosures required by law or made in connection with legal proceedings etc** provides that –

- (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.
- (2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—
  - (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
  - (b) for the purpose of obtaining legal advice,or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

### **Schedule 2 conditions relevant for the purposes of the first principle: processing of any personal data** provides that –

- 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, or
- (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.