

Freedom of Information Act 2000 (Section 50)

Decision Notice

23 February 2009

Public Authority: Chief Officer of Cleveland Police
Address: PO Box 70
Ladgate Lane
Middlesbrough
Cleveland TS8 9EH

Summary

The complainant requested a copy of a report written by a senior officer of the public authority regarding an investigation into alleged corruption at Hartlepool Borough Council between 1996 and 1998. The public authority said that it was unable to locate the final report following extensive enquiries but it had located an interim report into the same matter. It refused to provide the interim report arguing that it was exempt from disclosure under section 30 of the Act (Investigations Information). It further argued that the public interest in maintaining the section 30 exemption outweighed the public interest in disclosure. It upheld this position on review.

The Commissioner is satisfied that the public authority did not hold a copy of the final report. Having read the interim report, the Commissioner is satisfied that a significant portion of it is the personal data of the complainant. As such this portion should have been exempted from disclosure under section 40(1) (Personal Data of the Requester). The Commissioner has decided that the remainder of the interim report constitutes personal data relating to third parties and that it is exempt from disclosure under section 40(2) by virtue of section 40(3)(a)(i). This exemption applies where disclosure would contravene any of the data protection principles in the Data Protection Act 1998. However, the Commissioner found a number of procedural failures on the part of the public authority. It failed to respond within 20 working days in contravention of section 10(1) and failed to provide a refusal notice in contravention of section 17(1). It also failed to specify and explain fully which exemptions it had applied in contravention of section 17(1)(a), (b) and (c) and section 17(3)(b). No further steps are required.

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 6 June 2005, the complainant requested a “*copy of Cleveland Police Report done by [named former Fraud Squad officer] and [named officer] 1996-1998 re alleged [sic] corruption H.B.C.*” The Commissioner understands from comments elsewhere in his correspondence that “H.B.C.” refers to Hartlepool Borough Council. For the remainder of this Notice, the Commissioner will refer to Hartlepool Borough Council as “HBC”.
3. The public authority acknowledged receipt of this request on 9 June 2005 and explained that it aimed to respond to the request by 5 July 2005. It advised that in some cases it was not always able to meet the set deadline and if this occurred a likely timescale for response would be provided.
4. On 13 June 2005 the complainant wrote back to the public authority setting out the history of his attempts to obtain this report. He explained that he needed to see the report to “*understand the whys and wherefores of what happened to me*” and for his peace of mind and wellbeing. He added that HBC had recently told him that it (HBC) “*can find no evidence whatsoever indicating the existence of police report [sic]*”.
5. On 7 July 2005, the public authority wrote to advise the complainant that it was still trying to locate the information he had requested and that the relevant officers were on annual leave. It explained that it would have to extend its deadline by another 25 working days. The complainant agreed to this in a letter dated 11 July 2005.
6. On 26 August 2005, the public authority wrote to the complainant to advise that it needed additional time to respond and set a new deadline for itself of 1 October 2005. It offered the complainant its internal review procedure and advised him of his right to complain to the Commissioner having exhausted any internal review.
7. On 15 September 2005 and 7 November 2005, the complainant wrote again asking for a copy of the report. The public authority responded on 10 November 2005 to advise that his complaint was being passed to its Professional Standards Department.
8. On 30 November 2005 the public authority wrote to advise that after extensive enquiries it had been unable to locate a copy of the report that was submitted to HBC by its Fraud Squad pertaining to the investigation which took place between 1996 and 1998. However, it had found an interim report that was prepared by its officers.
9. It explained that the interim report was exempt from disclosure under section 30 of the Act because the information contained in the report was “*obtained or recorded for the functions relating to investigations into whether a person should be charged with a criminal offence or not*”. It set out arguments for and

against maintaining the exemption and stated that, having weighed up these arguments, it considered the public interest “*would not be best served by releasing the interim report prepared by the police*”. It included as an argument against disclosure the applicability of more than one exemption and listed “(i.e. *Section 40 covering personal information, Section 38 Health and Safety, Section 40 [sic] Information provided in confidence*”. However it provided no further comment as to the relevance or applicability of these other exemptions. It offered an internal review of this refusal and provided information about his right to complain to the Commissioner if he was dissatisfied with the outcome of any review.

10. The complainant requested a review in a letter dated 21 December 2005 and set out his arguments as to why greater weight should have been attached to accountability and openness. He also set out more detail about his personal interest in the matter and asked if he could “*at least visit your department and read [the report] in my own right*”.
11. On 13 February 2006, the complainant wrote again seeking a response to his request for a review. He described the events covered in the report as being 12 years in the past and characterised them as “*history*”. However, he emphasised, it was *his* history and that he needed to resolve “*what who and why*” before he died. He implored the public authority to respond and repeated a willingness to read the report “*under your auspices*”.
12. The public authority acknowledged this letter on 17 February 2006 and wrote again on 23 February 2006 to advise that the matter was being prepared for review. It estimated that he would receive a response by 23 April 2006.
13. On 25 April 2006, the public authority wrote to advise the outcome of its internal review and said that having considered his letter of 21 December 2005 it upheld its original position. It directed the complainant to the Commissioner’s office where he was dissatisfied with this response.

The Investigation

Scope of the case

14. On 30 April 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:
 - The public authority should have supplied the information he had requested.
 - He also queried the public authority’s denial that it held a copy of the final report.
15. The complainant also raised other issues that are not addressed in detail in this Notice because they are not requirements of Part 1 of the Act.

Chronology

16. As noted at paragraph 14 above, the complainant wrote to the Commissioner on 30 April 2006. In this letter he set out his arguments as to why the report should be disclosed. He also described the negative impact that the public authority's investigation had had on him personally and professionally and on his family.
17. On 19 June 2006, the Commissioner wrote to the complainant asking him for further evidence of his correspondence with the public authority. At this point the complainant had only provided a copy of the outcome of the public authority's internal review. The complainant admitted that in frustration he had cleared much of his correspondence out until he noticed the public authority's reference to the Commissioner's office in its letter to him of 25 April 2006. He provided what details he could recall, apologised for being unable to provide more and asked whether the documents could be obtained from the public authority.
18. On 26 June 2006, the Commissioner requested copies of the relevant documents from the public authority. These were provided in an undated letter which was received on 10 July 2006. This letter also set out the chronology of correspondence and the author commented that he did not recall having sight of the original letter of 21 December 2005 from the complainant. Instead he received it as a photocopy with the complainant's letter of 13 February 2006. He advised that he received this on 23 February 2006.
19. Included in the copy correspondence provided by the public authority were copies of letters that the complainant received from HBC in response to an information access request to that body. They had apparently been submitted by the complainant in support of his information request to the public authority.
20. These included a letter from the author of the report to HBC dated 24 May 1995 stating that inquiries into allegations made by a named individual in letters dated 24 April 1995 and 1 May 1995 had been completed. The author of the report stated that the enquiries "*failed to produce any evidence of a criminal nature*" and that no further action was intended. A second letter from the author of the report to HBC was also included. It was dated 22 December 1998 and stated the following:

"I have examined the anonymous letter which you forwarded to me on 15 December 1998.

I can see nothing contained in these anonymous allegations which were not part of my original investigation into Hartlepool Borough Council. That investigation, as you know, took two years to complete.

In the absence of fresh evidence, I do not see any point in using valuable resources in any reinvestigation of the allegations.

Should any new evidence come to light then please feel free to recontact me".

21. Prior to allocating the case to a complaints officer, the Commissioner wrote to the public authority on 15 November 2007 asking for a copy of the withheld information, namely the interim report. The Commissioner referred to the complainant's comments about the impact events covered in the report had had on him personally. With this in mind, the Commissioner commented that it seemed likely that the report included the complainant's personal data and, as such, the information access regime under Section 7 of the Data Protection Act 1998 (the "DPA") would apply to that information. With sight of the information, the Commissioner added, the applicable information access regime should become clear.
22. The public authority provided the information as an encrypted attachment to an email dated 29 November 2007.
23. Having reviewed the report, the Commissioner noted that a significant portion of the information was clearly the personal data of the complainant. The Commissioner telephoned the public authority on 14 July 2008 to advise it of his view. The Commissioner recommended that the public authority should now treat the complainant's request for that part of his report which was his personal data as a subject access request under DPA section 7.
24. On 16 July 2008, the Commissioner and the public authority went through the report together over the telephone to identify and agree what portion of the report constituted the complainant's personal data. The Commissioner confirmed that his investigation in this case would focus on whether the information which was *not* the complainant's personal data should be disclosed under the Freedom of Information Act. The complainant's individual right of access to his own personal data would not be considered in this case because that individual right of access was not a requirement of Part 1 of the Freedom of Information Act.
25. The Commissioner wrote to the complainant on the same day setting out his view that two information access regimes applied to his request of 6 June 2005 and that for the purpose of this case, the Commissioner would limit the scope of his investigation to that information which was not his personal data.
26. He also provided the complainant with general information about both information access regimes and his role as the regulator of both regimes. He advised that a separate data protection case would be set up by his data protection complaints team to address any concerns the complainant might have about his right of subject access to his personal data under section 7 of the DPA.
27. Finally, on 24 September 2008, the Commissioner contacted the public authority to ask for clarification of the information retention and disposal policy that it had referred to in relation to the final report. It provided a copy of a document disposal policy which post-dated the complainant's request but which was the earliest version of the policy it held on the subject.

Analysis

Procedural matters

Section 10(1) – Statutory period for response

28. The public authority failed to deny that it held a copy of the final report which was submitted to HBC within the statutory timescale of 20 working days. It also failed to confirm within 20 working days that it held an interim report the content of which was related to the aforementioned final report. These failures constitute a breach of section 10(1) (time for compliance). The relevant section is set out in full in a Legal Annex to this Notice.

Does the public authority hold the final report?

29. The public authority has asserted that it was unable to find the final report and that, in all likelihood it had been destroyed in accordance with its own retention policy. Having queried the matter with the public authority and having had sight of its document disposal policy, the Commissioner is satisfied that, on the balance of probabilities, the public authority no longer holds a copy of the final report.
30. The Commissioner notes the public authority's own surprise at finding an interim report on the same subject and has no reason to believe that this surprise was anything other than genuine. In other words, the fact that the public authority has inadvertently retained a copy of the interim report is not, in the Commissioner's view, evidence that it is likely to have also retained a copy of the final report.

Section 17 - Refusal of Request

31. The public authority's refusal notice set out its position in relation to section 30 and, as part of its arguments regarding the balance of the public interest, it alluded to (but provided no further detail about) the application of other exemptions. Given the public authority's explicit reference to the weight that should be given to the applicability of other exemptions, the Commissioner can only assume it was also seeking to rely on these other exemptions as a basis for withholding the information.
32. In failing to set out precisely which other exemptions it sought to rely on and its basis for doing so, it contravened its obligations under section 17(1)(a), (b) and (c) and section 17(3)(b). In failing to provide a refusal within the statutory time limit as described in paragraph 28 above it contravened its obligations under section 17(1). Full details of these requirements are given in a Legal Annex to this Notice.
33. The Commissioner draws particular attention to the public authority's repeated failure to identify that the report included the complainant's personal data and to advise the complainant that such information was exempt under section 40(1).

Full details of section 40(1) are provided in a Legal Annex to this Notice. Further comment about this failure is provided in the Other Matters section of this Notice.

34. While it provided some detail in relation to its application of section 30 it did not specify precisely which subsection it sought to rely on and this was not sufficiently clear from the explanation set out in the refusal notice. In failing to do so it also contravened the requirements of section 17(1)(b).

Exemptions

35. As outlined in paragraph 1 above, the Commissioner's duty under the Act is confined to considering whether the public authority complied with its obligations under Part I of the Act and in particular whether the public authority had a sufficient basis for withholding the information.
36. The Commissioner would divide the report into two parts:
- a) information which is the personal data of the requester;
 - b) information which is not the personal data of the requester.
37. The Commissioner has determined that the requester's personal data is exempt from disclosure under the Act by virtue of section 40(1). However, the Commissioner does not propose to make any further comment in this Notice as to whether the complainant is entitled to access that portion of the information under section 7 of the DPA because that is not a matter which falls within Part I of the Act. The Commissioner has reached this view having considered his own published guidance on the subject.

"Data Protection Technical Guidance - Determining what is personal data"
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_speci alist_guides/personal_data_flowchart_v1_with_preface001.pdf

38. This Notice will now focus on whether or not the public authority was right to withhold the parts of the report which do not constitute the complainant's personal data.

Which exemption applies?

39. As noted above, the public authority focused its refusal on the basis of section 30. It alluded to the application of other exemptions including section 40, but gave no specific explanation on how, in its view, those other exemptions applied. The relevant subsections of both section 30 and section 40 are included in a Legal Annex to this Notice.
40. The Commissioner acknowledges that the requested information would fall within the class of information described in section 30(1)(a)(i). This is information which "*has been held at any time by the authority for the purposes of any investigation which the public authority has a duty to conduct with a view*

to it being ascertained whether a person should be charged with an offence”.

The public authority is a police force which has a duty to conduct investigations into allegations of criminal activity. Such allegations were made and the public authority investigated them in order to ascertain whether any person should be charged with an offence. The interim report covers this investigation.

41. Section 30 is a so-called “qualified” exemption from the duty to disclose requested information under the Act, (ie, its application is qualified by a balance of public interest test). Therefore the exemption from the duty to disclose can only be maintained where the public interest in maintaining the exemption outweighs the public interest in disclosure.
42. Section 40 is, for the most part, a so-called “absolute” exemption, (ie, most of its provisions are not qualified by a balance of public interest test). Information is absolutely exempt under section 40(2) by virtue of section 40(3)(a)(i) where disclosure under the Act would contravene any of the data protection principles of DPA.
43. While the withheld information relates to a police investigation it also relates to named individuals. The allegations of wrongdoing were made against named individuals connected to HBC and most of the allegations were made by other named individuals. In other words, it contains information which tells the reader something about named individuals; either that they are alleged to have acted wrongly or that they have made an allegation of wrong doing. The Commissioner is satisfied that such information is those named individuals’ personal data. More detail about his reasoning will be set out later in this Notice. His reasoning in relation to information about other individuals who are mentioned will also be set out later in this notice.
44. Disclosure of personal data is not automatically a breach of any of data protection principles. However, the Commissioner is assuming that the public authority’s reference (albeit fleeting) to section 40 in its refusal notice means that it also believes disclosure of any of the personal data would breach one of the data protection principles.
45. Where a public authority believes both an absolute and a qualified exemption from disclosure applies to requested information, the Commissioner recommends that focus should be placed on the absolute exemption first. In other words, the Commissioner believes the public authority should have first set out clear arguments as to the application of the relevant provisions of Section 40 rather than the application of Section 30.
46. The Commissioner also has a general duty under section 51 of DPA to “*promote the observance of the requirements of this Act [the Data Protection Act 1998]*”. When considering whether or not requested information should be disclosed under the Freedom of Information Act, the Commissioner must be mindful of his obligations under DPA98 and cannot order the disclosure of personal data where that disclosure would contravene the data protection principles of DPA98. For these two reasons, this Notice will therefore focus first on the application of Section 40(2) by virtue of Section 40(3)(a)(i) rather than on

Section 30.

47. The Commissioner has not asked either the public authority or the complainant to provide more detail of their arguments on this point because he believes their respective positions can be readily deduced from the correspondence between the parties and to the Commissioner.

Section 40(2) by virtue of section 40(3)(a)(i)

48. As set out elsewhere in this Notice, this exemption applies where disclosure would contravene one of the data protection principles of the DPA. The data protection principles only apply to personal data. When considering the application of this exemption, the Commissioner must first satisfy himself that the information in question *is* personal data as defined by the DPA. To do so, he must first consider whether the information is “data” as defined in Section 1(1) of the DPA. He must then consider whether the data is “personal data” to which the provisions of the DPA apply.

Is it “data”?

49. There are five categories of personal data that are set out in section 1(1) of the DPA. The Commissioner has focused on the most relevant category namely that which is described in the DPA section (1)(1)(a) as *“information which is being processed by means of equipment operating automatically in response to instructions given for that purpose”*
50. Where information is held electronically and can be accessed via a computer, as was the case here, the Commissioner is satisfied that such information is “data” for the purposes of the Act.

Is it “personal data”?

51. Section 1(1) of the DPA also sets out the definition of “personal data” which is as follows:

“‘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’*

52. The Commissioner has not received any information which would suggest that any of the named individuals set out in the report are deceased. He has therefore proceeded on the assumption that any individual named in the withheld information was still living at the time of the request.
53. As outlined in paragraph 43 above the information tells the reader something

about named individuals. The Commissioner has identified three distinct groups of named individuals in the withheld information:

- Those against whom an allegation of wrongdoing has being made;
- Those who made allegations;
- Those who are referred to in the account of alleged events.

54. The Commissioner has recently published technical guidance to assist in the understanding of whether data is, in fact, personal data caught by the provisions of the DPA and he had regard to his own guidance when considering this case.

“Data Protection Technical Guidance - Determining what is personal data“
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specalist_guides/personal_data_flowchart_v1_with_preface001.pdf

55. This guidance makes it clear that where data is obviously about an identifiable living individual then it is that individual's personal data.
56. In the case of the first group, it is clear that a specific allegation of wrong-doing against Person A is Person A's personal data. In the case of the second group, the Commissioner also believes that where Person B has made an allegation to the police, the fact that they have done so and the detail of what they have alleged is Person B's personal data even if that individual has not been directly affected by the alleged wrong-doing.
57. The Commissioner acknowledges that it is not immediately obvious that the third group constitutes personal data. Information is not an individual's personal data simply because they are mentioned in it. The focus may be on other matters or other individuals and the information may not reflect an event that is biographically significant in relation to that individual. However, the Commissioner is mindful of the context in which the individuals in question are mentioned – a police investigation. Reference to each individual means that he or she has experience or knowledge which is relevant to the investigation of each allegation. As such, they are potential witnesses in a police investigation. This increases, in the Commissioner's view, the biographical significance of that reference to them.
58. This does not mean that the whole allegation containing a reference to them is their personal data. However, it means that parts of the allegation which reflect their connection to or knowledge of events are their personal data. The fact that they have such a connection or such knowledge is also their personal data.

Whose personal data is it?

59. In a recent ruling, the Information Tribunal considered an appeal in which it was argued that where information relates to more than one individual, there must be a “principal data subject” (EA/2008/0001 *Fenney vs Information Commissioner*). A “data subject” is the subject of personal data. In the *Fenney* case, the appellant was seeking to argue that certain information was not his personal data and was therefore not exempt under section 40(1) of the

Freedom of Information Act 2000 because he was not the “principal data subject”. He argued that the information should instead be made available to him under the Freedom of Information Act 2000.

http://www.informationtribunal.gov.uk/Documents/decisions/NFenney_v_InfoComm_26Jun08.pdf

60. The Tribunal did not accept that argument and at paragraph 13 stated “... *There is no basis for arguing that the DPA intended that the only data subject to be considered when assessing a document incorporating data on more than one individual is the one whose data is more extensive or more significant. If information incorporates the personal data of more than one person the data controller is not required to attempt an assessment as to which of them is the more significant and to then recognise the rights to protection of that individual and ignore any others.*”
61. The Commissioner believes that the Tribunal’s comments are relevant to this case because the withheld information here also includes the personal data of more than one data subject. Arguably a record of an allegation made against you is more significant for you than it is for the person making the allegation against you or for the person with relevant knowledge of alleged events. However, the Commissioner is satisfied that a considerable amount of the personal data contained in the withheld information is, simultaneously, the personal data of more than one individual such that the personal data of one individual is inextricably linked with another individual. That said, the withheld information also includes personal data which only relates to separate individuals who are not connected with the complainant.

Would disclosure contravene any of the data protection principles?

62. In considering this point, the Commissioner has focused on the first data protection principle.

The first principle has two main components and, in cases involving sensitive personal data, there is an additional component. These are as follows:

- Requirement to process all personal data fairly and lawfully;
- Requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
- Additional requirement to satisfy at least one DPA Schedule 3 condition for processing sensitive personal data (if applicable).

63. Both (or, where applicable, all three) requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would processing be fair and lawful?

64. It is important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it.
- The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (following *Hogan and Oxford City Council v The Information Commissioner*) confirmed that, “Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions” (paragraph 52)
- http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf.
65. The Commissioner notes that the bulk of the personal data in question is sensitive personal data. Section 2 of the DPA sets out the definition of sensitive personal data. It includes the following: “*information as to the commission or alleged commission [by the identifiable living individual] of any offence*”. As outlined above additional and stricter provisions (set out in the DPA Schedule 3) apply to the handling of sensitive personal data.
66. The remainder is either information about the individual who made an allegation (where that does not also identify the subject of the allegation) or personal data about individuals who have knowledge or experience of alleged events.
67. In considering fairness, the following are significant factors:
- What are the reasonable expectations of the individual in relation to the handling of their personal data?
 - What was that person told about what would happen to their personal data?
 - Is any duty of confidentiality owed to that person?

Fairness and sensitive personal data

68. The investigations into allegations of criminality which are described in the interim report did not result in any criminal proceedings. This is confirmed by the content of the two letters described in paragraph 20 above. In the Commissioner’s view, any person who is the subject of an allegation of criminality would reasonably expect that information about this would remain unpublished unless and until proceedings were initiated against them. While individuals were evidently interviewed, there is no evidence that any proceedings were initiated against them.
69. The Commissioner recognises that information about allegations of criminality which have not resulted in criminal proceedings may, in certain limited circumstances, be disclosed to relevant persons via the Criminal Records Bureau (e.g. to a potential employer where the role applied for involves contact with children or with vulnerable adults). However, such disclosures are not made under this Act and do not set a precedent for unrestricted disclosure of the same information. In the Commissioner’s view, it would be wholly unfair to

disclose under the Act any of the sensitive personal data contained in the interim report because the subjects of that personal data would not expect such a disclosure and their expectations in this regard would be entirely reasonable in the circumstances.

Fairness and non-sensitive personal data

70. The Commissioner acknowledges that a person making an allegation of criminality might reasonably assume that their identity could be disclosed more widely where the matter goes forward to criminal proceedings. However, in the Commissioner's view, where a matter does not go forward to criminal proceedings, a person whose identity has not been made available to the subject of their allegations would reasonably assume that their identity and other information about them would not be made available to the public at large under the Act. Even if it had been made available to the subject of their allegations, the Commissioner does not believe that the individual would reasonably expect further disclosure of their identity and the nature of their allegations to the public at large under the Act.
71. Where individuals are mentioned in the account of the investigation of allegations and are, in effect, witnesses to alleged events or are reported to have knowledge of alleged events, the Commissioner believes those individuals would also reasonably expect their identity and their relationship to alleged events to remain private where the matter does not result in criminal proceedings.

Fairness and the passage of time

70. The Commissioner notes that at the time of the request over 10 years had passed since the commencement of the public authority's investigation. The complainant has argued that these events are "history". The Commissioner assumes he is arguing that the passage of time lessens the reasonableness of any expectation of privacy in this case. The Commissioner would disagree with such an argument. He believes that an individual would reasonably expect such information about them to remain private regardless of the passage of time unless the matter in question became the subject of subsequent criminal proceedings.

Fairness – summary

71. For the reasons outlined above, the Commissioner is satisfied that it would be unfair to disclose any of personal data in the withheld information. In other words, the first component of the first data protection principle cannot be satisfied.
72. As outlined above, where one component of the first data protection principle cannot be satisfied, disclosure would contravene that principle. Where disclosure of information would contravene any of the data protection principles it is exempt from disclosure under Section 40(2) by virtue of Section 40(3)(a)(i).

Lawfulness

73. The first component of the first data protection principle also requires processing to be lawful. Disclosure under the Act is unlawful where, for example, a statutory prohibition applies such as the statutory prohibition on making public the name of a person who has alleged that a sexual offence has been committed against them. Given his view as regards fairness, the Commissioner has not considered any statutory prohibition that would apply in this case, nor has any been drawn to his attention by the public authority.

DPA Schedule 2 & 3 conditions for processing

74. Although the Commissioner is satisfied that disclosure would breach the first data protection principle because it would be unfair, he has, for completeness, considered whether any of the conditions for processing in Schedule 2 and, where applicable, Schedule 3, could also be satisfied. The list of conditions as set out in Schedules 2 and 3 of the DPA are reproduced in a Legal Annex to this Notice. As outlined above, where the processing of sensitive personal data is considered at least one condition in each Schedule must

DPA Schedule 2 conditions for processing

75. In identifying a DPA Schedule 2 condition for processing the Commissioner considers that the most appropriate condition is at paragraph 6(1) which states that processing (i.e., disclosure under the Act) can take place where it *“is necessary for the purposes of the legitimate interests pursued by the data controller or by a 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.”*
76. The application of DPA Schedule 2 condition at paragraph (6)(1) has been considered among other issues by the Information Tribunal in House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060). <http://www.informationtribunal.gov.uk/Documents/decisions/HOCfinaldecisionwbsite260208.pdf> The Tribunal's decision in that case was appealed at the High Court. <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1084.html>
77. The Commissioner recognises that the general public has a legitimate interest in knowing whether allegations of corruption at HBC have been properly investigated. However, he does not consider that full disclosure of this information to the general public under the Act is necessary in order to satisfy those interests. In addition, he believes that full disclosure of the interim report would cause unwarranted prejudice to those individuals who can be identified from the report. The Commissioner has already set out his view as to whether or not disclosure would be fair. He believes that where disclosure is unfair it would also inevitably give rise to unwarranted prejudice to an individual's legitimate interests and right to privacy. He believes that disclosure of information detailing an individual's dealings with the police or their relationship to a police investigation would be extremely intrusive. He does not believe such

an intrusion is warranted in this case.

DPA Schedule 3 conditions for processing

78. The DPA Schedule 3 conditions for processing set a higher test for satisfying the first data protection principle where the information in question is sensitive personal data.
79. Having considered each condition in turn as set out in the Legal Annex to this Notice, the Commissioner believes that there is no Schedule 3 condition for processing which could be satisfied in order to permit disclosure of this sensitive personal data under the Act.

Anonymised disclosure

80. The Commissioner has examined whether it would be possible to remove all identifiers from the withheld information and disclose a wholly anonymised version of the report where the reader would have access to data but would not have access to any personal data (sensitive or non-sensitive).
81. Having considered the information in the report, the Commissioner is not persuaded that it would be possible to remove all identifiers from the withheld information without rendering it meaningless. The information refers to specific individuals such that even if their names or other obvious identifiers were redacted, it would be difficult for the public authority to satisfy itself that one or more individuals' identity could not be deduced from what remained of the report by, for instance, a resident in the HBC "catchment area". As an obvious example, although the complainant is frustrated by the lack of information he has received about events, the Commissioner believes that he, nevertheless, has relevant knowledge that would "unlock" some of the redactions that the public authority might seek to use in order to anonymise the report. The Commissioner considers it logical to assume that there will be other individuals with similar knowledge which would enable them to "unlock" redactions put in place to avoid the unfair disclosure of personal data.

Section 40(2) – Conclusion

82. The Commissioner is satisfied that disclosure of any of the withheld information would contravene the first data protection principle of the DPA. Disclosure of the sensitive and non-sensitive personal data would be unfair and none of the conditions listed in Schedule 2 or (where relevant) Schedule 3 of the DPA can be satisfied. The Commissioner is therefore satisfied that the withheld information is exempt from disclosure under section 40(2) of the Act by virtue of section 40(3)(a)(i).

Section 30

83. As noted in paragraph 40, the Commissioner is satisfied that the withheld information would fall within the class of information set out at section 30(1)(a)(i). However, the Commissioner has not gone on to consider whether

the public interest in maintaining that exemption outweighs the public interest in disclosure because he is already persuaded that the same information is exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i).

The Decision

84. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It was entitled to withhold the interim report from disclosure under section 40(1), and under section 40(2) of the Act by virtue of Section 40(3)(a)(i).
85. However, the Commissioner has also decided that the public authority did not deal with the following elements of the request in accordance with the Act:
- It failed to respond within 20 working days. In doing so it contravened the requirements of section 10(1).
 - It did not properly set out which subsection of section 30 applied and did not provide an explanation as to the basis for its view in this regard. It also failed to specify precisely which other exemptions it sought to rely on nor did it provide an explanation as to why it was entitled to rely on these other exemptions. In failing to provide this information, it contravened the requirements of section 17(1)(a), (b) and (c) and section 17(3)(b).

Steps Required

86. The Commissioner requires no steps to be taken.

Other matters

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

When the Commissioner read the information in question, it was immediately apparent that it included personal data relating to the complainant. As such the complainant's request for access to that section of the information constituted a subject access request under section 7 of the DPA. The public authority should have instigated its own procedures for handling subject access requests much earlier in its dealings with the complainant. Ideally, this should have been at the time it received his request.

Right of Appeal

88. 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.

Website: 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 23rd day of February 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

Section 1(1)(a) & (b) - General right of access to information held by public authorities

- (1) 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 10(1) - Time for compliance with request

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17(1)(a), (b) and (c) and Section 17(3)(b) - Refusal of request

- (1) 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.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Section 30(1) - Investigations and proceedings conducted by public authorities

- (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—
- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
 - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
 - (c) any criminal proceedings which the authority has power to conduct

Section 40(1) – (3) - 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

Data Protection Act 1998

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, 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.

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.
- 8 (1) The processing is necessary for medical purposes and is undertaken by—
- (a) a health professional, or
- (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.
- (2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.
- 9 (1) The processing—
- (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
- (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
- (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.
- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.
- 10 The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.