

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 March 2009

Public Authority: Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall, London
SW1A 2WH

Summary

The complainant requested the complete contents of a file entitled '*Allegations against Mark Thatcher*', together with a schedule of any documents in the file which the public authority declined to disclose. The public authority claimed some of the requested information was exempt under section 27 of the Freedom of Information Act 2000 ('the Act') and extended the time limit in order to assess the public interest test. It subsequently identified some of the information as being exempt under sections 40(2) and 41(1). The Commissioner decided that, in extending the public interest time limit, the public authority failed to update its estimates of the extra time it required, in breach of section 17(2); that it failed to issue a refusal notice within 20 working days stating all of the exemptions on which it subsequently relied, in breach of section 10(1); and that it failed to provide its assessment of the public interest test within a reasonable timescale, in breach of section 17(3). He also decided that, in relation to section 27, it failed to provide an adequate assessment of the public interest test, in breach of section 17(3)(b); and that in failing to address the complainant's request for a schedule of withheld documents and therefore informing him whether it held the information it breached section 1(1)(a) and (b). The Commissioner decided that the information was in fact properly withheld by virtue of section 40(2), since it was largely sensitive personal data. However, in light of the fact that much of the information was already in the public domain, the Commissioner considered that its exemption from disclosure under freedom of information legislation was an anomaly and has recorded that he is inviting the Ministry of Justice to address the problem, including the possibility of remedial legislation.

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 19 January 2006 the complainant had requested from the Cabinet Office its file titles relating to Mark Thatcher for the years 1989-96. He then requested the complete contents of a file entitled '*Allegations against Mark Thatcher*' on 17 February. He also asked for a schedule of any documents in the file which the Cabinet Office declined to disclose.
3. The Cabinet Office replied on 16 March 2006. It stated that some of the requested information was exempt under section 27 of the Act and it needed further time in order to assess the public interest test. It estimated that it would require a further 20 (working) days in order to reach a decision, and it therefore hoped to respond by 12 April 2006. It advised the complainant of his right to request an internal review and to complain to the Commissioner.
4. The Cabinet Office wrote again on 12 April 2006, claiming that it needed an additional 20 days to reach a decision, and indicating that it hoped to respond by 12 May 2006.
5. On 23 January 2007 the Cabinet Office told the complainant that all of the information was being withheld. It identified the relevant exemptions as those in sections 27(1)(a), 40(2) and 41(1) of the Act. It did not specifically address the complainant's request for a schedule. It reminded him of the internal review procedure and of his right to approach the Commissioner.
6. The complainant requested an internal review on 26 January 2007, expressing his view that the public interest favoured disclosure. Noting the length of time that had elapsed, he also asked the Cabinet Office to '*review why this delay occurred*'.
7. The Cabinet Office acknowledged the letter on 29 January 2007, and provided its substantive response on 1 March 2007. It upheld the original decision to withhold the information and informed the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

8. On 17 April 2007 the complainant wrote to the Commissioner. He expressed his view that the Cabinet Office had misjudged the public interest. He also objected to the Cabinet Office's failure to provide the requested schedule of withheld documents, since he considered that to be good practice.

Chronology

9. The Commissioner asked the Cabinet Office on 23 January 2008 to provide him with the withheld information and inviting its comments on various issues.

10. He sent a reminder on 25 February 2008.
11. The Cabinet Office sent an acknowledgement on 3 March 2008.
12. The Commissioner sent a further reminder on 28 March 2008.
13. The Cabinet Office provided its substantive reasons and a copy of the withheld information on 31 March 2008.

Findings of fact

The complainant requested information from a file entitled '*Allegations against Mark Thatcher*' which related to the years 1989-96. The Cabinet Office claimed that disclosure of information from this file would prejudice United Kingdom relations with foreign states. The Commissioner notes that in fact there are various allegations about Mark Thatcher – which he has denied – during this period which are in the public domain, including issues which were raised in the House of Commons and reported in Hansard.

Analysis

Procedural matters

14. Section 10(1) of the Act provides that:

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

However, section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. Where any additional time beyond the initial 20 working days is required, the public authority must still serve a 'refusal notice' under section 17 of the Act within 20 working days of a request even in those cases where it is relying on a qualified exemption and has not yet completed the public interest test; state the exemption(s) being relied on and, if not apparent, the reasons why they apply; and give an estimate of the time by which the final decision will be reached.

Failure to include time estimate

15. In this case the request was made on 17 February 2006 and the Cabinet Office issued a refusal notice on 16 March 2006, which was within the statutory timescale of 20 working days. However, that refusal notice stated that the Cabinet Office required further time in order to consider the public interest test regarding section 27, and it gave an estimate for a final decision of 12 April 2006. This accorded with the requirement in section 17(2) that the refusal notice '*must contain an estimate of the date by which the authority expects that such a*

decision will have been reached'. In the event the Cabinet Office was not able to issue a decision on that date and gave another estimate on 12 April 2006 of 12 May 2006. The Cabinet Office missed that deadline and failed to provide a further time estimate, or even contact the complainant again, until it issued its final refusal notice on 23 January 2007. Therefore, between 12 May 2006 and 23 January 2007 it left the complainant without a time estimate, in breach of section 17(2).

Delay in considering the public interest test

16. In cases where a public authority has extended the time limit in order to consider the public interest test, and the final decision is to withhold the requested information, a second notice must be issued providing the reasons for the decision regarding the public interest. Under the terms of section 17(3) of the Act, this second notice should be issued *'within such time as is reasonable in the circumstances'*. As the Commissioner has explained in his *'Good Practice Guidance 4'*, public authorities should aim to conduct the public interest test within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken should in no case exceed 40 working days.
17. In this case, the complainant made his request on 17 February 2006 and the Cabinet Office issued the second (final) refusal notice on 23 January 2007. The Commissioner recognises that this case was dealt with prior to the issuing of his *'Good Practice Guidance No 4'* in February 2007. However, he considers that the 234 working days which the Cabinet Office took to address the public interest test was a wholly unreasonable timescale, and constitutes a breach of section 17(3) of the Act.

Exemption – section 27

Prejudice test

18. Section 27(1) of the Act provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State...'

To engage the section 27(1)(a) exemption it is therefore necessary for the public authority to demonstrate that disclosure of the information would, or would be likely to, cause some relevant prejudice. The Commissioner's interpretation of 'likely to prejudice' is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis. The prejudice test is a dynamic concept and different levels of prejudice will occur at different times according to the varying circumstances affecting the international relations or interests of the

United Kingdom abroad.

19. In its refusal notice and internal review the Cabinet Office did not specify whether its view was that disclosure of the information to which it had applied section 27 would prejudice United Kingdom relations with the other state, or would only be likely to do so. Indeed, it did not provide any details of alleged prejudice at all. However, in the comments which the Commissioner subsequently invited from the Cabinet Office, it explained that, while the title of the requested file was in the public domain, the nature of the allegations in the file was not publicly known. Some of the information related to another state or states; the Cabinet Office stated that disclosure or any publicity which could be interpreted as critical of that state or states *'will be taken'* as a hostile gesture, and *'would be likely'* to be interpreted as demonstrating a lack of candour and trust. The Cabinet Office claimed that even *'ostensibly innocuous'* documents on the file therefore engaged section 27 because of the context in which they appeared. This included documents which individually were in the public domain, and documents which contained information which was in the public domain. The Cabinet Office made the point that *'resurrecting allegations of corruption involving Mark Thatcher...could only generate fresh publicity'* which the other state or states involved would regard as unfriendly. The prejudice associated with disclosure was therefore not embarrassment to the government of the United Kingdom but the offence that *'would'* be caused to the government of the other state or states, however irrational or unreasonable that offence might be. Such offence would produce undesirable repercussions for the United Kingdom. Finally, the Cabinet Office claimed that *'The advice we have been given repeatedly by the Foreign and Commonwealth Office is that [the other state or states involved] would react to such disclosure in such a way as to prejudice relations between the UK'* and that other or those other states.
20. Having considered the Cabinet Office's comments, and in particular the suggestion that detrimental consequences *'would be'* and *'will be'* taken from, and *'could only'* be the result of, disclosure, the Commissioner takes the view that the Cabinet Office seems to be claiming that disclosure would, rather than would be likely to, cause the stated prejudice. The *'would'* test imposes a much stronger evidential burden on the public authority. Where the public authority has claimed that disclosure would give rise to the relevant prejudice then the Tribunal has ruled, in the case of *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026, EA/2005/0030), that the prejudice must be at least more probable than not. Where the public authority has claimed that disclosure is only likely to give rise to the relevant prejudice then, in accordance with the Tribunal's decision in the case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005), *'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'*.
21. In *Hogan* the Tribunal also stated that the *'evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice'*. Accordingly, unsupported speculation or opinion will not be taken as evidence of the likelihood of prejudice, although the Tribunal has also indicated that public authorities do not need to prove that

something will happen if the information in question is disclosed. Therefore, while there will always be some extrapolation from the evidence available, the public authority must be able to provide some evidence (not just unsupported opinion) from which to extrapolate.

22. The Cabinet Office has claimed that the nature of the allegations in the file is not publicly known. However, the Commissioner considers that the crucial issue in this case is not whether it is known publicly what information is in the Cabinet Office's file entitled '*Allegations against Mark Thatcher*', but whether the information that is in the file is already in the public domain. Research by the Commissioner has revealed that various allegations about Mark Thatcher from the period 1989-96 have been widely disseminated. As well as reports in the media (some of them initiated by the newspaper which made the freedom of information request in this case), aspects of the allegations have been raised in Parliament. The Commissioner considers that previous disclosure of this information is a decisive factor.
23. The Cabinet Office has opposed this view with its claim that 'resurrection' of the allegations now would 'offend' a particular foreign state or states and would be taken as a 'hostile gesture', In light of the fact that these allegations have already been aired, including in Parliament, and continue to be explored in the public domain, the Commissioner's view is that there would have to be specific evidence that 'resurrection' would cause some further prejudice to international relations to justify maintaining the section 27(1)(a) exemption in relation to information which is already publicly available.
24. The only specific evidence which the Cabinet Office has provided for the alleged prejudicial implications of disclosure is its claim that:
- 'The advice we have been given repeatedly by the Foreign and Commonwealth Office is that [the other state or states involved] would react to such disclosure in such a way as to prejudice relations...'*
- The Cabinet Office did not claim that this advice was provided specifically in relation to this case.
25. The Commissioner is particularly unconvinced by the Cabinet Office's statement that disclosure of even '*ostensibly innocuous*' documents in the file would prejudice relations with the state or states involved because of the context (ie the allegations) in which they appear.
26. Having regard to these arguments in respect of the information which is already in the public domain, the Commissioner has concluded that the Cabinet Office has not discharged the requisite evidential burden (identified in the cases of *Hogan* and *John Connor Press Associates Limited*) to demonstrate that disclosure would give rise to the necessary prejudice to international relations. In particular, the Commissioner takes the view that foreign states will recognise that the United Kingdom is a society in which statutory rights and the political culture limit the ability of the United Kingdom government to control information circulating in civil society, and will have due regard to the fact that allegations from the relevant time

period relating to Mark Thatcher have already been raised in Parliament and elsewhere. Furthermore, to the extent that disclosure of the allegations would lead to prejudice to relations with the relevant state or states then it is a prejudice which has already occurred.

27. In passing, the Commissioner also notes that it is a rather unattractive argument from the perspective of freedom of information legislation – which creates a presumption in favour of disclosure – that the Cabinet Office should seek, in effect, to suppress any reference to allegations lawfully made by individuals, including Parliamentary representatives, because a foreign state might regard them as negative or ‘unfriendly’.
28. In light of these considerations, the Commissioner has concluded that the Cabinet Office has failed to prove, to the standards laid down by the Information Tribunal in the *Hogan and John Connor Press Associates Limited* cases, that disclosure of information which is already in the public domain would create a ‘*real and significant risk*’ of prejudice to the United Kingdom’s international relations with other states.
29. The information which the Cabinet Office withheld by reference to section 27(1)(a) comprises:
- essentially administrative letters and notes which cover or acknowledge receipt of other documents;
 - documents which are, and documents containing information which is, already in the public domain;
 - allegations about a specific matter raised by a Member of Parliament (the ‘MP allegations’), and notes of broader allegations by an individual by way of a proxy (the ‘allegations minute’);
 - memoranda and letters (including drafts) providing Cabinet Office assessments of those allegations and how to address them;
 - advice to the Prime Minister as to how to respond in private and to Parliament.
30. The Commissioner considers that letters and notes which cover or acknowledge receipt of other documents – that is, information which is essentially administrative – do not contain any information which would prejudice international relations. He is not convinced by the argument that disclosure of information which is already in the public domain constitutes a ‘resurrection’ of issues which will cause fresh offence to the other or states. In relation to memoranda and letters (including drafts) providing Cabinet Office assessments of the allegations and how to address them, and advice from officials to the Prime Minister as to how to respond in private and to Parliament, the Commissioner has taken note of the specific content of these documents. In light of what is already in the public domain he does not consider that there is sufficient evidence that disclosure of this part of the information would, or would be likely to, prejudice

United Kingdom relations with any other state, to the extent that it addresses allegations which are already in the public domain, even if the memoranda and letters themselves are not. Furthermore, much of this information was, or was intended to be, released into the public domain as a public response to the allegations by the government of the day.

31. Although the Commissioner has conducted an internet search in an effort to ascertain what information is publicly available, there are elements of the allegations which he has not been able to establish are available in the public domain. He has therefore considered this information on the assumption that any disclosure of it now would be original. Having regard to these elements of the information, the Commissioner is satisfied that these elements of the allegations have the potential to cause new offence to the foreign state or states involved, since they have not been publicly disclosed before (or if they have, he has been unable to ascertain that to be the case).
32. In assessing whether such prejudice is actually likely, the Commissioner notes the case of *Campaign Against the Arms Trade (CAAT) v the Information Commissioner and Ministry of Defence* (EA/2006/0040), where the appellant had requested certain Memoranda of Understanding between the United Kingdom Government and the Kingdom of Saudi Arabia. In that case the Information Tribunal stated that disclosure of information could cause substantive prejudice *'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'*. The Tribunal also stated that:

'Prejudice...imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be "real, actual or of substance", as described in [the case of] Hogan'.

The Tribunal did *'not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage'*, rather than disclosure merely exposing United Kingdom interests to:

'the risk of an adverse reaction...or to make them vulnerable to such a reaction, notwithstanding that the precise reaction...would not be predictable either as a matter of probability or certainty'.

33. Having regard to the nature of the allegations addressed in the documentation which has not previously been released into the public domain, the Commissioner is satisfied that disclosure would create such a risk of an adverse reaction from another state or states. Since prejudice to United Kingdom relations with another state or states would therefore be likely, the Commissioner is satisfied that the section 27(1)(a) exemption is engaged in respect of this part of the information, and he has therefore gone on to consider the public interest test.

Public interest

34. Since section 27(1)(a) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*.
35. In its refusal notice, internal review and subsequent comments to the Commissioner the only public interest factors in favour of disclosure of this information which the Cabinet Office identified (in the refusal notice of 23 January 2007) was that there was a public interest *'in understanding the UK's conduct of its foreign relations'*, and (in its comments) that disclosure *'would enable greater scrutiny of the government's actions when faced with allegations of corruption'*.
36. The Commissioner does not consider that the Cabinet Office gave sufficient consideration to the factors in favour of disclosure and has therefore concluded that it failed to conduct a proper assessment of the public interest test. Section 17(3) of the Act provides that a public authority which is relying on a claim that the public interest in maintaining the exemption outweighs the public interest in disclosing the information 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 –

.....

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

The Commissioner takes the view in this case that the Cabinet Office failed to give the complainant adequate reasons as to why the public interest favoured maintaining the exemption, and that it therefore acted in breach of section 17(3)(b) of the Act.

37. In the view of the Commissioner, disclosure of the requested information would play a significant role in increasing public confidence, promoting transparency and decision makers' accountability to the public, and facilitating public understanding and debate on the particular issues in hand. In particular, disclosure would allow the public, politicians and relevant law enforcement agencies access to material alleging corruption of a serious nature affecting United Kingdom commerce and international relations. The Commissioner notes that allegations about the Al-Yamamah arms deal continue to be a live political issue: for instance, on 30 July 2008 there was a ruling by the House of Lords that, in halting its investigation into BAE's conduct during the al-Yamamah arms deal, the Director of the Serious Fraud Office had acted lawfully. He also notes that the United Kingdom has international legal obligations (for example, under the Organisation for Economic Co-operation and Development's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, which came into force in February 1999) and that there have been claims by politicians and in the media that the United Kingdom has failed to

comply with those obligations. In showing whether the United Kingdom had discharged its obligations, disclosure of the information might therefore have a positive effect on the reputation of the United Kingdom among states other than those directly or indirectly involved in the allegations. The Commissioner considers that the fact that there is an ongoing debate about issues of such importance generates a very significant public interest in disclosure of this information.

38. On the other hand, the Commissioner notes the public interest in withholding the information. The Cabinet Office made the point that there was a strong possibility that disclosure would damage relations with another state or states, and it claimed that endangering links could only be justified by a compelling public interest which it did not believe existed in this case. While the Commissioner is believes that the public interest factors in favour of disclosure are compelling, given the issues noted in the paragraph above, he accepts that the likelihood of prejudice to the relations with relevant states is also a significant public interest factor, which favours maintaining the exemption. Although the documents date from 12-19 years ago, they relate to diplomatic and international policy issues which are still live and affecting UK relations with those other states. This is evidenced by the decision of the Serious Fraud Office to halt its investigation in the al-Yamamah arms deal case noted above: in the House of Lords appeal, Lord Bingham stated that the Director of the Serious Fraud Office had lawfully made his decision on the *'judgment that the public interest in saving British lives [in the face of an 'explicit threat by the Saudi authorities'] outweighed the public interest in pursuing BAE to conviction'*.
39. In relation to the allegations which, so far as the Commissioner is able to ascertain, have never been disclosed into the public domain, he considers that the factors in favour of disclosure and in favour of maintaining the exemption are both very strong. Having given careful consideration to all of the factors in favour and against disclosure, the Commissioner has decided that the balance of the public interest under section 27(1)(a) lies in withholding this information.

Exemption – section 41

40. The Cabinet Office claimed that some of the information was exempt by virtue of section 41. Section 41(1) of the Act states:

'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.'

41. Accordingly, under the provisions of section 41(1)(a) the exemption only applies to information which was obtained by the public authority from another person or public authority, and does not apply to information created by the public authority

itself. In this case the Commissioner has concluded that a significant portion of the information – comprising final versions and drafts of letters, internal memoranda, covering notes, advice and speaking lines to take – was not obtained from another person. This information was generated by the Cabinet Office itself, whether for internal or external consumption. While the Commissioner considers that internally generated documents may contain information which has been obtained from another person, he has concluded that these documents do not do so. Since this information was not obtained from another person it cannot fulfil the provision in section 41(1)(a) and thus engage the exemption.

42. The Commissioner is satisfied that the remainder of the information was obtained from other persons, and so engages section 41(1)(a). The information comprises:

- i) a document of allegations (the 'MP allegations') referred on to the Prime Minister by a Member of Parliament, and the covering letter;
- ii) documents containing Cabinet Office assessment and advice regarding the allegations;
- iii) correspondence from the Member of Parliament several years after he had passed on the allegations; and
- iv) a note of a meeting concerning a separate set of allegations (the 'allegations minute').

43. To engage the section 41 exemption information must also comply with section 41(1)(b); that is, disclosure of the information by the Cabinet Office must constitute an 'actionable breach of confidence'. An actionable breach will only arise when the following conditions are satisfied:

- the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
- the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be used in accordance with the wishes of the confider;
- disclosure of the information would be to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
- the action would not fail on the grounds that disclosure of the information would be protected by a public interest defence.

44. The Cabinet Office explained to the Commissioner its application of section 41. It stated that the withheld information had the necessary quality of confidence because it was *'extremely unlikely that any of the individuals concerned would have wished such material to be broadcast'*, and it was not aware that the information had ever been made public. Regarding the obligation of confidence, it

claimed that the context of the referral of the allegations showed that those providing the allegations intended them not to be made public; however, it did not provide any explanation why the documents generated internally by the Cabinet Office were subject to such an obligation. Concerning detriment, the Cabinet Office claimed in respect of the allegations referred by the Member of Parliament that Members of Parliament should be able to refer such matters *'without being influenced by the possibility of inappropriate disclosure and possible adverse comment'*; regarding the meeting note, it stated that it was clear from the information itself that the person referring it would be distrusted by another of the individuals involved should the information be disclosed. Finally, in relation to the issue of a public interest defence, the Cabinet Office claimed that disclosure could not be justified on public interest grounds, although it did not provide a very substantial argument in support of that point.

45. In relation to the information identified in point (i) of paragraph 46 above, the Commissioner takes the view that, when he originally raised the allegations, it is clear that the Member of Parliament intended his involvement to be treated in confidence, but it is not clear that he intended the allegations themselves to be confidential. However, in the correspondence with the Prime Minister which he had several years later he indicated that he would now be making it known publicly that he had raised the allegations at the earlier date, and it is clear from recorded debate in the House of Commons that he did indeed do so. The Commissioner takes the view that, in subsequently releasing into the public domain the fact that he had previously raised the matter with the Prime Minister, the Member of Parliament in effect waived any duty of confidentiality which the Cabinet Office owed to him.
46. As the information about the fact that the Member of Parliament had raised these allegations was in the public domain, the Commissioner considers that it did not have the necessary 'quality of confidence' required to constitute an 'actionable breach of confidence'. The case of *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 clarified that:

'However confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge'.

The Commissioner further considers that, since the confider had himself put the information into the public domain, disclosure would not be to his detriment, a further requirement to constitute an 'actionable breach of confidence'. For these reasons disclosure of this information by the Cabinet Office could not constitute an 'actionable breach of confidence' as required by section 41(1)(b), and accordingly the information relating to the Member of Parliament's referral of the 'MP allegations' does not engage the section 41 exemption.

47. In relation to the 'MP allegations' themselves, the Cabinet Office has accepted that at least some of the information has been released into the public domain. Accordingly, that part also fails to engage the section 41 exemption. For any part of the 'MP allegations' that is not already in the public domain, the Commissioner is unconvinced that disclosure would create an actionable breach of confidence.

He has taken that view because there is no evidence that the person(s) confiding the information to the Member of Parliament intended it to be kept in confidence, or that they would suffer any detriment from disclosure – indeed, it seems likely that they wished the information to be disseminated. In relation to the Member of Parliament, it appears that the information was passed to him in his capacity as a Parliamentary representative with the intention that he would disseminate it more widely. In that case it seems unlikely that disclosure of it would result in any detriment to him. Furthermore, since the information related to serious allegations involving potential misconduct and criminal activity, the Commissioner considers it to be extremely likely that, should any duty of confidentiality be owed, disclosure of the information by the Cabinet Office would in any case be protected by a public interest defence. In all the circumstances, the Commissioner has therefore concluded that the 'MP allegations' do not satisfy the Condition in section 41(1)(b), and that the exemption is therefore not engaged.

48. In relation to the Cabinet Office's assessment and advice regarding the allegations (point (ii) of paragraph 46), the part of these documents which directly refers to the allegations, or from which the allegations could be reconstructed, attracts the same arguments as the allegations themselves, as identified above. Accordingly, this part of the information also fails to engage the section 41 exemption.
49. Regarding the remaining parts of the assessment and advice documents which do not embody the allegations themselves, this information was generated by the Cabinet Office. Accordingly, it was not obtained from another person so as to fulfil the provision in section 41(1)(a), and, as has already been explained, it therefore cannot engage the exemption.
50. In relation to the subsequent correspondence from the Member of Parliament (point (iii) of paragraph 46) indicating that he was going to make public that he had raised matters several years earlier, the Commissioner notes that the Cabinet Office has not explained why it considers that this was provided in such circumstances as to give rise to an obligation of confidence, nor has it indicated what detriment might be caused to the Member of Parliament by its disclosure. The Commissioner notes that there is no 'confidential', 'personal' or 'private' marking on the letters, nor do they contain any request or other indication by the Member of Parliament suggesting an expectation that they will be kept confidential. The Commissioner is mindful of the fact that correspondence between a Member of Parliament and the Prime Minister has a degree of privilege that may well give rise to an expectation of confidentiality in many circumstances. However, he does not consider that all such correspondence must as a matter of course be regarded as having been provided in confidence so as to give the Member of Parliament a legal remedy should the Prime Minister decide to make the correspondence public. In this case the Member of Parliament warned the Prime Minister that he himself was 'going public' about the issues involved, and having regard to the contents of the letters the Commissioner can find no evidence that the Member of Parliament intended them to be confidential. Accordingly, he considers that these documents do not engage the section 41 exemption.

51. With respect to the 'allegations minute' (point (iv) of paragraph 46), the Commissioner has concluded that this information has the necessary 'quality of confidence' because it relates to serious allegations of corruption and illegality which the individuals involved were unlikely to have wished to be broadcast more widely. The information was provided in circumstances which gave rise to an obligation of confidence because it is clear from the contents of the documentation that the confider expected his approach to be kept confidential because of other obligations which he or she had. It is also marked as 'Confidential – Personal'. The Commissioner is satisfied that a breach of those obligations would result in a not insignificant detriment to the confider. However, the Commissioner notes that a report commissioned by the Prime Minister into the allegations was read to parliament shortly after the allegations had been made, and so some of the information has therefore been disclosed into the public domain. Further, the Commissioner considers that an action for breach of confidence by the individual making these allegations would fail because disclosure of the information would be protected by a public interest defence.
52. In relation to the public interest defence, the Commissioner is mindful of the fact that the balance of the public interest test is slightly different with respect to the law of confidentiality than it is in relation to freedom of information legislation, in that the former dictates that confidential information should be withheld unless the balance of the public interest favours disclosure, whereas in the latter information can only be withheld when the public interest in maintaining the exemption outweighs that in disclosure. However, the Commissioner does not consider that this difference has any practical impact in this case.
53. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions. The duty of confidence protects the necessary relationship of trust between the confider and the confidant, thereby operating to serve the public interest. Disclosure of confidential information may undermine that relationship. In the case of *Bluck and The Information Commissioner and Epsom & St Helier University NHS Trust* (EA/2006/0090), the Information Tribunal quoted from the Lords decision of *Attorney General v Guardian Newspapers* [1990] 1AC109:

'as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence...'

The Commissioner recognises that in this case disclosure might well have a detrimental effect on the willingness of individuals to come forward and report others' alleged criminal activity and misconduct.

54. On the other hand, case law shows that the courts have been prepared to require disclosure in the public interest of confidential information where the information concerns misconduct, illegality or gross immorality, since there is a strong public

interest in the accountability and transparency of investigations into such activity. In the Information Tribunal case of *Derry City Council v the Information Commissioner* (EA/2006/0014) it was accepted that the public interest defence to breach of confidentiality had originated precisely in the perception that:

'there may on occasions be a duty to the public to disclose information, in breach of a private obligation to maintain its confidentiality, in particular for the purpose of preventing crime...the effect of cases such as Initial Services Limited v Putterill [1968] 1 QB was to extend the scope of the defence to permit disclosure relating to the commission of civil wrongs or misdeeds'.

The Commissioner notes that the allegations in this case do indeed relate to serious corruption and criminal activity.

55. The Commissioner has also had regard to the right to privacy recognised by Article 8 of the Human Rights Act 1998: *'Everyone has a right to respect for his private and family life, his home and his correspondence'*. Since the courts are obliged to interpret domestic law (including the law of confidence) in a way that respects this right to privacy, the Commissioner considers that Article 8 considerations should be taken into account when determining whether there would be a public interest defence against a breach of confidence. However, in this case he is satisfied that the serious nature of the allegations is such that the privacy of the parties mentioned does not affect the balance of the public interest.

56. In the circumstances, the Commissioner is satisfied that the public interest test favours disclosure of the information in the 'allegations minute' because the public interest in facilitating investigations into serious misconduct and criminality, and the public interest in accountability and transparency of such investigations, outweighs the public interest in encouraging future informants to come forward without fear that their contribution will be disclosed.

Exemption – section 40

57. In respect of a limited amount of the information the Cabinet Office applied section 40, which provides an exemption for information which is personal data. Section 1(1) of the Data Protection Act 1998 states that:

"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'.

58. The Commissioner notes that the information to which the Cabinet Office applied section 40(2) comprised:

- i) part of the allegations which had been raised;
- ii) the identity of the Member of Parliament, the fact that he had brought the allegation to the attention of the Prime Minister, and written material between others regarding a response.

59. The Cabinet Office also claimed that some of the information 'appears' to be sensitive personal data by virtue of section 2(g) of the Data Protection Act, which states that sensitive personal data includes information as to 'the commission or alleged commission by him [the data subject] of any offence'. Sensitive personal data is defined in section 2 of the DPA. It is personal data which falls into one of the categories set out in section 2 of the DPA, ie personal data consisting of information as to:

- ...
- (a) the racial or ethnic origin of the data subject,
 - (b) his political opinions,
 - (c) his religious beliefs or other beliefs of a similar nature,
 - (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
 - (e) his physical or mental health or condition,
 - (f) his sexual life,
 - (g) the commission or alleged commission by him of any offence,
 - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings'.

60. The Commissioner is satisfied that much of the information in this case relates to allegations of criminal conduct on the part of various parties, which fall within (g) above, as well as to proceedings for offences in respect of some of the parties ((h) above). This information is therefore sensitive personal data. Furthermore, while not all of the information is comprised of sensitive personal data, the remaining elements are so intertwined with that part which is that it either cannot effectively be separated from it or would be essentially meaningless were it to be so separated.

61. The Data Protection Principles are set out in Schedule 1, Part I of the Data Protection Act 1998, with further interpretation provided in Part II. In this case the Commissioner believes that the relevant data protection principle is the first one, which states:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and*

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

Accordingly, sensitive personal data may not be disclosed unless to do so would be fair, lawful and would satisfy at least one of the conditions in each of Schedules 2 and 3 (which are annexed to this Decision Notice).

62. Since the personal data in this case is sensitive, the Commissioner has considered whether any of the conditions listed in Schedule 3 apply to it. He has decided that none of them can in fact be met. As a consequence, he has determined that to disclose the sensitive personal data would breach the first data protection principle of the Data Protection Act. Accordingly, the exemption in section 40(2) of the Freedom of Information Act is engaged in respect of all of the information in the file.
63. Since a condition in Schedule 3 cannot be met, it is not necessary for the Commissioner to go on to consider whether there is a Schedule 2 condition or whether disclosure would be fair or lawful.

Schedule of information

64. In his complaint to the Commissioner the complainant objected to the Cabinet Office's failure to provide a schedule of withheld documents as he had requested. The Cabinet Office did not address this point in either its refusal notices or its internal review. The Commissioner's view is that the information that would comprise the schedule is part of other information which is held by the Cabinet Office, being the contents of the file '*Allegations against Mark Thatcher*'. In his view, requests are for 'recorded information' rather than for documents. Since the information exists and is held, the Cabinet Office cannot be said to be creating it. Production of a schedule may be a new task but it is not the creation of new information – merely a re-presentation of existing information. For this reason, the Commissioner takes the view that, for the purposes of the Act, the schedule requested by the complainant is in fact held by the Cabinet Office. Section 1(1) of the Act provides that applicants are 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.'

In failing to address this part of the complainant's request the Cabinet Office therefore breached section 1(1)(a) and (b).

65. However, the Commissioner notes that the complainant requested a schedule of withheld information. The Commissioner takes the view that identification of the information even in a schedule would breach the exemption in section 40(2) of the Act, since it would amount to the processing of sensitive personal data. Accordingly, the Commissioner does not consider that it would have been appropriate for the Cabinet Office to have provided the complainant with a schedule of withheld information.

The Decision

66. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. In extending the time limit for consideration of the public interest test, the Cabinet Office failed to provide time estimates for the duration of the extension, in breach of section 17(2); failed to issue a refusal notice within 20 working days stating all of the exemptions on which it subsequently relied, in breach of section 10(1); and failed to provide its assessment of the public interest test within a reasonable timescale, in breach of section 17(3) of the Act.
67. In relation to section 27 the Cabinet Office also failed, in breach of section 17(3)(b), to give the complainant adequate reasons as to why the public interest favoured maintaining the exemption.
68. Finally, in failing to address the complainant's request for a schedule of withheld documents the Cabinet Office did not inform him whether it held the information and therefore breached section 1(1)(a) and (b).
69. The Commissioner has decided that it was appropriate for the information to have been withheld by the Cabinet Office, but by virtue of section 40(2) of the Act rather than by reference to the exemptions which the Cabinet Office cited.

Steps Required

70. The Commissioner requires no steps to be taken.

Other matters

Interaction of the Freedom of Information and Data Protection Acts

71. In this case the Cabinet Office withheld most of the requested information by reference to sections 27 and 41(1) of the Freedom of Information Act. The Commissioner determined that only a fraction of the information was in fact exempt by virtue of those sections of the Act. However, in light of the fact that all of the information was either sensitive personal data, or so intertwined with sensitive personal data that it could either not realistically be separated or would be effectively meaningless were it to be so separated, he concluded that all of the information was instead exempt by virtue of section 40(2) of the Act.
72. The Commissioner reached that conclusion very reluctantly. He notes that a great deal of the substantive information in the file is already in the public domain, including an extract from Hansard. He does not believe that it is within the spirit of freedom of information legislation that such publicly available information should

be exempt from disclosure. In this case, he suggests that the Cabinet Office could alert the complainant to the relevant public domain references.

73. More generally, he notes that the root cause of this incongruity is the interaction between the Freedom of Information Act and the Data Protection Act, which is particularly pronounced when requested information amounts to sensitive personal data. He believes that this is a problem which is likely to recur and undermine the effectiveness of the Freedom of Information Act. Accordingly, he wishes to record that he will be drawing this Decision Notice to the attention the Ministry of Justice, with an invitation to address the problem, including the possibility of remedial legislation.

Delay in conducting internal review

74. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. There is no timescale laid down in the Act for a public authority to complete an internal review, but the Commissioner takes the view that, in the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the complainant's internal review request was made on 26 January 2007, and the Cabinet Office sent its decision to him on 1 March 2007. The Cabinet Office therefore took 24 working days to complete the review. While the delay only amounted to a few days, the Commissioner notes that the Cabinet Office's internal review decision of 1 March 2007 was limited to this statement:

'Having fully considered the case, I have concluded that the exemptions in sections 40 and 41 of the Freedom of Information Act relating to personal information and information provided in confidence have been properly applied. I have also concluded that the exemption in section 27 of the Act relating to international relations has been properly applied and that the public interest remains in favour of withholding the information. I therefore uphold the decision...'

75. The section 45 Code of Practice details expectations for the internal review that a public authority should undertake in response to an expression of dissatisfaction about the handling of a request by the requester. It states that a fresh decision should be taken on reconsideration of all of the relevant factors. Such a review should be fair and thorough and in any event, the public authority should undertake a full re-evaluation of the case.
76. The outcome of the review in this case, as communicated to the complainant, was very limited and did not demonstrate that a full reconsideration of the factors had taken place. The Commissioner therefore advises that the Cabinet Office ensures that future internal reviews are carried out in accordance with the guidelines in the section 45 Code of Practice and communicated in full.
95. On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test (PIT). This recommended that public authorities should aim to respond fully to all requests in 20 working days.

Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. Whilst he recognises that the consideration of the public interest test in this case took place before the publication of his guidance on the matter, the Commissioner remains concerned that it took over 230 working days for the authority to communicate the outcome to the complainant.

Right of Appeal

96. 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 2nd day of March 2009

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 1(1) provides that -

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

Section 1(2) provides that -

'Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'

Section 1(3) provides that –

'Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

Section 1(4) provides that –

'The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.'

Section 1(5) provides that –

'A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).'

Section 1(6) provides that –

‘In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as ‘the duty to confirm or deny’.’

Section 10(1) provides that –

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

Section 10(2) provides that –

‘Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.’

Section 10(3) provides that –

‘If, and to the extent that –

- (a) section 1(1)(a) would not apply if the Condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the Condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.’

Section 10(4) provides that –

‘The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.’

Section 10(5) provides that –

‘Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.’

Section 10(6) provides that –

‘In this section –
“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.’

Section 17(1) provides that -

‘A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.’

Section 17(2) states –

‘Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate

of the date by which the authority expects that such a decision will have been reached.'

Section 17(3) provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

Section 17(4) provides that -

'A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

'A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.'

Section 21(1) provides that –

'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'

Section 21(2) provides that –

'For the purposes of subsection (1)-

- (a) *information may be reasonably accessible to the applicant even though it is accessible only on payment, and*
- (b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.'*

Section 27(1) provides that –

‘Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.’

Section 27(2) provides that –

‘Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.’

Section 27(3) provides that –

‘For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.’

Section 27(4) provides that –

‘The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.’

Section 27(5) provides that –

‘In this section-

‘international court’ means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

'international organisation' means any international organisation whose members include any two or more States, or any organ of such an organisation;

'State' includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.'

Section 40(1) provides that –

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

Section 40(2) provides that –

'Any information to which a request for information relates is also exempt information if-

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

Section 40(3) provides that –

'The first Condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.'

Section 40(4) provides that –

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

Section 40(5) provides that –

‘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).’

Section 40(6) provides that –

‘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.’

Section 40(7) provides that –

‘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.’

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.’

Section 41(2) provides that –

‘The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.’

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

SCHEDULE 2 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.’

SCHEDULE 3 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF SENSITIVE PERSONAL DATA

SCHEDULE 3 provides that –

'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.'