

Freedom of Information Act 2000 (Section 50)

Decision Notice

12 January 2009

Public Authority: Leicester City Council
Address: New Walk Centre
Welford Place
Leicester
LE1 6ZG

Summary

The complainant, who worked for the Council, applied for two internal vacancies, unsuccessfully. He requested some information about the recruitment process, including copies of the application forms submitted by the other applicants, suitably redacted as necessary. The Council refused the request for the application forms, on the grounds that the exemption at section 40(2) of the Freedom of Information Act applied. The Commissioner decided that the exemption at section 40(2) applied in respect of some of the application form information, but that it did not justify withholding the information in its entirety. He considered that some information about applicants' experience and qualifications could be provided in an anonymised form, without breaching their rights under the Data Protection Act 1998. The Commissioner directed the Council to provide this information to the complainant, either by redacting the application forms so that all information from which a candidate could be identified was removed or by supplying brief summaries of applicants' experience and qualifications.

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. The complainant worked for the Council. In June 2007 he applied for two internal vacancies and was unsuccessful. He was given written feedback on his applications by the Chair of the interview panel.

3. On 12 July 2007 he submitted the following request to the Council, by email.

“Please provide me with the following information, suitably redacted if necessary.

- 1) Copies of the shortlisting matrix document, completed by each of the recruitment panel, indicating the successful candidates.
- 2) Copies of the application forms for each of the candidates who were interviewed, indicating the successful candidates.
- 3) Copies of the Candidate Assessment forms and any other interview notes completed by each of the recruitment panel for each of the candidates who were interviewed, indicating the successful candidates.
- 4) Copies of the two references provided for me.

Also please let me know when this information will be provided.”

4. The Council responded on 3 August 2007. It supplied items 1) and 4) of the complainant's request, together with copies of his own application forms. It explained that it was still considering whether the release of the items at 2) and 3) of the list would be in the public interest and that it required a further 28 working days to reach a decision on this. It did not state which exemption it was considering in relation to the public interest.
5. The Council wrote again on 21 August 2007, supplying item 3) of the request, which had been redacted to remove personal data. The remainder of the letter acted as a Refusal Notice in respect of the information at item 2) - applicants' application forms. The Council explained that it would not be supplying the application forms, citing the exemption at section 40 of the Act (although not the relevant sub section). The Council considered that disclosure of the application forms would breach its duty under the Data Protection Act 1998 (the “DPA”) to process personal data fairly and lawfully. It provided details of the complainant's right to complain about this decision to the Information Commissioner.
6. On 15 October 2007 the complainant wrote to the Information Commissioner to ask him to determine whether he was entitled to copies of other applicants' application forms. He explained that he wished to see the information so as to assess whether he had been treated fairly during the recruitment process.
7. The Commissioner replied on 5 November 2007, advising the complainant that he must firstly ask the Council to review its decision.
8. The complainant wrote to the Council on 8 November 2007, asking it to review its decision.
9. On 12 November 2007 the Council replied. It explained that although it had arrangements in place for reviewing complaints about “process based” matters,

no equivalent procedure existed for considering appeals against decisions to withhold information. It stated:

“The Council does not have an appeals process for this because it puts all its expertise in getting the decision right first time. While this guarantees that the best decision the Council can make is reached to the same standard every time, it also means that there is then no suitable person to review the decision should a complaint arise”.

10. The Council reiterated that the complainant should appeal to the Commissioner if he disputed its decision.

The Investigation

Scope of the case

11. On 12 November 2007 the complainant contacted the Commissioner to notify him of the Council's stance. The complainant specifically asked the Commissioner to consider whether the Council should release copies of the other applicants' application forms, suitably redacted in order to comply with the DPA.

Chronology

12. On 23 November 2007 the Commissioner wrote to the complainant confirming that his complaint would, in due course, be investigated. He also wrote to the Council to notify it that a complaint had been received and that a case officer would be in touch in due course.
13. On 17 January 2008 the Commissioner wrote to the Council setting out the complainant's concerns. The Commissioner commented that he agreed with the Council's assessment that the exemption at section 40 of the Act was relevant, but considered that it would be possible to provide certain information, which would still be useful to the complainant, without contravening the DPA. He also commented that he saw a distinction between information relating to the successful applicants, whose application for the posts would be self evident, and that relating to the unsuccessful applicants, who may not wish their application to be known.
14. The Commissioner asked the Council the following:
 1. How likely it would be that unsuccessful applicants could be identified from their application forms, if their names were removed. An indication of the internal/external application ratio was also requested.
 2. Whether the applicants publicised their qualifications in any way (for example on business cards or letterheads).
 3. Whether any qualifications were advertised as essential to the post.

4. Whether the Council would be willing to issue brief, anonymised summaries of applicants' experience and qualifications.
15. The Council responded on 29 January 2008. It specified that it was applying the exemption at section 40(2). It made a number of points in response to the Commissioner's letter.
16. The Council argued that it had already supplied the information which the Commissioner was asking it to release; the complainant was aware of the minimum essential requirements that all candidates needed to satisfy in order to be short listed for interview, and had been provided with anonymised copies of the short listing matrix and candidate assessment forms. It stated that to its knowledge applicants did not routinely publicise their qualifications.
17. The Council stated that the disclosure of redacted information would still enable the identification of some or all of the applicants. It expressed particular concern at releasing information about the successful applicants, who the complainant would be in a position to identify. It also argued that the processing of applicants' application data would breach the fair processing requirements of the First Data Protection Principle, as it was not a use of the data that applicants would have anticipated when supplying it.
18. The Council commented that the complainant was seeking to use the Act "inappropriately", as there was an alternative access route to the information, by way of applying to the Courts for a "disclosure notice".
19. The Council argued that disclosure of the information could have a detrimental effect on its ability to attract suitable applicants for future jobs, as they might be deterred from applying by the thought of their application information becoming publicly available. It said this would have a knock-on effect for the quality of service delivery.
20. The Council commented that if the Commissioner did not agree with its interpretation of section 40(2), it would also consider whether the exemptions at sections 36 and 41 applied. It has subsequently signalled no intention to invoke these exemptions or forwarded arguments in support of them, and so the Commissioner has not considered whether they might apply.
21. The Council referred the Commissioner to a recent Decision Notice issued against the House of Commons (FS50139317). The Council felt that the circumstances outlined in that Notice were similar, but that the Commissioner was proposing a significantly different resolution to that set out in the Notice, and questioned why this was.
22. The Commissioner wrote to the Council on 6 February 2008. He explained that each case was considered on its own facts, with decisions reached accordingly and that he had not yet reached a decision on this matter.

23. The Council was asked to address the question of the likelihood of applicants being identified by redacted information, as the Commissioner considered this had not been addressed satisfactorily in its response. The Commissioner also asked the Council to give an indication of the seniority of the posts that the complainant had applied for.
24. The Commissioner commented that simply providing an overview of the qualifications and experience of the successful applicants would not breach the DPA, as the information involved would not be of a particularly sensitive nature. The provision of a similar summary in respect of unsuccessful applicants would not be unfair if it was not possible to identify the applicants from the information.
25. The Council replied on 22 February 2008. It clarified that both vacancies were Head of Department posts.

Post 1: 12 applicants, 2 of whom were internal applicants. 9 applicants were interviewed (including the 2 internal applicants). An external applicant was appointed.

Post 2: 15 applicants, 4 of whom were internal applicants. 9 applicants were interviewed (including 2 internal applicants). An external applicant was appointed.
26. It reiterated its belief that the disclosure of information about educational background, skills and qualifications, detailed work experience and referee details would mean that it would be possible to identify individuals "with relative ease".
27. The Council argued that the applicants would have a strong expectation that the information they had provided would be held in confidence and that it would only be used for recruitment purposes. It argued that disclosing the information in response to the complainant's request amounted to processing for a different purpose, one which they had not been notified of; this conflicted with the Commissioner's own guidance on collection of personal data and fair processing.
28. The Council conceded that those employed in the public sector may have to expect that details of their employment may be subject to a greater degree of scrutiny than their private sector counterparts, but considered that this did not extend to information about unsuccessful applicants for public sector jobs.
29. The Commissioner wrote to the complainant on 26 February 2008 and advised him that whilst he considered that the Council had been correct in its use of the exemption at section 40(2) to protect the identities of the unsuccessful applicants, he considered that there was some information that could usefully be supplied to the complainant without breaching the DPA. He asked the complainant whether he wished to be provided with this information.
30. On 28 February 2008 the complainant wrote to the Commissioner confirming that he would like copies of the information.

Analysis

31. The full text of the relevant legislation can be found in the legal annex, however the salient points are summarised below.

Procedural matters

32. The complainant made his request for information on 12 July 2007. The Council supplied some of the requested information within the twenty working day timescale prescribed at section 17(1) of the Act, on 3 August 2007. It explained that it was considering whether the disclosure of the remaining information would be in the public interest, and that it needed a further 28 working days to do this. It did not identify which exemption the public interest considerations were being applied to.
33. The Council responded in full on 21 August 2007, 28 working days after the request was made, and explained that applicants' application forms were being withheld, citing section 40 of the Act.
34. The Council subsequently indicated, in its letter to the Commissioner of 29 January 2008, that it considered section 40(2) of the Act applied. This is an absolute exemption. If a public authority decides that an absolute exemption applies, it is not under an obligation to consider whether disclosure would nonetheless be in the public interest and the public authority has no grounds for granting itself a time extension for this purpose under section 10(3).
35. Therefore, by issuing a Refusal Notice 28 working days after the receipt of the request, the Council breached the requirement at section 17(1) that a refusal notice be served within the time for complying with section 1(1).
36. Section 17(1)(b) of the Act requires a public authority to specify any exemption it applies in its Refusal Notice. The Commissioner considers that in order to fully comply with this requirement, the Refusal Notice should specify the exemption right down to the relevant subsection (where applicable). Although the Council advised the Commissioner that the information was exempt under section 40(2) of the Act, its Refusal Notice referred simply to "Section 40 (Personal Information) of the Freedom of Information Act". By failing to identify the relevant subsection in its Refusal Notice the Council breached the requirement at section 17(1)(b).
37. Furthermore, the Council's Refusal Notice advised the complainant that any appeal against its decision should be directed to the Commissioner. This would appear, implicitly, to suggest that the Council does not offer an internal review procedure of any kind. However in its letter of 12 November 2007, the Council clarified that it would consider "process based" complaints (for example, time taken to respond, incomplete response) under its Corporate Complaints Process. Since this was not made clear in the Refusal Notice, the Council failed to comply with section 17(7)(a) of the Act, which requires the communication of details of

any procedure for dealing with complaints about the handling of requests for information as part of the Refusal Notice.

Exemptions

38. In considering whether an exemption is valid, the Commissioner has taken into account that the Act is designed to be applicant-blind and that disclosure should be considered in the widest sense; that is, to the public at large. In view of this, the Commissioner has proceeded with the investigation on the basis that if the information were to be disclosed it should be available to any member of the public.
39. When examining the arguments in favour of disclosure and the maintenance of the exemption, the Commissioner has taken into account evidence gathered from the complainant and the Council, as well as advice provided during internal discussions.

Section 40(2)

40. The Council has argued that the information requested is the personal data of the applicants and that to release it to the complainant, even in redacted form, would breach their rights under the First Data Protection Principle of the DPA. It has cited section 40(2) of the Act.
41. The Commissioner has considered whether the Council was correct to apply the exemption at section 40(2) of the Act. He has not examined copies of the actual application forms, but is familiar with the type of information that such forms contain: name, address, age, employment history, educational history, personal interests and statements in support of the application.
42. The Council's arguments in support of applying section 40(2) can be summarised as follows:

The information supplied by the applicants constitutes their personal data and was provided by them for use in connection with the job application process. It is unlikely that they would have anticipated that the information might be disclosed to third parties and they may have legitimate concerns about it. Any processing of the information for this purpose would therefore breach the fairness requirement of the First Data Protection Principle of the DPA.

43. In considering the Council's arguments, the Commissioner has referred to the definition of personal data at section 1(1) of the DPA:

“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...”

44. According to this definition, where an individual is capable of being identified from data (as defined at section 1(1) of the DPA) held by a public authority, which relate to that individual, such information is personal data.
45. Following this definition, the Commissioner considers that the application information supplied to the Council by the applicants is personal data about them, as it is information which relates to them and from which they can be identified by the Council. He has therefore considered the implications of the fair processing requirements of the First Data Protection Principle for the processing of the data in connection with an FOI request.

Fair Processing – basis for processing

46. The Council claimed that disclosing the application information to the complainant involved processing it for a fresh purpose which the applicants had not been advised about and so the processing would be unfair and in contravention of the First Data Protection Principle.
47. In considering compliance with the First Principle the Commissioner has firstly looked at the requirement contained within it that information may not be processed unless at least one condition from schedule 2 is met, and, in the case of sensitive personal data (as defined at section 2 of the DPA), at least one condition from schedule 3.
48. The Commissioner has asked the Council to disclose either copies of application forms, redacted of all information from which an applicant could be identified, or provide a very general summary of applicants' experience and qualifications.
49. The Commissioner considers that the information the Council has been asked to disclose does not constitute sensitive personal data, and that therefore only one condition in schedule 2 of the DPA needs to be met in order to satisfy the basis for processing element of the First Principle.
50. The Commissioner has considered whether the condition at paragraph 6(1) of schedule 2 of the DPA would satisfy this requirement.
51. Paragraph 6(1) of schedule 2 of the DPA establishes a three part test which must be satisfied;
 - there must be **legitimate interests** in disclosing the information,
 - the disclosure must be **necessary** for a legitimate interest of the public and,
 - even where the disclosure is necessary it nevertheless must not cause **unwarranted interference** (or prejudice) to the rights, freedoms and legitimate interests of the data subject.
52. The Commissioner considers that there is a public interest inherent in the provision of access to official information and is aware that this view is supported by the Information Tribunal (paragraph 55 EA/2007/0060 the House of Commons v ICO & Leapman, Brooke, Thomas). Additionally, the Commissioner considers

that the complainant has a legitimate interest in requesting the information, for the purpose of satisfying himself as to whether the recruitment process had been conducted fairly, through the comparison of the application information of successful and unsuccessful applicants.

53. The Commissioner is satisfied that the disclosure of the information in redacted form is necessary to meet the interests set out above. Although the Council accused the complainant of using the Act “inappropriately” it has offered no explanation as to how he could achieve his desired ends by alternative means. The Commissioner is satisfied that the request represents an appropriate route to the information the complainant is seeking.
54. The Commissioner considers that the disclosure of the information, in redacted or summarised form, would not cause unwarranted interference with the rights, freedoms or legitimate interests of the unsuccessful applicants. If the information is supplied as the Commissioner has requested, with appropriate redactions made, it should not be possible to identify individual applicants and so the disclosure will have no effect on them.
55. Turning to the two successful applicants, the Commissioner acknowledges that the identification of their redacted application forms or summaries as “successful” will involve the disclosure of information about them to the complainant, since he is aware of their identities. However, the Commissioner considers that the information he is recommending be released is of a general nature and likely to consist largely of the sort of information which could in any case be inferred from the person specification drawn up for the job. He is also aware that the appointments are to fairly senior posts, and considers that the post holders may therefore expect that their appointment may be subject to some degree of scrutiny, in the context of the public’s interest in the spending of public money. He therefore does not consider that the disclosure of such information about the successful applicants would cause unwarranted interference (or prejudice) to their rights, freedoms and legitimate interests.
56. The Commissioner is therefore satisfied that the condition for processing at schedule 2 paragraph 6(1) is met.

Fair Processing – fair obtaining and new use of data

57. Having established this, it is necessary to go on to address the Council’s specific concern, that the disclosure constitutes a significantly different use of their data which the applicants had not been notified of, which would render the processing unfair.
58. When individuals are asked to give personal data, any proposed non-obvious uses for that data should be explained by the data controller in a so-called “fair processing notice”, so far as is practicable. Generally, the Commissioner considers that the details contained in a fair processing notice should concern the business purposes of the data controller. The Commissioner does not consider compliance with FOI requests as being a distinct business purpose of a public authority; public authorities do not collect personal data specifically for the

purpose of responding to such requests. Therefore, omitting to mention disclosures under the Act in a fair processing notice will not in itself mean a disclosure contravenes the DPA. It will be necessary instead to consider the wider implications of “fairness” in relation to the First Principle. (In reaching this view the Commissioner has followed the Tribunal’s comments in EA/2006/0015 and 0016 *House of Commons v ICO & Norman Baker MP* (paragraph 75).

59. The Commissioner accepts that the release of the application forms in their entirety would be likely to constitute unfair processing, and considers that the exemption at section 40(2) can be applied in respect of some of the information. However, when applying an exemption under the Act, public authorities should consider whether some information can nevertheless be provided to the applicant without prejudicing the maintenance of the exemption.
60. In the case of the successful applicants, as discussed in paragraph 55 above, the Commissioner agrees that by identifying their forms/summaries as belonging to the successful applicant, the Council cannot avoid making a disclosure of personal data about them. The Commissioner has therefore considered the extent to which such a disclosure might be unfair. In doing so he has taken account of the seniority of the posts, the job specifications that set out minimum requirements for all applicants, any damage or distress that might occur to the data subjects as a result of any disclosure, the fact that there is a strong public interest in ensuring that public authorities have suitably qualified and experienced people in senior positions and in providing access to information about how a public authority spends public money.
61. The Commissioner has concluded that it would not be unfair for the Council to provide a very general summary of the successful applicants’ experience and qualifications, along the lines of the “pen portraits” found in conference speaker biographies. The Commissioner does not consider that it would be necessary to identify particular educational establishments but that qualifications should be described. Similarly, it would not be necessary to name previous employers, but rather give a general description of them together with an indication of the role(s) fulfilled.
62. Turning to the Council’s argument that it would be relatively easy to identify the unsuccessful applicants from redacted information about their experience and qualifications, the Commissioner appreciates that unsuccessful applicants may not wish the fact of their application to become widely known. However, he does not consider that the Council has demonstrated *how* individuals could be identified from suitably redacted application forms or summaries of experience and qualifications. He considers that were the Council to summarise the application information in the manner set out in paragraph 52, the information itself would not constitute personal data and that the number of applicants for each post, taken with the fact that only a minority of them were internal applicants, would make it unlikely that an individual could be identified from the information.
63. The Commissioner therefore considers that whilst the Council was correct to identify section 40(2) as being pertinent to the release of the application forms as

a whole, the exemption cannot be relied upon to withhold the information in its entirety, and that the Council must take steps to provide the complainant with more information about the other applications.

The Decision

64. 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:

The Council correctly applied the exemption at section 40(2) in respect of the full, unredacted versions of the application forms.

65. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- 1) The Council incorrectly identified that anonymised, general application form information should be withheld under section 40(2). This led to a breach of section 1(1)(b) of the Act.
- 2) The Council incorrectly considered that the provisions at section 10(3) applied in respect of its consideration of section 40(2) and delayed its response to the complainant beyond the time limit set out in section 10(1). The Council therefore breached section 17(1) by failing to issue a Refusal notice in line with the time limit specified at section 10(1).
- 3) The Council breached the requirement at section 17(1)(b) by failing to identify in the Refusal Notice the relevant subsection of the exemption claimed.
- 4) The Council failed to comply with section 17(7)(a) which requires the communication of details of any procedure for dealing with complaints about the handling of requests for information.

Steps Required

66. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The Council should provide the complainant with a general summary of the experience and qualifications of each applicant, taking account of the comments in paragraphs 46-63, above. Alternatively, it should supply the complainant with copies of the application forms, removing all information which would enable the identification of the applicants. It should ensure that the successful applications are indicated as such.

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

Other matters

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

69. In establishing a request handling process which relies upon decisions being taken at the most senior level, the Council has prohibited itself from conducting internal reviews in the manner recommended by the Code of Practice issued under section 45 of the Act (the "Code"). The Commissioner would wish to draw the Council's attention to section 40 of the Code, which states:

"Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable."

70. The Commissioner notes that the Council has defined the scope of their internal review in a way which excludes the consideration of complaints relating to the application of exemptions or associated public interest test considerations. In doing so, the Commissioner considers that the Council has established a review process which does not perform the recommended functions set out in the Code and would wish to direct the Council to section 39 of the code which states:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

71. In their response to the complainant's request for review the Council clarified that an internal review is offered in instances where a complaint identifies 'process based' matters. In such cases, issues raised would be handled under the 'Corporate Complaints Process'. Having viewed this process on the Council's website, this would appear to be a two stage complaints procedure.

72. Section 39 of the Code states that complaints procedures should be as clear and simple as possible and should encourage a "prompt determination" of the complaint.

73. The Commissioner's guidance clarifies:

"Some public authorities have complaints procedures which have a number of stages or levels. The Commissioner does not expect an internal review of a response to an FOI request to have more than one stage. Given that this is a review of a statutory process with clear rights for requesters and obligations on public authorities, a degree of formality is expected."

74. If it is the case that the Council is operating a two tier internal review procedure, the Commissioner would, therefore recommend that this be amended to a single stage process.
75. The above raised matters have been referred to the Commissioner's Good Practice and Enforcement team.

Failure to comply

76. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

77. 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

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 12th day of January 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that -

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

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

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

Time for Compliance

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.”

Refusal of Request

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(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Personal information.

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. “

Legal Annex

Data Protection Act 1998

Definitions: Data

Section 1(1) provides that –
““data” means information which –

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or
- (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)”

Definitions: Personal Data

Section 1(1) provides 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”

Definitions: Processing

Section 1(1) provides that –
““processing”, in relation to information or data means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including–

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- (d) alignment, combination, blocking, reassurance or destruction of the information or data”

Definitions: Sensitive personal data

Section 2 provides that –

“In this Act “sensitive personal data” means personal data consisting of information as to–

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

Disclosures required by law

Section 35(1) provides that –

“Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by order of a court.”

First Data Protection Principle

Schedule 1, part 1, section 1 provides that–

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless–

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

Conditions relevant for the processing of personal data

Schedule 2, section 6(1) provides that –

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”