

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 February 2010

Public Authority: Sport England
Address: 3rd Floor, Victoria House
Bloomsbury Square
London
WC1B 4SE

Summary

The complainant made a number of information requests to Sport England on 4 March 2008 for information concerning Sport England's dealings with Baseball Softball UK (BSUK) and its successor organisation. Some information was disclosed but other information was withheld on the basis of exemptions in sections 21, 40 and 41 of the Act. The Commissioner has investigated and found that while Sport England was correct to apply sections 21 and 41, he was not satisfied with the application of section 40 to two job contracts. The Commissioner has ordered Sport England to release the contracts, subject to a minor redaction. The Commissioner has also noted the difficulty of establishing the details of the handling of these requests because of gaps in Sport England's record keeping.

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.

Background

2. These requests sought information about monies paid to the governing bodies of baseball and softball in the UK by Sport England.
3. On 16 June 2009, Sport England announced an independent investigation into an internal funding mechanism that operated outside the organisation's normal financial controls. This mechanism was called the 'World Class Payments Bureau' and functioned between 1999 and March 2007. The investigation was led by Timothy Dutton QC and further information can be found at: http://www.sportengland.org/media_centre/press_releases/independent_investiga

[tion_wcpb.aspx](#). Timothy Dutton reported in December 2008 and further information on his findings can be found at:
http://www.sportengland.org/media_centre/press_releases/statement_from_richard_lewis.aspx.

4. In late December 2008, Sport England's Chief Executive Officer, Jennie Price, was first informed of the existence of a bank account called the 'World Class Payments Bureau'. The account was immediately closed and an internal investigation commissioned. The 'World Class Payments Bureau' made payments on behalf of sports' governing bodies that had limited or no financial capability of their own, typically due to their small size. Over the eight years it was active, the account received funds totalling £19.7 million.
5. Sport England's own internal investigation confirmed the account had operated outside the usual financial controls of the organisation, and had not formed part of Sport England's audited accounts. It also confirmed that the account had been dormant since March 2007.
6. Although baseball and softball were not amongst the sports that received payments via the 'World Class Payments Bureau' the complainant highlighted the Dutton investigation as providing context to his information requests.

The Request

7. The complainant made six requests to Sport England for:
 1. *All the Baseball-Softball UK (BSUK) financial accounts submitted to Sport England since their last 2005 audited accounts.*
 2. *The names and addresses of all beneficial owners and signatories on the bank account(s) and the next date of Sport England intended grant payment, as well as to which bank(s), especially because you may have signed a separate contract with their "new" limited company.*
 3. *Details of Sport England's scrutiny of these accounts (and copies of the submissions by BSUK/British Baseball Federation (BBF) made in respect of the same) especially as a function of your releasing contractually mandated funds in conjunction with KPI etc.*
 4. *Copies of all the grant and/or other agreements existing between BBF, BSF (British Softball Federation), BSUK, BSUK Ltd and Sport England*
 5. *Miscellaneous correspondence between Sport England, the BBF, BSUK etc., and any other related entities or individuals*
 6. *Other (to follow)*

8. It has proved difficult to establish the exact date of the requests as the Commissioner has seen an email from the complainant to the public authority making this request, which is dated 4 March 2008, but the public authority provided the Commissioner with a copy of its refusal notice dated 1 April 2008, which referred to the same requests having been made on 20 February 2008. No copy of that original request has been provided by either the complainant or the public authority.
9. The Commissioner has seen a copy of a letter from Sport England dated 1 April 2008, which states it was providing some of the information requested. However, it refused to disclose some of the other information requested on the basis of various exemptions in the Act. The exemptions cited for refusing disclosure of the various categories of information requested were (following the order of the numbered requests above):
 1. *Information withheld citing section 21 of the Act*
 2. *Information provided about grant payment dates, but further information withheld citing sections 21 and 40*
 3. *Some information provided but further information withheld citing sections 40 and 41*
 4. *Some information provided but further information withheld citing section 41*
 5. *Some information provided but further information withheld citing section 41*
10. Neither the public authority nor the complainant has been able to provide copies of what was disclosed with the letter of 1 April 2008 in response to requests from the Commissioner. Initially, the complainant alleged in an email dated 17 October 2008 with the subject line "Protest over a particular document" that he had never seen the letter of 1 April 2008 before the Commissioner provided him with a copy. In a later email dated 20 June 2009, the complainant stated he had received an envelope from Sport England in April 2008. He described what was received as an "irregular sized envelope containing an inadequate and incomplete set of documents". On the balance of probabilities, this suggests Sport England did disclose information with its letter of 1 April 2008 but the complainant was not satisfied because it did not contain everything he was expecting.
11. The refusal decision was subject to an internal review, the results of which were communicated to the complainant in a letter dated 30 April 2008. The review upheld the original decision including the exemptions cited in that decision. As with the date of the original requests for information, it has not proved possible to obtain definitive evidence of the date the internal review was requested.

The Investigation

Scope of the case

Chronology

12. On 12 June 2008 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The Commissioner wrote to the complainant on 5 August 2008 to ask for copies of the public authority's initial refusal notice and the complainant's request for internal review. The complainant provided some further information on 8 August 2008 but as it was still unclear exactly when the requests had been made, when the public authority had responded and when internal review had been sought, the Commissioner wrote to Sport England on 12 August 2008 to ask for copies of relevant documentation. During the course of these exchanges, the public authority raised the possibility of declaring the complainant vexatious under section 14 of the Act.
13. On 17 September 2008, Sport England provided the Commissioner with various documents, which included its initial refusal notice but did not include any documentary evidence of the information request having been made on 20 February 2008 as quoted on the refusal notice. The Commissioner wrote to the complainant on 24 September 2008 to make clear he would be investigating the complaint based on the information requests the complainant had made to Sport England on 4 March 2008.
14. The Commissioner wrote to Sport England on the same date to request sight of the information that had been withheld as set out on its refusal notice dated 1 April 2008 under sections 21, 40 and 41 of the Act. In response to further contact from the complainant, the Commissioner wrote to him again on 14 October 2008 to confirm the complaint being investigated related to his information requests to Sport England dated 4 March 2008 and not to any other information requests that he might have made already or might be considering making in future. The complainant confirmed in a message dated 17 October 2008 that he understood the investigation would be limited to these requests.
15. On 24 February 2009, Sport England wrote to the complainant to say the original decision on the requests dated 4 March 2008 and the results of the internal review had been re-considered. Now Sport England concluded it had been wrong originally to supply some of the information requested as the volume of material requested exceeded appropriate limits. Therefore the information was exempt under section 12 of the Act because the cost of complying would exceed the appropriate limit. The reasoning behind the decision was set out in Sport England's letter to the complainant dated 24 February 2009.
16. On 7 April 2009 the Commissioner wrote to Sport England again to request copies of the information withheld when the request was considered in April 2008, as well as copies of the information provided to the complainant with the initial refusal notice dated 1 April 2008. In addition, the Commissioner asked Sport

- England for further clarification concerning its reliance on section 21 of the Act in its original refusal letter.
17. Sport England replied on 16 April 2009 but rather than responding to the issues raised by the Commissioner stated the original requests and refusal had been reconsidered. Following reconsideration, Sport England had concluded the original request should have been refused on the basis it exceeded appropriate limits under section 12 of the Act. A copy of a letter to the complainant dated 24 February 2009 setting out the reasons behind this fresh refusal of the request was included for the Commissioner's information.
 18. The Commissioner wrote to Sport England on 28 May 2009 and again requested copies of the information withheld originally as well as copies of the information provided to the complainant with Sport England's letter of 1 April 2008. The Commissioner asked what had prompted the reconsideration of the request and substitution of the section 12 refusal for the original refusal letter, as well as for a copy of Sport England's estimate of the cost of dealing with the request and details of any advice and guidance that it had provided to the complainant under section 16 of the Act.
 19. Sport England responded on 19 June and stated the complainant had made numerous information requests dating back to the end of 2006. Sport England believed it had responded diligently to these requests, including allowing the complainant to visit its offices to view relevant files. However, further requests had been sent and on 24 February 2009 Sport England had issued a refusal letter under section 14 of the Act. Sport England explained reconsideration of its refusal dated 1 April 2008 had been prompted by the Commissioner's letter of 24 September 2008 asking for copies of the information withheld originally. Sport England estimated the time it would take to provide copies of the withheld information would exceed appropriate limits. Sport England provided its estimate of the costs involved in complying with the original request of 4 March 2008 and explained it had not provided advice and guidance to the complainant under section 16 because it seemed inappropriate having declared his most recent request vexatious.
 20. The Commissioner wrote to Sport England on 3 July 2009 and explained in the light of the further explanation provided by Sport England he did not accept that a refusal notice relying on section 12 of the Act could be substituted for the original refusal notice issued on these requests. The Commissioner noted the request had been considered and responded to in full at the time of the original decision and the attempt to substitute a section 12 decision had only been made in response to the Commissioner's enquiries concerning the complaint he had received. While exceeding the appropriate limit provided an exemption from complying with a request for information under section 12 of the Act it was not applicable to a request made by the Commissioner to a public authority for information to allow the Commissioner to discharge his statutory duties to investigate a complaint received under section 50 of the Act.
 21. The Commissioner requested copies again of both the information provided to and withheld from the complainant when the original decision was issued.

Further detail was also sought about the reliance on sections 21 and 41 of the Act in the original refusal letter.

22. On 22 July 2009, Sport England provided the Commissioner with a large file of documents, which contained:
- A list of the documents provided to the complainant between 19 December 2006 and 4 January 2007 in response to various earlier information requests and a note that the complainant had visited Sport England's offices on 4 January 2007 to inspect relevant information.
 - A copy of the complainant's request for internal review of Sport England's decision to withhold certain information. However, as this email was dated 1 May 2008 and the internal review in the present case was completed and communicated on 30 April 2008 this refers to a different information request.
 - Copies of all information held within scope of the third, fourth and fifth information requests made by the complainant on 4 March 2008.
 - Copies of three documents that were within scope of the second and fifth requests, which were still being withheld from the complainant as exempt. These are considered in more detail in the "Analysis" section below.
23. Sport England admitted it had been unable to locate a list of the information supplied to the complainant with its refusal letter dated 1 April 2008. In view of claims that it had not been received at that time, a further set of the information within scope of the third, fourth and fifth information requests had been sent to the complainant at the same time as it was sent to the Commissioner. The complainant had acknowledged receipt.

Findings of fact

24. The difficulty in establishing precise details concerning these information requests and how they were originally resolved has been noted. The Commissioner's investigation has considered the information requests made on 4 March 2008, which were decided by the public authority on 1 April 2008 and which were subject to an internal review whose findings were communicated to the complainant on 30 April 2008. The Commissioner is satisfied that, in order to produce both the complete set of information provided to the Commissioner on 22 July 2009 and the slightly smaller subset of that information provided to the complainant at the same time, Sport England has carried out an extensive search and identified all of the relevant information it holds that is within scope of the information requests submitted on 4 March 2008.
25. As a result of the Commissioner's investigation, Sport England's position is that it has supplied the complainant with all of the information that it holds that comes within the scope of his requests dated 4 March 2008 with the exception of three documents, namely a computer print-out generated from Sport England's financial system and two contracts of employment. The exemptions Sport England has applied to these documents are considered in the "Analysis" section below. Sport England has been unable to state when it first obtained or created these three documents. Sport England's position was that the consequence of these disclosures on its original decision on each of the information requests was:

1. *Information continued to be withheld citing section 21 of the Act*
 2. *Information provided already about grant payment dates, but further information on owners of BSUK withheld citing section 21 and the computer print-out withheld citing sections 40 and 41*
 3. *No information now withheld*
 4. *No information now withheld*
 5. *No information now withheld except for the contracts of employment withheld citing section 40.*
26. The Commissioner is satisfied that, with one exception considered in the "Analysis" section below, this gives an accurate picture of where matters stand following his investigation and following the disclosure of information to the complainant that took place in July 2009.
27. For the avoidance of doubt, the Commissioner has not considered the sixth information request, "Other (to follow)", because the complainant did not give any further explanation of what information was sought.

Analysis

Exemptions

Held/not held

28. It has proved impossible to establish definitively from either the public authority or the complainant what information was disclosed with the refusal letter of 1 April 2008. It has also proved impossible to establish what information was withheld at that time because no list was kept. With regard to the information that Sport England provided to the Commissioner but wishes to withhold from the complainant as exempt, Sport England is unable to state when this information either came into its possession or was first created. Sport England's application of exemptions to this withheld information is considered further below.
29. As noted at paragraph 24 above, the Commissioner is satisfied that Sport England has conducted a thorough search in order to be able to respond to his enquiries. As a result of those searches, Sport England provided the complainant in July 2009 with a copy of all of information that it holds now within scope of his requests with the exception of two contracts of employment and a computer print-out from its financial system that it regarded as exempt. On the last of these documents, Sport England explained it had been unable to locate the original BACS form, which would have been used to input the information now in its financial system and consequently which appeared on the computer print-out. The original BACS form had been sent to Sport England's archive and a record

had been found of it being recalled from the archive but no trace could be found of what happened to it next.

30. The Commissioner is satisfied that if the original BACS form was held at the time of the original request it would have been information within scope of the second request as Sport England has made clear that it would have held details of the signatories to the account. However, the Commissioner is also satisfied that the BACS form is no longer held by Sport England because despite searches it is missing and so has not been considered further as part of the investigation. Also, Sport England has confirmed in response to a direct question made as part of the Commissioner's investigation that it does not hold any information now about bank signatories for BSUK.
31. The Commissioner notes the original refusal letter dated 1 April 2008 stated that information had been withheld as exempt in response to each of the five information requests made on 4 March 2008. Allowing for the reliance on section 21 with regard to the first and second requests, this suggests that at least four pieces of information may have been withheld at that time. However, as previously noted, no schedule or list has been kept to make it possible to check what was withheld at that time. Sport England sought to rectify this by providing the complainant with a complete set of information that it holds now within scope of his requests, without the computer print-out and the two contracts of employment, which were treated as exempt. On the balance of probabilities the Commissioner is satisfied that Sport England held information at the time it first considered the requests, which it withheld as exempt, but which has either now been disclosed to the complainant as a result of the Commissioner's investigation or is one of the three pieces of information which Sport England still withholds as exempt.

First Information Request

Section 21

32. The first of the information requests made on 4 March 2008 sought:

All the Baseball-Softball UK (BSUK) financial accounts submitted to Sport England since their last 2005 audited accounts.

Sport England refused this request in its refusal notice dated 1 April 2008 relying on the exemption in section 21 of the Act (information accessible to the applicant by other means). Explaining this refusal, Sport England stated the information was available from BSUK.

33. The complainant disputed this conclusion and made clear that of particular interest were the accounts covering the period when BSUK went from being an unincorporated association until its incorporation in the spring of 2007. In response to enquiries from the Commissioner on this point, Sport England provided the following web link:
http://www.baseballsoftballuk.com/bsukdownload.php?from_section=BSUK+Home.

34. On inspection, this contains audited accounts for BSUK for the years 2001 to 2007-8. In response to a specific question from the Commissioner prompted by the complainant, about whether Sport England held versions of the accounts other than those that appeared on the website Sport England's reply was that the "accounts published on BSUK website are the same as the audited accounts received by Sport England". Sport England explained it could also request quarterly management accounts from BSUK. The only set of such accounts held by Sport England within scope of the information request cover the quarter ending 30 September 2007. A copy of this set of management accounts was disclosed to the complainant on 22 July 2009 and therefore this aspect has not been considered any further as part of the Commissioner's investigation.
35. It has not proved possible to establish when each set of the audited accounts appeared on the BSUK website, so it is impossible to state definitively that each set of accounts within scope of the first request were reasonably accessible by other means at the time the first information request was decided by Sport England on 1 April 2009. With that caveat, the Commissioner is satisfied that Sport England was entitled to rely on the exemption at section 21 of the Act with regard to the first information request.

Second Information Request

Section 21

36. The second information request made on 4 March 2008 sought:

The names and addresses of all beneficial owners and signatories on the bank account(s) and the next date of Sport England intended grant payment, as well as to which bank(s), especially because you may have signed a separate contract with their "new" limited company.

37. This request breaks down into four distinct subsets of information, namely:
- names and addresses of all beneficial owners (of BSUK);
 - names and addresses of all bank account signatories (of BSUK);
 - next date Sport England intends to pay grant (to BSUK);
 - which banks grant payment will be made to.

a). First Subset of Second Information Request

38. On the first of these subsets, in its refusal letter dated 1 April 2008, Sport England relied on section 21 to refuse to disclose information on "*the names of owners*" of BSUK. Sport England noted this information was accessible to the complainant by other means. The request had actually sought names and addresses of "*beneficial owners*" and when questioned on this point by the Commissioner, Sport England noted the term "beneficial owner" is "a term used in trust law where the property is held by one person but the person who benefits from the trust is someone else. BSUK was not a trust and the "beneficial owner" was therefore BSUK itself and by extension its members, not any particular individual who was a signatory to the bank account. The Commissioner has confirmed this

explanation of the term “beneficial owners” independently and is satisfied it is accurate. Therefore his consideration has concentrated on how Sport England dealt with the request for information on “the names of owners”.

39. The Commissioner notes the reason Sport England gave for relying on section 21 to treat the information it held on “the names of owners” as exempt constituted the complainant’s personal data and so it has not been repeated here. The reason was specific to the complainant and therefore ignored the principle set out by the Information Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and 0013) that, “disclosure under the FOIA is effectively an unlimited disclosure to the public as a whole, without conditions”. Therefore, with regard to the request for this information Sport England did not provide the complainant with a valid refusal letter in accordance with section 17(1)(c) of the Act stating why section 21 applied.
40. The Commissioner notes the BSUK website at <http://www.baseballsoftballuk.com/> contains extensive information about the organisation, including the names of the officers of the organisation, board minutes etc. In the Commissioner’s view, and taking account of his findings on the term “beneficial” owners at paragraph 38 above, Sport England would have been entitled to rely on section 21 of the Act to withhold information on “the names of owners” if it had referred to the information on the BSUK website. However, Sport England did not do so and therefore is in breach of section 17(1)(c) for the reasons given.

Section 40

41. The first subset in the second request also sought information about “addresses” of BSUK owners. In its refusal letter of 1 April 2008, Sport England stated the addresses of owners were withheld under the exemption in section 40 of the Act because the information constituted personal data. Sport England did not give a detailed explanation of how section 40 applied or which subsection applied in this case, stating only that if the data concerned a third party and if disclosure would breach any of the Data Protection Principles the information was exempt.
42. The Commissioner agrees addresses would constitute the personal data of the BSUK owners. Section 40(2) of the Act provides an exemption for information that is the personal data of any third party where disclosure would breach any of the data protection principles in the Data Protection Act 1998 (DPA). Sport England did not specify which principle might be breached if the withheld information was disclosed, but in the Commissioner’s opinion appeared to be relying on the first principle, which states:
- i. Personal data must be processed fairly and lawfully, and
 - ii. Personal data shall not be processed unless at least one of the conditions in DPA Schedule 2 is met.
43. Before considering whether the data has been processed fairly and lawfully, the Commissioner has considered the conditions in DPA Schedule 2. The first condition is not relevant because the data subjects have not given their consent

to the processing. Therefore it is the sixth condition that is the most relevant:

“The processing is necessary for the purposes of the 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.”

44. In deciding whether the sixth condition is satisfied the Commissioner has considered the three part test, which follows the approach laid down in the Information Tribunal's determination in the case of the House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc). This approach was later supported by the High Court in its subsequent judgement on that case. The parts of the test are:
- i. There must be a legitimate public interest in disclosure
 - ii. The disclosure must be necessary to meet that public interest
 - iii. The disclosure must not cause unwarranted harm to the interests of the individual.
45. The Commissioner has considered whether there is a legitimate public interest in the disclosure of the addresses of the BSUK owners and is not satisfied there is such an interest. In reaching this conclusion, the Commissioner refers again to the BSUK website, which contains contact information for the officers of the organisation, including the address of the head office as well as telephone numbers and email addresses for board members, national and regional officers. The Commissioner is not aware why there would be a legitimate public interest in disclosing the personal addresses of BSUK “owners” (which for the reasons given at paragraph 38 above he has taken to mean the organisation and its officers) in addition to the official address and other contact details freely available on the website.
46. Therefore, the Commissioner is satisfied Sport England was entitled to rely on section 40(2) of the Act to withhold as exempt information that it held on addresses of the BSUK owners. However, the Commissioner is not satisfied Sport England dealt with this aspect of the second information request completely in accordance with its obligations under the Act because it failed to explain to the complainant what it took to be meant by the term “the owners of BSUK” and it failed to make any reference to section 21 to indicate that information on the owners' addresses was reasonably accessible by other means. Sport England is in breach of section 17(1)(a) to (c) for these reasons.

b). Second Subset of Second Information Request

Section 40

47. The second subset sought information on “names and addresses of all BSUK bank account signatories”. In its refusal letter of 1 April 2008, Sport England stated the addresses of signatories were withheld under the exemption in section 40 of the Act because the information constituted personal data. Sport England

did not give a detailed explanation of how section 40 applied or which subsection applied in this case, stating only that if the data concerned a third party and if disclosure would breach any of the Data Protection Principles the information was exempt.

48. For similar reasons to those given in paragraph 45 above the Commissioner is satisfied that Sport England was entitled to rely on section 40(2) of the Act to withhold as exempt information the addresses of bank account signatories. However, for similar reasons to those given in paragraph 46, Sport England is also in breach of its obligations under section 17(1)(a) to (c).
49. Sport England failed to provide a response in either its refusal letter of 1 April 2008 or when reporting the results of its internal review on 30 April 2008 to the specific request for the names of BSUK bank account signatories. When the Commissioner investigated the complaints Sport England was unable to produce a list of the information that was disclosed and the information that was withheld when it served its initial refusal notice dated 1 April 2008. Although it carried out an extensive search on receipt of the Commissioner's enquiries, the only relevant information it was able to find was a print-out from its financial computer system containing payment details used when paying grant to BSUK. Sport England was unable to locate the original BACS form that would have contained information that would then have been entered onto its financial computer system.
50. Sport England noted the names of signatories to the account would have been on the original BACS form. However, this cannot be located, nor are the public authority able to adequately evidence whether it was held at the time of the request. Therefore the Commissioner cannot investigate the application of section 40 to it and it will therefore not form part of this notice. However, the issues of records management are addressed in the 'Other Matters' section below.

c). Third Subset of the Second Information Request

51. The third subset sought information on the next date Sport England intended to pay grant (to BSUK). This was answered fully in Sport England's letter of 1 April 2008 and consequently has not formed part of the Commissioner's investigation.

d). Fourth Subset of the Second Information Request

52. The fourth subset sought information about which banks BSUK's grant would be paid to by Sport England. Although Sport England's letter of 1 April 2008 referred to "bank accounts" neither it nor the subsequent letter reporting the internal review made any reference to particular banks to which grant payment would be made. It became clear during the Commissioner's enquiries that Sport England had held information relevant to this subset of the second information request at the time the request was made. Examination of the print-out from Sport England's financial computer system copied to the Commissioner in July 2009 suggests it was held at the time of the information request in March 2008 because it refers to a change made in March 2004. The print-out contains details of BSUK's bank, which Sport England used to make grant payments. Therefore Sport England was in breach of section 1(1)(a) of the Act for failing to inform the

complainant in writing whether it held information of the description specified in the request.

53. Although Sport England stated in response to the Commissioner's enquiries it was relying on sections 40 and 41 of the Act in refusing to disclose the print-out, the Commissioner noted the print-out did not contain any personal data and therefore section 40 was not applicable.

Section 41

54. As a result of his investigation, the Commissioner is aware information on BSUK's bankers is publicly available. BSUK accounts for 2006/7 are on its website and give details of its bankers, a branch of Barclays in Hull. The Commissioner's consideration of Sport England's application of section 41 to the other information held on the computer print-out is set out in the following paragraphs. However, considering first and separately Sport England's claim that section 41 applies to the information held in the print-out about the bank to which grant was paid, the Commissioner is not satisfied this case has been made. Although Sport England obtained the information from BSUK as required by section 41(1)(a), the Commissioner is not satisfied its disclosure by Sport England would constitute a breach of confidence under section 41(1)(b) because the information is publicly available. Therefore, Sport England was not entitled to rely on section 41 to withhold the information as exempt and as noted at paragraph 52 Sport England was in breach of section 1(1)(a) of the Act when it issued its refusal letter for failing to inform the complainant in writing whether it held information of the description specified in the request. Furthermore, Sport England failed to make any reference to section 21 to indicate information on the bank to which BSUK's grant was paid was reasonably accessible by other means. Sport England is in breach of section 17(1)(a) to (c) for these reasons.
55. Turning to the other information in the print-out, in its letter of 22 July 2009 Sport England argued that in addition to the exemption in section 40 of the Act, which it had relied upon in its original refusal letter dated 1 April 2008, it believed now section 41 also applied to the computer print-out. Sport England set out its arguments on section 41 in accordance with the criteria set out by the Information Tribunal in the case of *Derry City Council v the Information Commissioner* (EA/2006/0014). The relevant criteria were:
- whether the information was obtained from a third party,
 - whether its disclosure would constitute actionable breach of confidence,
 - whether disclosure would be a breach of that obligation and
 - if so, whether the disclosing party would nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of information?
56. With regard to the first of these criteria, the information was obtained by Sport England from BSUK as required by section 41(a) of the Act. With regard to the second criteria, Sport England's contention was that the information had the necessary quality of confidence as it was not generally accessible and would not be made accessible because of the risk of bank fraud. It might be added the information was provided only for the very specific purpose of allowing the

payment of grant and other monies, with the expectation that it would only be used for that purpose. The Commissioner notes these factors apply to the bank details, specifically the account number and sort code, contained in the print-out, information that is neither trivial nor accessible.

57. Sport England's position was that disclosure of the information would be a breach of the obligation created because of the risk of bank fraud and there would be no defence to a claim for breach of confidence based on the public interest in disclosure of the information because there would be little interest in releasing the information. Sport England stated the public interest in ensuring its funds were correctly applied and accounted for did not rest on publicising the names of signatories or details of particular bank accounts but rather on its overall system of assurance. Information on this assurance system had been released to the complainant in the disclosure in July 2009 as it came within scope of the third and fourth information requests made on 4 March 2008.
58. The Commissioner is persuaded by these arguments and notes the public interest test in deciding if a duty of confidence is actionable is the reverse of that normally applied under the Act where the public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure. The duty of confidence public interest test assumes information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. No compelling grounds for disclosure have been advanced with regard to the information on the computer print-out that is not publicly available so the Commissioner is satisfied Sport England was entitled to rely on the exemption in section 41 of the Act to withhold the information.
59. However, the Commissioner notes that the exemption in section 41 has only been raised by Sport England with regard to the second information request as a consequence of the Commissioner's investigation. The Commissioner is under no positive duty to consider exemptions that have not been referred to by a public authority in its refusal letter/internal review but may do so if it seems appropriate to him in any particular case. The Commissioner's approach will be pragmatic, taking into consideration the potential risks associated with disclosure of the information in question. As noted above, the Commissioner is persuaded there are risks associated with potential bank fraud if this information is disclosed and therefore is prepared to accept the public authority's late reliance on section 41. However, the Commissioner notes that in raising the exemption only during his investigation Sport England is in breach of section 10 and 17(1)(b) of the Act.

Third and Fourth Information Requests

60. The third and fourth information requests sought:

3. *Details of Sport England's scrutiny of these accounts (and copies of the submissions by BSUK/BBF made in respect of the same) especially as a function of your releasing contractually mandated funds in conjunction with KPI etc.*

4. *Copies of all the grant and/or other agreements existing between BBF, BSF, BSUK, BSUK Ltd and Sport England*

61. In its refusal letter of 1 April 2008, Sport England stated with regard to both of these requests that any information it held was disclosed with the letter except for information that was exempt as a result of section 41 (both requests) and section 40 (third request). No detail was provided in the refusal letter or the subsequent letter detailing the internal review to indicate what had been withheld as exempt under these sections. As noted, when the Commissioner investigated this complaint Sport England was unable to provide any details of the information withheld in April 2008 and this necessitated a new search by Sport England to identify all of the information it held that was within scope of the information requests of 4 March 2008.
62. As a result of this search in July 2009 Sport England sent the complainant a copy of everything it held within scope of his information requests with the exception of three documents that it continued to regard as exempt. None of these three documents came within the description of the information covered by the third and fourth requests so Sport England's position was that the complainant had now received all of the information it held within scope of the third and fourth information requests. The Commissioner is satisfied this is the case and there are no outstanding issues with regard to the third and fourth information requests.

Fifth Information Request

Section 40

63. As part of its fresh search of the information it held within scope of the requests, Sport England located and copied to the Commissioner two contracts of employment for staff at BSUK. In the Commissioner's view, the contracts are within scope of the wide ranging fifth information request, which sought:

Miscellaneous correspondence between Sport England, the BBF, BSUK etc., and any other related entities or individuals

Sport England was unable to provide the date it had received the contracts but it seemed almost certain they had been sent by BSUK.

64. Although Sport England had originally decided the fifth request by disclosing some information and treating other information as exempt under section 41, its position now is that all information that it holds that is within scope of the fifth information request was disclosed to the complainant in July 2009 with the exception of the two contracts. Sport England argued they are exempt by virtue of section 40 of the Act (personal information). The Commissioner is satisfied that following its fresh search Sport England has disclosed all information within scope of the fifth information request to the complainant, with the exception of the two contracts.

65. With regard to the two contracts, Sport England stated sections 40(3)(a)(i) and (3)(b) together provided an absolute exemption where disclosure of personal data to a third party would contravene any of the data protection principles in Schedule 1 to the Data Protection Act 1998. The contracts constituted personal data because they referred to named individuals and contained biographical details such as their respective salaries and responsibilities.
66. In Sport England's view, disclosure would breach the First Data Protection Principle because the relevant conditions in Schedule 2 to the Data Protection Act 1998 were not met. Sport England noted in relation to condition 1 the data subjects had not given their consent to disclosure. In addition, Sport England had considered condition 6 to establish whether the processing was necessary "for the purposes of Sport England's legitimate purposes". Sport England considered whether there was a legitimate public interest in disclosure and concluded there was not because details of both posts had been disclosed in the documents provided in response to the fifth information request dated 4 March 2008. In Sport England's view, no further public interest would be served by disclosing the names of those appointed to the roles.
67. The Commissioner has considered the arguments advanced by Sport England in relation to the two contracts. The Commissioner agrees the contracts are personal data about someone other than the complainant.
68. Section 40(2) of the Act provides an exemption for information that is the personal data of any third party where disclosure would breach any of the data protection principles in the Data Protection Act 1998 (DPA). Sport England argued the first principle would be breached if the withheld information were disclosed. The first principle states:
- i. Personal data must be processed fairly and lawfully, and
 - ii. Personal data shall not be processed unless at least one of the conditions in DPA Schedule 2 is met.
69. Before considering whether the data has been processed fairly and lawfully, the Commissioner has considered the conditions in DPA Schedule 2. The first condition is not relevant because the data subjects have not given their consent to the processing. Therefore it is the sixth condition that is the most relevant:
- "The processing is necessary for the purposes of the 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."
70. In deciding whether the sixth condition is satisfied the Commissioner has considered the three part test, which follows the approach laid down in the Information Tribunal's determination in the case of the House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc). This approach was later supported by the High Court in its subsequent judgement on that case. The parts of the test are:

- i. There must be a legitimate public interest in disclosure
 - ii. The disclosure must be necessary to meet that public interest
 - iii. The disclosure must not cause unwarranted harm to the interests of the individual.
71. The Commissioner noted Sport England's argument that there is no legitimate public interest in disclosure because Sport England has already disclosed details of both posts as part of the response to the fifth information request of 4 March 2008. However, the Commissioner has noted that what was disclosed was the job advert and specification for one of the posts and the outline job responsibilities for the other post. While these contain some of the information in the withheld contracts the match is not exact.
72. The BSUK is largely funded by public money through the grant it receives from Sport England. In the Commissioner's view, this creates a legitimate public interest in the disclosure of information about the roles and responsibilities of its paid members of staff in the interests of transparency and accountability. In an environment where there are concerns about the way Sport England distributes public money (see paragraphs 2 to 6 above), it is arguable this increases the legitimate public interest, although as noted previously the actual mechanism currently under investigation was not used to distribute public money to softball and baseball.
73. Turning to the question of whether disclosure is necessary to meet the legitimate public interest, the Commissioner has concluded there is no other mechanism available in the present case. It would not be possible to make an approach direct to BSUK with any expectation of success as it is not covered by the Act.
74. In considering whether the disclosure would cause unwarranted harm to the interests of the two individuals whose contracts these are, the Commissioner is mindful these posts are funded, whether directly or indirectly, through public money and both posts are public posts, concerned with the development of their respective sports nationally. In this regard, names of BSUK post holders are listed on its website. The Commissioner recognises both contracts contain precise salary levels, which should be withheld in order to avoid potential harm, distress or intrusion to the post holders. However, having considered the rest of the detail of the contracts the Commissioner is not satisfied that they contain anything that would cause potential harm, distress or intrusion to the post holders.
75. On the overarching question of whether processing the data by way of disclosure would be fair, the Commissioner is satisfied it would be for the reasons given in the immediately preceding paragraphs and subject to redaction of the salary details. The resulting information is not confidential and the Commissioner has no reason to believe its disclosure would be unlawful. The Commissioner concludes disclosure of the contracts, with the salary details redacted, would not breach the first or any of the other data protection principles.

Procedural Requirements

Second Information Request

76. As set out above, Sport England was in breach of section 17(1)(c) with regard to the first subset of information (“ the names of owners”) in the second information request for failing to provide the complainant with a valid refusal letter stating why section 21 of the Act applied.
77. With regard to the same subset of the second information request, Sport England was in breach of section 17(1)(a), (b) and (c) with regard to its failure to make any reference to section 21 of the Act to indicate that information on the owners’ addresses was reasonably accessible to the complainant by other means.
78. With regard to the second subset of the second information request, Sport England was in breach of section 17(1)(a), (b) and (c) with regard to its failure to make any reference to section 21 of the Act to indicate that information on the signatories’ addresses was reasonably accessible to the complainant by other means.
79. Concerning the fourth subset of the second information request, Sport England was in breach of section 1(1)(a) for failing to inform the complainant in writing whether it held information of the description specified in the request (details of banks to which it paid BSUK’s grant). Furthermore, Sport England was in breach of section 10(1) for failing to provide confirmation within 20 working days of the information request.
80. Furthermore, concerning the fourth subset of the second information request, Sport England only raised the exemption provided by section 41 of the Act in response to the Commissioner’s enquiries. Although the Commissioner agreed that Sport England was entitled to rely on section 41 with regard to most of the information on the computer print-out by only raising this during his investigation Sport England was in breach of section 10(1) and 17(1)(b).
81. Specifically with regard to the information in the print-out concerning the BSUK’s bank to which grant was paid, the Commissioner is not satisfied Sport England was entitled to rely on section 41 to withhold the information as exempt and was in breach of section 1(1)(a) of the Act when it issued its refusal letter for failing to inform the complainant in writing whether it held information of the description specified in the request. Furthermore, Sport England failed to make any reference to section 21 to indicate information on the bank to which BSUK’s grant was paid was reasonably accessible by other means. Sport England is in breach of section 17(1)(a) to (c) for these reasons.

Fifth Information Request

82. As the Commissioner has decided the information contained in the contracts should have been provided, subject to the redaction of the salary details, because it was not exempt from disclosure on the basis of section 40(2) of the Act, the Commissioner believes it should have been provided in line with the duty at

section 1(1)(b) of the Act. Therefore, Sport England's failure to do so constitutes a breach of section 1(1)(b). Furthermore, by failing to provide this information within 20 working days of the request Sport England also breached section 10(1) of the Act.

83. Furthermore, by failing to specify that it was relying on the exemption at section 40(2) to withhold the contracts in either its initial refusal letter or in its internal review, Sport England breached sections 17(1)(a) and 17(1)(b) of the Act.

The Decision

84. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- correctly deciding the first information request made on 4 March 2008

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

- with regard to the second information request, failing to identify correctly all of the information requested and therefore failing to respond at all to the request for information on the banks to which grant was paid. Also failing to explain adequately why section 21 applied to information requested about the names of owners and failing to identify that section 21 would have applied to the request for information on the addresses of owners and signatories and information on the banks to which grant was paid.
- with regard to the third and fourth information requests, the Commissioner has been unable to reach any firm conclusion on how they were dealt with when the requests were originally decided because of Sport England's failure to keep records of what was disclosed and what was withheld. However the Commissioner is satisfied that following disclosure to the complainant in July 2009, Sport England no longer holds any information within scope of these two requests that has not been disclosed.
- with regard to the fifth information request made on 4 March 2008, incorrectly relying on the exemption in section 40(2) of the Act to withhold the information comprising the two job contracts.

Steps Required

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

- disclose the two job contracts to the complainant, once salary details have been redacted.

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

Failure to comply

87. 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.

Other matters

88. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
89. Part 8 of the section 46 Code of Practice¹ (the “section 46 code”) recommends that public authorities should maintain such records that are required to explain and (if necessary) justify past actions in the event of an audit, inquiry or other investigation. The section 46 code cites an appeal to the Commissioner as a specific instance where an authority would be expected to maintain sufficient records to enable it to provide details of how a request was handled and, if necessary, why it refused to provide the information.
90. At various points this notice highlights the difficulty in establishing precise details concerning the information requests made and how they were handled. It proved impossible to find the date on which internal review of the refusal was requested and this was compounded by the inability to provide a list of what was disclosed with the initial refusal letter and what was withheld at that time. This made it difficult for the Commissioner to assess whether the decision taken at the time of the initial refusal was in accordance with the Act and necessitated what was essentially a fresh consideration and decision by the public authority in response to the Commissioner’s enquiries.
91. The Commissioner expects that, in future, Sport England will maintain proper records of its handling of requests and that its management of records will conform to the recommendations of the section 46 code.

¹ The revised, reissued section 46 code was published on 16 July 2009. Whilst this post-dates the complaint under consideration the version of the code in effect at the time contained parallel recommendations. The section 46 code is published online here: <http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

Right of Appeal

92. Either party has the right to appeal against this Decision Notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

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 15th day of February 2010

Signed

**David Smith
Deputy Commissioner and Director of Data Protection**

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

Legal Annex

1 General right of access to information held by public authorities

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) 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.
- (4) 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.
- (5) 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).
- (6) 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”.

10 Time for compliance with request

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee is paid 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.
- (3) 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.

(4) 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.

(5) Regulations under subsection (4) may—
(a) prescribe different days in relation to different cases, and
(b) confer a discretion on the Commissioner.

(6) 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 [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

17 Refusal of request

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

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

(2) 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.

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

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

(4) 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.

(5) 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.

(6) Subsection (5) does not apply where—

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (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

21 Information accessible to applicant by other means

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

(2) 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.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

40 Personal information

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if—
 - (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is—
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- (5) The duty to confirm or deny—
 - (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either—
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject’s right to be informed whether personal data being processed).
- (6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.
- (7) In this section—
 - “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] 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.

41 Information provided in confidence

(1) 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.

(2) 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.