

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 15 February 2010**

**Public Authority:** University of Plymouth  
**Address:** Drake Circus  
Plymouth  
Devon  
PL4 8AA

### Summary

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The complainant made two requests under the Freedom of Information Act 2000 (the "Act") to the University of Plymouth (the "University"). The first request was for copies of [named employee's] correspondence relating to the Climate Wars TV programme, including, but not restricted to, correspondence with two named individuals. The second request was for confirmation as to whether a [named employee] was on unpaid leave of absence during the filming of this programme. The University stated that it did not hold information relating to the first request under section 1(1)(a) of the Act. It explained that the [named employee's] involvement in the programme was in a purely personal capacity and not as an 'employee' of the University. The Commissioner considers that the University does not hold information relevant to the first request under section 1(1)(a) of the Act as under section 3(2)(a) the information is only held on behalf of another person. In relation to the second request, the University refused to provide this information as it stated that it was exempt under section 40(2). The Commissioner considers that section 40(2) was correctly engaged in this case. The Commissioner does however consider that the University breached section 1(1)(a), section 10(1) and section 17(1)(b) and (c) in its handling of the requests.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 17 December 2008 the complainant made a request to the University for the following information:

“I would like to receive copies of [named employee’s] correspondence relating to the Climate Wars TV programme, including, but not restricted to, correspondence with:

[Two named individuals.]
3. On 2 April 2009 the University responded to the complainant’s request. It explained that the [named employee’s] involvement in the making of the Climate Wars TV programme was undertaken in a purely personal capacity and not as an employee of the University. It confirmed that any correspondence [named employee] may possess relating to the programme is held in a personal capacity and is not therefore held by the University.
4. On 3 April 2009 the complainant made another request for the following information:

“Could you please confirm that [named employee] was on unpaid leave of absence during the filming of this programme.”
5. On 27 April 2009 the University responded to the complainant. It stated that it did hold the information requested on 3 April 2009 however it explained that it was exempt as it was personal information.
6. As the complainant was dissatisfied with the responses he had received, on 13 May 2009 he wrote to the University and asked it to conduct an internal review.
7. On 22 May 2009 the University wrote to the complainant with the result of the internal review it had carried out. The University upheld its original responses.

## The Investigation

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### Scope of the case

8. As the complainant was dissatisfied with the responses he had received from the University he made a formal complaint to the Information Commissioner’s Office. The Commissioner has considered whether the University holds the information requested on 17 December 2008 and whether it applied the section 40(2) exemption correctly to the information requested on 3 April 2009.

9. During the course of correspondence between the complainant and the University, the complainant queried whether his request of 17 December 2008 should be dealt with under the Environmental Information Regulations 2004 (EIR). Upon considering the information relevant to the request of 17 December 2008, the Commissioner does not consider that this would be classed as environmental information under section 2 EIR and is therefore satisfied that the University dealt with the request under the correct access regime.

## Chronology

10. On 14 August 2009 the Commissioner wrote to the University to obtain its further submissions to support its contention that it did not hold the requested information.
11. On 10 September 2009 the University responded to the Commissioner. It provided the Commissioner with detailed submissions in support of its contention that it does not hold the information requested on 17 December 2008. In relation to the information requested on 3 April 2009, the University explained that it did hold this information but stated that it was exempt from disclosure by virtue of section 40(2) of the Act.
12. On 8 January 2010 the Commissioner wrote to the University in order to obtain its arguments in support of its application of section 40(2) to the information requested on 3 April 2009.
13. On 19 January 2010 the University responded to the Commissioner and provided its submissions in support of its application of section 40(2).

## Analysis

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### Substantive Procedural matters

#### Section 1(1)(a) and 3(2)(a)

14. Section 1(1) of the Act states that:

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

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

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

Section 3(2) states that –

*“For the purposes of this Act, information is held by a public authority if-*

*(a) it is held by the authority, otherwise than on behalf of another person, or*

*(b) it is held by another person on behalf of the authority.”*

15. The Commissioner will determine whether or not the University holds the information requested on 17 December 2009.
16. The University explained that it believed that the requested emails were private correspondence and therefore they could not be deemed as held by the University. It stated that the requested information was not created by the University or by [named employee] acting in the course of his employment at the University. It clarified that the correspondence relates solely to [named employee's] appearance in the BBC series 'Climate Wars', which he undertook in his own private capacity and for which he was remunerated by the BBC. It stated that [named employee's] participation in this television series was entirely separate from his work at the University.
17. The University explained that the complainant had suggested that the test as to whether the requested information was held by the University was whether [named employee] was being paid by the University at the time the information was created. The University argued that its understanding was that individuals could act in a personal capacity whilst at work and receiving a salary, for example when sending personal emails during working hours using an employer's email system. It stated that the key issue was not whether [named employee] was receiving a salary from the University whilst generating the requested information but whether he was acting outside of the scope of his employment, in a purely personal or private capacity. It confirmed that the University was of the view that [named employee] was acting in a personal capacity in this instance. The University explained that it did not control the information in any way, for the reason that it has no interest in it. It stated that the correspondence was only in its possession as [named employee] was most easily contactable through his University email address.
18. The University also confirmed that both the [named employee] and the BBC were of the same view that the [named employee] was acting in a personal capacity outside the role of employment with the University. The University provided the Commissioner with a letter from the BBC dated 24 June 2009 addressed to the University confirming this viewpoint.

19. In coming to a decision in this case the Commissioner has taken into account the University's submissions and in particular the unanimous views of the University, the [named employee] and the BBC that the named employee was acting in a purely personal capacity in relation to the requested information.
20. The Commissioner does not consider that the issue as to whether or not [named employee] was on unpaid leave during the filming of the television programme would have any significant bearing upon the issue as to whether or not the [named employee] was acting in a private capacity in relation to the requested emails. This is because an individual could take part in other activities and send and receive personal emails through an employer's email system whilst in paid employment.
21. The Commissioner is also mindful of a previous decision notice issued on case reference FS5082767. In this case the Commissioner concluded that correspondence between a named employee and another individual was not held by the public authority as the public authority had no interest in, or control over the information as it considered it to be private correspondence. The Commissioner accepted that in common with some of the named employee's other non-business related personal papers and correspondence, it was purely a matter of circumstance that the requested information was in the possession of the public authority.
22. The Commissioner considers that as the University, the [named employee] and the BBC are all of the belief that the [named employee] was acting in a private capacity, outside of any employment with the University, and as the University has confirmed that it has no interest in or control over the requested information, he can only conclude that the information is not held under section 1(1)(a) of the Act as under section 3(2)(a) the information is only held on behalf of another person. The Commissioner has viewed the requested emails and can confirm that there is nothing contained within those emails which contradicts this.

## Exemption

### Section 40(2)

23. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*“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.”*

24. Section 40(3)(a)(i) of the Act states 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),”*

25. The full text of section 40 can be found in the legal annex attached to this decision notice.

26. The Commissioner will determine whether or not the University correctly applied section 40(2) in order to withhold the information requested on 3 April 2009.

27. In this case the University has argued that information as to whether a [named employee] was on unpaid leave of absence during the filming of a programme constitutes the personal data of the [named employee] and was therefore exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i). It stated that this was because to release this information would breach the data protection principles.

28. In order to reach a view on the University's arguments the Commissioner has first considered whether the information requested on 3 April 2009 would constitute the personal data of a third party. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- a. from that data, or
- b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

29. In this instance the information requested was information as to whether a [named employee] was on unpaid leave during the filming of a programme. The Commissioner considers that this would constitute information from which the data subject would be identifiable.

30. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The University has argued that

disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

31. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following:-

### **Likely Expectation of the Data Subject**

32. The University has explained that the data subject would not normally expect details of his leave arrangements to be disclosed into the public domain. Although this information relates in part to his professional life it also relates directly to his private life and, in any case, he does not occupy an especially senior management role within the University.
33. The Commissioner considers that employees of the University, including the data subject, would not expect details of their leave arrangements, including whether leave was paid or unpaid, to be disclosed into the public domain and that this is a reasonable expectation.

### **Whether the data subject has expressly refused consent to disclosure of the information**

34. The University has explained that the data subject has expressly refused consent to disclosure of the requested information.
35. The Commissioner has taken into account that the data subject has denied consent to release of the requested information.

### **The Legitimate Public Interest**

36. The complainant has alleged that there is a legitimate interest in the public obtaining information relating to the University's spending in order to promote openness and transparency. The University has recognised that the complainant has identified a legitimate interest. However the University explained that if an employee is receiving paid leave from the University in order to work on an outside project with an external organisation, the external organisation would recompense the University for its loss. For example the cost of hiring another tutor to cover any lectures missed by the employee.
37. The Commissioner considers that as the University would not be financially disadvantaged whether or not an employee was being paid during any leave to work on a programme, this reduces the legitimate public interest in disclosing the requested information.

## Conclusion

38. The Commissioner therefore considers that as the legitimate expectations and view of the data subject concerned has been clearly set, and as the legitimate public interest in disclosure is reduced by way of the explanation provided by the University, the overriding of the legitimate expectations of those concerned cannot be justified.
39. The Commissioner therefore concludes that disclosure of information as to whether a [named employee] was on unpaid leave of absence during the filming of the particular programme in question would be unfair and therefore the section 40(2) exemption was correctly applied to this information in this case.

## Other Procedural Matters

### Section 1(1)

40. Section 1(1) of the Act states 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.”*

41. In this case the University did not confirm what information it held relevant to the scope of the first request within the statutory time for compliance. The Commissioner therefore considers that the University breached section 1(1)(a) in its handling of this request.

### Section 10(1)

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

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

43. The Commissioner has considered whether or not the University complied with section 10(1) of the Act.
44. As the University did not comply with its obligations under section 1(1)(a) within the statutory time for compliance, it breached section 10(1) in its handling of the request.



## Section 17(1)

45. Section 17(1) states 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.”*

46. The Commissioner has considered whether the University has complied with section 17(1)(a), (b) and (c) of the Act.

47. In this case the University stated that the information requested on 3 April 2009 was exempt as it was personal information, however it did not specify that the relevant exemption was section 40(2) nor did it explain sufficiently why this exemption was engaged.

48. The Commissioner notes that the University did not specify that section 40(2) was the relevant exemption which was engaged in relation to the request of 3 April 2009.

49. Furthermore the Commissioner considers that the University did not provide the complainant with an adequate or relevant explanation as to why the section 40(2) exemption by virtue of section 40(3)(a)(i) was engaged.

50. The Commissioner therefore considers that the University breached section 17(1)(b) and (c).

## The Decision

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51. The Commissioner's decision is that the information requested on 17 December 2008 is not held under section 1(1)(a) of the Act as under section 3(2)(a) the information is only held on behalf of another person.

52. The Commissioner also concludes that the information requested on 3 April 2009 is exempt under section 40(2) of the Act.

53. The Commissioner does however find that the University breached section 1(1)(a), section 10(1) and section 17(1)(b) and (c) in the

handling of this request.

## Right of Appeal

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54. 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](mailto: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 15<sup>th</sup> 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

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### 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.”

**Section 1(2)** provides that -

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

**Section 1(3)** provides that –

“Where a public authority –

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

(b) has informed the applicant of that requirement,

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

**Section 1(4)** provides that –

“The information –

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

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

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

**Section 1(5)** provides that –

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

**Section 1(6)** provides that –  
 “In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

### **Public Authorities**

**Section 3(1)** provides that –  
 “in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
  - (i) is listed in Schedule 1, or
  - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

**Section 3(2)** provides that –  
 “For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

### **Time for Compliance**

**Section 10(1)** provides that –  
 “Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 10(2)** provides that –  
 “Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –  
 “If, and to the extent that –

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

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection

does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

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

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

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

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –

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

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

### **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.