

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 14 December 2010**

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

### Summary

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The complainant asked for information about the investigation into the leaking of a confidential briefing document to the press. The Foreign and Commonwealth Office refused to supply the information stating that it was exempt under section 30(1)(b). It later submitted that the information was exempt under section 31(1)(a), (b) and (g) and section 40. The Commissioner found that section 40 was engaged in respect of some of the personal data contained in the withheld information. He found that neither section 30 nor 31 were engaged. He decided that the information not covered by the section 40 exemption should be released. The Commissioner also found the FCO had breached procedural requirements of the Act.

### 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.

## Background

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2. In October 2008 the Daily Telegraph published an article quoting extracts from a confidential letter to the Foreign and Commonwealth Office (the "FCO") from Sir Nigel Sheinwald, the British Ambassador in Washington. The letter contained observations on Barack Obama's presidential candidacy. The FCO conducted an investigation to try to identify who had leaked the letter to the Telegraph. The inquiry was concluded in December 2008. The complainant requested information about the inquiry.
3. A version of the leaked letter was published by the Daily Telegraph and can still be viewed on its website<sup>1</sup>.

## The Request

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4. The complainant submitted a request for information by email, which the FCO confirmed it had received on 18 February 2009. The request asked for:

*"...a copy of the report or any documentation you hold about the leak of a letter from Sir Nigel Sheinwald in which President Obama is described as aloof and which was reported in the national press in November 2008".*

5. The complainant did not retain a copy of the original request, and so the Commissioner has not had sight of it. However, the text of the request was replicated in the FCO's letter of 17 March 2009.
6. On 17 March 2009, the FCO issued a refusal notice which confirmed that it held information which was covered by the request, but that it was exempt under section 30(1) of the Act. It briefly set out the public interest arguments it had considered and explained that it had concluded that the public interest favoured the maintenance of the exemption over the disclosure of the information. It set out the complainant's right to request a review and also provided the Information Commissioner's contact details.
7. On 7 April 2009 the complainant asked for the matter to be reviewed, stating that he disagreed with the application of the exemption at section 30. He clarified that he was content for any information that

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<sup>1</sup> [http://blogs.telegraph.co.uk/news/tobyharnden/5355995/Revealed\\_UK\\_ambassadors\\_verdict\\_on\\_Barack\\_Obama/](http://blogs.telegraph.co.uk/news/tobyharnden/5355995/Revealed_UK_ambassadors_verdict_on_Barack_Obama/)

was deemed to fall within the scope of section 40 to be redacted from the material covered by his request.

8. The FCO replied on 14 July 2009, upholding its decision not to disclose the information by virtue of section 30(1)(b). It also stated that it considered that section 40 was engaged by some of the information.

## **The Investigation**

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### **Scope of the case**

9. On 16 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled by the FCO. The complainant disputed that the exemption at section 30 was applicable and that the public interest favoured withholding the information.
10. The Commissioner does not consider the leaked letter itself to be covered by the request, which is clearly directed at information about the leak, not the letter. He has therefore excluded the letter from the scope of the investigation.

### **Chronology**

11. On 8 August 2009 the Information Commissioner wrote to the FCO, informing it of the complaint made against it and asking to be sent a copy of the withheld information. No response was received.
12. On 4 January 2010 the Information Commissioner wrote again to the FCO, asking it to provide detailed information about its application of the exemption at section 30(1)(b) together with a copy of the withheld information.
13. The FCO replied on 6 January 2010. For reasons of sensitivity it declined to send a copy of the withheld information, instead inviting the case officer to visit and view the withheld information on site.
14. It advised that it considered the information to be exempt under section 30(1)(b) or alternatively under section 31(1)(a), (b) and (g) (the function referred to being identified in section 31(2)(b)).
15. The Information Commissioner replied on 19 January 2010, giving assurances that the withheld information would be stored securely and

outlining the logistical difficulties viewing the material on site would create.

16. The FCO responded on 16 February 2010, agreeing to supply a copy of the withheld information. The information was subsequently provided to the Commissioner with a covering letter dated 26 February 2010.
17. The withheld information comprised a bundle of documents containing: a copy of the leaked letter; a series of email exchanges in which individual suspects were named, and their motives and opportunities for leaking the document outlined; general exchanges on the progress of the inquiry; exchanges on how to manage any actual or likely damage arising from the leak; exchanges on how to manage similar situations in future; information generated as part of the inquiry itself, including responses to a series of questions put to recipients of the leaked letter and information about other evidence gathering; and a final scoping assessment document, which summarised the inquiry's findings.
18. On 15 June 2010 the Information Commissioner wrote to the FCO, regarding the 'common informant' principle, which it had cited in its letter of 6 January 2010. The Commissioner asked the FCO to supply more information about the principle, including relevant cases or legal references, in order that he might determine its applicability in the context of section 30(1)(b).
19. No response was received from the FCO. On 5 July 2010 the Commissioner sent an email asking for a response within seven days. No response was received.
20. On 13 July 2010 the Commissioner emailed the FCO, notifying it of his intention to issue a Decision Notice based upon the information it had so far supplied. He invited the FCO to make any further submissions in support of its case by 19 July 2010. No response was received by that date but the FCO finally sent one on 20 July 2010, briefly explaining what it meant by the 'common informant' principle. It also clarified that it did not intend making further submissions in respect of section 31.
21. The Commissioner emailed the FCO on 18 November 2010, informing it that its application of section 30 and/or 31 to the requested information was not persuasive. Although it had not been raised by the FCO, the Commissioner considered it appropriate to ask it to confirm that it did not consider section 27 (prejudice to international relations) to apply in respect of some or all of the requested information. Alternatively, if the FCO considered that section 27 applied to some (or all) of the information, he asked it to provide full arguments about why

that was the case and what the balance of the public interest test was. The FCO responded on to the Commissioner on 9 December 2010, confirming that it was not applying section 27. It did not make any further representations.

## Analysis

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### Exemptions

#### Section 40

#### Personal information

22. Section 40(2) provides an exemption from disclosure for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
23. In this case, the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. The FCO has stated that the disclosure of some of the requested information about its investigation into the leaking of Sir Nigel Sheinwald's letter would be unfair to individuals who could be identified from that information, and would therefore be in breach of the first principle of the Data Protection Act 1998 (the "DPA").
24. In order to establish whether this exemption has been correctly applied the Commissioner has first looked at whether any of the withheld information constitutes the personal data of a third party.
25. Section 1 of the DPA defines personal data as data which relate 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
26. The Commissioner notes that the withheld information includes the following information: names, job titles, contact details; comments from and information about individuals participating in the investigation, senior civil servants, suspects and journalists; and the names of individuals referred to in the leaked letter itself.

27. The Commissioner considers that these elements of the withheld information constitute personal data, as they identify particular individuals.
28. Furthermore, information about potential suspects relates to the commission or alleged commission by them of a criminal offence (in this case, breach of the Official Secrets Act 1989) and also contains references to their health. This subset of personal data therefore constitutes sensitive personal data, as defined in section 2 of the DPA.
29. The Commissioner has gone on to consider whether the disclosure of any of this personal data would be in breach of the principles of the DPA. In particular the Commissioner has considered whether the disclosure of this personal data would be in breach of the first data protection principle.

30. The first principle provides that:

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

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

31. The Commissioner has considered whether the disclosure of the personal data identified in paragraph 26 would be fair to the data subjects. In doing so he has considered the possible consequences of the disclosure, the reasonable expectation of data subjects as to how their data may be used and whether there is a compelling public interest in making the disclosure.
32. For the purposes of the Commissioner's investigation, the data subjects and their data have been separated into five categories: individuals referred to in the leaked letter; US senators; senior UK civil servants; journalists; and individuals involved with the investigation.

### **Individuals referred to in the leaked letter**

33. The withheld information includes the name of Sir Nigel Sheinwald as the author of the leaked letter and Barack Obama as its principal subject.
34. The Commissioner considers that both parties could have had the reasonable expectation that the contents of the letter would remain confidential. However, it is a matter of fact that that confidentiality was

breached, and the content of the letter widely reported in the media. The references to both individuals in the context of the FCO investigation do not reveal anything additional. They are not likely to be personally intrusive or cause unwarranted interference with their rights and freedoms.

35. When considering the public interest, the Commissioner has had regard to the level of information already in the public domain about the matter and considers it disproportionate to withhold the names of the two principal (and very senior, public facing) individuals named in the leaked letter.
36. The Commissioner has therefore concluded that it would not be unfair to release the references made to them in the withheld information.

### **US senators**

37. The withheld information also features the names of two senior US political figures named in passing in the leaked letter. As above, whilst the parties may have had the reasonable expectation that the letter itself would remain confidential, it is a matter of fact that that confidentiality was breached, and the content of the letter, including their names, widely reported in the media. The references to them in the context of the FCO investigation do not reveal anything additional. They are not likely to be personally intrusive or cause unwarranted interference with their rights and freedoms. When considering the public interest, the Commissioner had regard to the level of information already in the public domain about the matter and considers it disproportionate to withhold the names of these two very senior, public facing individuals.
38. The Commissioner has therefore concluded that it would not be unfair to release the references made to them in the withheld information.

### **Senior UK civil servants**

39. The correspondence includes an extract from Cabinet Office guidance on leak investigation policy and procedures, published in 2006, which names two senior civil servants in connection with the procedure for handling leaks.
40. This is an extract from a standard guidance document, the names are provided as (the then) appropriate contact points for further action. The Commissioner considers that the individuals would not have the expectation that the guidance was confidential and that its release would have little or no impact upon them personally. Set against this,



the Commissioner has considered the importance of transparency when responding to requests for information. The Commissioner therefore considers that it would not be unfair to them to release their names in the context of the standard Cabinet Office guidance.

## **Journalists**

41. The withheld information includes printouts of two press articles discussing the leaked letter, complete with by-lines, as well as an email to a newspaper about the matter.
42. The two articles are still available on the internet. The Commissioner considers that the journalists would have had no expectations of confidentiality when they published the articles and that the disclosure of their names in this context would have no detrimental effect on them. The Commissioner therefore considers that it would not be unfair to them release their names in the context of the reports they published on the incident.
43. With regard to the email to the newspaper, the Commissioner notes that it is marked "personal: not for publication or broadcast". He considers that the recipient (the editor) may therefore have the expectation that it would be held in confidence by the FCO.
44. The email is critical of the newspaper's decision to print an article about the leaked letter, and to reproduce the letter itself. The Commissioner considers that, at worst, disclosure of the recipient's identity might have minor consequences for his professional reputation.
45. However, the Commissioner considers the role of newspaper editor entails being publically accountable for the actions of the newspaper's journalists. The Commissioner considers there is a public interest in the press being seen to be challenged to justify the publication of official, confidential 'leaked' information where this might be argued to be contrary to national interests. The Commissioner is also aware that the position of editor is a high profile one, and that even were the data subject's name removed from the email it would be easy to identify him by cross referencing the email with information in the public domain. The Commissioner therefore considers that it would not be unfair to release the name of the recipient of the email.

## **Individuals involved with the investigation**

46. The bulk of the withheld information comprises email exchanges and documents detailing the investigation (much of the investigation



appears to have been conducted by email correspondence). It identifies individuals tasked with conducting the investigation and those assisting with enquiries, including individuals named as suspects.

47. The Commissioner considers that both the investigators and those they approached for information would have the expectation that their involvement in the investigation and the information it generated would remain confidential. Data subjects may be embarrassed and in some cases suffer significant personal distress or reputational damage by the release of information linking them to the investigation, and this may inhibit their participation in future investigations.
48. The Commissioner considers that the release could be intrusive and in view of the fact that the investigation ultimately failed to uncover the source of the leak, could lead to unfounded speculation surrounding those named in the documents. As outlined above, some of the information also comprises sensitive personal data, which by its very nature, has been deemed to be information that individuals regard as the most private information about themselves.
49. The Commissioner acknowledges that there may be a legitimate public interest in the public ascertaining whether the FCO conducted a full and proper investigation into what was a serious breach of confidentiality, but considers that this would be served by the release of anonymised information. He considers that the public interest arguments in favour of full disclosure are not sufficiently strong to counterbalance the overwhelmingly detrimental effect of disclosure on data subjects. He also notes the complainant's pre-emptive acceptance of this point, in specifying that he did not wish to receive information covered by section 40 of the Act.
50. Having had regard to all this, the Commissioner considers that it would be unfair to disclose personal data relating to individuals involved with the investigation, and that such a disclosure would therefore be in contravention of the first data protection principle.

## **Schedule 2**

51. The Commissioner concluded that it would *not* be unfair to disclose personal data relating to Barack Obama, Sir Nigel Sheinwald, two US senators, senior civil servants mentioned in a standard guidance document and three journalists.
52. However, where the disclosure of personal data would be fair the first data protection principle also requires that a condition in schedule 2 of the DPA is met before the information may be disclosed. In this case

the Commissioner considers that the relevant condition is the sixth condition which states that:

6.-(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or third 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.'

53. The Commissioner's approach is to consider whether the sixth condition is met by way of the following three part test which must be satisfied:

- there must be legitimate interests in disclosing the information,
- the disclosure must be necessary for a legitimate interest of the public and,
- even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject(s).

54. In this case the Commissioner considers that in terms of disclosing the information, the legitimate interests lie in establishing whether the public authority carried out a full and proper investigation into a potentially damaging breach of confidentiality, as well as a general public interest in the public authority being as open and transparent as possible. The Commissioner is of the view that disclosure of the names of the individuals featured in the requested information is necessary to achieve this aim.

55. Having already established that the processing is indeed fair, the Commissioner is also satisfied that the release of personal data would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subjects. The Commissioner is satisfied that the information relates only to those individuals' professional lives and does not intrude on their private lives. Furthermore, there is no evidence to suggest that disclosure would compromise their personal safety or lead to harassment in their working lives. He also notes that much of the personal data in question can already be found on the internet due to the publicity surrounding the leak.

## Lawfulness

56. Finally, the Commissioner has considered whether disclosure of personal data where it would be fair would also be lawful. It is likely that disclosure would not be lawful if it would contravene a statutory prohibition. The FCO has not argued that any such statutory provision applies in respect of the investigation material. The Commissioner is therefore satisfied that disclosure would not be unlawful. The Commissioner would also stress that he does not consider there to be any other relevant statutory prohibitions and, given his previous findings on the fairness of disclosure, the Commissioner is also satisfied that disclosure would not contravene any of the articles of the Human Rights Act 1998.
57. Consequently, the Commissioner has decided that disclosure would not breach the first data protection principle and so section 40(2) is not engaged in respect of the personal data relating to Barack Obama, Sir Nigel Sheinwald, the two US Senators, the senior civil servants mentioned in the Cabinet Office guidance document and the three journalists.

## Section 30

### Investigations and proceedings conducted by public authorities

#### *Section 30(1)(b)*

58. For this section to apply the information must be or have been held by the authority for the purposes of any investigation which is conducted by the authority, and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct. This exemption is qualified by reference to the public interest. If the public interest does not favour maintenance of the exemption, the information must be disclosed.
59. The FCO explained that the information was held for the purpose of carrying out an inquiry to try to establish who was responsible for leaking Sir Nigel Sheinwald's letter to the Daily Telegraph. It explained that the sanctions open to it were either to bring about its own action, under the 'common informant' principle, or to ask the CPS to prosecute for breach of the Official Secrets Act 1989.
60. The Commissioner sought further information from the FCO regarding the 'common informant' principle. Such clarification as has been given seemed to be referring to what is commonly termed a 'private prosecution'.

61. Section 30(1)(b) applies to an investigation conducted by the authority which *“in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct”*. The Commissioner notes that the website<sup>2</sup> of the Crown Prosecution Service states: *“A private prosecution is a prosecution started by a private individual who is not acting on behalf of the police or any other prosecuting authority or body which conducts prosecutions”*. The Commissioner does not consider that any power the FCO may have to bring a private prosecution in a case like this would entitle it to claim the section 30 exemption. The Commissioner considers the exemption to cover specific prosecuting powers, such as those of local authorities for trading standards offences.
62. The FCO also claimed that it was possible that it could refer its inquiry findings to the CPS and ask it to prosecute for a breach of the Official Secrets Act. The Commissioner does not believe that this would constitute instituting *“criminal proceedings which the authority has power to conduct”*. Rather, the FCO would be inviting another authority to exercise its legal powers. The Commissioner does not agree that this satisfies the requirement set out at sub-section (1)(b).
63. For the foregoing reasons the Commissioner has concluded that section 30(1)(b) is not engaged by the withheld information. He has therefore not proceeded to consider the public interest test in respect of the exemption.

### **Section 31 Law enforcement**

64. The FCO did not cite this section in its refusal notice. It was introduced during the Commissioner’s investigation. Having taken into account the topic of the withheld information, its profile, sensitivity and the possible impact of its release, the Commissioner decided to consider the FCO’s late claim of section 31.

#### *Section 31(1)(a) and (b)*

65. Information will be exempt under this section if it is not exempt under section 30, and its disclosure would or would be likely to prejudice the prevention or detection of crime, or the apprehension or prosecution of offenders.
66. The Act specifies that a public authority cannot cite section 30 and section 31 in respect of the same set of information. The Commissioner

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<sup>2</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/#Principle](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#Principle)

considers that the late claiming of the section 31 exemption by the FCO casts further doubt on the validity of the original application of the section 30 exemption.

67. The FCO has not clarified whether sub-sections (a) and/or (b) apply to all or part of the withheld information. The Commissioner has therefore considered the claim as though it was made in respect of the withheld information in its entirety.
68. For the Commissioner to agree that this exemption is engaged the authority must demonstrate that disclosure of the requested information would, or would be likely to, prejudice one of the sub-sections cited. It must be able to demonstrate that some causal relationship exists between the potential disclosure and the prejudice, and that the prejudice is real, actual or of substance.
69. The authority must also indicate the likelihood of that prejudice occurring. Although it has been asked to, the FCO has not stated within its arguments whether it believes disclosure *would* or *would be likely to* cause prejudice. The Commissioner has therefore considered the lower threshold of *would be likely* for the arguments provided and he has reviewed the redacted information accordingly.
70. The Information Tribunal case *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005] outlined its interpretation of "*likely to prejudice*". It confirmed, at paragraph 15, that: "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk*". Following this, the Commissioner's interpretation of "would be likely to prejudice" is that there should be evidence of a significant risk of prejudice to the subject of the exemption.
71. The only statement that the FCO has made in support of its application of section 31(1)(a) and (b) was in its letter to the Commissioner of 6 January 2010:

*"In the alternative to section 30(1) f [sic] you are unable to accept the section 30(1) argument, we would invite you to consider section 31(1)(a) and (b) – that disclosure would or would be likely to prejudice the prevention of crime, and apprehension or prosecution of offenders. This argument focuses on the point made above that if investigators cannot speak on terms of confidentiality, then their work will be hampered, crime undetected and offenders either not apprehended or not prosecuted because of an insufficiency of evidence."*

72. The Commissioner notes that this point refers back to arguments made by the FCO in support of its consideration of the public interest in respect of section 30:

*"...parties who cooperated with the investigation would feel that there was a breach of confidentiality if at this stage their information entered the public arena. Were they called upon to provide further evidence they might, understandably, feel reluctant that any understanding of confidentiality was in effect, worthless. Added to that, investigators in future leak investigations would not be able to assure potential witnesses that what they said would be confidential, at least unless and until the case progressed to the criminal courts."*

73. The FCO's argument rests on the inhibiting effect that release of the information would be likely to have on its potential to gather evidence in future leak enquiries. It considers that individuals would be less likely to cooperate with future investigations if they were aware that details from a previous investigation had been released into the public domain. This, it argues, would be likely to have an adverse effect on its ability to prevent or detect crime and to apprehend or prosecute offenders.
74. The Commissioner does not consider that the FCO has provided evidence of a causal link between disclosure of specific information in this case and prejudice to the matters set out in subsections (a) or (b). For example, it has not pointed to the sort of information which, if disclosed, it would find very difficult to extract from future informants, by the very fact that it had been disclosed previously. The FCO has merely rephrased the wording of the exemption. It has provided general arguments based around supposition and conjecture, rather than considering the facts of this particular request.
75. Whilst it is not for the Commissioner to substitute arguments on behalf of public authorities, the Commissioner has noted that the most obvious circumstances in which confidentiality could be breached in this instance appears to be if the identities of those who had cooperated with the investigation were to be revealed in the disclosure. The Commissioner accepts that were this to happen, the prejudice to the exemption at section 31(1)(a) and (b) would be real, actual or of substance.
76. However, as outlined above, the Commissioner has concluded that to release such information would breach the first data protection



principle and that section 40 is therefore engaged in respect of it. This removes the possibility that these individuals will be identified, and concomitantly that the exemption at section 31(1)(a) and (b) could be prejudiced in the way described in paragraph 75.

77. The Commissioner also notes from the withheld information that the leak investigation is now, to all intents and purposes, dormant. Active investigation of the incident appears to have ceased in December 2008 with the publication of a leak report and will not resume unless significant new information comes to light. The possibility of cooperating parties being re-approached to provide further information and feeling disinclined to cooperate therefore appears, at this point in time, unlikely.
78. Finally, the Commissioner notes that the withheld information does not reveal hitherto secret or confidential investigation techniques that would be of assistance to those seeking to avoid detection or commit similar offences in the future.
79. The Commissioner has therefore concluded that the FCO has failed to demonstrate that section 31(1)(a) or (b) is engaged by the withheld information. He has therefore not proceeded to consider the public interest test in respect of the exemption.

*Section 31(1)(g) by virtue of sub-section (2)(b)*

80. The FCO also submitted, in its letter to the Commissioner, that section 31(1)(g) of the Act applied in respect of the withheld information, by virtue of sub-section (2)(b).
81. This provides that information is exempt if its disclosure would or would be likely to prejudice the exercise of the FCO's functions for specified purposes. The FCO specified the purpose at section 31(2)(b), of ascertaining whether any person is responsible for improper conduct.
82. The FCO has only submitted the following comments in support of its application of section 31(1)(g):

*"We would also argue that section 31(1)(g), (2)(b) supports the retention of the information if you are not persuaded that this was a situation where a prosecution was possible. The public interest points made for section 30 apply here as well".*



83. As noted in paragraph 19, despite being invited to submit further comments in support of its application of section 31, the FCO has not done so.
84. The Commissioner questions the appropriateness of the FCO's application of section 31(1)(g). Generally he considers that "*functions*" for these purposes must be statutory or core functions of the public authority, matters that have been specifically entrusted to the public authority, rather than general powers exercisable by any public authority.
85. In addition, sections 31(2)(a) to (e) include the word "ascertaining". The Commissioner considers that this word "ascertaining" means to determine definitely or with certainty. So, in relation to section 31(2)(a), for example, this would mean that whilst a public authority may have the power to conduct an internal investigation into whether an employee has committed a theft, the public authority would have to pass the matter to the police and later the Crown Prosecution Service and the Courts and it is these parties who would actually 'ascertain' whether any persons had failed to comply with the law. Accordingly, the Commissioner finds that the use of the word 'ascertaining' limits the application of this exemption to only those cases where the authority has the power to formally ascertain compliance with the law or judge whether any person's conduct is improper which is likely to limit the use of this exemption to law enforcement or regulatory bodies (for example, the FSA, Solicitors Regulation Authority and the Civil Service Commissioners).
86. In light of the above, the Commissioner has concluded that the exemption at section 31(1)(g) for the purpose at section 31(2)(b) is not engaged. He has therefore not proceeded to consider the public interest test in respect of the exemption.

## **Section 27**

### **International relations**

87. The FCO did not indicate whether it considered the exemption at section 27 to apply to some or all of the requested information, or supply any arguments in support of its application. The Commissioner has therefore not considered the application of this exemption to the requested information.

## Procedural Requirements

88. The FCO failed to provide information to the complainant that the Commissioner has concluded was not exempt. It therefore breached section 1(1)(b) of the Act. In addition, since the FCO failed to provide the information within the statutory time limit it also breached section 10(1) of the Act.
89. The FCO sought to rely upon an exemption it had not cited in its refusal notice to the complainant. It did not explain to the complainant why the exemption applied or set out how it had taken account of the public interest in deciding to withhold the information. In failing to do so the FCO breached section 17(1)(b) and (c) and section 17(3)(b) of the Act.

## The Decision

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90. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

## Steps Required

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91. The Commissioner requires the FCO to take the following steps to ensure compliance with the Act:
- to disclose to the complainant the withheld information, taking steps to ensure that any information in respect of which section 40(2) of the Act applies is redacted, so as not to reveal personal data. This Decision Notice contains a confidential schedule which identifies the information covered by section 40(2).
92. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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93. 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

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

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 60 working days for an internal review to be completed, despite the publication of his guidance on the matter.

## Right of Appeal

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95. 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).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

96. 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.
97. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 14<sup>th</sup> day of December 2010**

**Signed .....**

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

## Legal Annex

### Freedom of Information Act 2000

#### General Right of Access

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

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

#### Time for Compliance

**Section 10(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."

#### Refusal of Request

**Section 17(1)** provides that -

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

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

**Section 17(3)** provides that -

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

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

### **International Relations**

**Section 27(1)** provides that –

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

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

(a) relations between the United Kingdom and any international organisation or international court,

(b) the interests of the United Kingdom abroad, or

(c) the promotion or protection by the United Kingdom of its interests abroad."

**Section 27(2)** provides that –

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

**Section 27(3)** provides that –

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

**Section 27(4)** provides that –

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

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

**Section 27(5)** provides that –

"In this section-

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

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

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

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

### **Investigations and proceedings conducted by public authorities**

**Section 30(1)** provides that –

Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct

### **Law enforcement**

**Section 31(1)** provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)

**Section 31(2)** provides that –

The purposes referred to in subsection (1)(g) to (i) are-

- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper



## **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).”

## Legal Annex

### Data Protection Act 1998

#### Definition of 'personal data'

**Section 1(1)** provides that –

“personal data” means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

#### Schedule 1, Part I

##### First Data Protection Principle

- 1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

#### Schedule 2

##### Conditions relevant for purposes of the first principle: processing of any personal data

- 6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.