

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 31 March 2011**

**Public Authority:** Attorney General's Office  
**Address:** 20 Victoria Street  
SW1H 0NF

### Summary

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The complainant requested from the public authority information generated by a police investigation into his allegations of the forgery of witness statements. The public authority relied on sections 40(2) and 41 of the Act to withhold the information. The Commissioner's decision is that it correctly relied upon section 40(2) as a basis to withhold the information. However he has found procedural breaches of the Act in relation to the public authority's handling of the request and has also expressed concern at the length of time it took for the public authority to conduct the internal review.

### 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. In a letter dated 6 February 2010 the complainant requested that the public authority provide him with a copy of the police investigation report into allegedly forged statements given in relation to the investigation of a death of a named person.
3. The public authority provided its substantive response on 21 April 2010 by refusing to disclose the information requested on the basis of the exemptions contained in sections 31, 36, 40 and 41 of the Act.
4. On 7 May 2010 the public authority informed the complainant that it would now only rely on the exemptions provided by sections 40 and 41 to withhold the information.

5. The complainant requested an internal review of the public authority's decision on 13 May 2010.
6. On 4 August 2010 the public authority wrote to the complainant with the details of the result of the internal review it had carried out. The substantive outcome of which was that the public authority upheld its decision as laid out in its letter to the complainant dated 7 May 2010 but clarified that in respect of section 40, it was section 40(2) on which it was relying.

## **The Investigation**

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### **Scope of the case**

7. On 15 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

8. By way of a letter dated 21 October 2010 the Commissioner requested that the public authority provide him with a copy of the withheld information and answer specific questions regarding its application of the Act.
9. By way of a letter dated 1 December 2010 the public authority provided the Commissioner with its full reasons for withholding the requested information and provided a copy of the withheld information. The withheld information can be described thus:
  - a) Letter from Staffordshire Police to the public authority enclosing copy of the advice file dated 27 July 2002
  - b) Advice letter sent by the Crown Prosecution ("CPS" ) to Staffordshire Police, dated 2 July 2002
  - c) File Front Sheet
  - d) Schedule of offences
  - e) Report by a police inspector in relation to an allegation of forgery
  - f) Accident Report prepared by HSE dated 12 September 1994

- g) Witness statement dated 3 August 1994
- h) Letter dated 26 January 2001
- i) Witness statement dated 20 June 2001
- j) Witness statement dated 14 February 2002
- k) Witness statement dated 21 March 2002

## Analysis

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### Exemptions

10. Section 40(2) of the Act is an exemption which relates to the personal information of third parties. This provision creates an absolute exemption (i.e. one not subject to the public interest test) for information falling within the definition of personal data contained in section 1(1) of the Data Protection Act ("the DPA") (see attached Legal Annex for the full text of the sections of the DPA cited in this Decision Notice).
11. Personal data is defined in section 1(1) of the DPA as: -
  - "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."
12. The Commissioner is satisfied that all the requested information falls within a) and/or b) above. This is since the data relates to living individuals that can be identified from that data or that data and other information in the possession of the data controller. The data relates to an individual being investigated about the commission of an alleged offence and those who may have witnessed the said commission.
13. The Commissioner is also satisfied that some of the requested information is "sensitive personal data". It is personal data which falls into one of the categories set out in section 2 of the DPA, e.g. data relating to a person's physical or mental health, his political opinions or his sexual life. The Commissioner considers, having had sight of the requested information, that some of it constitutes *sensitive personal data* as it falls into one of the categories set out in section 2 of the

DPA. The presumption is that because sensitive personal data could be used in a discriminatory way and is of a private nature, it needs to be treated with greater care than other personal data. In particular, if a data controller is processing sensitive personal data it must satisfy one or more of the conditions for processing<sup>1</sup> which apply specifically to such data, as well as one of the general conditions which apply in every case.

14. Section 40(3) of the Act provides that section 40(2) will apply if disclosure of the information would contravene any of the data protection principles or breach a notice under section 10 of the DPA. Section 10 of the DPA entitles an individual to serve a written notice upon a data controller stating that processing his or her personal data would cause him or her unwarranted damage or distress. The Commissioner is satisfied that no such notice has been served in this case.
15. However, the Commissioner, having had sight of the requested information, considers it contains personal data such as identifying details of the author, evaluations on a witness and other views and opinions relevant to the investigation. It also, by its definition, contains the personal data of a person accused of a serious crime. The Commissioner is conscious that the accused person (who was not charged with any offence) was not a volunteer to, or an authoriser of, the collection of this information which now constitutes his personal data. The Commissioner is therefore satisfied that the disclosure of this information to the public would contravene data protection principles. He considers the most relevant data protection principle to be the first data protection principle, which 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.”

16. The Commissioner is also conscious that the accused person has not consented to its public dissemination. He further considers that in this case the other relevant third parties (the author and witnesses in this case) provided their personal data with the expectation that it was

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[http://www.ico.gov.uk/for\\_organisations/data\\_protection/the\\_guide/conditions\\_for\\_processing.aspx](http://www.ico.gov.uk/for_organisations/data_protection/the_guide/conditions_for_processing.aspx)

being provided in confidence and would only be used for the purpose for which it was obtained, namely relevant investigations.

17. The Commissioner acknowledges that in some cases how an investigation was or was not conduct may well provide strong factors that would mean disclosure of personal data is not unfair. However, having regard to the particular information and its contextual setting, this is not such a case. The Commissioner therefore considers that disclosure of third party personal data in this case (i.e. the withheld information) would be unfair to the individuals concerned and would therefore contravene the first data protection principle.
18. Having found that section 40(2) exempted disclosure of the withheld information the Commissioner did not go on to consider section 41.

### **Procedural Requirements**

19. 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."

20. Section (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

21. 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."

22. The Commissioner notes that the complainant made his request for information on 6 February 2010 but the public authority did not issue the refusal notice until 21 April 2010. Specifically, in relation to section

1(1)(a), the Commissioner finds that it breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request. In failing to provide a refusal notice within the statutory time limit, the Constabulary also breached section 17(1).

## The Decision

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23. 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:
- It correctly withheld the information under the exemption at section 40(2) of the Act.
24. However, the Commissioner has also decided that the following elements of the request were not dealt with by the public authority in accordance with the Act:
- It breached section 10(1) by failing to inform the complainant whether or not it held the requested information within 20 working days of the request; and
  - It breached section 17(1) by failing to issue a valid refusal notice within the statutory time limit.

## Steps Required

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25. The Commissioner requires no steps to be taken.

## Other matters

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

### Late Review

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 expresses his concerns that it took over 60 working days for an internal review to be completed.

## Right of Appeal

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27. 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: 0300 1234504

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)

28. 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.
29. 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 31<sup>st</sup> day of March 2011**

**Signed .....**

**Alexander Ganotis  
Group Manager – Complaints Resolution  
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 –

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

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **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 the 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.”

## **Data Protection Act 1998**

### **SCHEDULE 2**

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

##### **Condition 1 provides that –**

The data subject has given his consent to the processing.

##### **Condition 2 provides that –**

The processing is necessary—

- (c) for the performance of a contract to which the data subject is a party, or
- (d) for the taking of steps at the request of the data subject with a view to entering into a contract.

##### **Condition 3 provides that –**

The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

##### **Condition 4 provides that –**

The processing is necessary in order to protect the vital interests of the data subject.

##### **Condition 5 provides that –**

The processing is necessary—

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

**Condition 6 (1) provides that –**

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

**Condition 6 (2) provides that –**

The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

### **SCHEDULE 3**

#### **Conditions relevant for purposes of the first principle: processing of sensitive personal data.**

##### **Condition 1 provides that –**

The data subject has given his explicit consent to the processing of the personal data.

##### **Condition 2 (1) provides that –**

The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.

##### **Condition 2 (2) provides that –**

The Secretary of State may by order—

- (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
- (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

##### **Condition 3 provides that –**

The processing is necessary—

- (a) in order to protect the vital interests of the data subject or another person, in a case where—
  - 1. consent cannot be given by or on behalf of the data subject, or
  - 2. the data controller cannot reasonably be expected to obtain the consent of the data subject, or
- (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

**Condition 4 provides that –**

The processing—

- (a) is carried out in the course of its legitimate activities by any body or association which—
  1. is not established or conducted for profit, and
  2. exists for political, philosophical, religious or trade-union purposes,
- (b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,
- (c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and
- (d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

**Condition 5 provides that –**

The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

**Condition 6 provides that –**

The processing—

- (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),
- (b) is necessary for the purpose of obtaining legal advice, or
- (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

**Condition 7 (1) provides that –**

The processing is necessary—

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under an enactment, or
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

**Condition 7 (2) provides that –**

The Secretary of State may by order—

- (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
- (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

**Condition 8 (1) provides that –**

The processing is necessary for medical purposes and is undertaken by—

- (a) a health professional, or
- (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

**Condition 8 (2) provides that –**

In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

**Condition 9 (1) provides that –**

The processing—

- (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
- (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
- (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

**Condition 9 (2) provides that –**

The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.



**Condition 10 provides that –**

The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.