

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 28 March 2011

**Public Authority:** Crown Prosecution Service  
**Address:** 50 Ludgate Hill  
London  
EC4M 7EX

### Summary

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The complainant asked the Crown Prosecution Service (the “public authority”) to provide a schedule of information relating to the prosecution of a named individual. The public authority refused to disclose this using the exemption under section 40 (personal information) of the Freedom of Information Act 2000 (the “Act”).

The Commissioner’s decision is that the exemption in section 40(2) is engaged for the entirety of the information and that disclosure would breach the Data Protection Act 1998 (the “DPA”). The complaint is not upheld.

### 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. On 1 October 2009 the complainant, a journalist, originally made a request for the following information:

*“I would like to see all of the papers that the Crown Prosecution Service holds relating to the prosecution during 1997 and 1998*

*of Nicholas John Griffin (dob 19.03.59). Mr Griffin was successfully prosecuted under the 1986 Public Order Act, with his trial taking place at Harrow Crown Court between April 27<sup>th</sup> and 30<sup>th</sup> 1998".*

3. This was refused. As a result of this refusal the complainant made the request which is being considered in this Notice.
4. An earlier decision has already been made regarding this subject matter – FS50293914<sup>1</sup>. A further related decision is being made at the same time as this case – FS50352663.

## The request

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5. On 21 January 2010 the complainant again wrote to the public authority. As part of that correspondence he made a further request as follows:

*"I would now ask that you provide us with a full schedule of the material that you hold".*

6. The public authority did not respond to this request and, as a consequence, the Commissioner made an earlier decision on 31 August 2010 requiring the public authority to issue a response (as referred to above).
7. As a result of the decision, on 27 September 2010 the public authority wrote to the complainant. It advised him that it did hold the information requested but that it was exempt by virtue of section 40(2) (personal information).
8. On 30 September 2010 the complainant asked for an internal review. Having not received one, the complainant wrote to the Commissioner on 18 November 2010. The Commissioner contacted the public authority and was advised that its internal review would be sent out before the end of 29 November 2010.
9. On 29 November 2010 the public authority sent its internal review. It maintained its earlier position.

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<sup>1</sup>[http://www.ico.gov.uk/~/\\_/media/documents/decisionnotices/2010/FS\\_50293914.ashx](http://www.ico.gov.uk/~/_/media/documents/decisionnotices/2010/FS_50293914.ashx)

## The investigation

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### Scope of the case

10. In its letter of 8 October 2010 the complainant clarified the extent of his complaint in relation to both this request and his earlier one. In relation to this request he specifically stated:

*"The CPS continues to protect the documents, and even its own schedule of documents, from disclosure. In our view the exemptions relied on are not appropriate and do not reflect the high public interest in the disclosure of these documents, which outweighs any public interest in secrecy in this case".*

### Chronology

11. After receiving a copy of the internal review of 29 November 2010 the Commissioner wrote to the complainant on 1 December 2010 to confirm whether or not he wished a decision to be made. On the same date the complainant confirmed that he did but asked for some time to make further submissions. He advised that these would be likely to be provided before 10 December 2010.

12. On 4 January 2011 the complainant wrote to the Commissioner to advise that he did not wish to make any further representations. The Commissioner acknowledged this correspondence.

13. On 5 January 2011 the Commissioner raised some queries with the public authority and invited any further submissions to support its position. He made specific enquiries about a schedule of documents which he had been provided with and asked whether or not this had actually existed at the time of the request or whether it was compiled as a result of the request. In a response later that day he was advised:

*"... the schedule did not exist at the time of the request. It was created from the casework documentation already held within the archived boxes".*

14. The Commissioner then raised further queries including asking for the date on which the public authority compiled the schedule. Having had sight of the full prosecution papers when considering the other request made by the complainant, the Commissioner's attention was also drawn to two other schedules which were part of that information. He therefore asked whether or not the public authority had considered the

relevance of these two schedules, namely an MG6C<sup>2</sup> and an MG6D<sup>3</sup>. Noting that neither of these schedules list material which is to be used as part of the prosecution case, the Commissioner also enquired whether or not any list usually existed showing what was used at the trial. In its response of 14 January 2011 the Commissioner was advised:

*"[The complainant] asked to be provided with a full schedule of the material that we hold in relation to the case of Mr Griffin. This schedule was not available at the time of this request and had to be prepared to show all the information that we held. This was done by [name removed] and is dated 20 September 2010. You have been sent a copy of that schedule.*

*It is not the practice to complete a full schedule of all of the information at the time the prosecution file is prepared.*

*Schedules MG6C and MG6D are schedules that are compiled by the Police and ... are from the Police to the CPS and only contain information of non-sensitive unused material and sensitive material. They are schedules only and the material referred to is normally held by the Police. The MG6C lists non sensitive material that has been collected during the Police investigation, but the material does not form part of the prosecution case. The MG6D provides sensitive information from the Police to the CPS and is not disclosed.*

*The schedule raised by [name removed] lists all the material within the prosecution file. It is not normal practice to have a schedule of this detail within the case file".*

15. The Commissioner asked the public authority to confirm whether or not it considered the schedule it had compiled to be in the scope of the request. He also asked it to confirm whether or not it considered either of the MG6C and MG6D schedules created by the police to be within scope.

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<sup>2</sup> An MG6C is standard form completed by the Police when compiling a case for presentation to the CPS. It is a "Police Schedule of Non-sensitive Unused Material". The material listed does not form part of the prosecution case.

<sup>3</sup> An MG6D is another standard form completed by the Police when compiling a case for presentation to the CPS. It is a "Police Schedule of Sensitive Material". The material listed does not form part of the prosecution case.

16. The public authority confirmed that it believed the schedule it had compiled was in the scope of the request. In respect of the MG6C and MG6D it stated that it did not believe these were in the scope of the request because: *"... they are not schedules that list all casework material"*.

## Analysis

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### Substantive procedural matters

#### Section 1 – general right of access

17. The public authority only considers the schedule that it compiled on 20 September 2010 to fall within the scope of the request. The Commissioner will therefore consider its position in relation to this item and also the MG6C and MG6D schedules.

18. Section 1(1) of the Act states:

*'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.'*

#### *The schedule compiled by the public authority*

19. The request was made on 21 January 2010. The schedule which the public authority considers to be within the scope of the request was not compiled until 20 September 2010.
20. However, the Commissioner's view is that requests are for *"recorded information"* and not for documents. The fact that a schedule does not actually exist at the time a request is made does not mean that the information that it might contain does not exist. If the information which would be contained in the schedule described by the applicant is also contained in other documents held by a public authority, that information is held.

21. In an earlier decision<sup>4</sup> the Commissioner found:

*“The information already exists: the public authority cannot be said to be creating it. And, while producing a list of the documents in which the relevant information is contained may be a new task, it is not creating new information; it is simply a re-presentation of existing information as a by-product of responding to the information request”.*

22. The public authority was able to compile a schedule itself and determined that this was in the scope of the request, even though it was compiled at a later date. The Commissioner agrees that it was correct to take this position and he will therefore go on to consider whether or not the resulting schedule is suitable for disclosure later in this Notice.

#### *MG6C and MG6D schedules*

23. The request asks for: *“a full schedule of the material that you hold”*. The Commissioner here notes that the two schedules which are included within the information held by the public authority, which he has viewed, both relate to material which does not form part of the prosecution case. The lists therefore consist of all those items which are not held by the public authority as they are deemed as not required for the prosecution. It is therefore clear to the Commissioner that these fall outside the scope of the request.

## **Exemptions**

### **Section 40 – personal information**

24. 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”.*

25. The exemption provided by section 40(2) is an absolute exemption in combination with section 40(3)(a)(i) or 40(3)(b). This is where disclosure of information which falls under the definition of personal

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[http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision\\_notice\\_fs50070854.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50070854.pdf)

data contained in section 1(1) of the Data Protection Act 1998 (DPA) would breach any of the data protection principles.

26. In order to decide whether or not this exemption is engaged, the Commissioner shall consider whether the requested information is the personal data of one or more third parties, whether it can be considered sensitive personal data under the Act and whether the release of this information would be fair and lawful.

*Is the information personal data?*

27. Section 1(1) of the Data Protection Act 1998 (the DPA) provides the following definition of personal data:

*"'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."*

28. This provides two criteria that must be fulfilled for information to constitute personal data; the information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.
29. Having viewed the withheld information, the Commissioner considers it clear that the information in question here relates to the specified individual in that it relates to a criminal investigation concerning him. The Commissioner has therefore concluded that because the information in question relates to the specified individual, and that he would be directly identifiable from this information, this is therefore his 'personal data' according to the definition given in section 1(1) of the DPA.
30. Given the nature of this information, the Commissioner has also gone on to consider whether this information is 'sensitive personal data'.

*Is the information sensitive personal data?*

31. Section 2(g) of the DPA provides that personal data consisting of information as to the commission or alleged commission by the subject of an offence is sensitive. Furthermore, section 2(b) also provides that someone's political opinions are also sensitive. The Commissioner considers it clear that both descriptions can be applied to the

information in question and so this is, therefore, sensitive personal data.

32. As the information requested in this case has been compiled using the information which is the subject of the complainant's other information request (FS50352663), the Commissioner considers that, for the same reasons given in that case, all of the information in question is the sensitive personal data of the specified individual and that disclosure of most of the information would be unfair and in breach of the first data protection principle. The Commissioner accepts that there would be less prejudice from just disclosing details of the documents in the schedule but he finds that this would still provide enough insight into the case against him to be unfair. The Commissioner notes that even if it was fair to disclose some of the information this would not lead to disclosure as the information is sensitive personal data and one of conditions in schedule 3 of the DPA must also be satisfied to enable disclosure (the Commissioner has also considered further conditions specified in statutory orders). The Commissioner finds that none of the conditions are satisfied. In considering these schedules the Commissioner has taken an 'applicant blind' approach and the identity of the requester as a journalist is not relevant.
33. The exemption provided by section 40(2) is therefore correctly engaged in relation to all the information.

## The Decision

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34. 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 determined that the MG6C and MG6D were not in the scope of the request;
  - it correctly determined that the schedule within the scope of the request was properly exempt under section 40(2) of the Act.

## Steps required

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35. The Commissioner requires no steps to be taken.



## Other matters

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

### *Time for internal review*

37. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome of the review within this time frame. The public authority should ensure that internal reviews are carried out promptly in future.

## Right of Appeal

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38. 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)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 28<sup>th</sup> day of March 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**

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

## **Legal annex**

### **Freedom of Information Act 2000**

#### **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
- (a) either the first or the second condition below is satisfied.”

#### **Section 40(3) provides that –**

“The first condition is-

- (b) 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
  - (i) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

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.”

### **Data Protection Act 1998**

#### **Sensitive personal data.**

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

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