

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

22 December 2008

**Public Authority:** Information Commissioner  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 ("the Act"), he is unusually under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice.

### Summary

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The complainant wrote to the Information Commissioner to request notes of telephone conversations and internal correspondence regarding complaints he had previously submitted against the BBC. The Commissioner responded to the request by disclosing internal correspondence relating to his investigations into these complaints. However the Commissioner withheld the legal advice related to the complaints under the exemption in section 42 of the Act (legal professional privilege). The Commissioner, in his role as regulator, has now reviewed his handling of the request and has found that the withheld information constitutes the personal data of the complainant and that therefore the correct approach would have been to refuse to confirm or deny if the information was held under section 40(5)(a) of the Act. The Commissioner requires no steps to be taken.

### 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 8 July 2007 the complainant made a request to the Commissioner for information regarding complaints he had previously submitted against the BBC. The request read as follows:

“In respect of [the complainant] and ICO correspondence, decision notices, and complaints, please supply the following information:

- 1) A list of all telephone conversations between the ICO and the Information tribunal and the BBC. Please list the dates and time of conversation and the participants.
  - 2) A transcript off [sic] any such conversations and the notes arising.
  - 3) A copy of all ICO internal correspondence in respect of the above, including meeting notes.”
3. The Commissioner responded to the request on 7 August 2007. In response to parts 1 and 2 of the request the Commissioner provided the complainant with 3 “Records of Telephone Conversation” notes. The Commissioner explained that he did not hold transcripts of the conversations. In response to part 3 of the request the Commissioner provided the complainant with 12 internal emails.
4. The Commissioner explained that he held further information in the form of legal advice but that he was withholding this information under section 42 of the Act which provides for an exemption for information that attracts legal professional privilege. Section 42 is a qualified exemption and therefore the Commissioner carried out the public interest test after which he concluded that the public interest favoured maintaining the exemption.
5. The Commissioner invited the complainant to request an internal review if he was unsatisfied with the response he had received.
6. On 21 September 2007 the complainant contacted the Commissioner to request that he carry out an internal review of the handling of his request.
7. The Commissioner presented the findings of the internal review on 24 January 2008. The Commissioner acknowledged that this was a very belated response to the request for internal review and apologised to the complainant unreservedly.
8. In the review the Commissioner explained that there had been a misunderstanding in the original response to the request as some information that was relevant to the request had been withheld because it was wrongly believed that the information was legal advice. The Commissioner said that it was now apparent that this information should have been disclosed and as a result the information was made available to the complainant.

9. The Commissioner said that he had concluded that the information that constituted legal advice had been justifiably withheld under section 42 of the Act. The Commissioner provided the complainant with a copy of his guidance on Legal Professional Privilege.<sup>1</sup> In requesting an internal review the complainant had asked the Commissioner to explain the legal basis for what he referred to as “legal privilege” and asked which Act of Parliament applied to this. In response the Commissioner explained that legal professional privilege was a common law concept and had been developed by the courts in recognition of the need for communications between a professional legal adviser and a client to be confidential and not released without consent.
10. The complainant had also asked the Commissioner to define “public interest” and what his interpretation of this was. In response the Commissioner provided the complainant with a copy of his guidance on the public interest test<sup>2</sup> and explained that the public interest could be loosely defined as “the common well-being” or the “general welfare”. The Commissioner said that when determining whether the public interest in disclosure outweighs the public interest in withholding information he considers, in the context of a particular case, the competing interests in favour of disclosure and those against.
11. Finally, the Commissioner said he appreciated that, given his role in promoting and enforcing the Act, it was incumbent upon him not to withhold information, relying on an exemption, lightly. Nevertheless, the Commissioner said that he believed that in order for him to make decisions regarding whether to disclose information in response to a freedom of information request that are as soundly based as possible it is vital that he is able to rely on obtaining frank advice from his legal advisers.

## The Investigation

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### Scope of the case

12. On 13 February 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the decision to refuse to disclose all of the information falling within the scope of the request.
13. The failure to complete an internal review within a reasonable time is not addressed in this notice as this is not a requirement of part 1 of the Act. However the Commissioner has commented on this in the “other matters” section at the end of this notice.

### Chronology

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/legal\\_professional\\_privilege.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/legal_professional_privilege.pdf)

<sup>2</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_3\\_public\\_interest\\_test.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_public_interest_test.pdf)

14. In investigating the complaint the Commissioner has reviewed all of the documentation associated with the complaint as well as the information which has been withheld from the complainant. The Commissioner has also taken advice from members of staff who were not involved in dealing with the original request or the internal review.

### **Findings of fact**

15. The withheld information constitutes legal advice from the Commissioner's legal advisers relating to complaints that the complainant had previously submitted against the BBC. Some of the internal correspondence that was disclosed to the complainant was subject to minor redactions where legal advice was also withheld.

### **Analysis**

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16. A full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

### **Exemption**

#### **Section 40(1) – (Personal information)**

17. The Commissioner responded to the complainant's request under the Act and disclosed a quantity of information falling within the scope of the request. Information that constituted legal advice was withheld under the exemption in section 42 of the Act. However, the Commissioner, in his role as regulator, has now taken the opportunity to review the handling of the complainant's request and has concluded that the information that was both disclosed and withheld was the personal data of the complainant.
18. Section 40(1) of the Act provides that information is exempt from disclosure if it constitutes personal data of which the person making the request is the data subject. Personal data is defined in the Data Protection Act 1998 ("DPA 1998") as data which relate to a living individual who can be identified from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. In this case the Commissioner is the data controller.
19. The Commissioner's understanding of the nature of personal data is informed by the recent discussions by the Article 29 Working Party (a European advisory body on data protection and privacy).
20. Following these discussions the Commissioner reissued his guidance in August 2007. This guidance is designed to assist organisations and individuals to determine whether information may be classified as personal data. In order to do this the guidance asks a series of questions.

21. The Commissioner's Guidance can be viewed in full at the following link:

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)

22. The Commissioner has reviewed all of the information falling within the scope of the request and has found that the complainant, a living individual, could be identified from that information. Having considered the content of the information alongside the questions asked in his guidance he is satisfied that all of the information falling within the scope of the request is the personal data of the complainant.

### **Section 40(5)(a) – (Exclusion from the duty to confirm or deny)**

23. Section 40(5)(a) provides that the duty to confirm or deny under section 1(1)(a) does not arise in relation to information which is (or if it were held would be) exempt under section 40(1) of the Act. Therefore the Commissioner, in his role as a public authority, was not obliged to respond to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(a).
24. The Commissioner acknowledges that the correct approach would have been to refuse to confirm or deny if it held the requested information and then deal with the request as a subject access request under section 7 of the DPA 1998.
25. The Commissioner will not proactively seek to identify or consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA 1998, are closely linked to Article 8 of the Human Rights Act. The Commissioner may be in breach of his obligations under the Human Rights Act if he ordered public authorities to confirm or deny whether information was held under section 1(1)(a), or disclose information under section 1(1)(b) without considering these rights, even if the public authority has not cited the exemption. The Information Tribunal has supported this approach when it stated that:

*"If the Commissioner considered that there was a section 40 issue in relation to the data protection rights of a party, but the public authority for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider the data protection issue because if this information is to be revealed, it may be a breach of the data protection rights of data subjects... Section 40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects."<sup>3</sup>*

26. In view of the above, the Commissioner takes the view that it is appropriate for public authorities to identify information within a request which is subject to section 40(1) or (5) when it is received. Having done so, it should then consider access to that information under the DPA 1998 subject to the applicant providing

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<sup>3</sup> Bowbrick v The Information Commissioner [EA/2005/0006], para. 51.

any identification that may be required to prove that they are the data subject. For the avoidance of doubt, the Commissioner considers it unnecessary for applicants to submit a separate request under the DPA 1998. Public authorities should then go on to consider any of the outstanding elements of a request under the Act.

## The Decision

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27. The Commissioner's decision is that the Commissioner, in his role as a public authority, did not have a duty to comply with section 1(1)(a) on the basis of the exemption at section 40(5)(a).

## Steps Required

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28. The Commissioner requires no steps to be taken.

## Other matters

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

As is documented at paragraph 7, the Commissioner has apologised unreservedly to the complainant for the delay in conducting the internal review. Clearly, on this occasion, the Commissioner failed to follow his own good practice advice which states that internal reviews should be conducted within 20 working days and in no case should they exceed 40 working days. As a result, the Commissioner's Good Practice and Enforcement team have raised the matter with his Internal Compliance team to ensure that the procedures in place for tracking internal reviews are robust and effective.

The Commissioner would encourage all public authorities to deal with requests for information in accordance with the appropriate legislation and to always initially consider the possibility of the application of section 40(5)(a) when considering its response to requests of this kind. This will ensure that public authorities focus on their responsibilities under the DPA 1998 as well as the Act.

Whilst the Commissioner acknowledges that he should have refused to confirm or deny if he held the requested information under the Act, given that the information constitutes the personal data of the complainant, he is entitled to request this information under section 7 of the DPA 1998. The Commissioner intends to carry out a separate assessment under section 42 of the DPA 1998. This is a separate legal process from the consideration of a complaint under section 50 of the Act and so does not form part of this decision notice. The Commissioner will

contact the complainant separately to inform him of the outcome of this investigation.

## Right of Appeal

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30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

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 22nd day of December 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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



## Legal Annex

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### 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 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(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