

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 8 February 2010

**Public Authority:** The Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

### Summary

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The complainant requested the answers volunteered by serving judges in 1998 and those subsequently appointed on the issue of Masonic membership. The public authority applied section 40(2) to this information because it explained that processing the data in this way would not accord with the first data protection principle as it would be unfair. It also explained that it believed this information was sensitive personal data and that there were no relevant schedule 3 conditions. The public authority upheld its position in its internal review. The Commissioner has determined that he does not believe that the information constitutes sensitive personal data. He has found that the disclosure of the information would accord with the first data protection principle and would not contravene any other data protection principles. Section 40(2) was therefore incorrectly applied. He has therefore found breaches of section 1(1)(b) and 10(1). He orders all of the relevant information to be disclosed to the complainant within 35 calendar days.

### 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 15 August 2008 the complainant requested the following information in accordance with section 1(1) of the Act:

*'I request under the Freedom of Information legislation, the answers given by the serving judges and those subsequently appointed on the issue of Masonic membership.*

*The issue was first raised back in 1998 by Mr Jack Straw MP and the then Lord Chancellor and the question of Masonic membership was put to judges, though they could decline to answer. It is this list I require with the answers, member, not a member or declined to answer.*

*I require a print out of the information or a data file on CD rom.'*

3. On 5 September 2008 the public authority provided a response. It explained its view of the background TO THE registration system for Freemasonry. It also stated that there is no register that exists and that it did not plan to alter the requirement to declare membership [although it has subsequently removed this requirement]. It said that the information that was requested is exempt under section 40(2) of the Freedom of Information Act. This is because it felt that the release of the information would be unfair on the data subjects. It also explained that it believed that the information requested was sensitive personal data and that there were no conditions in Schedule 3 of the Data Protection Act 1998 (DPA) that could be satisfied in this instance. It confirmed that it did not believe that condition 3 was satisfied as disclosure was not necessary to protect anyone's vital interests. It stated that it believed that the judges have a reasonable legitimate interest for this data to remain private and confidential. It provided details of its internal review process and also advised the complainant that he could then appeal to the Commissioner.
4. On 16 October 2008 the complainant requested an internal review from the public authority. He stated the following reasons why he believed that the information should have been disclosed:
  - The judiciary must be impartial and their membership of orders that require an oath of loyalty or allegiance is inconsistent with even handed administration of justice.
  - He believes that a Masonic judge may not be prepared to remove himself from a case involving a fellow Mason, as it would be a breach of the oath of loyalty.
  - He believes the information was not sensitive and would only be thought so if it would prevent the fulfilment of the oath of loyalty.
  - That it is important that the relevant scrutiny is possible and that the public know who are Masons to ensure that justice can be seen to be done.
  - That the registration requirements are specifically required to ensure that justice is done.
  - That the defendant has the right to an impartial system of justice in accordance with Article 6 of the European Convention of Human Rights.

- That the information is required to ensure justice in his own case.
  - The individual right of the judge does not transcend the rights of the people over whom he makes decisions. The judge has the choice and the people do not.
5. On 9 December 2009 the public authority communicated the results of its internal review to the complainant. It explained that it believed it had correctly handled the request. It explained that it still believed the exemption found in section 40(2) applied and that the information was the sensitive personal information of the judges. It explained that there were no conditions in Schedule 3 that were met. It explained that in its view condition 3 was not satisfied as it did not consider that the processing of the data was necessary to protect anyone's vital interests. It said that it felt that this information should be afforded the appropriate protection with the correct application of the Data Protection Act and that the judges have legitimate expectations that the information would remain confidential.

## The Investigation

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### Scope of the case

6. On 12 December 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 following points:
- That the Commissioner should ensure that the public's Article 6 rights are protected and that there is no bias in decision making.
  - That the outcome is especially important where the issue is not determined by jury.
  - That the individual chooses to be a Mason and he enters with his eyes open. The oath of Masonic loyalty may compromise impartiality in his public role.
  - That he suspects that the withdrawal from cases may not occur in all cases when a potential conflict is apparent.
7. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. For clarity, the Commissioner is only able to consider whether the information requested should be disclosed to the public. Furthermore, the Commissioner is not able to consider whether the requirement of the judiciary to register in the first place complied with the European Convention of Human Rights. This was raised because there was a decision that related to similar requirements in *Grande Oriente d'Italia di Palazzo Guistiniani v. Italy (no 2)* [26740/02] the outcome of which was a genuine concern at the time of the request.
8. The Commissioner is unable to consider the contents of any Select Committee Report due to Parliamentary Privilege (this is the outcome of *Office of*

*Government Commerce v Information Commissioner & Anor* [2008] EWHC 737 (Admin)). Therefore the Select Committee Reports have not been considered by the Commissioner as evidence in this case.

## Chronology

9. On 24 April 2009 the Commissioner wrote to the complainant. He explained his preliminary verdict and asked the complainant whether he would like the investigation to continue.
10. On 29 April 2009 the complainant telephoned the Commissioner. He explained that he did want the case to continue. He consolidated what was said in a letter. In particular he emphasised that registration was voluntary for those judges prior to 1998 and that he felt it was essential to the public to have confidence in impartial decision making.
11. On 29 September 2009 the Commissioner wrote detailed enquiries to the public authority. He focussed particularly on how the information was held and the reasonable expectations of the data subjects.
12. On 2 October 2009 the complainant telephoned the Commissioner and asked for an update in this case. The Commissioner provided this update by email.
13. On 6 November 2009 the Commissioner received detailed submissions from the public authority.
14. On 27 January 2010 the Commissioner asked the public authority whether he could present its arguments outside a confidential annex. He was told the same day that he did not have permission.

## Findings of fact

15. In 1998, a requirement was imposed on new judges to declare whether or not they were freemasons as a condition of appointment. This came as a result of the first two Home Affairs Committee reports on 'Freemasonry in Public Life.'
16. For those who were appointed before that date there was a voluntary registration scheme. Each judge received a letter from the Lord Chancellor explaining the situation and inviting the individual to declare his or her Masonic status.
17. Each judge was also under a continuous obligation to inform the Lord Chancellor of any changes to their status in relation to Freemasonry.
18. The requirement to register was ended on 5 November 2009. It was explained that 'it would be disproportionate to continue the collection or retention of this information.' The public authority was also concerned that the outcome of *Grande Oriente d'Italia di Palazzo Guistiniani v. Italy (no 2)* [26740/02] would have potentially made its position unsustainable.

19. The public authority also explained that it thought that the concerns were addressed by existing safeguards that help support the proper performance of judicial functions. It identified these safeguards as the judicial oath, the availability of the complaints procedure and the Office of Judicial Complaints, the independence of the Judicial Appointments Commission which recommends candidates for judicial appointment, and judicial terms and conditions of service.
20. The most recent figures released by the public authority indicate there are 3,808 judges in England and Wales and 205 (or 5.4 per cent) have declared that they are Freemasons.

## Analysis

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### Substantive Procedural Matters

*What recorded information is held that is relevant to the request for information?*

21. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the time of the request for information. This is the only information that a public authority is obliged to provide. This is made clear in section 1(4) of the Act.
22. The public authority has explained that it has not kept a single register up to the date of the request.
23. The Commissioner has established that the information is held by the public authority in a different format. The information for each judge can be found by either checking that judge's personal file or a record on the electronic judicial database. He is satisfied that it is held and can be collated within the costs limit.
24. The Commissioner therefore has determined that there are two different sets of judges to consider when considering this case:
  1. Those judges who were appointed before 1998 who volunteered their Masonic status. There was no obligation to do so.
  2. Those judges appointed from 1998 to the date of the request (15 August 2008) for whom declaring their Masonic status was a condition of appointment.

### Exemptions

#### *Section 40(2)*

25. In analysing the application of section 40(2), the Commissioner considered a) whether the information in question was personal data and b) whether disclosure of the personal data under the Act would contravene the first data protection principle.

*Is the information personal data?*

26. Personal data is defined in section 1 of 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,*

*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.'*

27. Data is defined in section 1 of DPA. The first category of data within that definition is information *"which is being processed by means of equipment operating automatically in response to instructions given for that purpose."* The Commissioner is satisfied that the information in this case is processed in such a manner because it is processed on an electronic database.

28. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "Determining what is personal data" which can be accessed at:

[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)

29. The Commissioner notes that the withheld information in this case amounts to the name of a judge and whether or not they have declared that they are a Mason (and in the event that they were appointed before 1998 it will note the fact that they have not declared one way or the other where that is the case).

30. The Commissioner accepts that each entry of this data is directly linked to the relevant judge. It is therefore personal data.

*Is the information sensitive personal data?*

31. The DPA provides an additional layer of protection for information that is *'sensitive personal data.'*

32. *'Sensitive personal data'* is defined by section 2 of the DPA which states:

*'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 [1992 c. 52.] 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.'*

33. The public authority argued in their refusal notice, internal review response and its submissions to the Commissioner that the information requested was sensitive personal data within the meaning of section 2 of the DPA. It submitted that membership of the Freemasons should be considered to be covered by section 2(c) of the DPA and be a 'belief of a similar nature [as to a religious belief]'.
34. The public authority explained that it wished for all of its submissions to be treated in confidence. It explained that information it provided was confidential and supplied subject to the provisions in section 59(1) DPA. It said that it assumed that the supplied information will not be disclosed by the Information Commissioner. The Commissioner has therefore placed these arguments and his analysis for this point in a confidential annex. This information will be disclosed to the public authority alone and not to the public.
35. Having considered the arguments, the Commissioner has determined that he does not believe that an individual's Masonic status amounts to sensitive personal information under the definition in section 2 of the DPA.

*Would disclosure contravene the first data protection principle?*

36. The first data protection principle has two main components and, in cases involving sensitive personal data, there is an additional component. These are as follows:
  - requirement to process all personal data fairly and lawfully;
  - requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
37. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.
38. It is also important to note that any disclosure under this Act is disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it. The Tribunal in the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 and EA/2006/0013) (following *Hogan and Oxford City Council v The Information Commissioner* (EA/2005/0026 and EA/2005/0030))



confirmed that, “*Disclosure under FOIA is effectively an unlimited disclosure to the public as a whole, without conditions*” (paragraph 52):

[http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews\\_HBrooke\\_v\\_infocomm.pdf](http://www.informationtribunal.gov.uk/Documents/decisions/guardiannews_HBrooke_v_infocomm.pdf).

39. The public authority explained that it wished for all of its submissions to be treated in confidence. The Commissioner has been required to also place these arguments and his analysis for this point in a confidential annex. This information will be disclosed to the public authority alone and not to the public.
40. Having considered both sets of submissions and all the categories of data the Commissioner does not believe that the disclosure of any of the withheld information would contravene the first data protection principle.
41. He also does not believe that any of the other data protection principles would be contravened by the disclosure of this information to the public.
42. Accordingly section 40(2) was not applied correctly in this instance. The Commissioner finds a breach of section 1(1)(b) for not disclosing the non-exempt information and section 10(1) for failing to release the information within twenty working days.

## The Decision

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43. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the Act.
  - *It applied section 40(2) incorrectly to all the withheld information.*
  - *It breached section 1(1)(b) in failing to disclose all the information that it applied section 40(2) to.*
  - *It breached section 10(1) in failing to disclose this information within twenty working days.*

## Steps Required

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44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
  - *It must disclose the following information for every judge appointed before or on the date of the request (15 August 2008):*
    - (i) *Name.*



- (ii) *Masonic status (or the fact that the judge was appointed before 1998 and has not volunteered his/her status, or that post 1998 that any judge did not fill in the relevant part of the form).*

45. 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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46. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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47. 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 served.

**Dated the 8<sup>th</sup> day of February 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### The Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

(1) 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.

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

(3) Where a public authority—

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

(b) has informed the applicant of that requirement,

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

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#### Section 40 – Personal information

(1) 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.

(2) 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.

(3) 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 [1998 c. 29.] 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 [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] 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).

(5) 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 [1998 c. 29.] 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 [1998 c. 29.] 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).

(6) 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 [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] 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**

### **Section 1 - Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires—

- “data” means information which—

(a)

is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b)

is recorded with the intention that it should be processed by means of such equipment,

(c)

is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d)

does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
  - “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
  - “data subject” means an individual who is the subject 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,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;
  - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
    - (a) organisation, adaptation or alteration of the information or data,
    - (b) retrieval, consultation or use of the information or data,
    - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
    - (d) alignment, combination, blocking, erasure or destruction of the information or data;
  - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
  - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

## **Section 2 – 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 [1992 c. 52.] 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.