

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 September 2010

Public Authority: City of London Police
Address: Headquarters
37 Wood Street
London
EC2P 2NQ

Summary

The complainant made a request for information to City of London Police for details of the total remuneration package of the Chief Constable of the force. The police provided some of the information requested however withheld the remaining information on the grounds that section 40(2) of the Freedom of Information Act 2000 applied. The Commissioner has considered the request and agrees that some of the withheld information is exempt from disclosure. However, he has determined that further information should be released. He requires the public authority to take such steps within 35 days.

The Commissioner's Role

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

2. On 11 October 2008 the complainant wrote to the City of London Police (the "public authority") and requested the following information:

"...details of the total remuneration of the Chief Constable of the City of London Police. "Total remuneration" includes, but is not limited to, items such as base salary, bonus, benefits in kind, car allowances, housing allowance or grace-and-favour accommodation, expenses, payments for returning officer duties, pension payments and redundancy payments.

I would like this data annually for the past three full years. I do not mind if the data is compiled by financial or calendar year but it must be consistent throughout the time period. In each year please can you provide me with the name of the Chief Constable, total remuneration and a breakdown of that remuneration.

In relation to my request for pension payments: If this part of the request is refused then I would like the following:

1. How is the pension determined? If it is by formula I request that formula [...]
2. A copy of the provision laid out in the employment contract for the pension scheme."
3. 11 October 2008 was a Saturday and therefore the request is to be treated as being "received" by the public authority on 13 October 2008 for the purposes of section 10(1) of the Act.
4. The public authority responded on 24 January 2009. It provided some information however withheld the remaining information under section 40(2) of the Act.
5. On 3 March 2009 the complainant requested an internal review into certain responses provided by the public authority.
6. The public authority responded on 13 July 2009 with the outcome of its internal review. The public authority provided some additional information however confirmed its view that section 40(2) applied to the remaining disputed information.

The Investigation

Scope of the case

7. On 6 August 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
8. The Commissioner wrote to the complainant on 27 October 2009 to clarify her complaint. He suggested that the public authority had responded in full to those parts of the request which concerned base salary, car allowances, housing allowance and expenses and that there remained the issue of bonus payments to consider. The Commissioner asked the complainant to confirm his understanding.
9. The complainant wrote to the Commissioner on 12 November 2009. She explained that she wished to continue to pursue her request for bonus information and questioned the Commissioner's decision to accept the housing allowance part of the request as having been satisfied. The complainant reiterated that her request was for the Chief Constable's total remuneration package. Later the same day the complainant wrote to the Commissioner again and provided a hyperlink to an online news article which made reference to "off the book" payments made to senior police officers.

Chronology

10. On 26 November 2009 the Commissioner wrote to the public authority to begin the investigation.
11. The public authority responded on 6 January 2010.
12. Having received and considered the public authority's response, the Commissioner required some further information. He wrote again to the public authority on 19 January 2010 and set out what was required.
13. The public authority provided a response on 22 January 2010.
14. The Commissioner spoke to the public authority on the telephone on 25 January 2010 to discuss the case. The Commissioner wrote to the public authority on 3 February 2010 and confirmed that further information was required.
15. The public authority wrote to the Commissioner on 5 February 2010 and provided the requested information.
16. On 26 February 2010 the Commissioner wrote again to the public authority to request the information required to bring

the case to a close.

17. The public authority responded on 23 March 2010 and provided the necessary information.

Findings of fact

18. The Chief Constable of the City of London Police is not referred to as such but is termed "the Commissioner". The Information Commissioner considers that the public authority was correct to provide the Commissioner's details in response to a request about the Chief Constable. To avoid confusion, the police Commissioner is referred to as the "Chief Officer" throughout this Notice.
19. On clarifying her complaint, the complainant did not specify whether she was satisfied with the scope of the information identified by the public authority as being relevant to her request. Therefore, for completeness, the Commissioner asked the public authority to explain how it could be satisfied that it had identified all of the information it held that was relevant to the request. The public authority explained that the manager with overall responsibility for police pay had reviewed the response and had been unable to identify any additional payment made to the Chief Officer. The Commissioner therefore considers that the public authority has correctly identified and considered all of the information it holds that is relevant to the complainant's request.

Analysis

20. Sections of the Act referred to below are quoted in full in the legal annex to this notice.

Substantive procedural matters

General right of access

21. The remaining disputed requests in this case are as follows:
 - details of accommodation provided to the Chief Officer for business use; and

- bonus payments.
22. The Commissioner has considered whether the public authority has met its obligations under section 1(1) in respect of the above information.

Accommodation

23. The public authority had explained to the complainant in its letter of 24 January 2009 that the Chief Officer "has access to accommodation within the City of London Police area but this is only for business use". On 13 July 2009 the public authority further explained that "the accommodation...is not a benefit-in-kind as defined by HM Revenue and Customs".
24. The Commissioner asked the public authority to provide him with details of the accommodation that it provided to the Chief Officer for business use. The public authority explained that the accommodation comprised a bedroom/changing room, a shower, a toilet and a small kitchenette situated in a police station. The accommodation is available for use by the Chief Officer and officers of ACPO (Association of Chief Police Officers) rank. The public authority explained that it did not hold financial records that would satisfy the complainant's request. The police station in question is owned by the City of London Corporation (not the public authority itself). The rooms are cleaned as part of the overall cleaning contract and maintained along with the remainder of the building, by the Corporation.
25. The Commissioner is therefore satisfied that the public authority does not hold information showing a breakdown over the three years prior to the request, relevant to this accommodation used by the Chief Officer.

Bonus payments

26. The public authority explained in its internal review letter to the complainant of 13 July 2009 that "the City of London Corporation deals with the pay and remuneration of City of London Police officers and staff, and much of the information that you requested is held by that Authority and not the City of London Police. An early decision was made to obtain the relevant information from that Authority, rather than pass on those parts of the request relating to information not held by us".

27. The Commissioner was concerned that the public authority did not hold the information sought by the complainant for its own purposes or that the City of London Corporation did not hold it on behalf of the public authority. He therefore made enquiries to ascertain whether the public authority held the information requested. The public authority confirmed that its Finance department held information relating to bonus payments as the information appears on pay audit trails to which they had access. It apologised for any confusion caused as a result of the conflicting information provided. However, what is clear from the response is that the requested information is held by the public authority for its own purposes.
28. As will be explained below, the Commissioner has found that the public authority should have disclosed further information to the complainant at the time of the request. The public authority has therefore breached section 1(1)(b) in respect of the information which it must now disclose.

Exemptions

29. The Commissioner has considered whether the public authority correctly applied section 40(2) of the Act to the details of bonus payments made to the Chief Officer.
30. Section 40(2) provides that information will be exempt information where it constitutes the personal data of a third party (ie someone other than the requester) and where disclosure of that information would breach one or more of the data protection principles as set out in Schedule 1 of the Data Protection Act 1998 (the "DPA").

Is the information personal data?

31. Information constitutes personal data where it relates to a living individual who can be identified from that data.
32. In this case, the withheld information consists of the sums of money paid to the Chief Officer over a three year period. The public authority has explained to the complainant that the Chief Officer received honorarium payments in 2007 and 2008 and a bonus payment in 2008. No payment was made in 2006.
33. The information held constitutes personal data because it clearly relates to the Chief Officer.

Would disclosure breach the data protection principles?

34. The public authority has put forward its view that disclosure would breach the first principle of the DPA, which provides the following:

"Personal data shall be processed fairly and lawfully...".
35. The public authority argued that to disclose the bonus and honorarium payments made to the Chief Officer would be unfair. It explained that the legitimate interests of the public could be met by information already in the public domain, for example the aims and objectives of the force, together with a range of performance indicators, are available in the public authority's annual report.
36. In relation to the bonus payment, the public authority explained that the decision to make a payment and the amount to be paid was linked directly to the Chief Officer's Personal Development Review. Further, the Chief Officer had explicitly confirmed his refusal to consent to disclosure of this information.
37. The public authority has stated that the Chief Officer bonus scheme is a statutory scheme in which chief officers are obliged to take part. Information relating to the scheme is published by the Police Negotiating Board which sets the maximum amount payable to 15% of pensionable pay. The public authority has explained to the Commissioner that the bonus payment was made in line with this scheme and that it did not exceed the statutory maximum.
38. The public authority explained to the complainant that the bonus scheme contained a confidentiality clause and therefore the Chief Officer held a reasonable expectation that the exact detail of his bonus payment would be withheld. Further, in reaching its conclusion that the payment should be withheld, the public authority considered that, owing to the mechanisms in place to ensure the accountability of the payment of bonuses, the legitimate interests of the complainant had been met and that further disclosure would constitute an unwarranted interference into the Chief Officer's private life.
39. The public authority also advanced similar arguments relating to the alleged unfairness to the Chief Officer to justify the withholding of the values of the honorarium payments. The

Commissioner asked the public authority to confirm its policy regarding the making of honorarium payments and to explain the basis on which the payments had been made in this particular case.

40. In response, the public authority explained that there was no policy in place to cover the making of honorarium payments. The 2007 payment was made in lieu of a bonus scheme not having been implemented in the previous year and the 2008 payment was made in recognition of the force achieving lead fraud status.
41. In order to provide as much information as possible to the complainant without breaching the Chief Officer's privacy, the public authority explained to the complainant that it had made performance-related payments totalling £10,500 to the Chief Officer and the Assistant Commissioner in 2007 and £22,449 to the Chief Officer, the Assistant Commissioner and the Commander in 2008.
42. The Commissioner has considered the information the public authority has made available when deliberating as to whether further disclosure would be unfair. In relation to the bonus payment, he considers that by providing the totals paid between two and three senior officers over the relevant two year period, the public authority has in part met the public interest in relation to the transparency of decision-making and the spending of public money. He considers that there is not a strong enough public interest in revealing the exact bonus payment made to the Chief Officer. It would be unfair to the Chief Officer, as it would constitute an unjustified intrusion into his private life. In reaching this decision, the Commissioner has placed weight on the existence of a statutory scheme to ensure the transparency and accountability of the payment of bonuses.
43. However, the Commissioner has also been mindful of the general public interest in openness about payments made to senior public officials and he has considered his guidance concerning public sector salaries, which is available online at the following link:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salary_disclosure.pdf
44. This guidance suggests that, when responding to requests for details of the salary paid to someone employed by a public

authority, the exact salary should not normally be disclosed. It is likely that to do so would breach the DPA. However, the guidance encourages disclosures to be made in bands of £5,000. The Commissioner's approach was tested at the Information Tribunal (the "Tribunal") in the case of *Gibson v Information Commissioner* (EA/2009/0054), where the Tribunal upheld the Commissioner's decision to order disclosure of a council employee's salary to the nearest £5,000.

45. The Commissioner recognises that the information at issue is not the salary but the bonus payments made to the Chief Officer. However, he would emphasise that, any payment made to an employee of a public authority may be subject to legitimate scrutiny, without encroaching on an individual's rights under the DPA. The Commissioner considers that, as the salary scheme links bonus payments to pay, it is appropriate that greater detail is provided in relation to the bonus payments. He does not consider it would be unfair to disclose the bonus payments as a £5,000 band. This outcome balances the expectations of privacy of the individual against the strong legitimate public interest in the public understanding the level of payment made.
46. The Commissioner has also considered whether disclosure of the values of the honorarium payments would be fair. In doing so, he has considered the following factors:
 - the reasonable expectations of the individual concerned;
 - the seniority of the individual in question; and
 - the amount of money involved
47. The public authority has explained that the bonus scheme contains a confidentiality clause. However, the honorarium payments are not covered by the bonus scheme and therefore the confidentiality clause does not apply. The presence of such a clause relating to a similar payment may demonstrate how the Chief Officer would expect such information to be treated. However, the individual concerned is the most senior ranking police officer within the public authority. The Commissioner considers it would be reasonable for the Chief Officer to expect that a high level of information about his role would be made available. There is a clear legitimate public interest in the requested information being provided, to enable the public to assess whether public funds are being used appropriately.

48. The Commissioner has considered the amount of money involved in this case. In this case, whilst the sum of money involved is not a large amount, it is not an insignificant sum.
49. In view of the above, the Commissioner considers that disclosure of the exact honorarium payment details would be fair.

Is there a schedule 2 condition that allows processing?

50. The first principle of the DPA provides that personal data must not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
51. Therefore, the Commissioner is required to consider whether any of the Schedule 2 conditions apply in this case.
52. The most relevant condition is condition 6(1), which 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”.

53. The Tribunal, in the case of *House of Commons v ICO and Leapman, Brooke, Thomas (EA/2007/0060)* set out that the following test should be applied:
 - there must be a legitimate interest in the disclosure of the information;
 - the disclosure must be necessary to meet this legitimate interest, ie there must be no way that the legitimate interest could be met other than by disclosure of the information; and
 - the disclosure must not constitute an unwarranted interference into the individual’s private life.
54. The Commissioner finds that disclosure of the bonus information in a £5,000 band would comply with schedule 2 condition 6. He has concluded that there is a legitimate public interest in disclosure and that disclosure would not constitute an unwarranted interference into the Chief Officer’s private life. Disclosure of the £5,000 band is a proportionate way to

meet the legitimate public interest, considering that it is a statutory scheme and some information has already been provided at a higher level, related to a group of officers.

55. In his analysis as to whether disclosure of the honorarium payments would be fair, the Commissioner has considered whether the public has a legitimate interest in the information being disclosed and whether disclosure would constitute an unwarranted interference into the Chief Officer's private life. He has concluded that there is a legitimate public interest in disclosure and that disclosure would not constitute an unwarranted interference into the Chief Officer's private life.
56. In deciding whether disclosure is necessary to meet the legitimate public interest, the Commissioner has considered what other mechanisms are in place to allow the public to assess whether the honorarium payments made are appropriate. The public authority argues that it has made available sufficient information about payments made to the Chief Officer and the reasons for these payments being made to be able to avoid disclosure of the exact amounts of the honorarium payments. However, the Commissioner considers these to be generic arguments as the public authority has no policy in place which governs the making of honorarium payments to police officers. In particular, the public authority makes no justification for making the 2007 payment beyond the fact that there was no bonus scheme in place the previous year. Despite having made available the aggregate payments made to senior staff, the Commissioner does not consider that the public authority has demonstrated that the system for making honorarium payments is transparent or sufficiently independent to be considered truly accountable. The decision to make the payments was made by a Remuneration Sub-Committee consisting of the Chairman, Deputy Chairman and former Chairman of the public authority. Whilst the Commissioner acknowledges that a formal decision making forum was used, disclosure of the specific values of the payments would be necessary to meet the legitimate interests of the public to understand a payment system which was not supported by a clear policy or assessment mechanism.
57. The Commissioner therefore considers that schedule 2, condition 6(1) of the DPA allows processing of the data in question.

Would disclosure of the information be lawful?

58. The Commissioner has considered whether disclosure of the payments as specified above would be lawful. He has considered whether disclosure of the bonus information in a £5,000 band would be considered a breach of the duty of confidence, imposed by the confidentiality agreement. Considering the proportionality approach he has taken above (derived from article 8 caselaw) the Commissioner is satisfied that there would be a public defence against a breach in confidence, balancing article 8 and article 10 Human Rights. He has also concluded above that the agreement does not cover the honorarium payment. Therefore, he is satisfied that the disclosures may be lawfully made.

Conclusion on disclosure – circumstances of the case

59. However, in ordering disclosure of the amounts of the honorarium payments, the Commissioner must take into account that the public authority has disclosed aggregate sums of payments made to senior staff. Particularly in relation to the 2007 payment, disclosing the figure paid to the Chief Officer would reveal the payment made to the Assistant Commissioner. The Commissioner considers that this would be unfair, as the payment to the Assistant Commissioner was a bonus payment, not an honorarium payment.
60. The Commissioner has considered the complainant's request, which stated that the "total remuneration and a detailed breakdown of that remuneration" was required. He is of the view that the only way to meet the public's legitimate interests whilst balancing the rights of the Assistant Commissioner under the DPA is for the public authority to provide details of the honorarium payments in a £5,000 band, in line with the disclosure to be made regarding bonus payments.
61. The Commissioner would emphasise that the disclosure of exact payments will be justified in certain circumstances and that he would have ordered disclosure of the honorarium payments in full had this not had the inadvertent effect of disclosing the exact amount received by the Assistant Commissioner.

Procedural Requirements

62. Section 10(1) of the Act requires that public authorities must confirm whether they hold information and provide information which is not exempt within twenty working days

following the receipt of the request. In this case, the public authority confirmed that it held the requested information outside the twenty working day period. It has therefore breached section 10(1) in relation to this confirmation. The public authority provided the complainant with information that was not exempt, however did so late. The public authority also withheld information from the complainant which the Commissioner has determined should have been provided. By not providing information to which the complainant was entitled within twenty working days, the public authority has breached section 10(1) of the Act.

63. Section 17(1) of the Act requires that public authorities that are refusing to provide requested information should issue the complainant with a refusal notice within twenty working days following receipt of the request. In this case, the public authority refused to provide the requested information under section 40(2) of the Act. However, it did not explain this to the complainant within the twenty working day period. Therefore, it has breached section 17(1) of the Act by issuing the refusal notice late.

The Decision

64. 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 some of the requested information under section 40(2) of the Act.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority wrongly applied section 40(2) of the Act to some of the requested information and therefore breached section 1(1)(b) of the Act in relation to this information ;
- It breached section 10(1) of the Act by failing to confirm what information it held within twenty working days of receipt of the request and by failing to provide information which is not exempt under section 40(2) within the same timescale; and

- It breached section 17(1) of the Act by failing to issue a refusal notice within the statutory time period.

Steps Required

65. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose to the complainant details of the bonus and honorarium payments made to Chief Officer in 2007 and 2008 in £5,000 bands.

66. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

67. 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.

Right of Appeal

68. 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.
Website: 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 13 day of September 2010

Signed

**Steve Wood
Head of Policy Delivery**

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

Legal Annex

The 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.”

Section 1(2) provides that –

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

Section 1(3) provides that –

“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.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

"A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."

Section 1(6) provides that –

"In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

Public authorities

Section 3(1) provides that –

"In this Act "public authority" means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly owned company as defined in section 6."

Section 3(2) provides that –

"For the purposes of this Act, information is held by a public authority if–

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority."

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

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 -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that –

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

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 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 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.

The Data Protection Act 1998

Interpretative provisions

Section 1(1) provides –

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

“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.

Section 1(2) provides –

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.

Section 1(3) provides –

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 operation 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.

Section 1(4) provides –

Where personal data are processed only for the 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 provides –

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, such as the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1

The Data Protection Principles

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.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.