

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 15 August 2011

**Public Authority:** Foreign and Commonwealth Office  
**Address:** King Charles Street  
London  
SW1A 2AH

### Summary

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The complainant requested the dates on which the wife of the Foreign Secretary had stayed overnight at two Ministerial residences provided for the use of the Foreign Secretary. The public authority refused the request and cited the exemptions provided by sections 38(1)(b) (endangerment to safety) and 40(2) (personal information) of the Act. The Commissioner finds that these exemptions apply in part; the public authority is required to disclose the number of stays but not the dates. The Commissioner also finds that the public authority failed to comply with the procedural requirements of section 17(1) through its handling of the request.

### 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. The complainant requested the following information on 26 July 2010:
  - The number of overnight stays by Mrs Hague at Chevening House and at 1 Carlton Gardens.
  - The dates of these stays.
3. The public authority responded to this request on 27 August 2010. It refused the request and cited the exemption provided by section 40(1).

The Commissioner assumes that this exemption was cited in error; section 40(1) provides an exemption for information that constitutes the personal data of the person making the request. Clearly the information requested in this case was not the personal data of the complainant and so the Commissioner has proceeded on the basis that the public authority intended to cite section 40(2), which provides an exemption for information that is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

4. The complainant responded to this on 1 September 2010 and requested an internal review. The public authority responded with the outcome of the internal review on 12 November 2010 and upheld the refusal of the request. The public authority again cited section 40(1), though it is clear that it intended to cite section 40(2).

## The Investigation

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### Scope of the case

5. The complainant contacted the Commissioner's office in connection with this case on 25 November 2010. The complainant indicated at this stage that he was dissatisfied with the reasoning given for the refusal of his request.
6. The complainant was unable to supply to the Commissioner's office a copy of his original request. The public authority was asked to supply it instead, but did not address this point in its response. The various references to the wording of the request in the correspondence between the complainant and the public authority, and when the complainant corresponded with the Commissioner's office, are inconsistent, suggesting variously that the request was for the number of nights Mrs Hague spent at the specified addresses, the dates of these stays, or for details of the use made by Mrs Hague of these properties.
7. When asked to clarify the scope of his complaint, the complainant specified that he wished to be provided with details of the number of overnight stays by Mrs Hague at these properties. In correspondence with the Commissioner's office, the public authority stated that the request was for the dates of these stays and it was this information that the public authority supplied to the Commissioner's office when asked to provide a copy of the information withheld from the complainant.
8. Without having seen the original wording of the request, it is difficult for the Commissioner to form a view on what an objective reading of the scope of this request would be. As disclosing the dates of stays at these

addresses would also provide the number of nights Mrs Hague had spent at these locations, the Commissioner has dealt with this point by focussing in this Notice on the request for dates of overnight stays.

## **Chronology**

9. The Commissioner contacted the public authority in connection with this request on 10 February 2011. The public authority was asked to respond with a copy of the information withheld from the complainant and with explanations for the exemptions cited.
10. The public authority responded to this on 28 March 2011. As well as providing the withheld information and some explanation in relation to section 40(2), the public authority also at this stage introduced section 38(1)(b) as it believed that disclosure of this information would be likely to endanger the safety of Mrs Hague.

## **Background**

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11. The request refers to 1 Carlton Gardens and Chevening House. Both of these properties are listed as Ministerial residences in the House of Commons Library document titled "Ministerial residences"<sup>1</sup>. These residences are traditionally for the use of the Foreign Secretary. Currently Chevening House is shared between the Foreign Secretary and the Deputy Prime Minister. Mrs Hague is the wife of the Foreign Secretary.

## **Analysis**

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### **Exemptions**

#### **Section 40**

12. The public authority cited section 40(2), which provides an exemption for information which is the personal data of any individual, aside from the requester, and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process; first, it must be established whether the information constitutes the personal data of any individual aside from the requester and, secondly, it must be considered whether

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<sup>1</sup> <http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snpc-03367.pdf>

disclosure of this personal data would be in breach of any of the data protection principles.

13. Turning first to whether this information is the personal data of any individual aside from the requester, the argument of the public authority is that this information constitutes the personal data of Mrs Hague. Section 1(1) of the Data Protection Act 1998 defines personal data as data that relates to an individual who can be identified from that information. The Commissioner considers it clear that the requested information in this case both relates to and identifies Mrs Hague, so concludes that this information is the personal data of an individual aside from the requester.
14. Turning to whether disclosure of this personal data would be in breach of any of the data protection principles, the Commissioner has focussed initially on the first data protection principle, which states that personal data shall be processed fairly and lawfully. The argument of the public authority is that disclosure of this information would be an undue breach of privacy and, therefore, unfair.
15. The Commissioner has firstly considered the nature of the information. To reveal the dates Mrs Hague stayed would be an intrusion into Mrs Hague's privacy as it would reveal the detail about where she was residing (as a private individual), at specific times. The Commissioner also notes that the request covers only a short period of time; the period between the appointment of Mr Hague as Foreign Secretary and the date of the request. Although it could be argued any distress might be limited as the timeframe of the information is short it could be seen as enabling someone to build up a full profile of her stays in smaller blocks. The Commissioner therefore accepts it is reasonable to argue that the disclosure of the dates would cause distress.
16. The Commissioner has also considered the public dimension to the information and the fact that the properties identified in the requests are maintained at public expense, meaning that a distinction can be drawn between the information requested in this case and information relating to private properties; as the Commissioner believes that there is a legitimate public interest in information about the use made of properties maintained at public expense. The reasonable expectations of Mrs Hague are also relevant here; it is important to note that this information relates to the private life of Mrs Hague and that Mrs Hague is not herself a public figure. The view of the Commissioner is that in relation to residence of properties maintained at public expense, any reasonable expectation of privacy will be reduced but only to some extent. The Commissioner therefore finds that it would only be fair to reveal the number of times Mrs Hague stayed at the property but not the exact dates.

17. In order for the first data protection principle to be satisfied, it is also necessary to meet at least one of the conditions for fair processing set out in Schedule 2 of the DPA. The Commissioner has focussed here on the sixth condition, which establishes a three part test.
  1. There must be legitimate interests in disclosing the information.
  2. The disclosure must be necessary in the cause of that legitimate interest.
  3. The disclosure must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
18. The first and third points are covered above under the consideration of fairness; the legitimate interest in disclosure arises due to public interest in the use made of properties maintained at public expense. The specific information in question here would serve this public interest in revealing the regularity with which a spouse of a government Minister is using of publicly funded properties, which would contribute to improving public knowledge of how 'grace and favour' properties are used. In terms of the third point, disclosure of the number of stays would not cause unwarranted interference or prejudice but disclosing the dates would.
19. As to whether it would be necessary in the cause of this legitimate interest to disclose the information, the key issue is whether this interest could be satisfied by any other means. Whilst some information is available about properties used by members of the Government, such as lists of guests entertained at such properties, this does not include the numbers of stays or similar usage information requested by the complainant in this case. The Commissioner finds that it is necessary to disclose the numbers of stays. In terms of disclosing the dates the Commissioner finds that this would not be necessary and the legitimate public interest can be met by just disclosing the numbers. The view of the Commissioner is that the sixth condition from DPA Schedule 2 is satisfied in terms of disclosing the number of stays.
20. His overall conclusion is, therefore, that the exemption provided by section 40(2) is not engaged for the number of stays but is engaged for the dates of the stays.

### **Section 38**

21. The Commissioner has then considered whether section 38(1)(b) applies to the number of stays.
22. The public authority has cited section 38(1)(b), which provides an exemption for information the disclosure of which would, or would be

likely to, endanger the safety of any individual. This section is set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of endangerment to the safety of any individual, or individuals, being at least likely to result through disclosure. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

23. Turning first to whether this exemption is engaged, the public authority has not specified if it is believed that prejudice *would* result, or *would be likely* to result. The approach of the Commissioner in any case where the public authority has not specified which test it has applied is to consider whether the prejudice would be likely to result. For the Commissioner to accept that the prejudice would be likely to result, the probability of this must be at least real and significant, and more than hypothetical or remote. This is in line with the approach of the Information Tribunal in the case *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005) in which it stated:

*“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”* (paragraph 15)

24. The argument of the public authority is that disclosure of the information recording the dates of overnight stays at the specified addresses by Mrs Hague, which would also reveal the number of nights upon which such stays have taken place, would be likely to harm Mrs Hague's safety.
25. It is clear that the exemption has been applied because the public authority believes that the disclosure of this information could increase the possibility of Mrs Hague being targeted. The Commissioner accepts that the wife of the Foreign Secretary, one of the most senior posts in government, is clearly at some risk of being targeted. This would only be credible if the request was for information relating to the future whereabouts of Mrs Hague, or other information that could conceivably be used to predict the future whereabouts of Mrs Hague.
26. The amount of detail that would be revealed by disclosing the number of stays over three months is very limited and the Commissioner does not accept that this could realistically be used as a means to predict the future whereabouts of Mrs Hague and thus place her safety at risk. The Commissioner does not accept that the likelihood of endangerment to the safety of any individual meets the test of real and significant. His conclusion is, therefore, that the exemption provided by section 38(1)(b) is not engaged in relation to the number of stays.

## **Procedural Requirements**

### **Sections 1 and 10**

27. In failing to disclose within 20 working days of receipt of the request information which the Commissioner now finds was not exempt, the public authority did not comply with the requirements of sections 1(1)(b) and 10(1).

### **Section 17**

28. In failing to cite section 38(1)(b) in relation to the information in question in this case within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 17(1).
29. In specifying an incorrect subsection from section 40 (40(1) when it clearly intended to cite 40(2)), the public authority breached the requirement of section 17(1)(b).

## **The Decision**

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30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it applied the exemptions provided by sections 38(1)(b) and 40(2) incorrectly to the numbers of visits and, in so doing, breached the requirements of sections 1(1)(b) and 10(1). It correctly applied the exemptions to the dates of the visits. The Commissioner also finds that the public authority breached the procedural requirements of section 17(1)(b).

## **Steps Required**

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31. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the number of times Mrs Hague stayed overnight at 1 Carlton Gardens and Chevening House during the period covered by the request.
32. 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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33. 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

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34. 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)

35. 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.
36. 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 15<sup>th</sup> day of August 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**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 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 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 38(1) provides that –**

"Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual."

### **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."