

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 20 July 2011

**Public Authority:** Cabinet Office  
**Address:** 70 Whitehall  
London  
SW1A 2AS

### Summary

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The complainant requested information dating from April 1989 and relating to the Hillsborough disaster that was provided to the then Prime Minister, or that recorded meetings on this subject matter which were attended by the Prime Minister. The public authority refused the request and cited the following exemptions from the Freedom of Information Act 2000: sections 31(1)(a), 31(1)(b) and 31(1)(g) (prejudice to law enforcement), 35(1)(a), 35(1)(b) and 35(1)(d) (information relating to the formulation or development of government policy, Ministerial communications and the operation of any Ministerial private office), and 40(2) (personal information). In relation to the information withheld under subsections from sections 31 and 35, the Commissioner finds that the public interest favours disclosure of this information, and the public authority is now required to disclose this information. In relation to the information withheld under section 40(2), the Commissioner finds that the public authority was entitled to withhold this information. The Commissioner also finds that the public authority breached the Act in that it failed to respond to the request within 20 working days of receipt.

### 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 23 April 2009:
  - Copies of all briefings and other information provided to Margaret Thatcher in April 1989 relating to the Hillsborough disaster.
  - Copies of minutes and any other records of meetings attended by Margaret Thatcher during April 1989 at which the Hillsborough disaster was discussed.
3. After a delay of more than 9 months, which the Commissioner considers to be excessive, the public authority responded substantively to this request on 5 February 2010. The request was refused, with the exemptions provided by the following sections of the Act cited: 35(1)(a) (information relating to the formulation or development of government policy), 35(1)(b) (information relating to ministerial communications), 40(2) (personal information) and 41(1) (information provided in confidence).
4. The complainant responded to this on 9 February 2010 and requested an internal review. The complainant argued that the exemptions cited had been applied in a blanket fashion and that, in relation to the qualified exemptions, the public interest favoured disclosure. In relation to section 41(1), the complainant argued that there was an overriding public interest in disclosure (which would mean that any breach of confidence would not be actionable); and in relation to section 40(2) that information that related to individuals in their professional capacity should be disclosed.
5. After a further lengthy delay, the public authority responded with the outcome of the internal review on 1 September 2010. The refusal of the request under the exemptions cited previously was upheld and the public authority now also cited the exemptions provided by sections 31(1)(a) (prejudice to the prevention or detection of crime), 31(1)(b) (prejudice to the apprehension or prosecution of offenders) and 31(1)(g) / 31(2)(a) (prejudice to functions exercised for the purpose of ascertaining whether any person has failed to comply with the law) of the Act.

## The Investigation

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### Scope of the case

6. The complainant contacted the Commissioner's office in connection with this request on 21 September 2010. The complainant argued in relation to the subsections of sections 31 and 35 that the public interest favoured disclosure given the subject matter of the information, and in relation to section 40(2) that, for similar reasons, disclosure would be fair and lawful (and so not in breach of the first data protection principle). In relation to section 41(1), the complainant argued that a breach of confidence arising through disclosure would not be actionable in court as there would be a public interest defence against such a claim.
7. As noted above, there was a severe delay in the response to the complainant's request. In its letter to the Commissioner's office of 21 March 2011, the public authority acknowledged that it had received the original request from a BBC colleague of the complainant on 23 April 2009, but also referred to having received a further request from the complainant on 6 January 2010, and it stressed that it had replied to that request within 22 working days of its receipt. The public authority also suggested that it should not have allowed the complainant to pursue the original request.
8. The change of individual responsibility for this request within the BBC appears to have stemmed from a change in the role of the journalist who made the original request. As the request was clearly made by that individual in their capacity as a journalist for the BBC, the Commissioner considers it clear that it was appropriate for another BBC journalist to assume the task of pursuing the public authority for a very belated response. In any event, the refusal notice was clear that it was a response to the request received by the public authority on 23 April 2009. It is also notable that the individual who made the original request would likely have not moved to a different role by the time of the refusal notice had this been provided within 20 working days of receipt. The Commissioner comments further on the delays to the refusal notice and the internal review response, which were replicated during correspondence between the Commissioner's office and the public authority, in the *'Other matters'* section below.

### Chronology

9. The Commissioner's office contacted the public authority in connection with this case on 4 January 2011. The public authority was asked to respond within 20 working days with further explanations for the

exemptions cited and with a copy of the information withheld from the complainant.

10. Having received no reply after 30 working days, an Information Notice was issued under section 51 of the Act. This Notice required the public authority to provide within 30 calendar days of the date of the Notice a full response to the letter of 4 January 2011. The public authority failed to respond within the 30 day period specified in this Notice, but eventually responded with the withheld information and with further explanation for the exemptions on 21 March 2010, 54 working days from the letter of 4 January 2011.

## Background

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11. The complainant refers to the "Hillsborough disaster" in the request. This is a reference to the FA Cup semi final of 15 April 1989 between Nottingham Forest Football Club and Liverpool Football Club, which took place at Hillsborough stadium in Sheffield and at which overcrowding led to the deaths of 96 supporters of Liverpool FC. The main reason for the overcrowding was later attributed to the failure of police control.

## Analysis

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### Exemptions

#### Section 31

12. The public authority has cited section 31(1)(a), which provides an exemption for information the disclosure of which would, or would be likely to, prejudice the prevention or detection of crime, 31(1)(b), which provides the same in relation to the apprehension or prosecution of offenders, and section 31(1)(g) in conjunction with section 31(2)(a), which provides the same in relation to the exercise by any public authority of functions for the purpose of ascertaining whether any person has failed to comply with the law. These sections are set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice.
13. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged as a result of relevant prejudice being at least likely to occur and, secondly, these exemptions are qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.

14. The Commissioner will focus first on sections 31(1)(a) and (b). Covering first whether these exemptions are engaged, the public authority has specified that its stance is that prejudice *would* result, rather than *would be likely* to result. The test that the Commissioner applies when considering whether prejudice would result is that the likelihood of this must be at least more probable than not. This is in line with the approach taken by the Information Tribunal in the case *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 and EA/2005/0030) in which it stated:

*“prejudice test is not restricted to “would be likely to prejudice”. It provides an alternative limb of “would prejudice”. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge.”* (paragraph 36)

15. The public authority has argued that disclosure of the information in question would harm the relationship between the police and general public and that this would result in a reduction of willingness on the part of the public to cooperate with and assist the police, by, for example, providing information to the police. This in turn, would result in prejudice relevant to these exemptions. The Commissioner accepts that this argument is relevant to the prejudice described in sections 31(1)(a) and (b).
16. A key factor that the Commissioner has taken into account when considering if the likelihood of prejudice is sufficiently high is the content of the information in question. Whilst it is not possible to give details about the content of the information, having reviewed the information in question the Commissioner is satisfied that this supports the argument of the public authority. On the basis of the content of this information, the Commissioner accepts that prejudice relevant to sections 31(1)(a) and (b) would be more probable than not to result through disclosure and so these exemptions are engaged.
17. The complainant has raised the issue of the age of the information and suggested that the results of disclosure predicted by the public authority would be less likely to occur due to this information having been recorded 20 years prior to the request. In relation to these exemptions the Commissioner is satisfied that the prejudice predicted by the public authority would occur even taking into account the intervening period since this information was recorded. Also, as the public authority noted, section 63(4) of the Act provides that the exemptions in section 31 can continue to apply up to 100 years from the recording of the information, providing a clear indication of the intention of Parliament as to the period of time for which it believed the protection afforded by section 31 would continue to be necessary. The issue of the age of the information

is covered further below in the analysis of the public interest in relation to section 35.

18. The public authority has also cited section 31(1)(g) in conjunction with section 31(2)(a), which provides that information is exempt if disclosure would prejudice the exercise by any public authority of any of its functions for the purpose of ascertaining if any person has failed to comply with the law. It has cited the same arguments in favour of this exemption as were cited in favour of sections 31(1)(a) and 31(1)(b). For the same reasons as set out above, therefore, the Commissioner accepts that prejudice relevant to sections 31(1)(g) / 31(2)(a) would occur through disclosure of the information in question and so this exemption is engaged.

### **The public interest**

19. Having found that these exemptions are engaged, it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account the public interest in avoiding the prejudice inherent to the exemptions, which the Commissioner has accepted would be more likely than not to result through disclosure, and the general public interest in favour of disclosure on the basis that this would improve the transparency and openness of the public authority. These factors are in addition to those that relate to the specific information in question here, which includes any public interest relating to the content and subject matter of this information and the arguments advanced by the complainant and the public authority.
20. Turning first to those arguments that favour maintenance of the exemptions, as well as relying on the public interest in avoiding the prejudice described in the exemptions, the public authority has referred to the existence of a panel set up to review materials relating to Hillsborough with a view to the publication of these. This panel was created by the government to facilitate transparency of information relating to the Hillsborough disaster. The view of the public authority is that it would be counter to the public interest to disclose information that is amongst that being considered by this panel before it has completed its work.
21. The Commissioner does not agree that the existence of this panel is a relevant factor here, as it did not exist at the time of the request, or within 20 working days following the receipt of the request by the public authority. This Notice concerns whether the information should have been disclosed within 20 working days from the receipt of the request, and any factor that did not apply at the time of the request is not relevant. This situation applies regardless of the lengthy delay by the

public authority in responding to the request. In addition the Commissioner does not see how this argument is relevant to factors inherent in the exemption claimed. The Commissioner also notes the panel is not set up on a statutory basis, on the same terms as a formal Inquiry.

22. Turning to those factors that favour disclosure of this information, the Commissioner believes that there is a very strong public interest in disclosure on the grounds of improving public knowledge and understanding of the events of 15 April 1989. This is a public interest that the Government acknowledged when stating that it supported disclosure of information relating to these events. Whilst it may be argued against this that the events at Hillsborough have been subject to sufficient scrutiny (through, for example, the Taylor Report) that disclosure could add little further to public knowledge and understanding, it remains the case that the issue of responsibility and accountability for those events is controversial and the subject of conjecture and debate. The Commissioner believes that this supports the argument that full disclosure of information relating to the Hillsborough disaster is in the public interest and that this is a factor of very significant weight in the balance of the public interest.
23. The view of the Commissioner is that there are very significant factors in favour both of maintenance of the exemption and disclosure of the information. Having accepted that prejudice relevant to sections 31(1)(a), 31(1)(b) and 31(1)(g) / (2)(a) would be more probable than not to result through disclosure, the Commissioner must also accept that there is a weighty public interest in avoiding this prejudice. Although the Commissioner accepts the prejudice would be of substance and would be likely he also finds that the prejudice would be at the lower end of severity which tempers the weight to some extent. However, the subject matter of the information in question here means that there is also a clear public interest in the disclosure of this information. Support for disclosure of information relating to the Hillsborough disaster was expressed by the previous Government and has been re-confirmed by the current Government, and the Commissioner also believes that the specific content of the information in question would add to public knowledge and understanding about the reaction of various parties to that event, including the Government of the day, in the early aftermath.
24. When the general public interest in improving the transparency and openness of the public authority and the presumption of disclosure inherent within the Act is taken into account, the Commissioner believes that this tips the balance of the public interest in favour of disclosure. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

## Section 35

25. The public authority has cited sections 35(1)(a), which provides an exemption for information which relates to the formulation or development of government policy, 35(1)(b), which provides the same for information relating to Ministerial communications, and 35(1)(d), which covers information relating to the operation of any Ministerial private office. These are class-based exemptions - which means that the information is exempt if it falls within the class described in this exemption - and are subject to the public interest. Consideration of these exemptions is, therefore, a two-stage process; first the information must conform to the class described in the exemptions and, secondly, the balance of the public interest must be considered.
26. Covering first whether these exemptions are engaged, the approach of the Commissioner to the term 'relates to' as it is used in these exemptions is that this can safely be interpreted broadly. The Commissioner considers this to be in line with the approach taken by the Information Tribunal in the case *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006) in which it stated:

*"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable."* (paragraph 58)

27. The most important factor in considering whether this information falls within the classes described in the exemptions is the content of this information. In relation to the information in connection with which both sections 35(1)(a) and (b) were cited, the Commissioner has focussed on section 35(1)(b). Section 35(1)(d) was cited in relation to one document and is covered separately below.
28. Section 35(1)(b) has been cited in relation to the following information:
- (i) A letter dated 21 April 1989 from the Prime Minister's Principal Private Secretary to the Home Secretary's Private Secretary and a draft version of this letter.
  - (ii) A letter dated 17 April 1989 from the Prime Minister's Private Secretary to the Home Office, amongst other recipients, in which a meeting between the Prime Minister and other Ministers is described.
  - (iii) A record of a Cabinet meeting of 20 April 1989.

(iv) A letter dated 26 April 1989 from the Home Secretary's Private Secretary to, amongst others, the Principal Private Secretary to the Prime Minister and a briefing to the Prime Minister about the content of this letter.

29. The definition of Ministerial communications is set out at section 35(5), which specifies that exchanges between Ministers of the Crown and proceedings of the Cabinet are within this class. In the Information Tribunal case *Scotland Office vs The Information Commissioner* (EA/2007/0128), it was confirmed at paragraph 50 that letters from one Private Secretary to another when written on the behalf of a Minister would fall within this class:

*"communications between a Private Secretary writing on behalf of his/her Minister and another Minister, constitutes Ministerial communications."*

30. Given the definitions in section 35(5) and the clarification provided through the Tribunal, the view of the Commissioner is that all of the information in (i) to (iv) is within the class described in section 35(1)(b). This information consists of letters from and to Private Secretaries, the content of which suggests that they were written on the behalf of Ministers, information relating to this correspondence, and records of the proceedings of the Cabinet. The conclusion of the Commissioner is, therefore, that all of this information is exempt by virtue of section 35(1)(b). The Commissioner also accepts that section 35(1)(a) applies to the information.
31. The public authority has cited section 35(1)(d), which provides an exemption for information relating to the operation of any Ministerial private office, in relation to one document. This document is a handwritten note to the Prime Minister from the Principal Private Secretary.
32. In the Commissioner's opinion the scope of section 35(1)(d) should be limited to only include practical matters such as routine emails, procedures for handling ministerial papers, travel expenses, staffing, logistical issues etc. The example quoted in the Commissioner's guidance on section 35(1)(d) suggests that whilst the management of a minister's diary (i.e. the process of its handling) may be caught by the exemption, entries within the diary itself are unlikely to be. The effect of this limited interpretation of the exemption means that information will not necessarily fall within the scope of section 35(1)(d) just because it has originated in a private office or passed through it.
33. Having reviewed the content of the document in question, the Commissioner is satisfied that this represents the routine workings of

the Prime Minister's private office and that the focus of this is on procedural matters. Given this content, the Commissioner accepts that this information engages section 35(1)(d).

### **The public interest**

34. As the Commissioner has found that the exemptions provided by sections 35(1)(a) and (b) and 35(1)(d) are engaged, it is necessary to go on to consider the balance of the public interest. In forming a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in improving the openness and transparency of the public authority, as well as factors specific to the information in question here, including arguments advanced by the complainant and by the public authority.
35. That the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

*"The weighing [of the public interest] exercise begins with both pans empty and therefore level." (paragraph 65)*

36. Many of the same factors apply in the same way here as in connection with the exemptions cited from section 31. Specifically, the existence of a panel to consider disclosure of information relating to Hillsborough is not relevant as this panel did not exist at the time of the request, and the Commissioner regards there to be a very significant and weighty public interest in favour of disclosure of information relating to the Hillsborough disaster.
37. Turning to those factors that apply only in relation to these exemptions, the public authority has argued that disclosure would impact negatively upon the freedom with which Ministers believe they can engage in free and frank discussions with colleagues and upon the maintenance of collective Cabinet responsibility. The argument of the public authority about inhibition to discussion as a result of disclosure of what were previously regarded as a private record of discussions has been raised in a number of Information Tribunal cases and is often referred to as the 'chilling effect'. Collective Cabinet responsibility is the convention whereby every Cabinet member is responsible for every policy decision made by the Cabinet, even if they may in private discussion have expressed disagreement or disquiet about a policy. The argument of the public authority is that disclosure of information revealing that individual Ministers had argued in private against what was later adopted as an agreed policy of the Cabinet would erode the convention of collective

responsibility. Whilst the Commissioner accepts the premise of these arguments, the weight that they carry in a case will depend upon the individual circumstances.

38. The passage of time since the recording of the information in question is a key factor here. This information was 20 years old at the time of the request and, as the complainant has noted, the current Government is implementing a reduction of the current 30-year period before government papers are released to 20 years. Although this is not directly relevant here as section 62(1) of the Act continues to define an historical record as 30 or more years old and section 63(1) specifically provides that section 35 continues to be available for relevant information up to 30 years old, the Commissioner takes into account the recognition that there is a diminishing case for withholding information over 20 years old.
39. The age of the information has a wider significance in that it is necessary to consider how likely the harmful impacts of disclosure predicted by the public authority are given the age of this information. The public authority has not argued that disclosure would be likely to result in a chilling effect or in a rupture of collective Cabinet responsibility specifically in relation to the then Government's reactions to Hillsborough or on related matters, such as policy discussions on safety standards at football stadia. Having considered the information and the wider context this argument would not be sustainable given the passage of time and multiple changes in government since this information was recorded.
40. Instead, these arguments apply more generally in that the public authority is arguing that disclosure in this case would result in a chilling effect in general to Ministerial discussions and would broadly jeopardise the collective responsibility of the Cabinet. In relation to chilling effect, the Commissioner considers that the passage of time removes this argument as a factor of weight here; the Commissioner does not consider it conceivable that the disclosure of this information would have resulted in a chilling effect to Ministerial discussions at the time of the request, given the age and unique subject matter of the information in question.
41. In relation to the convention of collective Cabinet responsibility, the public authority has argued that the importance of this convention to the constitution of government means that the exemptions should prevail, despite the age of this information. The Commissioner does not dispute the importance of this convention or the public interest in its preservation, but also notes that section 35 provides qualified exemptions. This means that in any case where this convention is a relevant factor, the public interest in the maintenance of the exemption

on the grounds of preserving this convention must be weighed against whatever public interest factors apply in favour of disclosure. It follows from this that it is not the case that an argument against disclosure on the grounds of the maintenance of this convention will in every case carry an immutable weight that will invariably tip the balance in favour of maintenance of the exemption.

42. As to what impact the age of the information has on the weight of the public interest factor relating to maintenance of this convention, the view of the Commissioner is that this is reduced significantly through the passage of time. He regards it as clearly the case that this factor will carry more weight where it is cited in relation to information that records discussions of the Cabinet current at the time of the request, or a Cabinet with many of the same members, and particularly where the information records discussions of an issue that remained current at the time of the request.
43. In this case there had been multiple changes in government between the time that the information was recorded and the date of the request. Also, the subject matter of the discussions recorded within the information in question centred on a very particular set of circumstances that were no longer current at the time of the request. As a result the view of the Commissioner is that the argument in favour of maintenance of the exemption relating to convention of collective Cabinet responsibility is not a factor of significant weight in favour of maintenance of the exemption.
44. In relation to those factors that the public authority has cited in favour of maintenance of the exemption, the view of the Commissioner is that the passage of time since the recording of the information in question renders these factors of no significant weight in favour of maintenance of the exemption. Given this, the Commissioner considers it clear that the public interest in disclosure of information relating to the Hillsborough disaster – constituting improved public knowledge and understanding of the causes of and reaction to this event (and in relation to this specific information how the Government of the day reacted) – means that the balance of the public interest favours disclosure. His conclusion is, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
45. The Commissioner also finds that similar analysis applies to section 35(1)(a) and (d) and that passage of time has clearly diminished any likely harm to the processes these limbs of the exemption are intending to protect. Therefore, the public interest in the maintenance of these limbs of the exemption does not outweigh the public interest in disclosure.

## Section 40

46. The public authority has cited section 40(2) in relation to a letter from a survivor of the Hillsborough disaster to the Prime Minister and a cover note written by the Prime Minister's Private Secretary when sending this note to the Home Office for reply. Section 40(2) provides that information is exempt if it constitutes the personal data of any individual other than the requester and if the disclosure of that personal data would be in breach of any of the data protection principles.
47. Covering first if this information constitutes the personal data of an individual aside from the requester, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):
- "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".*
48. Both the letter and the cover note identify the author of the letter by name. Given this, the Commissioner considers it clear that both the letter and cover note are the personal data of the author of the letter in accordance with the definition of personal data in the DPA.
49. Turning to whether the disclosure of this personal data would be in breach of any the data protection principles, the Commissioner will focus here on the first data protection principle, which states that personal data shall be processed fairly and lawfully, and the issue of whether it would be fair to the author of the letter for this personal data to be disclosed into the public domain via the Act.
50. The public authority has argued that the information here is sensitive personal data according to the definition given in section 2 of the DPA on the grounds that the content of this letter comments upon, and provides an insight into, the mental health of the author. As it would be significantly less likely for it to be fair to disclose sensitive personal data than non-sensitive personal data, the Commissioner has considered whether it is accurate to define this personal data as sensitive according to section 2 of the DPA before going on to consider the issue of whether disclosure would be fair.
51. The Commissioner accepts that some of the content of the letter is clearly sensitive personal data where, for example, the author refers directly to their mental health following the disaster. The public

authority argues that the letter as a whole is evidence of the mental health of the author at the time that it was written. The Commissioner agrees that, in this context, the entirety of the information in relation to which section 40(2) was cited is the sensitive personal data of the author of the letter. Whilst some of the content would not be sensitive personal data if it were viewed in isolation, when this information is viewed as a whole the argument of the public authority can be accepted.

52. As to whether it would be fair and in accordance with the first data protection principle for this information to be disclosed, having found that this personal data is sensitive according to the definition given in section 2 of the DPA, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information would be likely to have a distressing effect on the data subject, the Commissioner considers that it would be unfair and in breach of the first data protection principle for the information in question to be disclosed. The exemption provided by section 40(2) is, therefore, engaged in relation to the letter. However, the Commissioner finds that the cover note can be disclosed in a redacted form, removing the two references to the data subject's name. The cover note disclosed in this form would be anonymised and would not be personal data, and section 40 would not be engaged.

## **Section 41**

53. As the above conclusion on section 40(2) relates to the information in connection with which section 41(1) was cited, it has not been necessary to also consider this exemption.

## **Procedural Requirements**

### **Sections 1 and 10**

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

### **Section 17**

55. In failing to respond with a refusal notice within 20 working days of receipt of the request, the public authority did not comply with the requirements of section 17(1).

## The Decision

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56. The Commissioner's decision is that the public authority did not deal with the request in accordance with the Act in that it applied the exemptions provided by sections 31(1)(a), 31(1)(b), 31(1)(g) / 31(2)(a), 35(1)(b) and 35(1)(d) incorrectly and in so doing breached the requirements of sections 1(1)(b) and 10(1). It also breached section 17(1) as detailed above. However, the Commissioner also finds that the public authority applied the exemption provided by section 40(2) correctly in relation to one item of information.

## Steps Required

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

- disclose all information falling within the scope of the request, apart from that in relation to which the Commissioner has found that section 40(2) is engaged. The cover note to the survivor's letter should be disclosed in redacted form, as noted above.

58. 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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59. 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.

## Other matters

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60. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The progression of this request to this point has been hampered by repeated delays in responding by the public authority. The refusal notice was delayed by more than 9 months. Whilst section 17(3)(b) of the Act does allow that a response setting out the balance of the public interest may be provided after twenty working days, no extension beyond twenty working days is available for a response setting out why exemptions are engaged, or in relation to exemptions that are not qualified by the public

interest. Also, the approach of the Commissioner is that a response setting out the balance of the public interest should be delayed by no more than a further 20 working days.

61. The approach of the Commissioner to internal reviews is that these should be carried out within 20 working days, but that this period may be extended to 40 working days in exceptional circumstances. The public authority exacerbated the previous delays by failing to complete the internal review for close to 7 months. The Commissioner considers the total of approximately 16 months from the receipt of the request until the provision of the internal review outcome to be unjustified and excessive, as well as in breach of the requirements of the Act and the Commissioner's guidance.

## Right of Appeal

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62. 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)

63. 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.

64. 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 20<sup>th</sup> day of July 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 31(1) provides that –**

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"

**Section 31(2) provides that –**

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law

**Section 35(1) provides that –**

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.”