

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 14 April 2009

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

### Summary

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The complainant requested prison-related information regarding Myra Hindley, Fred West, Harold Shipman and Reggie Kray. The public authority refused to supply the information, applying section 22 of the Act (information intended for future publication). It subsequently refused to release the information through the application of section 12 of the Act (cost limit). The Commissioner decided that section 22 could not be applied to any of the requested information or section 12 to the request.

However, following intervention from the Commissioner the public authority applied several other exemptions to withhold some of the requested material. Each was applied to specific categories of information contained therein: section 31 (law enforcement), section 32 (court records), section 38 (health and safety), section 40 (personal information), section 41 (information provided in confidence), section 42 (legal professional privilege). The Commissioner upholds this decision and therefore requires that in respect of the public authority's revised position, the information not withheld under these exemptions is disclosed to the complainant. However, the Commissioner has also found there to have been several procedural breaches of the Act in the public authority's handling of the complainant's request, specifically section 1(1)(b) (duty to communicate information), section 10(1) (time for compliance with request), section 17(1) (refusal of request) and section 17(7) (procedure for dealing with complaints and right of appeal).

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 4 and 5 January 2005 the complainant requested the following information from the Home Office:
  - i. “Personal information and/or letters regarding Myra Hindley. I am especially interested in psychiatric reports shedding light on the state of Hindley’s mind. I would also like documents which reveal anything about:
    - her relationship with Ian Brady or former prison warder [name given]
    - details of the reasoning behind any parole decisions
    - details of any information passed to prison therapist [name given].”
  - ii. “Personal information and/or letters regarding Fred West who hanged himself in Winson Green jail, in Birmingham on New Year’s Day 1995. Also any details of Fred West’s, prison arrangements, psychiatric reports, and any other information regarding Fred West held by the Home Office or Prison Service.”
  - iii. “Personal information and/or letters regarding Harold Shipman. I am especially interested in psychiatric reports. I would also like to see any other documents not already in the public domain.”
  - iv. “Any personal information and/or letters regarding Reggie Kray. I would be particularly interested in documents relating to any parole, health or disciplinary matters concerning Kray and his time in prison – although my request is in no way limited to these specific areas.”
3. On 17 January 2005 the Home Office responded to the complainant, in which it stated that it held the requested information but is withholding it under section 22 of the Act (Information intended for future publication). It explained that in the case of Shipman, the Kray Twins, West and Hindley, it planned to put this information into the public domain and will do so, via The National Archives (TNA), in 2005.
4. On 19 September 2005 the complainant contacted the Home Office to request an internal review of its response. In doing so, he stated that “The nine month delay since the request was lodged contravenes section 22(1)(c) of the Act which states that *it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to*”.
5. The Home Office responded to the complainant on 10 October 2005, in which it reiterated its intention to put the information in question into the public domain via TNA at “some point” in 2005. However, it stated that it was unable to provide any new information or give a definite date for publication.
6. The complainant contacted the Home Office on 26 January 2006 to enquire as to why the requested information had not yet been released via TNA and therefore failed to meet its own deadline of publishing before the end of 2005. He pointed

out that the only requested file he understood to have been so far released was that about Hindley, in response to a request made by another individual.

7. On 19 May 2006 the Home Office contacted the complainant to provide an update on its review of the papers relating to Myra Hindley. It assured the complainant that "the review is ongoing and our intention to transfer these papers to TNA in Kew remains unchanged....the volume and nature of these records means that the review is an ongoing process".
8. On 10 July 2006, in response to intervention from the Commissioner, the Home Office contacted the complainant to inform him that it had not received his request for an internal review but that the internal review process would be initiated immediately as of that date. A full response was promised within 40 calendar days of that date.
9. On 22 August 2006, the complainant contacted the Home Office, requesting an update as regards the position of the internal review which he believed, according to its correspondence of 10 July 2006, should have been completed.
10. On 1 September 2006, the Home Office contacted the complainant to explain that the "due to the complexity of the case and the volume of accompanying papers...it needs to extend the previous response deadline of 4 September 2006 to 4 October 2006".

### **Outcome of internal review**

11. The Home Office provided the complainant with details of the outcome of its internal review on 13 October 2006, which informed him of the following:
12. Handling of internal review
  - The delay in responding to the request for review was caused by the fact that it had to reconsider the public interest test in relation to the exemption applied.
  - It was incorrect in previously asserting that he had not previously requested an internal review. This was an oversight caused by the misplacing of correspondence.
13. Application of Cost limit
  - The original responses should have instead refused the requests under the £600 cost limit as permitted by section 12 of the Act as a vast amount of information would need to have been collated in relation to some of the offenders, and an amount which would exceed the limit in relation to all.
14. Application of Section 22
  - The reply should then have informed the complainant that there was a plan to review these papers with the intention to open as much information as possible at TNA. Then the response should have cited section 22(1) as the Home Office intends to open all non-exempt information relating to Hindley, Shipman, West and Kray at TNA in a series of planned transfers. Given the sensitive nature of the papers there will be certain information that is considered exempt under the Act and the exemptions likely to apply to any

sensitive information will be section 38 (health and safety) and section 40 (personal information). This exempt material will be transferred to TNA closed for a limited period.

15. Public interest test

- The primary consideration which weighs in favour of withholding the information requested is the overriding public interest in avoiding harm to interested parties, most notably the victims' families.
- Given that these papers cover extremely sensitive subject areas it is essential that time is taken to inform and consult with any living relatives of the victims as well as the relevant police forces. This is in order for their views to be taken into account and to reduce the risk of harm when the papers are finally released at TNA.
- An ongoing piecemeal disclosure of the information held by the Home Office might in itself cause distress to individuals, given the likelihood of media interest being sustained over a longer period. It is consequently the Home Office's view that a single disclosure of all the non-exempt information held by the Home Office, by means of its transfer to the National Archives, is the course of action that best serves the public interest.
- There is a further public interest in not releasing single documents without the context of the remainder of the material – a piecemeal approach could lead to the public receiving an inaccurate impression of events.
- The public interest considerations in favour of early disclosure are the general public interest in open government accountability which may lead to increased trust and engagement between the public and the government.
- In this case the public interest arguments for withholding the information considerably outweigh those in favour of release.

16. Delay in opening the information to public viewing

- The original date for when these papers were likely to be open at TNA was incorrect. The delay has been caused by the vast amount of sensitive information that needs careful consideration and consultation.
- Another factor that has added to the delay is the resource implication for the department that such a huge ongoing review creates and we can only allocate a reasonable level of manpower in order to complete the reviews of this sensitive material. However, it is doing all it can to make sure that non-exempt information is open for public viewing at the earliest possible date.

17. Internal Review Conclusion

- It was correct to cite section 22 given the intention to publish and the balance of the public interest. However, over and above that they should have refused these requests on cost grounds before referring to the exemption and the fact that some of the information will be withheld when the bulk of it is published.
- The use of section 22 was never intended to imply that all the information held on these offenders was to be published at TNA, as it was always accepted that other exemptions were likely to apply to a certain amount of the information.

## The Investigation

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### Scope of the case

18. On 21 May 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - i. The unreasonable length of time between the response to his request and the date he was informed that the requested documents would be deposited at the National Archives, at which time he was informed that he would be able to access the information.
  - ii. The Home Office's failure to fulfil its pledge to release the requested documents.
19. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
20. Following the Commissioner's intervention which resulted in the Home Office carrying out an internal review, on 13 October 2006 the Home Office contacted the Commissioner to inform him that a full review of the request had now been completed and the complainant had been informed of the outcome (see paragraph 11). It explained that the complainant's internal review request of 19 September 2005 was treated as general correspondence and not recorded within the FOI monitoring procedures.
21. On 13 October 2006, the complainant informed the Commissioner that he was dissatisfied with the outcome of the Home Office's internal review, as set out in its letter to him of 13 October 2006. He therefore requested that the Commissioner investigates his case as per his complaint of 21 May 2006.

### Chronology

22. On 18 October 2006, the Commissioner contacted the Home Office to investigate the following points that were communicated to the complainant in the outcome of the internal review of 13 October 2006:
  - i. Whether it had considered disclosing to the complainant elements of the requested information that would not exceed the cost limit, such as the information about Hindley previously requested by and released to another requestor;
  - ii. Full details of the number and nature of the documents involved in each of the cases, including details of where and how they are stored;
  - iii. Details of what work had been undertaken to prepare the papers for transfer to TNA since the request of 4 January 2005;
  - iv. Steps which had been taken to consult the victims' families and relevant police forces, together with any responses received; and

- v. Details of why it had not previously explained to the complainant that not all of the information would be published and why it had not relied upon additional exemptions in the outcome of its internal review.
23. The Home Office responded to the Commissioner on 3 November 2006, in which it informed him of the following (which is reproduced here as direct quotations):
- Any refined request received which did not exceed the appropriate limit would be refused under the section 22 exemption and any other that might apply.
  - Contrary to the complainant's assertion, none of the information has already been disclosed to another requestor to date. The complainant may be referring to a request made to The National Archives for transferred court records relating to the Hindley case. Non-exempt papers falling within the scope of that request were released in December 2005.
24. In relation to the volume of information falling within the scope of the request, the Home Office stated the following:
- Due to the volume of material held it is not practical to state the exact number of individual documents held. However, it can be confirmed that the following is held in relation to each case:  
Hindley  
Approximately eleven metres of papers relating to Myra Hindley have been received from the Prison Service.  
West  
Approximately half a metre of papers relating to Fred West have been received from the Prison Service. Further to this, six files are held at the Home Office's storage facility in Derbyshire, in relation to Mr West which also require consideration.  
Shipman  
Approximately two and a half metres of papers relating to Harold Shipman have been received from the Prison Service. In addition they have also provided 21 audio cassettes in relation to his imprisonment which are also of relevance.  
Kray  
These papers, still held by the Prison Service Registry, consist of two and a half metres of files for Reggie Kray and half a metre for Ronald Kray. In addition, papers are held containing legal advice relating to the Krays and a significant volume of papers from the Mental Health Unit relating to Ronald Kray. Papers relating to both brothers could contain material relevant to the request.
25. The Home Office confirmed to the Commissioner on 31 July 2007 that the measurement of papers referred to above refers to the horizontal storage of the papers as placed on shelving.
26. With regard to its review of the papers relating to the four individuals, the Home Office stated the following:
- Within the Home Office, the approval for the transfer of all information held within these papers to TNA was taken by the Prison's Minister on 21 December 2004. The decision confirmed that, to the extent that exemptions



- did not apply, the papers would be transferred as open for viewing by the public.
- With the advantage of hindsight it is apparent that the date for transfer of the material to TNA was never going to be achievable.
  - Thus far the review of the Shipman, West and Kray papers has not been commenced. Efforts have instead been concentrated on the Hindley papers which it and TNA believe to possibly be of the greatest interest to the public. Once they have been transferred to TNA their attentions will be turned to the others.
  - Prior to October 2005 the Prison Service were retrieving and collating the relevant papers from a variety of locations around the country, the decision already having been taken in advance that any information within them not subject to exemptions should be transferred open, to TNA. The review of the papers then commenced in October and has been ongoing since then without interruption.
  - The initial review of the Hindley papers is now complete and 170 files have been sensitively reviewed. As of 17 October 2006 the actual redactions have been completed on 14 files, and on these 14 files a total of 1441 redactions have been necessary. There are a further 156 files, or about 4 metres of papers, requiring redactions before transfer can take place. It is estimated that it will be in a position to transfer this material to TNA around Easter 2007.
27. Finally, with regard to the consultation with third parties which it was undertaking, the Home Office stated the following:
- Throughout the review of the Hindley papers extensive but entirely necessary discussions with all interested parties, be they other government departments or the relatives of victims, have been entered into, and continue to be held.
  - The information released by TNA in December 2005 was originally transferred by the DCA, and in light of the media reaction to that release, including the reported reaction of the victims' families, important lessons have been learned and shared.
  - Views differ between interested parties and their views are therefore impossible to predict without individual consultation.
28. In its submission, the Home Office also included two annexes, detailing an inventory of the papers it had received from the Prison Service in relation to Hindley, West and Shipman (but excluding files held in its storage facility in relation to West and audio cassettes in relation to Shipman).
29. On 6 July 2007, the Commissioner contacted to Home Office to invite it to put forward any further representations it wished to make on its position in relation to the case. The Home Office responded to the Commissioner on 17 July 2007, in which it informed him of the following additional points:
- Since 3 November 2006 the Commissioner has issued two decision notices which deal with the issue of the application of section 41 to information relating to deceased individuals (FS50071069 and FS50101391). It has always been the intention to release Myra Hindley's medical information open to TNA; however it is felt necessary to review

this position in light of these decisions....it has been concluded that Myra Hindley's medical information is exempt under section 41 of the Act.

- As a result of the decision to exempt medical information under section 41 the Home Office has had to go back through the files in order to remove it. This work is well underway but 84 files have still to be gone through to complete this process. There also remains a considerable amount of listings work to undertake prior to transfer along with the completion of FOI exemptions forms and other documentation. All of this will then need to be checked by TNA and the FOI exemptions applied will also have to be approved by the Advisory Council. In this matter the Home Office is somewhat dependent on when the Advisory Council is sitting and, although it is optimistic that this process will be completed by the end of this year, it is possible that the Advisory Council may not be in a position to consider the papers until early 2008.
30. On 3 August 2007, the Commissioner wrote to the Home Office to inform it that, as a result of its letter of 17 July 2007, he no longer considered himself to be in a position to be able to reach a decision without receipt of further representations and clarification. The Commissioner advised the Home Office that this would be best achieved through a representative of his visiting in person in order to both view the requested information and further discuss its position. Specifically, the Commissioner informed the Home Office that, on his visit, his representative proposed to undertake/discuss the following matters:
- Viewing the volume and nature of the information held (in relation to all four individuals);
  - An update on the work carried out by the Home Office since November 2006 on the information relating to West, Shipman and Kray;
  - Viewing samples of information the Home Office wishes to exempt under section 41 of the Act (information provided in confidence);
  - Clarification as to what other exemptions the Home Office wishes to apply (if any) and viewing samples of the information to which these exemptions have been applied;
  - Viewing samples of information which the Home Office does not consider to be exempt; and
  - Analysis of the Commissioner's views of the Home Office's application to date of sections 12 (cost limit) and 22 (information intended for future publication).
31. The Home Office agreed to the Commissioner's request for a meeting, which took place on 22 August 2007. At the meeting, his representative (referred to from here on as 'the Commissioner' for ease of reference) advised of his view about the application of sections 12 and 22 (see analysis section). He also viewed several samples of requested information which the Home Office wishes to exempt from disclosure under section 41, as well as samples it intends to release. The Home Office also advised the Commissioner of the work carried out to date on the transfer of the material to TNA in respect of its application of various exemptions and that which remained to be carried out, most of which it advised would be completed by the end of 2008. The Commissioner was advised that work had so far only been carried out on aspects of the Hindley material, and was provided with a schedule of further work to be carried out on this, together with



estimated completion dates for each task. However, the Commissioner went on to advise the Home Office that the requirements of the Act are such that unless it reached an informal resolution with the complainant, he would have no option but to issue a Decision Notice ordering the Home Office to either disclose the entire requested information or formally apply exemptions to it within 35 calendar days of the Notice being served.

32. On 15 October 2007, the Home Office met with the complainant in order to attempt to informally resolve his complaint. The Home Office notified the Commissioner on 14 December 2007 of the suggestions it put to the complainant to this end, which centred upon asking the complainant to reduce the scope of his request to the Hindley papers alone. However, this attempt failed and, on 22 February 2008, the complainant informed the Commissioner that he wished him to proceed to issue a Decision Notice on the basis of all the requested information.
33. On 25 February 2008, the Commissioner wrote to the Home Office to request that it formally sets out its position in relation to all the requested information, namely:
  - work carried out and completed to date;
  - progress and justification on the application of exemptions;
  - confirmation of work remaining; and
  - projected dates for transfers of information to the National Archives.
34. The Home Office responded to the Commissioner on 31 March 2008, in which it set out in detail its application of exemptions to various types of information within the Hindley files. Details of this can be found in the analysis section, apart from reasoning provided to the Commissioner in confidence. The content of that reasoning (and that in all other submissions provided to the Commissioner in confidence) is not included in this Notice as the Commissioner is satisfied that disclosing any of the information provided to him in confidence would reveal exempt information. The Home Office's response included a schedule of the entire Hindley papers transferred to TNA, together with details of the extracts being withheld and the corresponding exemptions applied.
35. The Home Office response also enclosed a copy of the letter which it sent to the complainant on the same day (31 March 2008). This letter detailed all the exemptions applied to the information, together with full justifications. Details of this can be found in the 'analysis' section. The letter also informed the complainant of the following:
  - The review of the Hindley papers was completed at the end of October 2007...the use of those exemptions has now been approved by the Lord Chancellor's Advisory Council on National Records and Archives following their meeting on 14th February 2008.
  - Having completed the review of the Hindley papers, the review has now commenced of both the West and Shipman papers which will be ready for consideration by the Advisory Council in their meeting at the end of May 2008. The Kray papers will be considered last of all and are likely to be released towards the end of 2008.

- An explanation cannot be provided of what exemptions will be applied to the West, Shipman and Kray papers until such time as the review of those papers has been completed. The application of exemptions in the Hindley papers should, however, give some indication of the type of information likely to be considered exempt.
36. Further to the Home Office's submission, the Commissioner contacted it on 2 April 2008 to request samples of documents it wishes to withhold from the Hindley files from each subcategory of information identified as falling within each exemption applied. The Commissioner was informed that because the information had been transferred to TNA, and because of the nature and sensitivity of the information, it would be easier for him to view these samples in situ. The Commissioner agreed to this suggestion and a representative of his visited TNA on 15 May 2008 to undertake this viewing.
  37. Prior to his visit, the Home Office supplied the Commissioner with a list of extracts of information, entitled 'Examples of exemptions applied to Hindley files', which would fulfil his request for examples of redactions; these were the extracts which the Commissioner viewed during his representative's visit. This list consisted of various extracts falling within the several classifications.
  38. On 31 July 2008, the Home Office wrote to the Commissioner to inform him that the work on the West and Shipman papers had been completed and it notified him of the exemptions that would be applied to this information when it is transferred to TNA, and the categories of information which fall within each exemption. The Home Office also provided the Commissioner with a schedule of the categories of information being withheld, one each for Shipman and West. A justification for withholding each category of information was included, each by reference to exemption, piece number, piece details, extract details and covering dates. The Commissioner notes that the reasoning provided to withhold information relating to West and Shipman, as set out in the submission to him of 31 July 2008, was either identical or very similar to that used in relation to the Hindley papers.
  39. On 7 November 2008, the Home Office wrote to the Commissioner to notify him that it had been necessary to revisit the Shipman and West files due to a concern that some of the information they contained might be damaging to prison security if released and decided to apply section 31(1)(f) – "prejudice to the maintenance of security and good order in prisons or in other institutions where people are lawfully detained" - to some information, predominantly relating to Shipman. The Home Office provided a full explanation as to why it was applying this exemption. It also identified some further documents it had earlier overlooked, consisting of court records, medical information, which it wished to withhold. A justification for withholding each category of information was also included, each by reference to exemption, piece number, piece details, extract details and covering dates.
  40. On 3 December 2008, the Commissioner visited the Home Office to view the information it had decided to withhold under section 31(1)(f) of the Act. The Commissioner also asked for confirmation as to the current position in respect of the Kray material. The Commissioner was informed that all review and redaction

work on it had been completed and that the transfer of this information to The National Archives would most likely take place in early 2009.

41. On 13 January 2009, the Ministry of Justice wrote to the Commissioner to notify him of the exemptions which will be applied to the information on the Kray brothers when it is transferred to TNA, and the categories of information which fall within each exemption. The Commissioner was also provided with a schedule of the categories of information being withheld. A justification for withholding each category of information was included, each by reference to exemption, piece number, piece details, extract details and covering dates. The Commissioner notes that the reasoning provided to withhold information under the exemption specified was either identical or very similar to that used in relation to the other papers requested by the complainant.

### **Finding of fact**

42. The requested information has, at the date of this Notice, been transferred to the National Archives. However, the decision relates to the status of the information at the time the request was made, in which it was held by the Home Office. Yet this Notice is being served on the Ministry of Justice (MoJ). This is because of a reorganisation of responsibilities between the Home Office and MoJ on 8 May 2007, in which responsibility for the requested information (including its past handling) passed to the MoJ. Although the information continued to be administered by the Home Office beyond that date, the Home Office therefore undertook this work on behalf of the MoJ.
43. The Commissioner viewed samples of information relating to Hindley being withheld under each exemption applied. A schedule of the information viewed can be found in annex A. The Commissioner also viewed all the information falling within the scope of the request being withheld under section 31(1)(f).

### **Analysis**

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44. The provisions of each of the exemptions referred to in this section can be found in Annex B.
45. The Commissioner must restrict his decision to whether the application of the Act to withhold the requested information was correct in relation to the circumstances of the case at the time of the complainant's request. However, he may use his discretion take into account reliance on different/additional provisions of the Act used by the Home Office/Ministry of Justice subsequent to the outcome of the internal review in reaching this decision provided that these could have applied at the time of the request. In the circumstances of this case he accepts that it would be reasonable for him to accept late reliance on the provisions claimed.

## Procedural matters

### Scope of request

46. The Home Office has interpreted the complainant's request as being for all information held by it, relating to each of specified individuals' time spent in prison. The Commissioner notes from the complainant's request, that in relation to some of the specified individuals, there were particular categories within this information in which he was interested. However, given the broad wording of the complainant's request overall; the scope of matters referred to by the complainant; and the Commissioner's view that all the withheld information he viewed fell within the scope of the complainant's request, the Commissioner accepts that in effect, all of this information can be said to fall within the scope of the complainant's request.
47. Furthermore, in its meeting with the complainant of 15 October 2007, the Home Office explained the scope of the information it considered to fall within the boundaries of the request and the complainant accepted this. In addition, the Commissioner notes that the complainant refused to reduced the scope of his request as per the Home Office's suggestion that he restrict it to the Hindley material. The Commissioner therefore proceeded to analyse the handling of the request as per the volume of the information considered by the Home Office.

### Section 17 - Refusal Notice

48. The Commissioner notes that the Home Office's refusal notice of 17 January 2005 did not conform to the requirements of section 17 for the following reasons:
- i. No details provided of the Home Office's public interest test reasoning under section 22 of the Act. This is a breach of section 17(1)(c).
  - ii. No details provided of the public authority's own internal review complaint process. This is a breach of section 17(7)(a).
  - iii. No details provided of the complainant's right to appeal to the Commissioner. This is a breach of section 17(7)(b).
49. The Commissioner considers the Home Office's letter to the complainant of 31 March 2008 to be an adequate explanation for the application of the various exemptions to the Hindley material in respect of section 17(1). However, the Commissioner did not consider this letter to constitute a revised refusal notice. This is because, although it informed the complainant of its formal reliance on exemptions applied, it only related to the Hindley material and post-dated the internal review. In addition, the complainant was not informed of the exemptions subsequently applied to the remaining material being withheld. This constitutes further breaches of sections 17(1)(b) and (c).

## Section 12 - Cost Limit

50. In the outcome of its internal review of 16 October 2006, the Home Office stated that the original responses should have instead refused the requests under the £600 cost limit as permitted by section 12 of the Act as a vast amount of information would need to have been collated in relation to some of the offenders, and an amount which would exceed the limit in relation to all.
51. Technically, each of the four elements of the complainant's request constitutes a separate request. However, the Commissioner considers them to be sufficiently similar that they can be aggregated when considering the cost limit. This is because there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested. The fact that requests concern different individuals does not mean that they cannot be similar. This line was upheld by the Information Tribunal in the case of *Ian Fitzsimmons v Information Commissioner and the Department for Culture, Media and Sport* [EA/2007/0124].
52. However, in its submission to the Commissioner of 3 November 2006, it was clear from the Home Office's explanation and content of its annexes of information held, that the information had already been collated and was held by the Home Office. It was also clear that no work needed to be undertaken in order to separate information within the scope of the request from other information (or, in other words, to locate and retrieve relevant from irrelevant material)..
53. The Commissioner's analysis of the Home Office's response leads him to conclude that the cost limit was applied instead to the amount of time that it would take to prepare the papers for disclosure in terms of cataloguing and going through the information to identify and redact information which it considered should remain exempt from disclosure under the Act post-transfer to TNA.
54. Under Regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, a public authority may, for the purposes of its estimate of the cost limit, take account only of the costs it reasonably expects to incur in relation to the request in:
- (a) determining whether it holds the information,
  - (b) locating a document containing the information,
  - (c) retrieving a document containing the information, and
  - (d) extracting the information from a document containing it.
55. The key to the proper interpretation of this provision is that the "information" in this context is the information requested, not the information to be disclosed. A public authority cannot therefore take into account for these purposes the cost of considering whether the information requested was exempt. Furthermore, the time taken to redact a document when the process of redaction is to blank out exempt information, leaving only the information which is to be disclosed in response to the request, does not fall within regulation 4(3)(d).

56. The Commissioner has therefore concluded that the Home Office did not provide a reasonable cost estimate and cannot rely on section 12 to withhold the information requested.

## Exemptions

### Section 22 – Information intended for future publication

57. Following the internal review, the Home Office continued to rely upon section 22 in order to withhold the information but did so in addition to section 12 rather than the sole basis. However, as the Commissioner has decided that section 12 does not apply to the requested information, he proceeded to analyse whether some or all of the material could be withheld under section 22 alone.
58. The Commissioner is satisfied that 'publication' of this information can relate to the time at which it has been transferred and is made available to the public for inspection at TNA. He believes this to be the case for the following reasons:
- i. An FOI publication scheme contains information which a public authority commits to publish upon request. However, information only available to the public by inspection can also be placed in that scheme. Using this interpretation, the Commissioner is satisfied that even if the requested information will only be available at the TNA for the public to inspect, it will constitute information that has been "published". In reaching this conclusion the Commissioner notes the ready availability of the TNA's inspection facilities and systems.
  - ii. There is no requirement under section 22 for the public authority holding the information to be the body who will publish the information to which the exemption has been applied.
59. The Commissioner notes that the line as to when the information was to be published changed a number of times, such as:
- i. "By the end of 2005" (Response to the request)
  - ii. "At the earliest possible date" (Outcome of the internal review)
  - iii. "Easter 2007" (November 2006)
  - iv. "Early 2008" (July 2007) – Hindley. This letter also altered its position in relation to the scope of the publication of information.
  - v. "Towards the end of 2008" (March 2008) – Kray.
  - vi. "Early 2009" (December 2008) - Kray
60. Section 22 does not require a public authority to specify the date when it plans to publish the information. It merely requires an assertion that it had a view to publish the information at some future date at the time when the request for information was made. However, in considering section 22(1)(c) timing is a key factor in considering what is reasonable in the circumstances. The Commissioner



is of the view that, in general, the sooner the intended date of publication, the better the case for maintaining the exemption.<sup>1</sup>

61. The Commissioner is not satisfied that, at the time of the complainant's requests, it was the intention of the Home Office to publish the requested information in its entirety. This is borne out by its subsequent representations which set out that it had always been the case that some of the information contained within the requested papers would remain 'closed' post transfer to TNA. In addition, the Home Office was not in a position to clearly specify which sections of the information it wanted to apply section 22.
62. In effect, the exercise of working out what to transfer to TNA was the same as working out what in fact section 22 applied to. Therefore, at the time of the request, the Home Office was not able to clearly point to the information it intended to publish. In order to have done this, the Home Office would have needed to carry out the transfer identification process within twenty working days of its receipt of the request. As such, the reasons provided by the Home Office to justify the application of section 22 are not in fact grounds for the application of the exemption, for example the following:
- The resource burden placed upon the Home Office caused by the 'speeding up' of the work, as a result of a lack of resources; and
  - The time required to determine what information contained within the papers should be withheld from the complainant, post transfer to TNA, under other exemptions.
63. Although the Commissioner is sympathetic towards the Home Office with regard to the resource burden which this request placed upon it, hence his suggestion at the meeting of August 2007 that an informal resolution be reached with the complainant, this could not have a bearing on his assessment of section 22. Therefore although at the time of the request it was clear that the Home Office intended to public some but not all of the information within the scope of the request, it was unable to specify which information it wished to apply section 22 to and the Commissioner is not satisfied that the exemption is engaged.
64. Therefore as the Home Office did not supply to the complainant any material to which the other exemptions were not applied by the time of the internal review, the Commissioner finds there to have been breaches of section 1(1)(b) and section 10(1) in this respect.

### **Section 40(2) – Personal data**

65. The Home Office explained that there are several categories of personal data which have been redacted from the material on the basis that its release would contravene data protection principles; it also provided a justification for each. These were set out in the Home Office's letter to the complainant of 31 March

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<sup>1</sup> Information Commissioner's guidance on section 22 of the Act:  
[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_7\\_-\\_information\\_intended\\_for\\_future\\_publication.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_7_-_information_intended_for_future_publication.pdf)

2008 (Hindley) and its letters to the Commissioner of 31 July 2008 (West and Shipman) and 13 January 2009 (Krays). The categories and explanations are as follows:

i. Personal data included in correspondence from members of the public

A large amount of correspondence was sent to the Home Office and Prison Service. The names, addresses and other personal information contained within that correspondence are exempt as to release it would breach the first data protection principle that data should be processed fairly. Those who corresponded with the Home Office/Prison Service on this issue did not have an expectation that their correspondence would be made available to the public at large and it would consequently be unfair to them to publish their personal data in this way.

ii. Names of prison and probation officers, those sitting on Parole and Review Boards and Boards of Visitors, tutors and educational officers, doctors and other medical staff who came into contact with Hindley, Shipman or West during the course of their duties

There remains a significant level of interest in any information relating to these individuals. It is considered that if the names of those who had contact in a professional capacity were released, they would be likely to be targeted by journalists or others seeking to gain new insights and stories to publish. It would breach the first data principle that personal data should be processed fairly to release information which could lead to intrusion into the personal lives of those who came into contact with them as public servants or in the exercise of their professional duties. There is an expectation that public officials' names (after a certain passage of time) are released in the context of them performing their public duties but it would not be fair to do so in this case. Those officials named did not have a choice about who they were responsible for and their names are not otherwise connected with these individuals in the public domain.

iii. Personal data of friends and relatives

The release of personal data of living relatives and friends would also breach the first data protection principle. It would be unfair to the individuals concerned to release their personal information, which they would expect to remain private, simply because the public are interested. It is also likely that the release of this information would cause those individuals to receive particular media interest and intrusion into their private lives. This exemption is being applied to information which is not currently in the public domain

iv. Personal data of victims' families

Data within this category has been removed on the basis that its release would breach the first data protection principle as its release would be unfair to the victims' families.

v. Personal data of Ian Brady

Releasing Ian Brady's personal data would breach the first data protection principle that information should be processed fairly and lawfully. His personal data is protected by the Data Protection Act and although the public are

interested in it, the Home Office is of the view that the release of the material held would do little to serve a genuine public interest.

vi. Personal data of fellow inmates (Shipman, West, Krays)

Fellow inmates' names have been redacted on the basis that they have no expectation that their data would be released in this context and they too would be likely to be the subject of press intrusion as a result of their association with Shipman or West. It would breach the first data principle that personal data should be processed fairly to release information which could lead to intrusion into the personal lives of those who came into contact.

66. The Home Office also provided the Commissioner, in confidence, with additional reasons to explain its decision in respect of the application of section 40(2) to each of the categories outlined above.

67. The relevant subsections of section 40 provide that:

*(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if-*

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.*

*(3) The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the 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).....*

68. In relation to section 40(2)(a), the Commissioner is satisfied that the requested information is personal data as defined in the Data Protection Act 1998. That Act defines personal data as:

*...data which relate to a living individual who can be identified-*

- a) from those data, or*
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...*

69. Given that Hindley was in prison for many years it is possible that the authors of some of the letters and indeed people referred to within them could be deceased. However, the Commissioner has erred on the side of caution in this respect and assumed that these people are still alive, because he does not have the capability

or resource to investigate this fact nor, for the same reason, does he expect the Home Office to have done so.

70. In this case the Commissioner has had to consider whether section 40(2) applies by virtue of 40(3)(a)(i). It is clear from the Home Office's submission that it considers this provision to be satisfied by virtue of the first data protection principle, which requires that:

*"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"*

71. Condition 6 in Schedule 2 of the DPA is the relevant condition for consideration in this case. This legitimises the processing of personal data in cases where:

*'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'.*

72. Having viewed samples of each of the categories of information to which section 40(2) was applied, and taking into consideration the explanations provided to the complainant and, in confidence, to himself, the Commissioner is satisfied that the exemption was appropriately applied. He does not believe that condition 6 would be satisfied in this case, for the categories of information withheld under section 40. He considers this to be the case for the following reasons:

- i. The Commissioner is satisfied that there is no expectation among these individuals that this information would be placed in the public domain, particularly with regard to the private individuals referred to.
- ii. Given the high profile nature of this material and considerable interest in its contents, disclosure of the information would be likely to result in a significant intrusion into the private lives of the individuals concerned. This is the case for both the private individuals and officials referred to in the information. Although it is possible that some of the officials referred to may already have been publicly identified as having been linked to the individuals, given the high profile of the offenders, the nature of this information would reveal details of their involvement to a much greater extent, which the Commissioner does not consider to be fair.
- iii. The public interest in access to these documents is sufficiently met by release of the remaining contents of the documents (to which section 40(2) has not been applied), which provide a wide-ranging and detailed understanding of the individual's time in prison and of their cases, the workings and decisions of the public authorities in question; and promotes the participation of public debate around these issues.

73. The Commissioner wishes to point out, however, that whilst it is possible to take into account the possibility of media coverage, he did not base his decision on the

prejudgement that an article will be the outcome. The Commissioner also accepts the Home Office's view that the names of officials by reference to their dealings with each individual in this context are not already in the public domain.

74. The Commissioner also notes that the personal data of fellow inmates is likely to constitute sensitive personal data – at least in part because it would confirm that the individual (assuming they are still living) has been convicted of a crime, though admittedly not what that crime is. There is also a possibility that by revealing this information there may be rehabilitation of offender issues. Although individuals who are sent to prison may have reduced expectations of privacy and greater intrusion into their private life may be warranted, they still have rights under article 8 of the Human Rights Act 1998 (right to respect for private and family life) and therefore under the DPA. Moreover in relation to sensitive personal data there is no schedule 3 condition in the DPA to permit the disclosure of this information. Therefore whether or not any of this information may be in the public domain, the processing (release) of this information would be unfair under the terms of the DPA. This particular issue was considered in a previous decision of the Commissioner (FS50158274) in which the public authority was prevented by the DPA from releasing sensitive personal data, the content of which was already substantively in the public domain.
75. As such, although the Commissioner accepts that there is a general interest in access to this information (which is akin to the legitimate interests served by the contents of these documents which are not being withheld under section 40), he has concluded that the legitimate interests of the public that would be furthered by the disclosure of this information is outweighed by the prejudice to the rights, freedoms and legitimate interests of those individuals. This would not be fair to those individuals.

### **Section 38(1)(a) – information which would be likely to endanger the physical or mental health of any individual**

76. In its letters of 31 March 2008 and 31 July 2008, the Home Office advised that section 38(1)(a) was being applied to three categories of information:
- i. Information identifying and relating to those who had a particularly close relationship with Myra Hindley.
  - ii. Information relating to the victims' families (Hindley).
  - iii. Certain information relating to the victims (Hindley and West).

No information relating to Shipman or the Krays has been withheld by the Home under section 38.

77. The Commissioner only considered the application of section 38 to the third category of information identified as falling within section 38. This is because he is satisfied that the information falling within the first two categories is exempt under section 40(2). For reasons of confidentiality, the Commissioner cannot state the Home Office's reasons for withholding information falling within the third category, aside from stating that it was considered that disclosure of this information would be distressing to some of the victims' families.

78. In order for section 38 to be engaged, it must be the case that release of the specified information would or would be likely to endanger the physical or mental health of any individual. In this respect, the Commissioner took into account the decision of the Information Tribunal in the case of *John Connor Press Associates Limited v The Information Commissioner* [EA2005/0005], in which the Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk” (para 15). This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that “likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests.
79. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not”. Therefore, the risk of prejudice need not be more likely than not, but must be substantially more than remote. In this case, the Commissioner understands from the Home Office’s submissions that its position is that disclosure of the information withheld ‘would be likely’ to endanger the physical or mental health of an individual(s). He therefore assessed the withheld information with regard to the Tribunal’s interpretation of this limb of the exemption.
80. The Commissioner considers an individual’s mental wellbeing to fall within the scope of section 38. In this he includes emotional and psychological wellbeing, including the likelihood of causing significant upset or distress. In this case, having looked at most of the information relating to the victims to which section 38 (alone) was applied, the Commissioner believes it to be evident that the consequences of the disclosure of this information into the public domain, especially the likelihood of it being reported in the media, is such that it would cause significant distress to the families of the victims referred to in the material. As such, the Commissioner is satisfied that the exemption is engaged.
81. In reaching his view the Commissioner relied heavily on his view that much of the material he viewed was graphic in nature, particularly the descriptions of the way in which the crimes were carried out, and of the harm this information would cause to the surviving relatives of the victims, if disclosed. In addition, given the degree of publicity surrounding Hindley and West, although the victims’ families are probably accustomed to coverage, there is still an interest in avoiding the matters repeatedly being raised for this reason.
82. However, as section 38 is subject to the public interest test, the Commissioner went on to consider whether the exemption can be maintained in this respect. He considers the following public interest factors in the disclosure of this information to be relevant in this case:
- The passage of time since the murders took place and the information was produced.



- Furthering the public's awareness and understanding of these high profile cases, in order to reach a more informed view about the efficiency and appropriateness of actions taken by the Home Office and the courts.
  - Participation in public debate, particularly in respect of the sentences given to these individuals and the way in which the crimes were investigated.
  - Promoting transparency in the workings of public authorities and decisions taken, such as the way in which the Home Office acted in response to the material and managed it.
83. However, the Commissioner has only afforded slight weight to each of the arguments identified as favouring the disclosure of this information. This is because he believes that the withheld information, albeit of great interest to the public, would only actually serve the public interest in disclosure identified above to a limited extent. Therefore when balanced against the single factor he considers to support the maintenance of the exemption to which the Commissioner has afforded significant weight, avoiding the significant distress which release would be likely to cause, the Commissioner has concluded that the public interest in maintaining the exemption is far stronger and outweighs those in favour of the disclosure of the information.

### **Section 42(1) – Legal professional privilege**

84. The Home Office has advised that section 42(1) was being applied to information regarding Hindley, West, Shipman and the Krays which contains legal advice from Home Office lawyers and Treasury Solicitors.
85. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)
86. There are two types of privilege: legal advice privilege and litigation privilege. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation.
87. On the basis of the above, and having reviewed much of the information withheld, the Commissioner is satisfied that the correspondence to which this exemption was applied consists of both litigation privilege and legal advice privilege, and therefore that section 42 is engaged. Having assessed the information the

Commissioner concluded that it is the Government who is the party entitled to LPP and also considers that this privilege has not been waived in this case.

88. In respect of the information he viewed, some documents solely contained details of the handling of an appeal in relation to Hindley. The Commissioner is satisfied that this information consists of litigation privilege. The remaining information consists of documents which contain both advice to Government in relation to more general Government and prison policy which is not solely based on individual cases and advice on the handling of an appeal. The Commissioner is satisfied that this information is both litigation privilege and legal advice privilege. The Commissioner is also satisfied that the information relating to these individuals is likely to be applicable in other cases of a similar nature.
89. However, section 42 is subject to the public interest test. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: "There is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases. The Tribunal also noted that the public interest in disclosure might be given more weight where the legal advice was stale.
90. In *Pugh v Information Commissioner and Ministry of Defence* [EA/2007/0055], the Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "*where the privilege holder no longer has a recognised interest to protect*". The Tribunal also said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect "*a significant group of people*". In the case of *Shipton v Information Commissioner and the National Assembly for Wales* [EA/2006/0028], a differently constituted Tribunal suggested that the public interest in maintaining the exemption would be outweighed by the public interest in disclosing the information "*when the harm likely to be suffered by the party entitled to LPP is slight, or the requirement for disclosure is overwhelming*" (para 14b).
91. As a result of these Information Tribunal decisions on section 42, the Commissioner considers the following factors to favour the maintenance of the exemption in this case:
- The ability to communicate freely and receive advice with internal and external legal advisors in confidence.
  - The continued relevance and implications of the matters discussed.
  - The likelihood that the advice given in this context will be useful in relation to other subsequent issues.
92. Against the arguments for maintaining the exemption in this case, and in line with the decisions of the Information Tribunal, the Commissioner considered the following public interest arguments in favour of disclosure to be of relevance:

- Informing debate on key issues, including allowing the public to feed into key policy decisions, especially those which have wide application in the workings of the criminal justice system.
  - Helping people understand and challenge decisions affecting them.
  - Promoting accountability for decisions taken.
  - Promoting probity.
  - The time elapsed since the information was produced, in relation to the matters discussed and the subsequent death of the individuals.
93. The Commissioner considers all of the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. This is particularly the case in terms of informing the debate on the key issues to which the information relates and promoting transparency for decisions taken.
94. Having viewed the information withheld under section 42 (Hindley), the Commissioner considers all the arguments favouring disclosure, when applied to the content and context of the withheld information, to carry weight. He afforded particular weight to his view that, taking into account what is already in the public domain about the issues considered in the information, the categories of which are outlined above, disclosure would assist the public in taking part in debate and would assist in challenging decisions.
95. However, in the circumstances of these particular pieces of information, the Commissioner considers that the arguments for disclosure are outweighed by the arguments in favour of maintaining the exemption under section 42. This is based on the Commissioner's analysis of the content and context of the information he viewed to which section 42 applies, from which he reached the following conclusions:
- i. The sensitivity and significance of the advice provided is such that the inbuilt weight of LPP in relation to this information is very strong.
  - ii. The information remains relevant to Government in terms of the matters referred to, and there are clear recognised interests which the advice continued to protect.
  - iii. The harm likely to be suffered by the party entitled to LPP, as a result of disclosure, would not be slight.
96. The Commissioner has no reason to believe that he would have reached a different conclusion with regard to the remaining information withheld under section 42 which he did not view (Shipman, West and the Krays). The Commissioner has therefore concluded that in this case the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption.

### **Section 31(1)(a) – Information which would be likely to prejudice the prevention or detection of crime**

97. The Home Office informed the complainant on 31 March 2008 that it was applying section 31(1)(a) to information which relates to open police investigations concerning Keith Bennett. It explained that "his body has never

- been found and the police investigation into his murder and the whereabouts of his body remain open. The information to which this exemption applies would be likely to prejudice the open investigation if released into the public domain”.
98. Some of the information to which this exemption was applied was also withheld under section 40(2). As the Commissioner is satisfied that this information is exempt from disclosure under that provision, he did not consider it in relation to section 31, and instead focussed upon the remaining information.
99. In order for information to be withheld under section 31, it must be the case that it is not exempt by virtue of section 30 (investigations and proceedings conducted by public authorities). In order for section 30 to apply, the body holding the information must have the duty to investigate one or more of the matters specified in that exemption. In this case, based on the reasoning provided by the Home Office to the Commissioner in confidence, he understands that it is Greater Manchester Police which has this duty rather than the Home Office, which holds the information. This led him to conclude that none of the provisions of section 30(1) or section 30(2) are fulfilled.
100. As the Home Office stated that the information is being withheld for the purposes of an investigation being carried out for the purposes of detecting a crime that has been committed, the nature of the investigation relating to a suspected murder and missing person which has not yet been detected. The Commissioner is therefore satisfied that the material falls into the scope of section 31(1)(a). However, for this exemption to be engaged, the Commissioner must be satisfied that the release of this information would, or would be likely to, prejudice the detection of the crime, in this case the search for Keith Bennett's body. In this respect, the Commissioner was guided on the interpretation of the phrase 'would, or would be likely to' by the Information Tribunal decisions he considered in relation to section 38 (see previous analysis).
101. The Home Office did not clearly specify which limb of the exemption in this respect it was relying upon. The Commissioner therefore assessed whether the information falls within the lower threshold of the exemption, that of 'would be likely to'. This is consistent with the approach taken by the Information Tribunal in *McIntyre v The Information Commissioner and the Ministry of Defence*. At paragraph 45 it stated that “in the absence of designation as to level of prejudice...the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level”.
102. The Commissioner was informed (in confidence) of the nature of the contents of all the information being withheld under section 31(1)(a) and viewed much of this material. In relating this to the Home Office's justification, together with the reasoning provided to it by Greater Manchester Police, who have conduct of this investigation, the Commissioner was persuaded that section 31(1)(a) is engaged. However, for reasons of confidentiality, the Commissioner is not, within this Notice, able to elaborate on the contents of these submissions which led him to reach this conclusion.

103. In relation to the public interest test under section 31(1)(a), the Commissioner considered the following factors to be of relevance:

In favour of maintaining the exemption

- It would not be in the public interest for those other than the relevant authorities to attempt to investigate this crime or attempt to locate the subject of the investigation. Such actions could result in any as yet undiscovered evidence becoming compromised or contaminated.
- Allowing the police to undertake their investigation and the evidence free from outside interference.

Against maintenance of the exemption

- Promoting the public's understanding of the information held which may relevant to this investigation.
- Promoting accountability and transparency in the conduct of this investigation, particularly in respect of the information held which has lead to the investigation, why this information is relevant, and how and why the investigation remains ongoing.
- Public participation in the debate about issues surrounding this investigation.

104. There is a strong argument that it is in the public interest to disclose the information if the effect of releasing it is that the crime will be more likely to be detected. However, having assessed the information, the Commissioner believes that release would be unlikely to have this effect and therefore this is not a sufficient reason in this case to outweigh the public interest in ensuring that the relevant authorities investigate the matter and preserve the evidence. Given the weight of Greater Manchester Police's arguments in relation to their analysis of this information, and the Commissioner's own view of the likelihood of this information containing references which could allow for the detection of this crime, whether overt or not, the Commissioner believes that the importance attached to not restricting avenues open to the relevant authorities and their ability to conduct this investigation remains significant. Therefore, the Commissioner believes that these arguments are sufficient to tip the balance of the public interest in favour of the maintenance of the exemption.

**Section 31(1)(f) – Information which would, or would be likely to, prejudice to the maintenance of security and good order in prisons**

105. The Home Office informed the Commissioner that some information relating to Shipman and West contained within eleven piece numbers was being withheld under section 31(1)(f). The Home Office provided the following explanation for relying upon this exemption, in which it is clear that it is relying on the 'would prejudice' limb of the exemption:

“That information covers security arrangements in the prison service, processes which are used to evaluate, and monitor prisoners and prisoner risk and intelligence gathering methodology. The vast majority of the information relates to Harold Shipman, who was detained as a category A prisoner. The Shipman information dates from 1999-2004



and is therefore relatively recent. The West information is older but still relevant to current processes. All of the information...has been identified as containing details of methodologies, processes and other information which are still current or relevant to current processes and which would prejudice the ability of the Prison Service to maintain security and good order in prisons if it were released. If this information was placed in the public domain it would enable individuals to circumvent or avoid processes and procedures which are necessary to ensure the effective management of prisons and prisoners.”

106. The Commissioner viewed all the information being withheld under section 31(1)(f) and concluded that the exemption was appropriately engaged. Specifically, he is satisfied that the release of the information would prejudice to the maintenance of security and good order in prisons if released. The Commissioner also agrees that the vast majority of the information is relatively recent and is satisfied that it is all relevant to current processes.
107. The Commissioner then proceeded to assess the public interest test in relation to this information. In its letter to the Commissioner, the Home Office provided the following details in relation to the public interest test:

“Factors in favour of disclosure

It is in the public interest to understand how prisons and prisoners are managed and to know that they are being managed effectively. The information covered by this exemption would, to a limited extent, demonstrate those processes and the methodologies that prisons use.

Factors against disclosure

It is clearly in the public interest that those detained within the prison system are detained securely in order to protect the public and to ensure that justice is served. It is also in the interests of those employed within prisons that good order is maintained to ensure their own safety and security.

Balance of the public interest

The public interest in ensuring that prisoners are effectively managed and securely detained is very high. The balance in this case clearly falls in favour of protecting information which would prejudice the ability to maintain security and good order if it were released.”

108. In order to reach his conclusion on the public interest test, in addition to viewing the withheld information, the Commissioner also sought verbal explanations from the Home Office as to why it would not be in the public interest to disclose each specific document or extract being withheld under section 31(1)(f). The Commissioner was persuaded by the specific explanations put to him in respect of each piece of information. Such explanations related to the following:

- Security arrangements at a court



- Intelligence reports and intelligence gathering reports
  - Details of how psychometric testing scores are used within the prison system
  - Contingency plans in the event of a suicide
  - Patterns of security checks used in a prison
  - Excerpts from the Prison Security Manual
  - An escape pack put together for use in the event of a prisoner's escape
  - Prison monitoring methods
  - Arrangements for transferring prisoners
  - Categorising risk and characteristics of prisoners
109. The Commissioner believes that disclosure of the information would demonstrate process and methodologies used by prisons in relation to the above, to a much greater extent than that considered by the Home Office. In respect of information concerning suicide prevention arrangements, the Commissioner notes that Shipman and West both committed suicide in jail via similar means. They were both high profile murders and may have been on suicide watch. The Commissioner considers there to be a public interest in releasing details surrounding prison arrangements for such matters to assist the public's understanding of how these suicides might have happened and why they were not prevented. (The Commissioner is of the view that the withheld information goes beyond what is in the public domain on this matter.) Therefore, the Commissioner believes that the Home Office has underestimated the public interest in the disclosure of this information.
110. However, the Commissioner is of the view that these factors are still outweighed by the effect that disclosure would have on the ability of prisoners and others to use the information to circumvent arrangements put in place for their wellbeing and the maintenance of order, security and management in prisons. As such, the Commissioner accepts that the public interest favours the maintenance of section 31(1)(f). In addition, the Commissioner wishes to point out that the files he viewed from which information was being withheld under s31(1)(f) contain much information regarding prison arrangements which is to be disclosed, and that this information is less sensitive in nature than that being withheld.

### **Section 32(1)(c) – Court records**

111. The Home Office informed the Commissioner that the Shipman papers contain a document from the trial judge to the Home Office containing his recommendation as to whether the life tariff should be a "life means life" tariff. It also advised that the West papers contain court documents relating to Fred and Rosemary West's appearance in court on rape charges in 1992.
112. Information can only be withheld under section 32 if it is only held by the public authority in a court record and not elsewhere. As Rose West is still alive the Home Office may still have her case 'on the books'. If this is the case, it is reasonable to question if information relating to her which has been withheld

under section 32 is not held elsewhere, such as for the purpose of reviewing the case. The Commissioner is therefore of the view that it is more appropriate to conclude that this information is exempt under section 40 as it would constitute Rose West's sensitive personal data as it relates to allegations of rape.

113. However, based on the Home Office's explanations the Commissioner has no reason to doubt that the information relating to Shipman and Fred West is also held elsewhere and he is not aware of any evidence to suggest that the Home Office also holds the information elsewhere. The Commissioner is therefore satisfied from the Home Office's account of this information that it is exempt from disclosure under section 32(1)(c). Section 32 is an absolute exemption; therefore the public interest does not apply.

### **Section 41(1) – Information provided in confidence**

114. The Home Office advised that section 41 was applied to Hindley, West, Shipman and the Krays' medical information and records on the basis that to release them would constitute an actionable breach of confidence.
115. In order for section 41(1)(a) to apply, the information must have been obtained from a source outside the public authority. In this case, although the information was produced by the public authority, it was about, and sourced from these individuals. However, in order to determine whether disclosure of the withheld information would constitute an actionable breach of confidence (which would allow for section 41(1)(b) to apply) the Commissioner was required to take the following considerations into account:
- Whether the information has the necessary quality of confidence about it;
  - Whether the information was communicated in circumstances importing an obligation of confidence; and
  - Whether disclosure of the information would be to the detriment of the party to whom the duty of confidence is owed.
116. The Commissioner assessed all the information relating to Hindley to which section 41 was applied and was satisfied that this exemption was correctly applied. He reached this conclusion for the following reasons:
- i. Given the sensitive and personal nature of the information to which section 41 was applied, the Commissioner is satisfied that the information has the necessary quality of confidence. He also considers that disclosure of information of this type would constitute an unwarranted intrusion into the subject's life, which the Commissioner believes meets the test of detriment. Indeed individuals would not expect details of their mental or physical health which they impart to the authorities for the purpose or treatment or welfare to be released to the wider public irrespective of the degree of material already published.
  - ii. The Commissioner has taken the view in several previous decisions (such as Epsom and St Helier NHS Trust – FS50071069 upheld by the Information Tribunal in September 2007 - EA/2006/0090) that a deceased

person's medical records are exempt from disclosure under section 41. This view is based on the understanding that the public authority holding the records owes a duty of confidentiality to the subject of the records and this duty continues after the death of the individual. Any breach of the duty of confidentiality owed to the deceased would be actionable by his family or personal representatives. Such information could only be disclosed, therefore, with the consent of the individual(s) to whom the duty of confidence has been passed.

- i. In determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative.
  - ii. All the withheld information consists of either medical records or medical information/reports about Hindley. While some of the information is not in the form of medical records it is of the same sensitivity and relevance to the deceased as her medical records. The Commissioner therefore sees no reason why the same duty of confidentiality which would apply in relation to Hindley's medical records would not apply to the remaining medical information. To illustrate this point, were this information to relate to a living individual, the Commissioner is satisfied that this material would have met the definition of sensitive personal data. This is afforded even greater protection under the Data Protection Act in recognition of its sensitivity and the impact on individuals if it is not processed in accordance with the Data Protection principles.
117. Having viewed this information, the Commissioner has no reason to consider that his conclusion could not equally apply to the information withheld under section 41 which relates to Shipman, West and the Krays.
118. As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, case law on the common law concept of confidence suggests that a duty of confidence can be overridden if there is an overriding public interest in the disclosure of the information. In this case, the Commissioner therefore assessed whether this public interest override is relevant in respect of the information withheld from the complainant.
119. The Commissioner interprets the public interest test in deciding if a duty of confidence can be overridden as differing from the public interest test normally applied under the Act, in that the burden of proof is reversed:
- The FOI public interest test for qualified exemptions assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.

- The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
120. In light of this interpretation, the Commissioner believes that it is important to fully appreciate the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. In particular, his view is that a duty of confidence should not be overridden lightly, particularly in a case such as this, where a duty of confidence is owed to an individual.
121. The wider public interest in preserving the principle of confidentiality  
The Commissioner considers the relationship of trust between a patient and a health worker, protected by the duty of confidence, operates to serve the public interest. If the information in question in this case is released, such a relationship could be undermined and patients may be less willing to disclose medical information to a doctor, for example, or allow it to be recorded. The Commissioner accepts the view that this could also lead to medical staff being unable to make a correct diagnosis.
122. The interests of the confider and those connected to them  
The importance of the right to privacy is recognised by the Article 8 of the Human Rights Act 1998 which states that: "Everyone has a right to respect for his private and family life, his home and his correspondence." The Commissioner considers there is a requirement to consider the interests of the confider beyond death and a right to privacy for the family or those closely connected with the confider will extend beyond death of the individual. There is a public interest in protecting these interests.
123. Although the Commissioner accepts that the public has a strong interest in the contents of this information, this is not the same as the public interest, which does not relate to that in which the public is interested. The Commissioner could not therefore take this into account in respect of section 41.
124. Rather, factors which the Commissioner considers to favour disclosure in this case are as follows, which largely match those of the Home Office:
- Public scrutiny of the activities of public authorities.
  - Access to information about the medical treatment of prisoners who have committed the most serious crimes.
  - Providing an insight into the way in which medical treatment has been administered to an individual over a very lengthy period of time.
  - Aiding the understanding of how practices have changed.
125. Having identified the public interest in both withholding and releasing this information, the Commissioner proceeded to reach a view as to whether the Department would have a public interest defence were it to disclose the withheld information. He concluded that it could not as he did not believe that the public interest in maintaining the confidence was outweighed in this case.

126. Although the Commissioner's analysis on section 41 was restricted to the information relating to Hindley, he is of the view that the public interest defence arguments relating to the Shipman and West information may be stronger. This is because there may be a stronger interest in understanding how they were treated given their subsequent suicides. However, the Commissioner recognises that Shipman and West were not in prison for as long as Hindley and therefore the degree to which the material may inform the public about changing practices and the administration of treatment over time is likely to be reduced in their cases, and certainly not to the degree so as to provide a public interest defence were the information to be disclosed. Therefore, although the Commissioner does not believe that there is a public interest defence in the disclosure of the Shipman and West material, he is of the view that the public interest defence considerations are slightly different in these cases.

## The Decision

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127. 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:
- i. Application of the following exemptions to withhold specified categories of information:
    - Section 31(1)(a) – Information which would be likely to prejudice the prevention or detection of crime;
    - Section 31(1)(f) – Maintenance of security or good order in prisons;
    - Section 32(1)(c) – Court records;
    - Section 38(1)(a) – information which would be likely to endanger the physical or mental health of any individual;
    - Section 40(2) – Personal information;
    - Section 41(1) – Information provided in confidence;
    - Section 42(1) – Legal professional privilege.
128. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- i. Section 17(1) in relation to various aspects of the refusal notice, specifically the application of exemptions post-internal review; and not informing the complainant of the additional exemptions applied to each one of the individuals to which the request relates. .
  - ii. Section 17(7)(a) and 17(7)(b) in relation to not informing the complainant, in the refusal notice, of the procedure for dealing with complaints or his right of appeal to the Commissioner.
  - ii. Application of section 12 (Cost limit).
  - iii. Application of section 22 (Information intended for future publication).

- iv. Section 1(1)(b) (Duty to communicate information) and section 10 (Time for compliance with request) in relation to the information requested which the Commissioner does not consider to be exempt from disclosure (i.e. the information to which no exemptions, apart from sections 12 and 22, were applied)..

## Steps Required

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

If it has not already done so, make available to the complainant all the requested information which the Commissioner does not accept is exempt from disclosure (this being the material not falling within the categories outlined in the Home Office's letter to the complainant of 31 March 2008 and letters to the Commissioner of 31 July 2008, 7 November 2008 and 15 January 2009).

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

## Failure to comply

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

## Complainant's application to the Commissioner

133. The Commissioner accepted the complainant's appeal to him of 21 May 2006 as a valid application under section 50 of the Act (application for decision by Commissioner). Although the Commissioner is not obliged under section 50 to accept an application until the complainant has exhausted any internal review provided by a public authority, in this case it was clear that many months had passed since the complainant had requested an internal review and a response did not appear to be forthcoming.

134. However, the Commissioner initially used the application of 21 May 2006 in order to intervene in the matter of the internal review and request that the review be



carried out as soon as possible. The Commissioner then put his investigation into the matter on hold until the review had been completed and the complainant informed him that he wished to appeal against its outcome.

### **Conduct of Internal Review**

135. There is no legal obligation on the part of a public authority to conduct an internal review into its handling of a request. Therefore, although the code of practice issued under section 45 of the Act advises a public authority to conduct an internal review if requested and to do so in a timely fashion, the Commissioner cannot comment upon such conduct in the body of a Decision Notice.
136. However, the Commissioner wishes to comment on the fact that the complainant's internal review request of 19 September 2005 was treated as general correspondence and not recorded within the FOI monitoring procedures. The Commissioner is of the view that any expression of dissatisfaction from a complainant should be treated as a request for an internal review. Nevertheless, the Commissioner does recognise that the complainant's request was made in the early days of the Act's implementation when public authorities' procedures for recognising a request for an internal reviews may have been less robust than is now the case.
137. Moreover, the Commissioner wishes to draw attention to the handling of the internal review in this section of the Notice. This is because it appears to him that there were serious administrative shortfalls resulting in a severe length of time to reach an outcome. There was also confusion as to what constituted that outcome. Furthermore, the final outcome of the internal review was only achieved as a result of pursuance on the part of the complainant and intervention on the part of the Commissioner. This delay served to frustrate the complainant and delayed his appeal to the Commissioner for a decision.

### **National Offender Management Service**

138. The Commissioner notes that the public authority which initially handled the complainant's request was the National Offender Management Service (NOM) which sat within the Home Office. The Commissioner has previously taken enforcement action against NOMS in relation to its procedures in handling requests under the Act, and he has taken into account the early stages of the handling of this case as part of his ongoing review of NOMS' performance.

## Right of Appeal

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

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

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 14th day of April 2009**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

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

**Annex A - Examples of exemptions applied to Hindley files, all of which was viewed by the Commissioner's representative**

**Section 40(2): personal data**

**Personal data included in correspondence from members of the public who:**

Wrote to Home Office

Piece 12, extracts 1-7, 9, 14-16, 18, 22, 23, 26

Piece 55, extracts 1-4, 9

Wrote to their MP

Piece 180, extracts 1-6

Piece 314, extracts 1-4

Piece 552, extracts 1-3

**Names of prison and probation officers, those sitting on Parole and Review Boards and Boards of visitors, tutors and educational officers, doctors and other medical staff who came into contact with Myra Hindley during the course of their duties:**

Prison officers

Piece 22, extracts 23, 48, 63, 64, 68, 73, 74, 76

Piece 110, extracts 4, 15, 19, 21, 27, 28, 31, 33, 34, 64

Probation officers

Piece 168, extracts 3-7, 9-11, 14, 27-29, 31, 32

Parole Board members

Piece 22, extract 45

Open University tutors

Piece 22, extracts 32, 33

Piece 110, extract 39

Doctors

Piece 83, extracts 8, 14, 15

Piece 168, extracts 3-6, 12-13, 25-27, 29

Medical staff

Piece 55, extracts 10-13

Piece 130, extracts 10, 29

**Personal data of friends and relatives of Myra Hindley and other inmates**

Inmates

Piece 12, extracts 10-20

Piece 55, extracts 4, 7, 8

Piece 130, extracts 17, 18, 25-28, 30, 33, 38, 39

Details of correspondents with Hindley

Piece 83, extracts 46, 47

Piece 110, extracts 1-3, 5-10, 12-63, 65-71

Financial details of [named individual]

Piece 110, extracts 41, 43, 46, 47, 51, 52, 54-62

**Personal data of Myra Hindley's victims' families**

Piece 32, extracts 1-3, 5, 6, 8-13, 15, 17-19, 22-27, 29, 35, 39

Piece 55, extract 18

**Personal data of Ian Brady**

Piece 19, extract 31

Piece 83, extract 53

Piece 173 (letters to Hindley)

**S38(1)(a) – information which would be likely to endanger the physical or mental health of any individual**

**References to [named individual]**

Piece 20, extracts 8, 11, 12, 35, 37, 38

Piece 33, extracts 6-8, 12, 13, 49, 52, 53, 64, 70, 81, 82, 85, 86, 91

**References to [named individual] (S40(2) also applies to these redactions)**

Piece 12, extracts 1, 5-8, 22, 23

Piece 83, extracts 6, 9, 17, 19, 28, 29, 45

**References to [named individual] (S40(2) also applies to these redactions)**

Piece 19, extracts 2, 48-52

Piece 55, extracts 7, 8

**Information relating to the victims' families**

Piece 12, extract 21

Piece 55, extract 18

**Information relating to the victims**

Piece 49, extract 12

Piece 168, extracts 18-24

**Section 31(1)(a) – Information that would be likely to prejudice the prevention or detection of crime**

Piece 168, extract 15

Piece 172, whole file

Piece 173, letters between Brady and Hindley

**Section 41 – Information provided in confidence (medical information)**

Piece 83, extracts 14, 15, 17, 22, 24-27, 31, 40-42, 52, 53

Piece 168, extracts 12, 13, 25, 26

**Section 42 – Legal Professional Privilege (legal advice)**

Piece 76, extract 16

Piece 181, extracts 1-9, 11-33

Piece 187, extracts 1-11

## Annex B - Legal Annex

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### 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”.”



### **Exemption where cost of compliance exceeds appropriate limit**

**Section 12(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

**Section 12(2)** provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

**Section 12(3)** provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

**Section 12(4)** provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

**Section 12(5)** – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

### **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.”

### **Information intended for future publication**

**Section 22(1)** provides that –

“Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

**Section 22(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).”

### **Investigations and proceedings conducted by public authorities.**

**Section 30(1)** provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
  - (i) whether a person should be charged with an offence, or
  - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

- (c) any criminal proceedings which the authority has power to conduct.”

**Section 30(2)** provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
  - (i) investigations falling within subsection (1)(a) or (b),
  - (ii) criminal proceedings which the authority has power to conduct,
  - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
  - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

**Section 30(3)** provides that –

“The duty to confirm or deny 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) or (2).”

**Section 30(4)** provides that –

“In relation to the institution or conduct of criminal proceedings or the power to conduct them, references in subsection (1)(b) or (c) and subsection (2)(a) to the public authority include references-

- (a) to any officer of the authority,
- (b) in the case of a government department other than a Northern Ireland department, to the Minister of the Crown in charge of the department, and
- (c) in the case of a Northern Ireland department, to the Northern Ireland Minister in charge of the department.”

**Section 30(5)** provides that –

“In this section-

"criminal proceedings" includes-

- (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 52G of the Act of 1957,
- (b) proceedings on dealing summarily with a charge under the Army Act 1955 or the Air Force Act 1955 or on summary trial under the Naval Discipline Act 1957,

- (c) proceedings before a court established by section 83ZA of the Army Act 1955, section 83ZA of the Air Force Act 1955 or section 52FF of the Naval Discipline Act 1957 (summary appeal courts),
- (d) proceedings before the Courts-Martial Appeal Court, and
- (e) proceedings before a Standing Civilian Court;

"offence" includes any offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957."

**Section 30(6)** provides that –

“In the application of this section to Scotland-

- (a) in subsection (1)(b), for the words from "a decision" to the end there is substituted "a decision by the authority to make a report to the procurator fiscal for the purpose of enabling him to determine whether criminal proceedings should be instituted",
- (b) in subsections (1)(c) and (2)(a)(ii) for "which the authority has power to conduct" there is substituted "which have been instituted in consequence of a report made by the authority to the procurator fiscal", and
- (c) for any reference to a person being charged with an offence there is substituted a reference to the person being prosecuted for the offence."

### **Law enforcement**

**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,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her

Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

**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,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

**Section 31(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

## **Court Records**

**Section 32(1)** provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
  - (i) a court, or
  - (ii) a member of the administrative staff of a court,



for the purposes of proceedings in a particular cause or matter.”

**Section 32(2)** provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

**Section 32(3)** provides that –

“The duty to confirm or deny 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 this section.”

**Section 32(4)** provides that –

“In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

### **Health and safety**

**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 38(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).”

### **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) he 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.

### **Information provided in confidence.**

**Section 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

### **Legal Professional Privilege**

**Section 42(1)** provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

**Section 42(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

### **Data Protection Act 1998**

#### SCHEDULE 3

Conditions relevant for purposes of the first principle: processing of sensitive personal data

1 The data subject has given his explicit consent to the processing of the personal data.

2 (1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

3 The processing is necessary—

(a) in order to protect the vital interests of the data subject or another person, in a case where—

(i) consent cannot be given by or on behalf of the data subject, or

(ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or

(b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

4 The processing—

(a) is carried out in the course of its legitimate activities by any body or association which—

(i) is not established or conducted for profit, and

(ii) exists for political, philosophical, religious or trade-union purposes,

(b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,

(c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and

(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5 The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6 The processing—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7 (1) The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

8 (1) The processing is necessary for medical purposes and is undertaken by—

(a) a health professional, or

(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

9 (1) The processing—

(a) is of sensitive personal data consisting of information as to racial or ethnic origin,

(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and

(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

(2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

10 The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.