

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 27 June 2011

**Public Authority:** Department of the Environment  
**Address:** Clarence Court  
10 - 18 Adelaide Street  
Belfast  
BT2 8GB

### Summary

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The complainant asked the public authority to provide information relating to a disciplinary investigation into a named member of staff. The public authority refused to disclose the information relying on section 40(2) of the Act. The Commissioner finds that the public authority should have refused to confirm or deny whether it held the information falling within the scope of the request, citing the exemption provided by section 40(5)(b)(i) of the Freedom of Information Act 2000 (the "Act"). The Commissioner finds that confirmation or denial would disclose personal data and that the disclosure of this personal data would be in breach of the first data protection principle. The exemption provided by section 40(5)(b)(i) is therefore engaged and the public authority is not required to take any steps. The complaint is not upheld.

### 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.

### Background

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2. The request concerns the final report into a disciplinary investigation of a member of staff.

## The request

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3. On 16 June 2009 the complainant made a request for information that constituted a copy of the final results of a disciplinary investigation into a named member of staff.
4. The public authority issued its refusal notice on 18 June 2009. It stated that the requested information constituted personal information and as such was exempt under section 40(2) of the Act.
5. On 11 September 2009 the complainant requested an internal review of the public authority's decision. The public authority provided its review decision on 9 November 2009. It stated that its original position as detailed in its refusal notice of 18 June 2009 remained the same and that it was relying on section 40(2) of the Act.

## The investigation

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### Scope of the case

6. The Commissioner commenced his enquiries and determined that the scope of his investigation would be to focus on whether the requested information constituted personal data.

## Analysis

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### Exemption

#### Section 40 - Personal Information

##### Section 40(5)(b)(i)

7. Section 40(5)(b)(i) provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
  - constitute a disclosure of personal data, and
  - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).

8. The Commissioner's analysis of whether the above criteria would be satisfied follows.

***Would confirming or denying that the requested information is held constitute a disclosure of personal data?***

9. The DPA defines personal information as:

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

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual."*

10. In his guidance on the section 40 exemption<sup>1</sup>, the Commissioner expands on what constitutes personal data:

*"The two main elements of personal data are that information must 'relate to' a living person, and that person must be identifiable. Information will 'relate to' a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way."*

11. The public authority has argued that the way in which the request is worded clearly indicates that the complainant is seeking information which can be linked with a named individual. Therefore, to comply with section 1(1)(a) of the Act would inevitably disclose information that would relate to that individual (the relevant wording of the public authority's response is included at paragraph 4 above).
12. The Commissioner has determined that, where this sort of information is linked to an individual, it will be that individual's 'personal data'. Therefore, the Commissioner is in agreement with the public authority that should the information be disclosed it would constitute a disclosure of personal data.

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/de-tailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/de-tailed_specialist_guides/personal_information.pdf)

***Would disclosure of this personal data breach a data protection principle?***

13. In refusing the request, the public authority has claimed that disclosure of the requested information would breach the first data protection principle. This requires that personal data is processed fairly and lawfully and that:
- at least one of the conditions in Schedule 2 is met, and
  - in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
14. The Commissioner's considerations here focus on the general issue of whether disclosure would be fair to the individual who, as the subject of the disciplinary investigation, would be the subject of any information on those complaints which the public authority may hold.

***Fairness***

15. In establishing whether disclosure is fair, the Commissioner will look to balance the consequences of any release of personal data and the reasonable expectation of the data subject.
16. The personal data that would potentially be disclosed as a result of a request for the sort of information involved in this case might well relate to the individual not only in a professional but also in a private capacity. This is significant in that previous decisions issued by the Commissioner have been guided by the principle that information about an individual's private life will deserve more protection than information about someone acting in an official or work capacity.
17. The Commissioner also considers that any individual in the circumstances which apply in this case would have a legitimate expectation that disciplinary matters would be handled with a degree of confidentiality, and that details would not be disclosed to the public at large without very good reason. The Commissioner therefore believes that to disclose this information would be an unwarranted intrusion into the rights and freedoms of that data subject, given the distress that the release of the information could potentially cause.

***Conclusion***

18. As indicated, the Commissioner has taken a clear line that disclosure of personal data relating to an individual in a private capacity should be afforded a high degree of protection, as should information where there is a reasonable expectation of confidentiality.

19. Leading on from these considerations, the Commissioner has determined that to confirm or deny whether the requested information is held would be unfair to the data subject. As disclosure would therefore breach the first data protection principle, the Commissioner has determined that section 40(5)(b)(i) is engaged.

## **The Decision**

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20. The Commissioner's decision is that section 40(2) was inappropriately cited and that the public authority should have refused the request under section 40(5)(b)(i) of the Act.

## **Steps Required**

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21. The Commissioner requires no steps to be taken.

## **Other matters**

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22. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner notes that the complainant requested an internal review on 11 September 2009 which was completed on 9 November 2009, some 45 working days later.
23. Part VI of the Act's section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt decision. As he has made clear in his 'Good Practice Guidance No 5', the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review or, in exceptional circumstances, 40 working days. In this case the public authority exceeded these timeframes. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the public authority fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the public authority of the expected standards in this regard.

## Right of Appeal

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24. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

**Dated the 27<sup>th</sup> day of June 2011**

**Signed .....**

**Jon Manners  
Group Manager**

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

## Legal annex

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### Freedom of Information Act 2000

#### Section 40 – Personal data

Section 40(5) provides that –

*“The duty to confirm or deny-*

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and*
- (b) does not arise in relation to other information if or to the extent that either-*
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”*

#### Data Protection Act 1998

Section 1(1) provides that –

*“‘personal data’ means data which relate to a living individual who can be identified-*

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”*

The first data protection principle provides that –

*“Personal data shall be processed fairly and lawfully...”*