

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

26 March 2007

**Public Authority:** Information Commissioner  
**Address:** Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Note: The complaint in this case was made against the Information Commissioner. Since the Commissioner is himself a public authority for the purposes of the Freedom of Information Act 2000 (the "Act"), he is unusually under a duty to make a formal determination of a complaint made against himself. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this Notice.

### Summary

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The complainant requested copies of all documentation sent by an individual in relation to a complaint made about the complainant to the Information Commissioner under the terms of the Data Protection Act (the "DPA"). The complainant further requested an explanation regarding payments made by the Commissioner to individuals relating to the same DPA complaint. The Commissioner refused the first part of the request on the basis that section 44 of the Freedom of Information Act applied as section 59 of the DPA provided statutory prohibition on disclosure. The complainant received an answer to the second part of the request. This Decision Notice does not uphold the complaint made and concludes that the exemption has been applied correctly.

### 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 Act. This Notice sets out his decision.

## The Request

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2. The complainant made the following request for information to the Commissioner on 17 January 2005:

*“On the 1<sup>st</sup> March 2004, I wrote a letter to [name redacted], a compliance officer requesting copies of documents sent to him by [name redacted#1].*

*I had been taken to court by [name redacted#1] and 4 other persons under sec. 55 D.P.A. and I had to attend court on three occasions, my request for the documents was refused.*

*I am writing again to request copies of all documentation sent by [name redacted#1], under the Freedom of Information Act, if the Data Protection Agency comes under this Act. If not I would ask for the original decision to be reversed.*

*I was dismayed to learn that the five persons involved in taking me to court have been reimbursed £680.00 each. I would be grateful to be told why this money has been refunded.”*

3. The Commissioner responded to the request by letter of 7 February 2005. The first part of the request relating to case documentation was refused on the basis that section 44 of the Act applied as disclosure of the information was prohibited by virtue of section 59 of the DPA. The letter explains that the information requested was originally furnished to the Commissioner for the purposes of the DPA, related to an identifiable individual and was not previously available to the public from other sources.
4. The second part of the request was answered. The Commissioner explained that the sums were paid to the individuals involved because the Commissioner's previous advice to them had been inappropriate. It had indicated that a civil action could be brought under the terms of section 55 of the DPA when in fact, only criminal prosecutions can be brought.
5. The complainant responded to the refusal notice by letter of 30 March 2005. He stated that he felt that section 59, paragraph 2 subsections (d) and (e) of the DPA provide grounds for the information to be released to him. This, he stated, was because the action taken in the first instance by [name redacted#1] was unfounded and was primarily used to try and stop a court action that he was taking against [name redacted#1] and four other people. This, he felt, was demonstrated by [name redacted#1]'s use of the words “if you stop your action, we will stop ours.” This letter also dealt with issues that did not relate to the information request made to the Commissioner.
6. This letter was treated as a request for internal review by the Commissioner and the outcome of the review was communicated to the complainant by letter of 3 June 2005. This letter firstly addressed the issues that do not relate to the information request.

7. The review concluded that the original decision not to release the information to the complainant was correct. It was explained that section 59 of the DPA is designed to ensure that information provided to the Commissioner is kept confidential. To make it widely available would discourage referrals to the Commissioner's office. This, he reasons, would not be in the broader public interest.
8. The review does go on to consider the argument put by the complainant that subsections (d) and (e) of paragraph 2 of section 59 of the DPA should permit the Commissioner to disclose the information. In relation to (e), the Commissioner states that there would need to be some evidence that the reasons for keeping such information confidential should not apply. He states that nothing in the complainant's letter suggests that it would be in the public interest to disclose this information.
9. In relation to subsection (d), the Commissioner said, in relation to the complainant's statement that "the documentation will be needed in my civil case against [name redacted#1]", that the nature of the proceedings was unclear. The Commissioner confirmed that he required further information regarding the proceedings before he could consider the issue further. In particular he needed to know:
  - whether the proceedings had already commenced or, if not;
  - the likelihood of such proceedings being commenced.
10. The Commissioner commented that he would consider the position further in light of the complainant's response but that he may have to insist on a court order to release the information.
11. The complainant wrote to the Commissioner on 20 September 2005 giving some detail about the ongoing civil action. Receipt of this letter was acknowledged by the Commissioner in a letter of 29 September 2005 but no further action was taken. The complainant wrote again on 5 June 2006 stating that he had written two letters that he had not received a response to. The Commissioner responded by letter of 9 June 2006, explaining that he had not received the two letters and reiterating that he may reconsider the decision not to disclose the information if the details of the court proceedings referred to were provided.
12. The complainant's response of 14 June 2006 stated that the people involved in the court case had apologised and paid him compensation. The Commissioner asked in his letter of 16 June 2006 by return, whether the court case was now concluded.
13. In a letter of 19 June 2006, the complainant confirmed that the matter had settled out of court. The Commissioner responded to this by letter of 5 July 2006. He stated that as the court case had been concluded, the documents could not be required for it and therefore section 59(2)(d) of the DPA did not apply. Further, the Commissioner stated that as the issue of the data protection complaint made against the complainant had been included within the issues raised at court, the whole question had been referred to court. In such circumstances, the

Commissioner would not wish to reconsider something that a court had already adjudicated upon.

## The Investigation

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### Scope of the case

14. On 14 July 2006 the complainant contacted the Commissioner by email to complain about the way his request for information had been handled.

### Chronology

15. On 13 September 2006, the Commissioner asked the complainant by letter to provide any submissions that he wished to make. He did not provide any.
16. Having considered all the relevant documents attached to the complaint and the original data protection files, the Commissioner took internal advice from members of staff at the Information Commissioner's Office who were not involved in either the original data protection complaint or the handling of the complainant's request for information.
17. The Commissioner emailed the complainant on 29 November 2006 and requested a copy of the settlement terms for the court case along with any other evidence he may have that the data protection complaint was made maliciously as is inferred by the complainant's comments referred to in paragraph 5 above.
18. The complainant provided a letter of apology signed by the four people that the complainant brought a defamation action against, some meeting minutes that referred to counter-action by [name redacted#1] and a transcript of a meeting where the issues appear to be discussed. These were sent to the Commissioner in a letter of 4 January 2007.
19. The Commissioner emailed the complainant again on 12 January 2007 to request the terms of settlement agreement again as this was not included in the complainant's letter. The response from the complainant of 23 January 2007 provided the Commissioner with a copy of the Tomlin Order that formed the basis of the settlement terms.

## Analysis

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### Exemption

20. The exemption at section 44(1)(a) of the Act provides that information is exempt from disclosure where it is subject to a statutory prohibition on disclosure under another piece of relevant legislation. This is an absolute exemption by virtue of

section 2(3)(h) and therefore no public interest test need be conducted. The full text of these sections can be found in the attached Legal Annex.

21. The section 44 exemption was applied in this case as it was deemed that the information was prohibited from disclosure under the terms of section 59 of the Data Protection Act. Section 59(1) states that the Commissioner or his staff may not release information that:
- has been obtained for the purposes of the DPA,
  - relates to an identifiable individual or business and
  - is not available to the public from other sources unless the disclosure is made with lawful authority.

This is understood to mean all information held by the Commissioner for the purposes of and in relation to investigations that he conducts following complaints about compliance with the legislation over which he has jurisdiction.

22. Section 59(2) of the DPA gives the conditions under which lawful authority is provided. The complainant relied upon subsections 2(d) and (e) of these conditions. The full text of section 59 DPA can be found in the attached Legal Annex.
23. The Commissioner is satisfied that the information requested falls within the definition set out in section 59(1) and meets all of the criteria. This is factual and not disputed by the complainant. The investigation therefore focused on whether lawful authority could be established.
24. The complainant makes the case that the information is required for the purpose of legal proceedings and therefore satisfies the requirements of subsection (2)(d). Further, he states that the complaint made about him regarding data protection was done so maliciously and he feels that this would warrant release of the information under lawful authority provided by subsection (2)(e).
25. At the time that the request was made, the Commissioner was not aware that legal proceedings were ongoing. Once informed of this, the Commissioner requested further information regarding those proceedings. In order for disclosure to be made under the provisions of section 59(2)(d), the Commissioner must be satisfied that the legal proceedings have commenced or will be commenced. At the time that the information regarding the court case was provided, the matter had been concluded by way of settlement. The information could therefore no longer be deemed as required for legal proceedings.
26. Although at the time that the request was made, it would appear that the court case was live, the outcome of this decision would remain the same. The Commissioner or his staff may personally be held criminally liable for the release of information obtained in the course of an investigation such as the information requested here. It would not be unreasonable for the Commissioner to require sight of a Court Order requiring release of the information before disclosing it. In these circumstances, it is clear that the information was not necessary for the purpose of the proceedings as the case concluded (in the complainant's favour)

without the release of this information. The Commissioner is therefore satisfied that section 59(2)(d) of the DPA does not apply.

27. In relation to the consideration of section 59(2)(e), the Commissioner asked the complainant for a copy of the terms of settlement of his court case along with any other evidence to support the allegation that the DPA complaint about him was malicious. Such information could demonstrate a legitimate interest on the part of the complainant to satisfy the requirement of subsection (2)(e), thus making disclosure warranted in the public interest.
27. The complainant provided documentation including an apology from the parties that the court case was against. However, none of the documentation provided demonstrated that the DPA complaint was made maliciously. The apology did not confirm any wrong doing on the part of those making it, it simply apologised for any harm that may have been caused by comments made. The minutes and transcript provided also did not detail any malice toward the complainant.
28. The complainant states that [name redacted#1] attempted to use the proceedings that were brought against the complainant as leverage to get the complainant to drop his case. There is no evidence of this for the Commissioner to consider but even so, it would not be conclusive evidence that the legal proceedings brought by [name redacted#1] were done so entirely out of malice.
29. The original DPA complaint made by [name redacted#1] was done so in relation to an alleged breach of the DPA. This is evidenced by the Commissioner's handling of that complaint, the file having been reviewed for the purpose of this Decision Notice. Any allegation that the DPA complaint was made out of malice could be in part refuted on the basis that the Commissioner compensated [name redacted#1] and the other parties involved in the original court case. This was because advice given by his office led the individuals to commence legal proceedings on an incorrect legal basis. This led to the case eventually being struck out and those individuals having costs awarded against them. This suggests that those individuals were given good reason at the time to believe that they had legitimate grounds to pursue a breach of the DPA.
30. Given the above, the Commissioner is of the opinion that no case has been made for disclosure being in the public interest as required by section 59(2)(e) DPA. The Commissioner is of the opinion that there is strong public interest in maintaining the exemption regarding this type of information as it enables the Commissioner to regulate in an effective way. Disclosing such information may discourage complainants from making a complaint and data controllers from co-operating fully and frankly with the Commissioner.
31. The Commissioner is satisfied that it has been established that section 59 of the DPA was applied correctly to the information requested. Given that lawful authority to release the information cannot be demonstrated, this provides statutory prohibition on disclosure of the information requested. Therefore the section 44 exemption of the Act has been correctly applied to the information.

## The Decision

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32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act. The exemption at section 44 of the Act was applied correctly in conjunction with section 59 of the DPA.

## Steps Required

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33. The Commissioner requires no steps to be taken.

## Other matters

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

Although the general handling of this request, the refusal notice and initial internal review were fully compliant with the Act, the Commissioner notes that he did not respond in full to the complainant's response of 20 September 2005 providing further information regarding the court case mentioned. This was due to a misunderstanding of the information provided. It did not contain sufficient detail and the Commissioner therefore initially took this letter as for information only.

## Right of Appeal

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33. 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@dca.gsi.gov.uk](mailto:informationtribunal@dca.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 26<sup>th</sup> day of March 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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