

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 September 2009

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London SW1A 2HB

Summary

The complainant requested service records relating to a number of individuals. The requests were made to the British Army (the Army) and the Royal Air Force (the RAF). Both authorities refused to provide this information, claiming that it was exempt under sections 38, 40(2), 41 and 44 of the Act. The British Army and the RAF fall within the remit of the Ministry of Defence, so the Commissioner dealt with the MOD in investigating this case.

The Commissioner found that the information related to individuals who may be alive or deceased, and comprised sensitive and non-sensitive personal data. The Commissioner finds that the information was correctly withheld in reliance on the exemptions at section 40(2) of the Act. Therefore the Commissioner does not require any steps to be taken. The Commissioner also finds that both the Army and the RAF both breached section 17(1) in that they failed to provide adequate refusal notices to the complainant.

The Commissioner's Role

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 Requests

2. The complainant has advised the Commissioner that he made two requests: one to the British Army (the Army) and one to the Royal Air Force (the RAF). The armed forces of the Crown are listed as public authorities under Schedule 1 to the Act, but are not legal entities in their own right. As the armed forces fall within the responsibilities of the Secretary of State for Defence, the

Commissioner has dealt with the Ministry of Defence (the MOD) in investigating this case. This Decision Notice is served on the MOD for that reason.

The request to the Army

3. The complainant has advised that he requested service records relating to five individuals who served in the Army. The complainant advised the Army that he believed all the individuals to be deceased. Although the request was undated, the Army confirmed to the complainant that the request was received on 31 May 2006.
4. The Army wrote to the complainant on 7 June 2006, advising him that it did hold information in relation to each of the five individuals. The Army advised the complainant that it was at that time reviewing its procedures for handling requests for this type of personal information. The Army stated that it would not disclose personal information without consent, either from the individual or their next of kin, until the review was complete. The Army advised that the information it held was exempt under section 44 of the Act, as disclosure of the information was barred by Article 8 of the European Convention on Human Rights.
5. The complainant was dissatisfied with the Army's response, and requested an internal review on 20 June 2006. The internal review was undertaken by the MOD, who responded to the complainant on 31 October 2006. The MOD upheld the Army's original refusal in reliance on section 44 of the Act, and further advised that the information was exempt by virtue of section 38 of the Act. The MOD also advised the complainant that it had a common law duty of confidence to current or former employees, which extended to their next of kin if the particular individual was deceased.

The request to the RAF

6. The complainant made a similar request to the RAF on 20 June 2006, asking for service records relating to four individuals. The RAF wrote to the complainant on 27 June 2006, advising him that service records relating to two of these individuals could not be located using the referencing information he provided. The RAF advised that the service records of the other two individuals could not be provided without the written consent of the individual, or their next of kin. In the absence of such consent, the RAF claimed that it had a duty of confidence to the individuals "under the common law and the Data Protection Act 1998", although no exemptions under the Act were cited at this stage. However the RAF did provide the complainant with information which was already in the public domain (the gazetted details, see Findings of Fact). This comprised the full name, rank, date and place of birth, and promotion history of the two individuals who could be identified.
7. Although the RAF did not offer an internal review at this stage, the complainant appealed its decision by letter dated 30 June 2006. The complainant advised the RAF that he believed the individuals to be deceased,

but he was of the view that the Act did not require consent from the next of kin before the information could be disclosed.

8. The RAF responded to the complainant on 24 July 2006. This letter advised that the information the RAF held in relation to the request was considered exempt under section 40(2) of the Act. This exemption applies if the information is personal data relating to identifiable individuals (other than the requester)¹, and if disclosure would breach any of the data protection principles¹, or section 10 of the Data Protection Act 1998 (the DPA). The RAF advised that it normally released service records and related information into the public domain 75 years after the last entry on the service record. In this particular case, the RAF estimated that some of the requested information could not be provided until 2019, and some until 2038. The RAF repeated its argument that it had a common law duty of confidence to current or former employees, which extended to their next of kin if the particular individual was deceased.
9. The RAF referred the complainant to the MOD for a further review, which he requested by an undated letter which was received by the MOD on 4 July 2006. The MOD wrote to the complainant on 30 August 2006, advising that it had conducted an internal review of his request. The MOD acknowledged that the complainant had not been offered an internal review as part of the RAF's original response of 27 June 2006, but explained that it had handled the request as "normal business". The MOD confirmed that some of the requested information could not be located from the information provided by the complainant. The MOD further upheld its original refusal to disclose the remaining information without written consent. The MOD confirmed that it was relying on the exemptions under section 40(2) and section 41 in order to fulfil its duty of confidence. Section 41 provides an exemption where disclosure of the requested information would give rise to an actionable breach of confidence. The MOD was of the view that disclosure of the information would breach its duty of confidence to the individuals concerned.
10. At this stage the MOD also claimed reliance on the exemptions under sections 38 and 44 of the Act. Section 38(1) provides an exemption where disclosure would, or would be likely to, endanger the physical or mental health or safety of any individual. The MOD claimed that the exemption was engaged because disclosure of the service records might cause distress to relatives. Section 44 exempts information where disclosure is prohibited by other legislation. In this case the MOD claimed that disclosure of the requested information could breach the Human Rights Act 1998 in respect of information relating to living and deceased individuals.

¹ As set out in Schedule 1 to the DPA

The Investigation

Scope of the case

11. On 8 September and 2 November 2006 the complainant contacted the Commissioner to complain about the way his requests had been handled. The complainant did not challenge the RAF's assertion that it could not locate some of the requested information, but he asked the Commissioner to consider whether all of the information he requested had been wrongly withheld. As both requests related to similar types of information the Commissioner decided to combine the requests for the purposes of his investigation.

Chronology

12. The Commissioner contacted the MOD on 5 November 2007 to advise it of the complaints and to obtain full copies of the withheld information. The Commissioner also sought clarification and further information in relation to the MOD's reliance on the exemptions claimed.
13. The MOD responded to the Commissioner on 10 December 2007, and provided copies of the withheld information. In relation to each of the exemptions, the MOD provided a more detailed explanation as to why it was relying on that provision of the Act. The Commissioner wrote to the MOD for further details on 10 November 2008, and the MOD provided another submission on 10 December 2008.

Section 40(2)

14. The MOD advised the Commissioner that it was unable to confirm whether the individuals whose service records were requested were alive or deceased. The MOD explained that it did not routinely keep records once an individual left its employment, and in the absence of information to the contrary it assumed a person was alive if they were born after 1891. In this case the MOD was assuming that all the relevant individuals were still alive.
15. The MOD explained that each service record generally contained the following categories of information:
 - a. place and date of birth
 - b. next of kin details, including addresses
 - c. marital status
 - d. home/personal address
 - e. postings
 - f. promotions
 - g. honours and awards
 - h. courses attended
 - i. medical information
 - j. leave requested and granted

- k. disciplinary records
 - l. discharge information (release certificates and discharge reports/testimonials)
 - m. personal report information
 - n. comments by third parties in relation to categories e-m above
16. The MOD explained its view that disclosure of this information into the public domain would be unfair to the individuals involved, and would therefore breach the first data protection principle (which requires that personal data be processed fairly and lawfully). In support of this view, the MOD asserted that the individuals involved were not informed that their personal information might be disclosed outside the MOD. These individuals would therefore have expected that their service records were only to be used for internal purposes, and they would not have expected these records to be disclosed into the public domain.
17. The MOD drew the Commissioner's attention² to his decision in a similar case², where the Commissioner ordered disclosure of MOD footage dating from 1952. In this case the MOD had claimed that it would be unfair to release the footage as the individuals featured would not have expected it to be disclosed into the public domain. The MOD reminded the Commissioner that, although it did not appeal this decision, the MOD disagreed with the Commissioner's conclusions in relation to section 40(2).
18. In particular, the MOD claimed to the Commissioner that it could not identify a condition for processing (ie disclosing) the service records, as required by the first data protection principle. Again the MOD reminded the Commissioner that it disagreed with his conclusion in the case referred to above, where the Commissioner decided that the MOD could rely on Condition 6 of Schedule 2 to the DPA. This provides that personal data may be processed lawfully if:
- “The processing is necessary for the purposes of legitimate interests pursued by the data controller or 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.”
19. The MOD maintained its position that disclosure of the withheld information would not meet any of the conditions in Schedule 2 or 3 to the DPA.
20. The MOD also drew the Commissioner's attention to section 72 of the Act, which amends section 34 of the DPA. The amended section 34 provides that personal data is exempt from certain provisions of the DPA if the data controller is obliged under any enactment (apart from the Act) to make that information available to the public. The MOD claimed that the amendment to section 34 had the result that “compliance with the DPA98 cannot be a legitimate interest for releasing data under FOI”.

² Decision Notice ref FS50099223, issued 21 January 2008

21. The MOD did not believe that a request under the Act represented “fair processing” under the DPA, and in any event, the MOD was of the view that the request in this case was made for private rather than public interest. The MOD further confirmed to the Commissioner that it had not received any notices under section 10 of the DPA.

Section 38

22. The MOD advised the Commissioner of its view that the exemption under section 38 may be engaged for service records of individuals who are deceased. The MOD also argued that the exemption might be engaged with regard to relatives of the individuals or third parties named in the records. The MOD accepted that most of the information contained in the requested records was “fairly uncontentious and less likely to cause distress”. However the MOD pointed out that the records may contain more sensitive information, such as medical details and third party comments (for example, disciplinary matters).
23. However, the MOD confirmed to the Commissioner that it had no evidence that any of the individuals were in fact deceased, therefore it was not seeking to rely on any of the arguments put forward in relation to section 38.

Section 41

24. The MOD explained to the Commissioner that it considered this exemption to apply to the following types of information contained in the service records:
 - medical information about the individual (including medical conditions and injuries suffered)
 - next of kin details
 - details or comments about the individual written on the records by others (including disciplinary matters)
25. The MOD was of the view that this information was provided in confidence, and to disclose the information into the public domain would give rise to an actionable breach of confidence.

Section 44

26. The MOD indicated to the Commissioner its view that disclosure of the withheld information might breach Article 8 of the European Convention on Human Rights (the Convention). Article 8 of the Convention states that individuals have a right to respect for their private and family life. The MOD argued that disclosure of the withheld information would represent a “disproportionate interference with the Article 8 rights of the family of deceased service personnel”. The MOD concluded that Article 8 amounted to a statutory bar on disclosure, although the MOD noted that neither the Commissioner nor the Information Tribunal agreed with this approach.

Other legislation

27. The MOD also expressed the view that disclosure of the withheld information might breach other legislation. The MOD confirmed that it was referring to the Access to Health Records Act 1990.

Section 21

28. In his letter of 10 November 2008, the Commissioner indicated to the MOD that he had carefully considered the information contained in the service records. Given that the Act applies to information rather than documents, it appeared to the Commissioner that some of the information contained in the service records was already in the public domain via the gazetted details³ (for example, an individual's name, date and place of birth, promotions and honours). The Commissioner noted that some of this information had also been provided to the complainant by the RAF (see paragraph 5 above). Therefore the Commissioner asked the MOD whether it was seeking to rely on the exemption under section 21 of the Act (information already accessible to the applicant) in relation to this portion of the information.
29. The MOD confirmed that in its view the exemption under section 21 did apply to much of the withheld information. The MOD advised the Commissioner that it would in future inform applicants that they may be able to access third party personal information via the London Gazette, in recognition of the duty to provide advice and assistance under section 16 of the Act.

Findings of fact

30. Of the requested information, the MOD holds information relating to all five individuals in the Army, and two of the four individuals in the RAF.
31. The service records contain some information which is already in the public domain via the London Gazette. The London Gazette is the Official Newspaper of Record for the United Kingdom, and is available online at www.london-gazette.co.uk. The Ministry of Defence Supplement to the London Gazette contains information on officers' appointments, promotions, etc, and the Honours and Awards supplement contains information on medals and honours awarded to individuals.
32. Certain service records have been transferred to the National Archive⁴ (formerly the Public Record Office) and are available for public access:
- Royal Navy Officers commissioned prior to 1914
 - Royal Navy Ratings who enlisted prior to 1924 and First World War records for the Women's Royal Naval Service
 - Royal Marine Officers commissioned prior to 1926
 - Royal Marine Other Ranks that enlisted prior to 1926

³ Information contained in the London Gazette (see Findings of Fact)

⁴ <http://www.nationalarchives.gov.uk/militaryhistory/>

- Army Officers commissioned prior to 1920
- Army Other Ranks that enlisted prior to 1920
- Royal Air Force Officers that served prior to 1922
- Royal Air Force Airmen that served prior to 1924

Analysis

Section 40(2): personal information

33. The exemption under section 40 applies to information which is the personal data of an individual other than the applicant, where disclosure of the information would breach any of the data protection principles or section 10 of the DPA.

Is the information personal data?

34. "Personal data" is defined at section 1(1) of the DPA:

"personal data" means data which relate to a living individual who can be identified –

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

The Commissioner has first considered whether or not the withheld information does in fact comprise personal data relating to living individuals. As detailed at paragraph 15 above the withheld information is the service record in relation to each individual. This comprises a range of information, all of which relates directly to that individual. Having inspected the information, the Commissioner is satisfied that the withheld information does constitute data which relates to an individual who can be identified from that data.

35. The complainant has advised the Commissioner that he believes the individuals in this case to be deceased, but the MOD says that it has no evidence to confirm this. The Commissioner notes from the service records that the individuals in question were born between 1909 and 1923, so would have been aged between 83 and 97 at the time of the complainant's requests. In addition, the MOD has provided the Commissioner with evidence that at least two of the individuals were in correspondence with the MOD in 1993 and 1997. With this in mind the Commissioner considers it appropriate to treat all of the withheld information as potentially comprising personal data of living individuals. None of the information is personal data of the complainant.
36. For this reason the Commissioner is satisfied that the withheld information does fall within subsection 40(2) of the FOI Act. This creates an absolute exemption (that is one not subject to the public interest test) for information falling within the definition of personal data contained in the DPA of which the applicant is not the data subject.

Would disclosure contravene any of the data protection principles?

37. The MOD claimed that disclosure of the withheld information in this case would contravene the first and second data protection principles.

First data protection principle

38. The first data protection principle provides 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.”

Schedules 2 and 3 to the DPA set out conditions under which personal data may be processed, such as the consent of the data subject, and the legitimate interests of the data controller.

39. Sensitive personal data is defined in section 2 of the DPA as

“... personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.”

Having inspected the withheld information (outlined in paragraph 15 above) the Commissioner that is satisfied that it comprises both sensitive and non-sensitive personal data. As both classes of information require a Schedule 2 condition to be satisfied, the Commissioner has considered these conditions first.

Is there a Schedule 2 condition for processing the information?

40. The MOD maintained to the Commissioner that it was unable to identify any Schedule 2 condition for processing the personal information, ie disclosing it into the public domain.
41. The Commissioner has considered the conditions set out in Schedule 2 (these are reproduced in the legal annex to this Notice). The Commissioner notes that the first condition in Schedule 2 is that the data subject has consented to

the information being processed. The Commissioner has not seen any evidence to suggest that any of the individuals concerned have provided such consent, however the Commissioner accepts that it would be difficult if not impossible for the MOD to seek consent from each of the individuals in relation to disclosure.

42. In light of the above, the Commissioner considers that the only other relevant condition would be that set out at paragraph 6(1) of Schedule 2. This establishes a three part test which must be satisfied;
- there must be legitimate interest in disclosing the information,
 - the disclosure must be necessary for a legitimate interest and,
 - even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms and legitimate interests of the data subject.

Legitimate interest

43. The Commissioner considers that there is a public interest inherent in the provision of access to official information and is aware that this view is supported by the Information Tribunal in *the House of Commons v ICO & Leapman, Brooke, Thomas*⁵.
44. In the Commissioner's view there is a legitimate interest in ensuring that the public has access to information about the history of the armed forces, and how the service of individual officers informs our understanding of that history. The MOD has also acknowledged that
- “there is a great deal of public interest in military historical matters, both generally and in relation to specific campaigns and military episodes. The service records of individuals form part of this and add a very personal dimension to the historical record.
45. In light of the above, the Commissioner is satisfied that there is a legitimate interest in disclosing the information.

Necessity

46. The Commissioner is required to consider whether disclosure of the withheld information is necessary for the purposes of legitimate interests pursued by the data controller or by third parties. As stated above the Commissioner accepts that there is a legitimate interest in disclosing the information, but this does not necessarily mean that such disclosure is actually necessary.
47. The MOD has advised the Commissioner that it does not consider it necessary for its own legitimate interests to disclose individuals' service records without their consent. Nor does the MOD believe that it is necessary

⁵ Appeal no EA/2007/0060, para 55

to disclose service records of individuals in order to satisfy the interests of other individuals, rather than the public as a whole.

48. The Commissioner notes that there is a substantial amount of information already in the public domain which helps inform the public about the armed forces, and specifically the Second World War. For example, both the MOD and The National Archives provide information to assist those researching military history. The Commissioner accepts that individual officers' service records would be of interest to many people, but this in itself does not mean that disclosure is necessary. For example, information relating to regiments or military campaigns is already available via a range of sources. The Commissioner therefore concludes that the legitimate public interest is in fact met by the various sources of official information currently in the public domain.
49. For the reasons set out above the Commissioner is not satisfied that disclosure of individual service records is in fact necessary for the purposes of legitimate interests pursued by the data controller or other parties.

Unwarranted prejudice to the rights and freedoms of the data subjects

50. Although the Commissioner is not satisfied that disclosure of the withheld information is necessary, in the interests of thoroughness he has considered whether disclosure would nevertheless result in unwarranted prejudice to the rights and freedoms of the data subjects.
51. The Commissioner often distinguishes between the public and private lives of individuals when assessing whether disclosure would breach the first data protection principle. In this case the withheld information relates both to individuals' professional lives and their personal lives. A service record contains a range of information, much of which would be considered private (for example, information relating to the individual's religious beliefs, medical history and next of kin).
52. The complainant has argued that the individuals are deceased, therefore there is no reason not to disclose the information. However, as set out at paragraph 35 above, the Commissioner has considered that the individuals in question may still be alive, and may well have strong views on the disclosure of their service records. The MOD has advised the Commissioner that the individuals had no expectation that their service records would be disclosed to the public, and were never asked for their consent regarding possible disclosure.
53. The Commissioner is mindful of the fact that, in this case, the information in question is over 50 years old, and the Commissioner is of the view that the sensitivity of information often decreases with the passage of time. However, the MOD also argued to the Commissioner that disclosure would be unfair because it might cause distress to the individuals, and their relatives, in disclosing information about their involvement in what is still a very emotive issue. The Commissioner considers this to be a persuasive argument in this

case, as he is aware that many individuals who served in the Second World War choose not to discuss their experiences.

54. It appears to the Commissioner that disclosure of individuals' service records would be likely to prejudice the right of the individual to choose whether or not to disclose historical information about themselves. The Commissioner is further satisfied that this interference would be unwarranted, as he is satisfied that such disclosure is not necessary as set out above. Consequently the Commissioner finds that disclosure would be unfair to the individuals concerned.
55. For the reasons set out above, the Commissioner is not satisfied that any of the conditions in Schedule 2 can be met. In addition, the Commissioner is of the view that disclosure of the withheld information would be unfair. Therefore the Commissioner concludes that disclosure of the withheld information would breach the first data protection principle. Consequently disclosure of this information is exempt from disclosure by virtue of section 40(2) of the Act.

Other exemptions claimed

56. As the Commissioner considers that as the information is exempt under section 40(2) of the Act there is therefore no need to consider whether the information would also be exempt under the other exemptions claimed by the MOD.

Procedural matters

Section 17: refusal notice

57. Where a public authority refuses a request for information it is required under section 17 of the Act to provide the applicant with a 'refusal notice' which:
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if it would not otherwise be apparent) why the exemption applies.

The refusal notice must be issued within the time for compliance, ie no later than twenty working days following the date the request is received.

The request to the Army

58. In response to the complainant's request of 31 May 2006, the Army issued a refusal notice on 7 June 2006. The refusal notice cited only the exemption at section 44 of the Act, and the internal review of 31 October 2006 cited the exemption at section 38 of the Act.
59. During the course of the Commissioner's investigation, the MOD advised the Commissioner of its view that the requested information was exempt under sections 40(2) and 41 of the Act. As these exemptions were not referred to in

the refusal notice or the internal review, the Commissioner finds that the MOD breached section 17(1) of the Act in issuing an inadequate refusal notice.

The request to the RAF

60. In response to the complainant's request of 20 June 2006, the RAF issued a refusal notice on 27 June 2006. The refusal notice did not cite any exemptions. The RAF's internal review of 24 July 2006 cited the exemption at section 40(2) of the Act.
61. As explained at paragraph 8 above, the MOD subsequently carried out an internal review of the RAF's handling of the case. The MOD's letter of 30 August 2006 advised that the requested information was exempt under sections 40(2), 41, 38 and 44 of the Act.
62. As the RAF did not cite these exemptions in its original refusal notice, the Commissioner finds that it breached section 17(1) of the Act.

The Decision

63. 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:
 - The MOD correctly withheld information in reliance on the exemption under section 40(2) of the Act.
64. However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:
 - Both the Army and the RAF failed to provide an adequate refusal notice which cited and explained the exemptions relied upon, thus breaching section 17(1) of the Act.

Steps Required

65. The Commissioner does not require any steps to be taken.

Right of Appeal

66. 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

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 2nd day of September 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex: Relevant statutory obligations

Freedom of Information Act 2000

1. **Section 1(1)** provides that:
 - (1) 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.

2. **Section 10(1)** provides that –
 - (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

3. **Section 17(1)** provides that:
 - (1) A public authority which ... 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.

4. **Section 38** provides that:
 - (1) 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.
 - (2) 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).

5. **Section 40(2)** provides that:
 - (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), 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.

(4) 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).

6. **Section 41(1)** provides that:

(1) 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."

7. **Section 44** provides that:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Data Protection Act 1998

Schedule 2

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

1. The data subject has given his consent to the processing.
2. The processing is necessary –
 - a) for the performance of a contract to which the data subject is a party, or
 - b) for the taking of steps at the request of the data subject with a view to entering a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary –
 - a) for the administration of justice,
 - b) for the exercise of any functions conferred on any person by or under any enactment,
 - c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. (1) 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.